

Is documenting customary land system against the New Uganda National Land Policy?

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Introduction.

“Documentation” of customary land rights is frequently used but what does “documentation” really mean? On reflection, there are different types of documentation of customary land rights. This paper examines three types of documentation before making a simple recommendation:

1. Documenting only customary rules

In the first 7 years of LEMU's work, LEMU documented customary land rights and management of the people of Lango, Teso, Acholi, and Kumam. This involved working with the traditional institutions to research and investigate the oral customary land management and rights in order to put it in writing. The original intention of LEMU was to work with the district councils to have these customary laws termed “Principles, Practices, Rights and Responsibilities” (PPRR) passed as “ordinances” under the Local Government's Act. Fortunately, with hind sight, we were pleased that the PPRR were not passed as ordinances. According to the law, the procedure to pass the PPRR as an Ordinance would have been very expensive and lengthy in terms of costs and time. The documentation of the PPRR exclusively focused on putting customary laws and management in writing; previously, such laws were only conveyed orally. In this first documentation, only two things changed – a) the same oral laws became the same written laws; and b) where the practice contradicted

customs or the context changed to affect a custom, or custom contradicted the State law, the PPRR gave clarity and introduced change. For example, the choice of a widow for a man to inherit her. The PPRR stated that the widow could pick a man from within or outside the clan because limiting her choice to the clan would have been unconstitutional. Apart from this change, everything – the governance and the land rights of customary tenure—remained the same. If the traditional institutions later wanted to change the laws, they could convene and change the laws.

2. Documentation that leads to codifying customary rules

The second type of documentation was passing the PPRR as a “state law” ordinance. This documentation is referred to as “codification” of customary law. A lot has been written about codification of customary laws, giving both pros and cons. The major change in this type of documentation is that customary law becomes “state law”. Amending or changing the laws is part of the state's responsibilities, and is not the responsibility of traditional institutions. The application of the laws in courts also leave room for interpretation and precedence that may not wholly be in line with customs. Over time, the PPRRs will most probably lose their identity as customary law. The greatest challenge, though, is that the district councils will not likely have amended the PPRR because they were not the original authors, leaving the customs “stuck in space”.



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3. Documenting rules and registering owners as legal entities to acquire titles.

The last type of documentation is what Land and Equity Movement in Uganda is attempting to do in the Community Land Protection Project (CLPP) or, indeed, what happens when customary land tenure is documented as a title or a Certificate of Customary Ownership (CCO). For the latter, the law is not clear regarding which governance system applies. In this documentation, oral customary law is documented for the purpose of registering the owners of the land as legal entities before they can acquire either a title or a CCO. What is the implication of registering for incorporation under the state law, and what is the effect of acquiring a title or CCO? In my opinion, this documentation has the potential to change customary land rights and management in the following manner:

- a) If owners are left out of the title, which is very likely because the educated people would have an advantage over the illiterate in this process, they lose their land rights. The rights would have therefore changed in the sense that whilst under customary tenure, they had rights; under the documentation, they have lost land rights.
- b) While under customary law, land owners are owners with equal rights; if the incorporation is under the Land Act or the trust laws, the owners become beneficiaries and, if the trustees are corrupt, at the mercy of the trustees.
- c) The transactions on land are no longer governed by customary laws but by state laws. For example, for any sale of land, the stamp duty would need to be paid, and the clans no longer give consent or oversee the sale. In case of death of one of the owners in the title, or the death of one of the trustees, letters of administration would be necessary to make the transfer of the title

or the change in the name of the trustee. Under customary tenure, the procedure would be much simpler.

So, in effect, this last documentation seems to change both the land rights and the management of customary tenure. If this reflection is correct, this documentation would be tantamount to "conversion of customary tenure" that our newly approved National Land Policy (approved in February, 2014) has abolished.

Do we honestly believe that, in a predominantly illiterate community, this last type of documentation will protect the land rights of the community? Are we not setting them up for elite capture and eventual loss of land rights?

I leave each reader to arrive at their own conclusions. My one recommendation is that all stakeholders who are advocating for documentation of customary land note the differences above and choose a method of documentation that is not contrary to our National Land Policy, which was passed with the approval of all Ugandans for the protection of customary land tenure as a system - a system governing 99% of northern Uganda, and a system that is good for the poor. We believe that the best documentation is one that improves on customary land tenure system but keeps it within the customary system and does not convert customary tenure to freehold.

Article by
Judy Adoko, Executive Director, LEMU