

The Status of Customary Land Rights in Africa Today

Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #4 of 5

Briefs on Reviewing the Fate of Customary Tenure in Africa

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1 Clarifying the parameters

Other briefs in this series have defined what is meant by customary land tenure in Sub-Saharan Africa and how it has been treated officially over the last century, including by recent reformism.

It has been concluded in those briefs that the crux of just treatment lies in national laws respecting **customary land interests as having equivalent force** (and therefore protection) with private properties acquired through non-indigenous tenure systems deriving from Europe. (The latter are often referred to as statutory rights given that national statutes (laws), not rural communities govern their attributes and security).

Private property has been explained as *not* necessarily always existing as individual property, being as well owned by families, groups and communities. In regard to naturally collective resources like forests, rangelands and marshlands, and which are not usefully privatized into the hands of individuals, a critical measure of due respect for customary rights is where national laws make it possible for communities to secure these communal assets ('the commons') as their **private, group-owned property**, owned in undivided shares and used under communal rules.

Under derived European land ownership norms, formally introduced into Africa by colonialism, a landholding cannot amount to

"property" unless it is fully fungible, which means it can be freely traded as a commodity. Modern thinking in land tenure prefers to leave such attributes of property up to the owners.

Colonialists and post-colonial administrations have also found it convenient to rule that only land which is used for houses and farming can be eligible as "property". The main objective of this paradigm has been to enable governments to declare land that is neither cleared nor farmed as **unowned**, and therefore by default the property of the state, and able to be disposed of at its will. This condition has done great damage over the last century to traditional community rights over forests, rangelands and marshlands.

Why should Africa's hundreds of thousands of rural communities want their lands recognized as property? The reality in today's commoditized world is that being recognized as merely a lawful occupant and user of someone else's land (usually the state's) has never been a protection and is even less so today.

Until individuals, families and communities in the customary sector are recognized as lawful owners of their lands, they run the continuing and worsening risk of losing those lands to others. Because governments consider themselves the *de jure* or *de facto* owner of these customary lands, losses usually occur through the state reallocation for other purposes or to private persons seeking large areas of land of their own, often for industrial agriculture or private commercial

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agriculture. This has been acceptable to administrations over the last century on grounds that only wealthy individuals/companies can successfully commercialize production. It has also meant that governments do not have to invest in the smallholder sector (and it has not, especially over recent decades). Therefore challenging unjust tenure norms also challenges paradigms which sustain majority rural populations in poverty, including a lack of opportunities to create wealth out of their substantial land resources. Who owns forests is central to such considerations, as a resource with immense values.

An additional comment must be made on **statutory tenure**. This refers to laws made at national level, usually by parliaments. The choice is not between customary or statutory tenure. The choice is between whether or not national law gives its support to customary ‘law’ (the rules about land made by communities) and to the land rights those systems deliver.

In fact, where full support is given, customary land rights become in effect, *statutory land rights*; rights to land which national law recognizes and protects, and which courts will therefore have to uphold when those rights are interfered with. This is why it was noted above, that it is confusing that rights to land under introduced tenure systems are referred to as statutory rights. Under true reform in a customary-rich region such as Africa, both rights which are derived from customary systems and from introduced systems should both be, in effect, “statutory land tenure”.

Earlier briefs in this series have also made clear that **indigenous and customary land tenure mean the same**. Both refer to systems which are locally derived, not introduced from foreign climes. “Indigenous peoples” is, in contrast, a term often used to refer to communities who live by hunting and gathering or pastoralism. Such communities constitute a tiny minority of all those Africans who own land customarily.

Customary land tenure has also been discussed as best conceived (and referred to) as **community-based tenure**. This

is because the outstanding characteristic of all customary/indigenous regimes around the world is that the norms and procedures of these systems are determined and sustained by communities, not outside bodies like governments, and that communities are themselves a continuing and living entity. Accordingly, norms practised by customary systems usually include many modern practices, as devised by living communities who make adjustments to meet modern situations. What never changes and is therefore “traditional” is this fact that jurisdiction always comes from, and is sustained by, the community. This does not mean that rights to land within the community land area are always equitable (they are not) or that some members (usually chiefs or elites) do not have undue say in how land ownership and access is distributed and regulated (they usually do).

The purpose of this brief is to offer a fairly precise picture as to the national law status of customary land rights in Sub-Saharan Africa today (2011). This is done by analysing what current laws say about such interests in 35 Sub-Saharan states. Because the vast majority of the customary domain is in fact composed of lands by tradition owned and used collectively (forests, rangelands, marshlands), this brief also pays special attention to what current land laws say about their tenure.

2 What are primary indicators of just legal respect for customary land rights?

Customary land interests are respected in national laws if they are:

- a. treated as equivalent in legal force to land interests obtained through non-customary (usually introduced statutory) regimes; that is, accepted as an equitable form of private property,
- b. able to be certified or registered without first being converted into non-customary forms of landholding,
- c. bound to be upheld as private property by government and the courts, even if they are not formally certified or registered,

- d. respected to equal degree as property whether owned by families, spouses, groups, or whole communities, not just individuals,
- e. understood in the law as expressible in different bundles of rights, including, for example, the seasonal rights of pastoralists,
- f. respected where they refer to unfarmed and unsettled lands such as forests, rangelands, and marshlands,
- g. acknowledged as including rights to above-ground resources such as trees and wildlife, and also to local streams and ponds, coastal beaches, and surface minerals that have been extracted traditionally for centuries (e.g. iron and gold),
- h. given primacy over non-customary commercial investment purposes seeking rights to the same land,
- i. recognized as requiring legal support for community-based, democratically formed land administration to be successfully and fairly regulated,
- j. supported by the creation of local-level dispute resolution bodies, whose decisions carry force and whose rulings rely on just customary practices,
- k. reined in legally where customary norms are unjust to ordinary community members (e.g. as a result of undue chiefly privilege) or to vulnerable sectors such as women, orphans, the disabled, hunter-gatherers, pastoralists, immigrants, and former slave communities,
- l. given the same protection as statutorily derived private properties when required for public purposes, as indicated by the extent to which the law requires the same levels of compensation to be paid and the same conditions to both forms of property to apply,
- m. recognized as existing even where forest and wildlife reserves have been overlaid on customary lands, so that due separation is made between land ownership and the protection status of those lands, and
- n. provided for in such a way that officials, courts and especially customary land holders may easily understand and apply supporting provisions in law.

Some of these indicators are canvassed in Table 1, which reviews the legal status of customary land rights in 35 of Sub-Saharan Africa's 51 mainland and island states. Others are addressed in the subsequent commentary.

3 How do countries fare?

TABLE 1: THE LEGAL STATUS OF CUSTOMARY LAND RIGHTS TODAY^a

Country; key laws	Statutory status of customary land rights	Specific effect on common properties
ANGOLA Constitution, 1992 Land Law, 2004	POSITIVE TO MIXED: Customary rights recognized as property interests but not equivalent to state-granted or purchased rights ("concessions"). No provision for direct entitlements to individuals, families, groups, or communities (Constitution, Article 12 (4) and Land Law, articles 9 & 37).	POSITIVE TO MIXED: The land law recognizes community land areas through provision for "delimitation of useful domains" held by communities in perpetuity; communities are unable to transfer the areas. Nor can registered useful domains be subject to investor concessions or other private rights. However the implication is that such domains include only immediately adjacent and used lands excluding valuable forests and rangelands (Article 34). Few useful domains have been delimited or registered so it is difficult to know how successful this paradigm is for community rights.

BENIN Land Law, 2007	<p>POSITIVE: Building on Rural Land Plan experiences from 1994, the law recognizes customary rights as property. These may be formalized as Rural Land Certificates, evidential of ownership until proven otherwise before a judge (Article 111). These rights are nevertheless not of equal legal force with rights acquired through statutory means as the law provides for voluntary conversion of these rights into statutory entitlements, and losing the attributes of customary rights in the process.</p>	<p>POSITIVE: The investigation and certification regime is explicitly geared to include groups, communities, and especially family rights (articles 3 and 5). Delimitation of community areas is also provided for, inclusive of forests and rangelands. These may be certified as community property. A problem lies in the weaker force of certificates and the requirement for expensive formal surveys to alter this. While a number of communities have established inventories of rights within their community land areas, certification has been slow.</p>
BOTSWANA Tribal Lands Act, 1968 (amended 1986, 1993)	<p>POSITIVE TO MIXED: The law vests all customary lands in (district-level) land boards, although comprising significant numbers of state-appointed members. Boards may issue Certificates of Customary Grants for residential, farm, grazing, public use, and other purposes, geared to house and farm lands. The certificates are not equivalent to leases that land boards may also issue, including to non-customary landholders.</p>	<p>NEGATIVE: The law does not provide directly for common property titles and treats commons as available to all citizens and by lease to foreigners, with the result that many grants of local commonage have been made to non-local elites and investors to the detriment of majority community rights. The law also overrides the traditional notion of each village community holding customary rights to specific spheres of grazing land within the tribal area; this was centralized in 1968 as tribal grazing lands, laying the path for the above.</p>
BURKINA FASO Land Law, 2009	<p>POSITIVE: Following diminishment of customary rights in the 1984 Agrarian and Land Reform Law, the Land Law, 2009, provides for “local land charters” in which all rights within the community domain are to be identified and recorded. The voluntary issuance of certificates by communities is possible by local consensus (articles 12–15). Equity with rights obtained under introduced statutory procedures is assured. Other than in this respect the law is similar to that enacted in Benin.</p>	<p>POSITIVE: Possession may be exercised lawfully by an individual, family, or collective (Article 34). The definition of “areas of collective use of natural resources” is obligatory in local land charters (Article 2). The <i>de facto</i> exclusion of pastoral interests within these “collectivities” has been noted, however, a focus of lobby groups.</p>
BURUNDI Land Code, 1986	<p>NEGATIVE: Customary interests are secondary to the fact of actual occupation, which, given Burundi’s history, can discriminate against customary owners. Farms are registrable as private property if occupied for 30+ years, encouraging land-grabbing by elites and denying original ownership by thousands of now-returning refugees. No provision has been made for certification of customary individual, family, or collective interests.</p>	<p>NEGATIVE: All forest, marshlands, and other uncultivated lands are owned directly by the state.</p>
CAMEROON Land Tenure Ordinance 1/1974 State Lands Ordinance 2/1974	<p>NEGATIVE: Customary rights are treated as no more than the occupation and use by families and communities of state or un-owned lands. Occupation and use for farming and houses are acknowledged as lawful but not amounting to real property until converted into registered entitlements through an expensive and remote procedure. A pledge to land reform was made in early 2011 but with indications that this is not intended to significantly affect the status of customary land rights.</p>	<p>NEGATIVE: Only “effectively occupied” land is lawful, thereby excluding traditional ownership of forests, rangelands, marshlands, etc. These are classed as national lands, which the state may allocate at will. There is a loophole in the law whereby a community with a viable production plan and capital could acquire a grant of that land by the state, but it is geared to commercial investors working with communities.</p>

CENTRAL AFRICAN REPUBLIC Constitution, 1995 Land Law No 63, 1964 Draft Agro-Sylvan Law, 2009 Draft Law on Indigenous Peoples 2011	NEGATIVE: The 1964 land law places all unregistered holdings within the private domain of the state. Only those who develop the land intensively may apply for formal land rights. The draft Agro-Sylvan Law recognizes customary tenure as a legal basis for establishing registrable rights but is far from being delivered in law. A law has also been drafted to bring respect for the land interests of indigenous peoples (pygmies and pastoralists) in line with ILO 169 (ratified in 2010) and which, if passed, would make a big difference to their rights, but not of the majority non hunter-gatherer or pastoral populations. However it could set a precedent for wider change.	MIXED: There is a potential under the still-draft Agro-Sylvan law for pastoralists to be acknowledged as having rights over pastures, through group registration procedures (articles 160–168). This opportunity does not include forests.
CHAD 3 land laws, 1967 Law No 7, 2002	NEGATIVE: There have been minimal changes to land laws since 1967. Untitled land belongs to the state. A 2001 law establishes an investigatory commission (“Observatory”), which could produce new policy advice but given the long passage of time now looks like a sop to pacify public demands.	NEGATIVE: Communities may manage pastoral commons but not own them (Law 7, 2002). Aristocrats allegedly retain the largest share of access and control.
CÔTE D’IVOIRE Rural Land Domain Law, 1998	MIXED: Under the 1990 Rural Land Plan (<i>Plan Foncier Rural</i>) there was a clear commitment to map all customary rights for certification. The Rural Land Domain Law, 1998, provides for such land certificates to be issued based on custom but followed by <i>mandatory</i> conversion into statutory entitlements subject to formal mapping. These do not necessarily alter the incidents of the right, just the source of jurisdiction, thereby removing control from communities. There is a plethora of disputes between indigenes and immigrants, the latter only permitted to obtain leases (one cause of the civil war). No certification or registration has been undertaken in practice.	MIXED: The 1998 law provides for the registration of individual, family, clan, village, or local-authority lands from the customary sector, but these claims must be converted into registered entitlements to be upheld as private property rights. The cut-off date has passed and presumably been extended until further notice, but there has been no progress in registering individual, family, clan, or village lands inclusive of commons. It could be that the recent ending of the civil war might see these land security measures reactivated.
DEMOCRATIC REPUBLIC OF THE CONGO Land Code, 1973 amended 1983 Forest Code, 2002 Constitution, 2006	NEGATIVE TO MIXED: The 1973 law upheld customary rights but only as access rights on state land. Its promise (Article 389) to clarify and protect customary rights has never been met. The new constitution pledges to protect possession of lands held individually and collectively in accordance with law or custom (Article 34) however with possession interpreted as occupation and use rights only, with intention to retain untitled lands vested in the state. The government continues to routinely allocate customary lands to third parties, although the consent of the traditional authority is required.	NEGATIVE TO MIXED: Uncultivated land is held by the new constitution (Article 34) to be empty of owners; it acknowledges the existence of collective rights, but as use rights only. It also provides for customary land administration (traditional authorities), but subject to the higher authority of the state. The new Forest Code does provide for community concessions (Article 22) which could provide a route to more effective community control given the term of concessions and the exclusivity of their rights but the enabling law has remained in draft.

ETHIOPIA Constitution, 1995 Federal Land Law, 2005 Regional state land laws, 2006 & 2007	MIXED: Customary rights were abolished in 1975, confirmed in a land law of 1997, and replaced with recognition of existing holding rights as registrable, mainly for houses and farms. Often existing holdings are in fact based on traditional occupation. This system was upheld by the 2005 land law. A mass titling operation is under way in four of nine regional states, focusing on farm holdings.	NEGATIVE: Although groups, peasant associations, and other legal persons, including non-governmental organizations (NGOs) and companies, may hold lands collectively, there has been limited group registration over six years of mass rural titling (a few cases in Amhara). The federal government and regional states also reserve the right to reallocate commons to individuals or companies as required. Pastoral and other communal rights dominate in five states, where no formalization is under way and with less legal protection from reallocation. Significant reallocation of communal lands to private investors has occurred since 2005. Forests are broadly treated as federal or regional state property, with limited provision for community-owned forests. Some forests including Parks have also been partially allocated to investors.
ERITREA 1994 Land Proclamation and key Regulation 1997 Constitution 1996	NEGATIVE: Customary land rights were abolished in 1994, but actual occupancy is the basis of security of tenure and remains largely customary.	NEGATIVE: Commons are not recognized as ownable.
GABON Laws of 1963 (No. 14), 1963 (No. 15), 1976 (No. 2), 1971 (No. 16), 2003 (No. 26) Constitution, 2000 Forest Code, 2001	NEGATIVE: There have been no new policies on customary rights since decolonization. Laws vest all land and its control and management in the state and recognize customary rights as use rights on state land including in the Permanent Domain of the State. Titled such as in Permits to Occupy may be obtained over lands which are demonstratively occupied and used. Many conflicts exist among land use claimants which the law of 2003 attempted to address.	NEGATIVE: There are no provisions for the collective ownership of, or even the protection of collective use rights to, customary lands. Forests belong to the state. Most are under long-term commercial concession to foreign companies. The Forest Code enables communities to create a Community Forest over which they may have management rights but the enabling decree is not in place after a decade. A 2007 law on national parks allows communities to exercise some uses in periphery areas of parks only, but again no enabling degree.
GAMBIA State Land Act, 1991	NEGATIVE TO MIXED: The State Land Act recognizes customary rights as a legal form of possession but as permissive occupants on state land. The minister may declare any area to be state land in order to issue leasehold titles. Communities may receive leaseholds, however.	MIXED: The only route to security is statutory leasehold. This is being used for community forests, giving some tenure security to communities who prove good management. The government is the landlord, and customary incidents are lost. Policy reform is likely, as a Land Reform Commission is in place and the strong precedent of in effect collective leaseholds over community forests is likely to ensure that collective tenure is addressed.

GHANA Constitution, 1992 Registration of Land Titles Act, 1986	POSITIVE: Up to 80% the land area is designated as customary lands under the ownership of chiefs, family heads, clans, or communities, although chiefs and family heads dominate. The land law of 1986 and the 1992 constitution strongly favor chiefs as owners, leaving their subjects as tenants of the chief. There has been little registration of customary freeholds provided for in 1986 as the procedure is expensive, bureaucratic, and centrally controlled.	POSITIVE TO MIXED: In principle, a community or family may be the allodial owner (root owner of the soil). In practice, chiefs and family heads claim this, and they have ample legal support. Moreover the state took trustee ownership of virtually all forests within the customary sector in the 1960s, sharing revenue with chiefs and district councils but not community members. Unfarmed lands are characteristically controlled by chiefs and frequently sold to outsiders or favored families. Immigrants have minimal rights.
KENYA Constitution, 2010 National Land Policy, 2009 Trust Land Act, 1962 Group Ranches Act, 1967	MIXED: Customary land (about 67% of the country's land area) is vested in county councils as trustees for populations and with undue powers to dispose of these lands in the presumed interest of those populations. This right is also exercised by central government as the legal administrator. Generally, farming/house customary occupancy is not interfered with, except for registration, which converts the right into freehold, removing rights from community jurisdiction. The new constitution turns trust lands into community lands held by groups and communities, but only through case-by-case registration; in the meantime, county councils remain trustees. No enabling law for Community Land has been enacted.	MIXED: Commons have proven vulnerable to administrative decisions by the president and land commissioner, in alliance with county councils. Individualized titling has also subdivided many common properties in favor of wealthier families. Masai and some other pastoralists have had opportunities to bring commons under group title, but those without livestock are usually excluded, remaining clients of livestock-owning elites. Most group ranches are now subdivided into private farms to the benefit of the better-off. Group title will be provided for under laws to be enacted in the light of the new constitution. However, all existing forest and game reserves and any forests/woodlands that are not sacred groves remain the property of the state or county councils. While claims for ancestral domains to be recognised has been a source of conflict and killings among tribes, the constitution does not clarify how their grievances can be met and not enabling legislation is in place.
LESOTHO Land Act, 1979 Land Act, 2010	NEGATIVE: The Land Act, 2010, does not mention customary rights but provides for the issuance of titles over rural land. The objective is to convert all customary holdings into statutory leaseholds, held from the state. The situation is regarded by many as especially negative given that customary land law through the <i>Laws of Lerotoli, 1903</i> remained in force until 1979 when the act removed ultimate title from the King to the President and removed powers of chiefs to allocate land. While communities welcome more democratic local land allocation institutions security of tenure based on customarily-acquired lands is slight, and limited to house and permanent farm lands.	NEGATIVE: Although the law provides for both corporate and unincorporated bodies (i.e. communities) to register title, there is no provision for securing community rights to traditional pasture lands, a main resource. For all intents and purposes these remain vested in the state at which is able to reallocate these to investors or individuals at will.

<p>LIBERIA Hinterland Law, 1949 Registration Law, 1974 Public Land Law (origins in 1890s)</p> <p>Community Rights Act with Respect to Forest Lands, 2009</p>	<p>MIXED: The status of customary rights is strong in principle but, in practice, confused and disputed. The Hinterland Law, 1949, recognized “the right and title of tribes of an adequate area for farming and other purposes” and “protected against any person whatsoever”. This language was changed in the Liberian Code, 1956, which reduced fee simple (freehold) title to the right of <i>possession and use of land only</i>. The new Aborigines Law did not appear in the 1973 Civil Code, raising questions as to its force. The 1974 Registration Law requires that tribal reserves be recorded as existing on public land, and the Public Land Law provides for something similar. These lands may be alienated subject to the chief’s permission on behalf of community. The Land Commission was established in 2009 to devise a new policy and law by 2013. Interim Public Land Regulations, 2011 still require customary owners to buy their own land back from the state, albeit at token prices.</p>	<p>POSITIVE: Collective rights to forests and other lands have some protection, in principle and past practice (see in other column) and which enabled communities to secure original title over 1 million ha of mainly forest lands. Private property law also provides for communal entitlement through the issuance of public land sales deeds. Around 40% of the total land area is under collective entitlement (averaging 30,700 hectares per parcel) through either Aboriginal Title Deeds or Public Land Sale Deeds although the tenure status of both is now uncertain. In addition, many of these areas were interfered with by the creation of National Forests in the 1960s which extinguished customary rights although without constitutionally required payment of compensation. The Community Rights Act with Respect to Forest Lands, 2009, now acknowledges that customary common property rights to forests exist and awards a proportion of rent and revenue to customary owners when the state allocates concessions over their lands.</p>
<p>MADAGASCAR Law No. 019 of 2005 Law No. 031 of 2006 Decree No. 1109 of 2007</p>	<p>POSITIVE: Under new land laws (2005–2007), occupancy is recognized and upheld even without a title. The issuance of certificates is devolved to the commune (district) level (there are 1,500 communes) but not to village level. Good early progress has now slowed due to a lack of donor funds.</p>	<p>MIXED: The law provides for collective entitlement as well as individual entitlement, and even if there is no entitlement, customary rights are to be upheld. However, collective entitlement appears to be interpreted as mainly family tenure and it does not appear that any customary pasture or forestlands have been titled to communities. The class of protected lands is also very wide, minimising the area of forests or rangelands which could be available to private community tenure.</p>
<p>MALAWI Land Act, 1965 Customary Land (Development) Act, 1967 Land Policy, 2002</p>	<p>MIXED: The land policy supports customary rights as property interests and establishes a system for their voluntary registration and a locally based customary land administration regime, including the chief but with elected advisers. However, no new law is in place (a bill was withdrawn in 2007) and current laws vest customary lands in the state, and enables commercial lease of these lands without local consent.</p>	<p>MIXED: The land policy provides for commons to be the private, group-owned properties of communities, or groups, but no enabling legislation has been enacted. The World Bank-funded Community-based Land Management Program aims to promote a new law.</p>

<p>MALI Order No 00-027/P-RM, 2000 (amended 2002) Law No 96-059, 1996 Agricultural Orientation Law, 2006 Pastoral Charter Law No 1, 2004</p>	<p>NEGATIVE: The Land Code, 2000, maintains customary rights as use rights on state land. Rural municipalities have administrative control over lands in villages (around 700 in each municipality) and may issue concessions on the basis of survey, written records, and fees. Therefore, even though devolved to district level local government, decisions are remote. Concessions are <i>petits papiers</i> and can be issued readily to individuals, families, and communities as well as outsiders, but they have to be transformed into registered entitlements to be upheld as property, a further expensive procedure. A new rural land policy is in preparation.</p>	<p>NEGATIVE: While there is clear legal provision for communities to control and manage commons, there is no provision for them to be recognized as owners, making them vulnerable to the dictates of local and central government. Dispossession of untitled lands is now common, including to foreign investors.</p>
<p>MOZAMBIQUE Constitution 1990 Land Law, 1997</p>	<p>POSITIVE TO MIXED: Article 9 recognizes customary rights and provides for statutory entitlement on request, with survey. Registration may be in the name of a community, a chosen group name, or the name of individuals, corporate persons, men, or women (Article 7). Regulations (1998, 1999) provide procedures. Limited progress has been made in delimitation; with no clear state program, NGOs are left to facilitate. A main problem with the law is that there is a lack of community-level institutional formation to assist communities to define their respective domains or democratically represent communities. Another problem is that non-customary land holders and foreign investors may all apply for the same lands, without the precedence of customary owners of those lands being clearly stated.</p>	<p>POSITIVE TO MIXED: While customary collective rights to land are fully recognized as existing, the level of protection for these is low without formal registration. This is made difficult because of the lack of systematic national procedures to help communities agree, define and register these domains. Accordingly, private investors have found it relatively easy to secure vast areas under 50 year leaseholds on the basis of fairly limited consultation with community leaders or elites. Only 230+ community areas (among potentially 10,000) have been delimited and titled. An attempt in 2010 to limit the size of area a community may claim was dropped.</p>
<p>NAMIBIA Constitution, 1990 Communal Land Reform Act, 2002 Regulation No 37, 2003</p>	<p>MIXED: Customary lands ('Communal Areas') remain vested in the state while former white areas absorbing 44% of the land area remain under freehold tenure. The 2002 law created regional communal land boards which may issue certificates of customary rights for residential and housing purposes only, as lifetime usufructs and subject to a 20 ha limit. Traditional Authorities must approve these entitlements. Registration is a laborious process, and the issued right is not fully transferable. Registration is also compulsory, with a cut-off date, if families are to secure homesteads, now passed and with only a tiny proportion of the estimated 230,000 certificates needed issued. The cut-off date has now been extended.</p>	<p>NEGATIVE: The law explicitly excludes unregistered commons from entitlement as family or community assets. Since 2002 very large parts of these lands have been enclosed by elites of areas which vary between 2,500 and 10,000 ha for ranching purposes. Many of these are secured by taking out commercial leases over these lands. In either case the local community loses all access to its traditional commonage. The Government of Namibia is sponsoring a review (2011) which may recommend that control over communal lands is directly vested in communities under long leasehold, and from which it may if it wishes sub-lease parcels. No proposals to vest title in communities have been forthcoming.</p>

NIGER Rural Code, 1993	MIXED: The rural code and guidelines established 57 rural land commissions to issue titles on the basis of customary rights, which are acknowledged to exist but at registration are converted into statutory entitlements. The procedure is slow, dependent on survey and mapping, and begins as a temporary concession until the land is developed. Chiefs are issuing informal certificates in lieu of legal backing (<i>petits papiers</i>).	NEGATIVE: There is no provision for group or community entitlement to commons. Land that is not under “productive use” (<i>mise en valeur</i>) (i.e. cultivation) falls to state for potential reallocation. There have been many cases of this in recent years, including allocations to foreign investors.
NIGERIA Land Use Decree, 1978	MIXED: Customary rights have been recognized since 1903 in the Southern Protectorate and in 1910 in the Northern Protectorate, followed by the Land Tenure Act, 1962, and the Land Use Decree, 1978, but with radical title vested in governors and the administration of rural lands vested in local governments, crippling community control. Rights may be formalized in statutory or customary rights of occupancy, and certificates issued. The National Land Commission was established in 2009 to review policy and laws.	MIXED: Provision was made in the 1978 law for grazing areas of up to 5,000 hectares in size to be allocated and able to be held in common as customary rights of occupancy. Few communities bother to do this, and in practice chief-led tenure regimes continue, with provision made for the communal use of all lands not allocated to farming. The situation varies by state/tribe. District and state governments have powers to reallocate unregistered lands.
RWANDA Constitution, 2003 Organic Land Law, 2005	MIXED: The Organic Land Law abolished customary rights but protects previously obtained rights. It makes registration mandatory in renewable leases of 15–99 years but also provides for the issuance of absolute title in unspecified conditions (usually to investors). There is sharply rising polarization in farm ownership.	NEGATIVE: There is no provision for group titling; this affects all communities who, by tradition, owned the 10% of lands that are marshlands, which the law made state property. These areas are routinely sold to investors or elites. All forests are also state property, directly dispossessing minority hunter-gatherers. Provisions for the ownership of grazing lands are unclear.
SENEGAL Land Law No 64-46, 1964 Law 76-66, 1976 <i>Code des Collectivités Locales</i> , 1996 <i>Agro-Pastorale Loi</i> , 2004	MIXED TO NEGATIVE: All unregistered land belongs to the state, with distinctions drawn between urban zones, classified zones, pioneer zones, and <i>zones de terroir</i> ; the latter (around 58% of total land area) are occupied and used areas, for which villagers hold access rights based on rural council allocation. Although the powers of rural councils were trimmed in 1996, this was in favor of centralization, not devolution to communities. The 2004 law was suspended while a Land Reform Commission (established in 2006) considered new policies.	NEGATIVE: There is a strong emphasis on rights being upheld on the basis of demonstrated use (cultivation, houses). Commons have proven easily reallocated by government or councils in favor of investors, urban expansion, and personal privatization by entitlement. Some local forests have been lost. The 2004 law promotes commercial farming and also recognizes pastoral use as a productive use, but is not in force.
SIERRA LEONE Local Government Act, 2004 National Land Policy, 2005	MIXED: There are inconsistencies in retained old land laws, but the Local Government Act (2004) vests title over non-titled land in chiefs and heads of families. This echoes the National Land Policy, 2005, which plans to recognize allodial (primary title) over community lands (or chiefdoms) but likely to be vested in chiefs. The Policy also aims to provide for subjects to be issued with customary freehold entitlements and lesser interests including customary leaseholds and sharecropping contracts (similar to Ghana). Capture by chiefs is widely anticipated, although it is also expected that they will be legally endowed with only trustee rights but with powers which will legalize allocations by them.	MIXED: The current land law regards customary occupancy as permissive, and proposals do not provide for communities to own land directly but rather for communal land (“community” or “chiefdom” land) to be a distinct class of land alongside state public land, private land (statutory freeholds), and family land (another customary form). This would be satisfactory if it were not for the strong implication and likelihood that chiefs rather than community members will gain legal ownership of commons and be able to dispose of these lands more or less at will, creating personalised rent-seeking injustices already long experienced in Ghana.

<p>SOUTH AFRICA Constitution, 1996 Interim Protection of Informal Land Rights, 1996 Communal Property Associations Act, 1996 Communal Land Rights Act, 2004</p>	<p>POSITIVE TO MIXED: The constitution upholds customary rights, which were also given protection under the 1996 law. However, the Communal Land Rights Act, designed for former homelands, was struck down as unconstitutional in 2010, largely because it opened the way for chiefs to make themselves trustee owners of customary lands, deemed undemocratic. Also, the registration of customary rights as “new order rights” was deemed to unduly convert customary rights into introduced forms, with expected loss of important customary attributes including community-derived jurisdiction and accountability. Customary rights outside the former homelands have been recognized through a process of application for restitution, the results of which are normally cash payments in lieu. The process has been fairly satisfactory. The customary rights of workers on lands owned by commercial farmers (often white) is yet to be satisfactorily redressed, and killings of owners has been common.</p>	<p>POSTIVE TO MIXED: In principle there is nothing stopping a community claiming a collective right over naturally collective assets. One or two communities have seen vast land areas restored to their ownership, including some parts of National Parks and Reserves. The mechanisms for a group or community to secure ownership are however complex. The Communal Property Associations Act, 1996, provides a bureaucratic and costly route for this and uptake has been limited.</p>
<p>SUDAN (North Sudan only) Interim National Constitution, 2005 Civil Transactions Act, 1984</p>	<p>NEGATIVE: The Civil Transactions Act, 1984, retains customary lands as permissive occupancy on government land, although some customary use rights, especially settlement and cultivation, are to be upheld (articles 559–570). The 2005 constitution pledged to progressively address customary rights and to restore lands wrongfully taken between 1967 and 2005 but there has been no action since and none is anticipated. Attempts by Southern Kordofan and Blue Nile States to introduce devolved systems for customary land rights to be respected and registered were rejected.</p>	<p>NEGATIVE: Most of Sudan’s land is, by custom, owned and used communally but is still being freely reallocated by government to investors and private persons, involving millions of feddan (acres). This failure has been a significant trigger to armed civil unrest and possible reactivation of civil war in Southern Kordofan, Blue Nile and Darfur states.</p>
<p>SOUTH SUDAN Interim Constitution, 2005 Draft Constitution, 2011 Land Act, 2009 Draft Land Policy, 2011</p>	<p>POSITIVE: The constitution(s) and new land law directly support customary land rights, registered or not, “with equivalent force in law with freehold or leasehold rights acquired through statutory allocation, registration, or transaction” (Section 8 (6)). Such rights may be held in perpetuity. The constitution also provides for registrable derivative rights of occupancy and use to a person or community (Section 17), such as would apply to pastoralists using an otherwise owned local land area. The Land Act provides for ward (<i>payam</i>) land councils to supervise traditional authorities, although this is not being implemented. It also provides for a class of Community Land to encompass all customarily owned lands (Section 11). The major constraint is the lack of implementation of the institutions at the local level required to protect and administer customary interests. Few remote Sudanese are even aware of their new legal rights.</p>	<p>POSITIVE: There is full legal protection for community-owned forests, pastures, shrines, etc., which may be registered (Section 11 of the Land Act), although they are also protected without such registration. The ownership of a legal right to communal land may be in the name of a community, clan, family, community association, or traditional leader (Section 58). A community may issue leases of up to 99 years on customary land of more than 250 <i>feddan</i> (acres) with approval of the <i>payam</i> land council, county land authority, and Minister for Lands (Section 15). No councils are in place and state leases are being issued to investors on the advice of the investment authority, with minimal consultation. Nor is there legal obligation for obtaining free, prior, and informed consent prior to the state delimiting an investment zone, although communities must be compensated (Section 63).</p>

<p>(Mainland) TANZANIA Land Act, 1999 Village Land Act, 1999 Land Use Planning Act, 2007 Forest Act, 2002</p>	<p>POSITIVE: Land laws recognize customary rights as having equal legal force and effect as rights acquired through grant or purchase from the state. In practice, customary rights are stronger because they are held and registrable "in perpetuity" whereas statutory rights have a limited term. Nearly 70% of the land area is "village land" and to which the Village Land Act applies. Each village is in the process of defining its village land area and once registered makes the elected village government the lawful controller and manager of those lands. This includes the right to set up its own Village Land Register, register collectively owned areas, and issue titles of Customary Rights of Occupancy over house and farm plots. Communities may issue customary leases to non-villagers in certain conditions but who then have to make the village their principal residence. The land and forest laws also make it possible for National Parks and Reserves to be owned by communities.</p>	<p>POSITIVE: Each village community is obliged to identify and register communal lands in its village land register as community property <i>before</i> granting title to families or individuals on residual lands (Village Land Act, Section 12). Few such registers are yet set up. Also, in practice, the government routinely persuades villages to surrender "unutilized" or "spare" commons to the state to be reallocated by the Tanzania Investment Centre and leased to foreign investors for 99 years. The Forest Act, 2002, has been critical in providing another and easier route through which all 12,000+ village communities may secure complete control over forest/woodlands or lands which could become forest/woodlands within their Community Land Areas. Several million hectares of forest/woodlands are under such status.</p>
<p>UGANDA Constitution, 1995 Land Act, 1998 Land (Amendment) Act, 2010 Draft National Land Policy, 2011</p>	<p>POSITIVE: The constitution (Chapter 15) makes customary land tenure a fully lawful route to land ownership along with freehold, leasehold, and <i>mailo</i> (a form of feudal tenure introduced by the British in Buganda areas in 1902). The Land Act, 1998, provides for the voluntary acquisition of certificates of customary ownership (sections 5 and 6) to be regulated by customary law, anticipated for uptake mainly for individual and household parcels or lands belonging to a traditional institution (Section 4). Title may be converted to freehold, weakening the equivalency of these certificates with freehold titles. Without registration, customary rights are legally bound to be upheld. There has been minimal issue of certificates of customary ownership. A main constraint is that governing institutions are only at the district level; remote from villages. There is also no supervision of actions by chiefs or elites.</p>	<p>POSITIVE: Communities are owners of customary communal land, whether registered or not, but they may form a communal land association to formalize this (Section 16). Few if any have so far been formed. In practice, internal land-grabbing by elites is common and rising. The state is also actively creating special areas for investment, public purpose and claims ownership of all waters, wetlands, forest reserves, national parks and other areas reserved for touristic or ecological purposes, although in trust for the nation (Article 45). This limits community rights over these areas to management and use rights.</p>
<p>ZAMBIA Land Act, 1995 Draft Land Policy, 2010</p>	<p>MIXED: 88% of the land area is termed customary lands, and the permission of chiefs is needed prior to reallocation. Land may be registered under a customary leasehold title (Section 8) for individual parcels for houses or cultivation only. The state exerts strong powers over customary lands, as do chiefs, with continuing leasing of uncultivated lands (commons) to non-customary owners. Unregistered rights do not compare well with registered entitlements in either legal force or effect.</p>	<p>NEGATIVE: There is no clear provision for commons to be registrable as collective property, and they are vulnerable to alienation on the recommendation or demand of the state or through chiefly permits, which do not require community consensus. The draft land policy makes no substantial changes although it is under challenge by local groups.</p>

ZIMBABWE Communal Lands Act, 1982	NEGATIVE: The 1982 law recognizes customary rights as permissive occupancy and use only, ownership directly vested in the President and who holds strong legal powers to reallocate any part of these lands at will via local district councils. The draft land policy, 1998, provided for the exercise of customary tenure as a property regime administered at the village level, but was never approved or adopted. The focus of tenure change has been since limited to restitution of white-owned farms to black individual and groups, with considerable success but with major questions pertaining as to who have been beneficiaries. Security of tenure by these beneficiaries is also limited.	NEGATIVE: There is no provision for the recognition of common properties. Conversionary leasehold is the only viable route. In practice it is not easy to remove commons from local council authority or from the customary sector.
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4 Which countries give most support to customary rights over forests?

Table 1 illustrates how countries vary in their policies and laws for customary rights. A minority of national land laws (8–9, or about 25% of the 35 surveyed countries) are assessed as broadly positive in their treatment of customary rights. In terms of law, the most positive are Uganda, Tanzania, Burkina Faso and Southern Sudan. Even in these cases there are limitations in law and especially post-law implementation and practice. A further 11–13 (about 37%) are mixed—that is, neither all bad nor all good. Such ambivalence has three main sources:

- a. Protection of customary rights may be now provided but is legally applicable only to lands which are *occupied and used*, and in effect, family properties. This leaves most of the customary land resource involving forests, rangelands, marshlands and other traditionally collectively owned lands without protection.
- b. Customary rights may be protected but only if they are made subject to *formal survey, registration and titling*, and under the non-customary system, so they are in effect removed from the customary sector.
- c. New policies are in the process of being formulated with indications that positive improvements *might* be made.

Moreover, 13–16 surveyed states (up to 46%) have either not changed their laws to recognize customary interests as having force as real property rights, or have retained in new land laws denial that these interests are more than permissive rights of occupancy on national or government lands. In such situations, customary rights to unfarmed lands are again especially ill-treated.

Nevertheless, that nine countries do now give positive support to customary land rights suggests a slowly improving trend. Among this group, **Tanzania** meets most of the criteria listed earlier as demonstrating justiciable respect for customary rights. There are several factors which allow the Tanzanian case to stand out:

- a. Its land laws enable customary landholders to register their interests “as is” and protects those rights even if they remain unregistered.
- b. These rights apply to all categories of property within the community, whether designated for the purpose of a shop, a house, a family farm, a community forest, pasture or marshland, or water source area, or simply spare land within the community land area.
- c. By creating a very strong construct of community land area (“Village Land Area” or VLA) every one of the country’s 12,000+ rural communities may secure

their overall resources at relative speed, by agreeing and mapping the perimeter boundary of their domain with neighbouring villages, and having this VLA registered at district level. Customary law (in effect, as defined by elected village governments) applies in these areas.

- d. Longstanding provision has been made for Tanzanian villages to elect their own governments (“Village Councils”) and these democratic bodies are made the legal manager of all land matters within the VLA, subject to the ultimate authority of the community itself; this includes being able to make by-laws as to land tenure and land use, and which the courts must uphold. It also includes being able to control land titling itself, through Village Land Registers. That is, only the community can decide who gets title and on what grounds, guidelines provided in the law. District, regional, and national bodies have advisory oversight over the decisions and operations of the Village Land Managers, not authority, although the law also makes provision for a minimum of 100 villagers to challenge the decisions of its village government.
- e. Collective properties are given special protection; no community may proceed to issue titles over individual or family lands until the community has agreed which resources are rightfully communal, owned by all members of the communities. Description of these common properties is to be registered in the Village Land Register.
- f. Customary land rights, whether registered or not, are given equal legal force and effect to rights obtained through statutory grant or purchase.
- g. Communities may petition to have classified forests and wildlife areas (Parks and Reserves) returned to their tenure, although no community has sought to do so yet.

- h. Because customary rights are upheld as full private property rights (and whether owned by individuals or communities), when the state wants these lands for other purposes, it must buy these at open market rates from the community and pay compensation for other losses incurred through that purchase; this acts as a major disincentive to wilful appropriation without strong cause.

Several other states have made much improved provision for community-based governance of land matters but fall short in other ways. **Benin**, for example, has failed to make the status and legal force of customary rights fully equivalent to those applying to holdings under statutory deeds or titles. **Southern Sudan** falls short in that its largely excellent new land law (2009) does not have the localized institutional support to see it put into practice. Additionally, it fails to require local consent for land-takings by the state for investment purposes. **Mozambique** weakens the state’s proclaimed support for customary rights by failing to either provide for a devolved and democratic land administration regime or to launch a systematic delimitation of community land areas inclusive of common assets. Without these, communities are ill-equipped to deal with requests by investors to surrender their lands for commercial enterprises. Permission tends to be easily secured by consulting with often self-selected representatives.

Ghana, Botswana and Liberia all have longest histories in recognizing customary rights as property interests, but also fall down in delivering this in specific ways. **Ghana** has long allowed chiefs to capture primary rights over all lands and finally rooted this in law in constitutional law in 1992. **Liberia** has remained politically and legally ambivalent as to its support for customary rights and only weakly applies this. The new Government of **Botswana** after Independence was the only administration to not bring customary property (Tswana “tribal lands”) under state tenure but stopped short of including non-Tswana with such rights, leaving

San hunter-gatherers as state tenants over one third of the country until 1978.

Uganda deserves special mention in paving a radical path in its 1995 constitution by doing away with the colonial-inherited vesting of root title in governments and presidents and which has been so abused. Ugandans own both the soil and rights to the soil under one of three systems; customary tenure, leasehold tenure, or mailo tenure.

However, Uganda's land law does *not* make provision for communities to directly own forests or other ecologically important areas, a right it reserves to itself or to local governments. Nor have village governments with legal land powers been established, limiting action to secure customary rights. Uganda's law also failed to do away with institutionalized tenancy under the *mailo* tenure, although an amendment to the land law in 2010 now protects tenants from eviction. Uganda's new land policy (2011) plans to remedy most of the above.

5 How is collective ownership curtailed?

Limitations to the protection of collective properties are discussed above. However, much more severe constraints apply in the 27 country laws assessed as negative or mixed in their support of collective rights.

Many of these laws do not recognize unfarmed lands as ownable other than by the state or the government of the day. Many agree that these resources are subject to customary rights but do not view such rights to be more than permissive rights of access, and limit such access where protected areas are created. In **Botswana** and **Namibia**, for example, district bodies may own such lands in trust for local communities but may also dispose of them to individuals or investors. Villages have routinely found their grazing lands enclosed against them. Similarly, in **Ethiopia**, **Madagascar**, and **Senegal**, lesser support for locally owned commons than for cultivated lands has repeatedly been demonstrated in the ease with

which governments allocate these lands to private persons and companies. **Congo Basin** countries have been especially remiss in failing to reform treatment of customary land rights, despite some pledges to do so. There is a slight chance however that some Congo Basin states as well as The Gambia, Kenya, Nigeria, Sierra Leone, Senegal and Liberia might eventually afford communities the same degree of legal protection for the collective ownership of forests and rangelands as offered for houses and farms. Policy-making land commissions are still sitting or laws being drafted in these states.

6 The implications for forest tenure

Natural forests cover around 478 million hectares in Sub-Saharan Africa (including Sudan). Virtually all of this is legally owned by the state. There is a reasonable chance that *unreserved forests* will be systematically acknowledged as the property of communities in only **Benin, Burkina Faso, Ghana, Mozambique, South Africa, South Sudan, Tanzania, and Uganda**. The total forest area of these countries is around 160 million hectares (some 60 million hectares of which is attributed to Southern Sudan). From this must be withdrawn the estimated 40–50 million hectares designated as protected areas (forest reserves and parks).

Therefore, around 110 million hectares *could* be acknowledged as the collective property of communities, or nearly one-quarter of the total resource. This is a potential figure only, since even this group of countries, with best-practice land laws, require communities to demarcate and often survey and declare, or secure more formal gazettement of forests, in order to be entrenched as their private, group-owned property. There are very few natural forests indisputably recorded as community property, such as in the form of registered community forest reserves—less than five million hectares in Sub-Saharan Africa. Most customary forest owners have no such recognition.

The potential for the remaining three quarters of Africa's forests to be vested in community hands is slight.

At most, rural communities may gradually acquire more rights to *manage* forests, although most likely only as secondary partners with government agencies. A large proportion of forests in especially the Congo Basin and West Africa are already under private concessions and whose terms are for some decades and renewable. Meanwhile, as we know, large areas of forest are being degraded or lost altogether. Rates of loss have not significantly declined in Africa since FAO began collating figures. Many communities are among those who believe this will not change until their customary ownership of forestlands is more properly accounted for in regulation and management regimes.

Endnotes

¹ Content in this table is supported by a direct review of the laws cited therein, as well as by over 100 papers that are not listed due to their large number.

² Constitutions and forest laws are only mentioned in this table where they have a direct impact over customary tenure.

The Rights and Resources Initiative (RRI) is a strategic coalition comprised of international, regional, and community organizations engaged in development, research and conservation to advance forest tenure, policy and market reforms globally.

The mission of the Rights and Resources Initiative is to support local communities' and indigenous peoples' struggles against poverty and marginalization by promoting greater global commitment and action towards policy, market and legal reforms that secure their rights to own, control, and benefit from natural resources, especially land and forests. RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, D.C. For more information, please visit www.rightsandresources.org.

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