



Policy Discussion Paper 4: Does customary tenure have a role in modern economic development?

What is customary tenure ?

Over 80% of all land in Uganda is held under unregistered 'customary tenure'. This means that it is private property, but the owners need no documents to prove ownership. Their claims to the land, and the boundaries of the land, are locally recognised, and this recognition is given the full protection of State law.

Attitudes to customary tenure

Attitudes to customary tenure are often a mixture of misunderstandings and the legacy of colonial attitudes. It is said that 'customary tenure is out-of-date', 'it retards economic development' and 'it has no place in the modern world'. It is often believed that 'land is owned communally, so owners have no security of tenure and won't invest. It prevents those who could use land commercially from obtaining land.'

As a result, although the law recognises rights of customary owners, this has not been accompanied by support for the customary tenure system. The Government's focus in land administration has been on titled land, especially in a pilot project for 'systematic demarcation' – surveying for

is owned by individual families, who are guaranteed security of tenure by customary law. Where land can most sensibly be managed on a large scale, e.g. grazing and hunting grounds, then customary tenure usually provides for the land to be managed in the interests of a village.

Arguments about the relative advantages of a freehold tenure or customary tenure are largely theoretical. The vast majority of land in Uganda, in both urban and rural areas, is held under customary tenure. Whatever the policy of this or future governments, that is going to continue to be the case for many years.

If economic development is not to be delayed generations, then, and unless millions of citizens are to be excluded from progress, growth is going to have to take place under customary tenure. Government at all levels therefore has a duty to see how economic transformation including agricultural modernisation, can be achieved on customarily owned land. **The question is not "which land tenure system is best?", but "how can growth and development be achieved within each and every tenure system?"**

Myths about customary tenure (CT)

'Customary land only exists in rural areas'	- <i>much urban land is owned under CT</i>
'It is only in the north and east'	- <i>land under CT is over 80% of all land in Uganda</i>
'Land cannot be sold'	- <i>land has been bought and sold under CT for many years</i>
'land is owned communally'	- <i>most agricultural land held under CT is privately owned</i>
'It does not give security of tenure'	- <i>customary owners have the same rights as title holders</i>
'It belongs to the past'	- <i>most Ugandans own land <u>today</u> under customary tenure</i>
'Its rules are from the past'	- <i>the rules are continually evolving (for better and for worse)</i>

certificates which can be converted into freehold.

It is sad that the system by which most Ugandans own land today is still so widely misunderstood. The rules of customary tenure vary from place to place, but farming land is rarely owned collectively anywhere in Uganda – almost all agricultural land

Is progress possible on customary land?

The Government has several objectives in the land sector:

- economic development
- poverty eradication
- improved land rights for women

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- reduction of conflicts
- environmental protection (e.g. wetlands)
- revenue generation

All these objectives could be met within customary tenure. Customary tenure can provide the necessary context for agricultural modernisation.

- Security of tenure for investment

Families own their own land under customary tenure, and their rights to their own land cannot be taken away from them by customary authorities. This is why Ugandan farmers have long invested in perennial crops, such as coffee, knowing that their investment was secure. This security is guaranteed both to those who inherit and those who buy land.

- Cheap, accessible and accepted process for land disputes and land administration

Investment cannot happen without a transparent judicial system which is perceived as legitimate to deal with any disputes. The state judicial system for land is unable to meet the demands for arbitration, and yet wrangles over land are ever increasing. Customary institutions exist at local level, and are capable of dealing with the vast majority of disputes in a cheap, fair and timely way. (Some issues may be beyond the clan system – e.g. land conflicts between ethnic groups. District Tribunals need to complement them for such cases.)

- Protection of rights

Customary law has given protection of all ownership rights, with mechanisms for compensating for trespass, encroachment, or the destruction of crops on someone's land. Land grabbing would have been impossible under a system where everyone's land holding was known and with a strong local authority rooted in the village. Women were guaranteed rights to land, either from their parents or through their husband, and clan elders could intervene if these rights were being violated. Traditionally, customary law gave widows security to remain and farm their

husband's land, and the land rights of minors was protected.

- Social protection

The worst degree of destitution has been prevented, because land also functioned as a social security system. Some reserve was maintained to support those with no other means of livelihood, even if they had previously left the village.

- Land transactions

Mechanisms have always existed for those who have been able to farm more to obtain more land. These have included rental agreements, grants of land from village owned land (e.g. grazing land), and purchase of land.

- Private initiative and community environmental management

Customary tenure systems typically devolved ownership to the economically most rational level, allowing individual initiative but tempering it where community interests demanded. Hunting grounds needed to be managed over a large area, and so a clan member would be appointed to manage the land on behalf of the community. Individual rights to hunt were subject to what today would be called a 'community based conservation management system'. Families can almost always innovate and invest as they like on their agricultural land, unless the rights of neighbours would be threatened. Protection of the rights of future generations through the clan system ensured that land could not be used destructively.

Rapid and far-reaching changes in agriculture occurred during the colonial period and since independence under these rules and institutions. Uganda has seen large-scale production of introduced cash crops in all parts of the country – tea, coffee, sugar, cotton. State marketing, cooperatives and individual marketing have all been possible with customary tenure. A new leap forward in agriculture is badly needed, and technology change and investment are needed. Customary tenure can only provide a land

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administration system, it will neither guarantee nor constrain development.

- revenue generation

The Government needs to broaden its tax base. Given that most of the population are agriculture dependant, it is not surprising that Government has stated that it is examining the possibility of introducing a land tax. The costs of land transactions are already high, in ‘fees’ to LCs and witnesses. However, because Government has ignored transactions in customary land, none of this money goes to the State.

Why are there problems if the customary system is so good?

The institutions of customary tenure are not currently providing the necessary contribution to the development of Uganda. The clan systems for land administration and justice have been progressively weakened, for many reasons. Clan authorities have no power to enforce their decisions, and as the local economy is increasingly monetarised and integrated into a national economy, social norms are more often abandoned in favour of personal profit. Their role is gradually being taken over by LCs – but in practice, this means that there is a huge vacuum, since LCs have no authority (or training) to arbitrate in land disputes and access to the judicial process is almost impossible for most people. In customary law, ‘ownership’ also meant stewardship – the obligation to manage land in the interests of others, women and children, and future generations. In an increasingly individualised society, power of land is being concentrated in the hands of the household head (male) as an individual. The system which protected women and children has thus grown weak precisely when it is most needed – and in a situation where state systems are unwilling or unable to take over the responsibility.

The resultant absence of authority in land administration is one of the most serious problems facing people. Every village has stories of land

grabbing, disputes over boundaries, disputes over ownership between and within families, dependants chased off land, dispossessed widows and orphans... The State cannot bring order to this situation in the short or medium term, because the task is simply too big and the resources, in trained personnel and funds, are too few.

“Recognising customary tenure” should not mean abandoning people to their own devices. With some support, the institutions and rules of customary tenure could bring in a degree of order and law in the land sector. The customary institutions can be brought within the State system by simple and low cost measures, that require only the political interest. The Ministry Of Lands with local Government could support and recognise a process of settling boundaries (local ‘systematic demarcation’) through the customary system and marking them in locally agreed ways (e.g. with trees of certain species) – a process which would stir up less fear and mistrust. The Ministry could push local Government to start implementing key areas of the land act, by issuing certificates of customary ownership and assisting families and communities to form communal land associations. Sub-county land recorders, who are charged with maintaining a register of all transactions on titled land, could also keep registers of transactions on customary land.

A clear policy could be laid down that customary judicial authorities would have the mandate to judge land disputes, and that the state structures such as the police and the courts would help enforce their decisions. This would be the overdue implementation of the Land Act provision which gave State legal recognition to ‘local customary regulation’¹. (Appeal and supervision would be available through the District Land Tribunal.)

¹ Land Act 1998, 3 (1) (d): see also (b), (c) and (e).

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Non-governmental actors could support the process through training and facilitation.

In many places, the local customary institutions are still there. They could be assisted to perform a service which would be cheap and accessible to the people, and cheap for the Government. Some may argue that their rules and institutions are imperfect: others may prefer them. The debate is theoretical – there is currently no real alternative, either for land administration or justice.

If customary tenure wither away?

The desire to replace the old with the modern undoubtedly means that there are those who have been hoping that the institutions and practices of customary tenure will wither away, to be replaced by a modern State land administration system.

However, the State does not have the resources to roll out a fully-working new land system in a short period of time. The truth is that the institutions established by Parliament seven years ago are still not fully in place. A more realistic analysis gives a very different assessment of what would happen if customary tenure continued to be neglected.

- Ever increasing local conflicts
- Increased land grabbing – bringing landlessness and destitution
- No progress on women's rights
- No progress on protection of orphans
- Increased social tension
- Increased land fragmentation

The results would not favour investment and growth or poverty eradication.

Recommendations

Policy-makers need to think in terms of a long transition period from customary tenure to freehold title) and how land will be administered during this time.

A **wider range of actors** needs to get involved in debates about land. All those interested in poverty and economic development need to be interested – not just lawyers and land economists.

The Ministry of Lands :

- should recognise and engage with the institutions of customary tenure, in the interests of both.
- should support to a process of local boundary demarcation through the customary system.

District Government:

- can sensitise communities about the pros and cons of acquiring certificates of customary ownership. These should be issued to those who apply. The certificates need to become a 'living' document, amended as land is bought, and as people are born and die.
- can set up a system for recording land transactions on 'customary' land through the sub-county recorders.
- should inform communities about the possibilities of forming Community Land Associations. An intensive process of mobilisation and facilitation should follow, supported by central and local Government and by non-Governmental actors.

The **District Land Tribunals** and customary land judges need to establish a partnership, with clear and accepted areas of jurisdiction for each. Courts of law and law enforcement agencies should join this partnership, supporting the judicial decisions of the customary judges where these fell within their jurisdiction.

This paper is one of a series of discussion papers written by Land and Equity Movement in Uganda (LEMU) intended to help inform both policy makers and a wider public.

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