

Defining Customary Land Rights

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Overview of the Presentation



- What do we mean by ‘Custom’?
- Characteristics of Customary Tenure
- Common Property Resources
- Custom and Conflict
- Titling & Tenure Security
- Recognition of Custom
- Dispute Resolution
- Concluding Thoughts

What do we mean by 'Custom'?



- In the majority of countries, most of the land is held under customary tenure - 90% in Africa
- Wide variety of customary tenure regimes
- Custom is not static, it evolves
- Custom includes, but is not limited to 'tradition'
- Unsuccessful attempts to 'abolish' customary tenure
- Much customary land already alienated
- Customary lands often legally held 'in trust' by state
- Legal pluralism is the reality in most places

Characteristics of Customary Tenure



- Individual rights (residential plot, fields, etc)
- Common property resources (forests, pastures, etc)
- More investment leads to more individual security
- Fuzzy boundaries and buffer zones
- Overarching spiritual relationship to the land
- Kinship or territory-based criteria for land access
- Community leaders regulate internal management & transfers of land
- Restrictions on dealing with outsiders
- Unused land reverts to community control

Common Property Resources – Myth and Reality



- Multiple users: individuals, households, kinship groups, villages, communities, etc
- Users of different status: owners, co-owners, primary, secondary and tertiary users, lessors and lessees, unrecognised or ‘illegal’ users
- Multiple uses, multiple resources (Turkana example)
- Informal rental and sales markets exist
- ‘Tragedy of the Commons’ confused CPR with open access regimes
- ‘Tragedy of the enclosure’ may be more common, especially of key resource areas

Custom and Conflict



- Customary systems are robust but can be profoundly altered during protracted conflict
- Alienation of land
- Customary decision-makers become involved in the conflict
- Political interference (i.e. in leadership succession)
- Can 'recover' quickly (no offices to rebuild)
- Group identities change
- State or rebels may introduce parallel & competing structures



Does Titling Provide Tenure Security?



- **Titling processes have proven contentious**
- **Titling brings out ‘latent conflicts’**
- **Winners & losers: difficulties of registering ‘secondary rights’**
- **Title-holders often sell-out (potential for disaster at family and community levels)**
- **Where the state is predatory, titling increases risk of land-grabbing**
- **Titles may not provide basis for credit for smallholders, but increase inequalities**
- **Outcomes are highly context-specific**

Increasing Recognition of Customary Tenure



- **WB: Customary rights are flexible and locally-adapted; definition of rights at level of the group can offer security**
- **Attempts to codify customary systems e.g. W. Africa**
- **Minimalist approaches : legal recognition of ‘custom’**
- **Where few internal conflicts exist, map external boundaries to protect from encroachment**
- **Recognition of local ‘certificates of ownership’**
- **Group incorporation, constitution, etc**
- **Internal conflicts may require elected land boards & recourse to external adjudication**

Dispute Resolution



- Customary systems have dispute resolution mechanisms
- NGOs, religious groups often conduct mediation
- Local systems are accessible & rely on social pressure, popular participation, flexible rules of evidence
- Usually combine custom and statutory law
- Potential weaknesses: no due process, discrimination (women, youth, etc), community-specific, corruption
- Lack of legal basis of decisions
- Forum-shopping is the norm in most places
- Who is the 'shop keeper'? Not the state

Concluding Thoughts



- Identities become politicised – good conflict analysis essential
- Variety of software (participatory mapping) and hardware (GPS, sat photos) to assist delineation
- Major issues remain legal, political, social
- Beware idealization or demonization of custom
- Monitoring and evaluation essential
- Focus on rights of women, orphans, ethnic minorities
- Hybrid systems - but what is articulation between customary and statutory?