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# INTEGRATING CUSTOMARY LAND TENURE INTO STATUTORY LAND LAW

## PROPERTY RIGHTS AND RESOURCE GOVERNANCE PROJECT<sup>1</sup>

### A REVIEW OF EXPERIENCE FROM SEVEN SUB-SAHARAN AFRICAN COUNTRIES AND THE KYRGYZ REPUBLIC

Several countries in sub-Saharan Africa have revised their land laws to grant legal recognition to customary forms of land tenure. Most of these reforms have taken place only within the past 15 years and have been part of a growing recognition that the imposition of Westernized systems of titling and registration has not succeeded in driving customary tenure systems underground and that indeed these systems continue to play an important role in administering and enforcing the land rights of most people residing in rural communities. Moreover, it is increasingly thought that reforms that grant statutory recognition of customary land rights will enable these rights to be more secure and less vulnerable to effacement by others seeking to establish legal rights on the same land.

This brief paper describes the varied means by which countries have granted legal recognition to customary property rights and institutions. Specifically, it describes the governing legislation and experiences implementing relevant provisions of those laws for seven sub-Saharan African countries: Botswana, Namibia, Uganda, Tanzania, Mozambique, South Africa, and Mauritania. The paper further illustrates the adoption of customary dispute resolution systems in the Kyrgyz Republic. Rather than conducting a review of the theoretical debates on the interface between customary and statutory tenure, this briefing note builds on new empirical evidence from recent experience.

#### **Botswana**

Botswana is perhaps the first post-independence country in Sub-Saharan Africa to accord recognition of customary law into formal statutory system for land rights.

The Tribal Land Act, 1968 vests tribal land<sup>2</sup> in a decentralized system of land boards operating on behalf of Botswana citizens. These boards administer rights to land in accordance with customary law. The Act drew on the core principle of customary law that all tribesmen should be entitled to land. The law was

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<sup>1</sup> The Rural Development Institute (RDI)'s Anna Knox coordinated the preparation of this briefing with the assistance of Renee Giovarelli, Matthew Foreman, and Melinda Shelton. RDI researchers conducted background literature reviews.

<sup>2</sup> Land traditionally occupied and used by native tribes according to customary law. As of 2003, tribal land constituted around 71% of Botswana's land area (Adams et al, 2003).

built on Tswana land tenure rules, eclipsing alternative forms of customary law practiced by other ethnic groups.

Although the Act served to validate customary tenure, it invoked a major shift in the trusteeship of tribal land and the institutional authority for its administration. Whereas the power to allocate land under customary tenure rested with chiefs and headmen, the law shifted this authority to local land boards, semi-autonomous corporate bodies made up of a combination of locally elected and government appointed officials. Land remains vested in these boards until such time as it is allocated. Allocations of rights to arable and residential land (as well as rights to use wells and drill boreholes) now have to be evidenced by certificates.

Customary land rights (for residential/arable purposes) are secured by a “customary land grant certificate” which grants exclusive, perpetual, and heritable use rights to individual applicants. In 1993, these rights could also be transferred, provided the land was developed for the purpose intended. Under the Land Act, once grants of customary land rights are acquired, they cannot be cancelled without just cause.<sup>3</sup> To acquire transfer and mortgage rights, one must convert their tenure to a common law lease. Land Boards can grant common law leases on tribal land to Batswana citizens (whether tribesmen or not) and foreigners. Leases for residential purposes are for 99 years; for industrial and commercial purposes the lease is for 50 years and eligible to be renewed for an additional 50 years.<sup>4</sup> Leases are fully negotiable.

Main Land Boards, operating within each tribal territory, are responsible for allocating land for residential, arable, industrial, commercial, and other purposes under both customary and common law; allocation of land for customary uses falls into the purview of Subordinate Land Boards which also have authority to settle land disputes. In addition to granting land rights, boards also maintain land records, authorize transfers or changes in the use of tribal land, have the power to cancel any grants, impose restrictions on the use of tribal land, and determine land use zones.

Whereas under the original legislation chiefs were allowed to serve on the land boards, the 1989 amendment to the Land Act removed them from boards’ membership and increased membership of the Main Boards from six to 12. Five members are democratically elected; five are nominated by the Minister of Local Government, Land and Housing. The other two are ex-officio members who represent the Minister of Commerce and Minister of Agriculture. The composition of the Subordinate Boards is the same, except they do not include the two ex-officio members.

Since its amendment in 1993, the Tribal Land Act no longer restricts allocation of customary land to local tribesmen, but opens this up to all Batswana citizens. While the intent appears to facilitate more equitable access to land by all citizens in Botswana, the effect is also to weaken customary rules that restrict allocation of primary land rights to one’s particular tribe or clan. The 1993 amendment also established a system of Land Tribunals, intended to help enforce the decisions of the Land Boards with regard to customary land as well as hear appeals against these decisions. The tribunals also preside over land disputes in their jurisdiction. The tribunals are comprised of three individuals appointed by the Minister of Local Government, Land, and Housing. Since tribunals serve as a lower court in the formal justice system, it is unclear to what extent these bodies are able to apply customary law in their decision-making.

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<sup>3</sup> Customary land rights may be cancelled: when the holder is no longer eligible to hold land under the provision of the Act, for failure to observe land use restrictions; when the land is required for public use; to ensure fair and equitable land distribution; when the use of land in contravention of the customary land law; for failure to cultivate or develop the land within a specific period. However, boards almost never cancel grants for residential or arable purposes.

<sup>4</sup> The Land Act also provides for short leases of up to five years, which can be terminated on a month's notice.

## Performance

Botswana's land reforms are regarded as among the most successful and visionary on the continent. Its land administration system is regularly lauded as a shining example of good governance. The country's first president following independence, Sir Seretse Khama, was himself a Tswana chief and sensitive to the substantial legitimacy accorded to customary tenure institutions and the risks of trying to rapidly replace them with a "modern" system. His administration and successive ones instead pursued a strategy of slow adaptation that mirrored the pace of changes in social attitudes and beliefs among Botswana citizens. This is reflected in changes made to the Tribal Land Act that gradually weakened the power of traditional leaders and later extended eligibility to acquire customary land grants to women and non-tribesmen.

Nevertheless, when first implemented, the reforms took time before they were effective due to the significant amount of capacity building necessary to make land boards function properly. Problems with land board operations continue today, with many of them being too under-resourced to adequately fulfill their responsibilities, although costs of land administration in rural Botswana compare very favorably against those of most other African nations. Liberalization of transfer rights to customary land and the ability of all citizens to acquire land regardless of their tribal affiliation have also led to an unprecedented wave in demand for tribal land, stretching the capacities of the land boards and fueling speculation.

Because the Land Act drew mainly on the traditions of Tswana tribes, customary land rights of non-Tswana ethnic groups have routinely been excluded. Under the Tribal Territories Act, eight Tswana-speaking tribes have been recognized as a tribe and designated land. Rural non-Tswana people that have not been recognized as a tribe therefore missed out on opportunities to claim land during the early decades of the Act's implementation and were subjected to forced removals because the laws of the country don't recognize them as a tribe. In 1993, amendment of the Act extended eligibility for customary land rights to all Botswana citizens, but by then much of the land had already been allocated or was being demanded by urban residents.

## Namibia

Statutory land tenure applicable to the communal areas of Namibia (covering around 335,400 km or 41% of the country's total land area) is similar to that pertaining to Botswana's tribal land areas. The Communal Land Reform Act, 2002 kept customary land tenure rules largely intact, but altered customary administration structures. Although traditional authorities may still make grants of customary land and revoke those rights, applications for such land must be made in writing and allocations are subject to the approval of Communal Land Boards, the jurisdictions of which are determined by the Minister of Lands. Traditional authorities are also empowered to cancel customary rights with Board approval. This system enables land to be administered according to the varied customs of different communities and avoid codification of a uniform set of customs. Typically, rights are granted to an individual for his (in most cases) natural lifetime and revert to the traditional authority upon his death for redistribution, which is usually to the surviving spouse and children. Grants may or may not include transfer rights. Those that do will typically require prior written consent from the traditional authority. Land in communal areas is vested in the state on behalf of traditional communities.

The Minister of Lands appoints the board members, which must include: representatives nominated by each of the Traditional Authorities within the Board's area, one representative of the organized farming community within the area, the regional officer of the area regional council, four women (two engaged in farming operations and two who have expertise relevant to the functions of the board), four staff members in the Public Service, and one representative from any recognized conservancy groups. These Boards are obliged to ensure that allocations made by traditional authorities are not encumbered by the

rights of others (including commons) and that they do not exceed a prescribed maximum area. Assuming rights meet these criteria, Boards will then issue a certificate evidencing the customary rights. The Act specified that persons with existing customary rights to land must apply to have their land registered by the board no later than February 2009. Boards are also responsible for deciding on applications for leaseholds, establishing and maintaining a register and reporting back to the Minister of Lands.

Like Botswana, both customary land rights and leasehold rights may be established in communal areas. Customary rights may be acquired by individuals for residential and subsistence farming purposes though nothing in the law appears to exclude groups from obtaining collective rights. There do not appear to be any legally imposed eligibility criteria for grants of customary rights,<sup>5</sup> which are acquired without cost, perpetual, and heritable. Transfers of customary land rights require the written consent of the traditional authority.

The Act gives the Minister of Lands the ability to identify portions of a particular communal area where long-term leases (up to 99 years, renewable) can be granted (for agricultural purposes) by the Communal Land Boards with the consent of the area's traditional authority. If the traditional authority refuses to allow the Land Board to provide leases for the identified areas, the Land Board can submit the matter to arbitration. Leaseholds cannot be granted on a piece of land where someone else has a customary land right, unless that person agrees to relinquish their right in exchange for compensation. Customary right holders may apply to have their land tenure converted to leasehold. Leasehold rights are transferrable upon written consent of the Land Boards.

Dispute resolution between individuals is mainly handled at the level of the traditional authority. If a person is aggrieved by a decision of the traditional authority or Land Board, s/he may appeal the decision to an "appeal tribunal" appointed by the Minister. When disputes arise between Traditional Authorities and Land Boards, one or more arbitrator is appointed by the Minister to help resolve the dispute

## **Performance**

Assessments of the implementation of the Communal Land Act are relatively few thus far. Not unexpectedly, there are reported deficiencies in the capacity of Communal Land Boards to carry out their functions due to lack of adequate resources. Insufficient knowledge of the law has also hampered Traditional Authorities from complying with the Act's provisions.

Problems appear to be particularly acute in Bushmanland, an area of Namibia's communal lands occupied by the San. While traditionally hunter-gatherers, several bouts of resettlement have resulted in the San mostly abandoning this way of life and losing political cohesion. Accountability of the traditional authority and the Communal Land Board to the San is weak and has led to the allocation of farming and grazing rights in the region to persons from other regions. This includes allocation of land that forms part of a conservancy managed by the San.

## **Uganda**

In Uganda, customary land tenure was first granted formal recognition by the amended constitution of 1995, the particulars of which were subsequently spelled out by the Uganda Land Act, 1998. Similar to Botswana and Namibia, Uganda established a system of local land boards to administer land, though their authority extends beyond customary land to include the other three types of tenure provided for in the legislation: mailo, leasehold, and freehold. Unlike these two countries, however, customary land rights in

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<sup>5</sup> Though the fact that communal lands are vested in the State on behalf of traditional communities could be interpreted to restrict eligibility.

Uganda may be established in all rural areas, not simply those designated as “tribal” or “communal.” Moreover, the constitution vested all land in the country’s citizenry, rather than in the Land Boards or the state.

District Land Boards are autonomous from the central Land Commission, but nevertheless are obliged to take into account national land policy, district level land policy, as well as the different systems of customary tenure in their district. Board membership includes a chairperson, a representative of the municipal councils, one for urban councils, and a representative from each country in the district. One third of all members must be women.

The law also provides for the establishment of Land Committees at the sub-district level. In order to legally establish customary rights, persons must apply to the Committee for a certificate of customary ownership and pay a prescribed fee. It is the District Land Boards, however, who review the applications and award the certificates. Decisions to grant, deny, or limit land rights should follow the customary laws of that area, except when such decisions deny women, children, or disabled persons rights to own, occupy, or use land, in which case they are legally invalid.

Applications can be made on an individual, family, or a group basis. In the latter case, groups first must legally establish themselves as a Communal Land Association in order to be eligible for customary rights. Once granted rights, these associations may then allocate individual and common land rights to their members, while those granted individual rights can seek to have these certified by the Land Boards and, in effect, exit the Association. For areas set aside by the Association as commons, members must establish a mutually agreed upon Common Land Management Scheme to govern land use management.

Customary rights are established as equal to all other forms of tenure in Uganda. These rights may be leased, sold, and mortgaged. Nevertheless, holders may convert customary ownership rights (whether certified or not) to leasehold (99 years) or freehold. Since customary rights are deemed equal, it is not clear what added benefit freehold rights afford.<sup>6</sup>

The Act also established Land Tribunals to adjudicate disputes regarding land, and particularly to handle grievances against District Land Boards. They comprise a chairperson and two persons with knowledge of the area, who are appointed by the Chief Justice. The law also affords customary authorities a role as mediators in resolution of disputes that involve customary tenure.

## **Performance**

Progress in implementing the 1998 land reforms has been rather dismal. By 2002, not a single customary certificate of ownership had been issued. As of mid-2003, only 45 District Land Boards and 56 District Land Tribunals had been established and funding released to support these bodies. Major challenges in establishing parish-level Land Committees led to their eventual removal from the land administration structure and replacement with Land Committees at the division or sub-county level. Land Tribunals now operate at the district level only (not sub-county level as provided in the original law) and on a circuit basis. These impediments have derived mainly from lack of government funding and human resource capacity to undertake such a massive decentralization of the land administration and enforcement system. Commitment on the part of central government to implementation of the reforms has also wavered as a result of political alliances with interests that are not supportive of the reforms.

Other problems stem from clashes between customary and statutory. Some communities and traditional authorities object to provisions allowing for the sale of customary land where this had been restricted under customary law. Some communal landowners have also been unwilling to allow members to take land from the group via individual certification.

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<sup>6</sup> This review has not investigated whether freehold provides greater protection against government expropriation or not.

## Tanzania

In 1999, Tanzania adopted two pieces of legislation as part of a comprehensive land reform: the Land Act and the Village Land Act, with the latter law embracing customary tenure.

Under the new laws, the allocation of authority and responsibility for land administration depends upon the classification of the land. Land is classified as either village, general, or reserved land. The Commissioner of Lands within the Ministry of Lands, Housing, and Urban Development is charged with the allocation of general and reserved lands and the administration of the former, while retaining overriding powers in the administration of village lands. Around 70% of land in Tanzania is classified as village land.

Village lands are governed by the Village Land Act which provides for two types of tenure: granted rights of occupancy and customary rights of occupancy. Both have equal status except that customary rights are permanent and perpetual whereas granted rights are limited to 99 years. Those who have occupied lands for many years are entitled to customary rights of occupancy and are eligible to register the right and obtain a Certificate of Customary Right of Occupancy. Entitlement to the right does not require certification, though registration does afford one the ability to use the certificate as collateral for credit.

Administration of village lands is highly decentralized, though the Commissioner of Lands retains overriding powers. Responsibility for the adjudication, survey, and registration of customary rights to village lands within the more than 9,000 villages of Tanzania is given to elected Village Councils and Village Adjudication Committees, which also maintain the village land registries. These registries take applications, process them, and submit them to district councils, which issue the certificates. Costs borne by rural citizens to have their land demarcated, adjudicated, and registered are low. Councils are also charged with drafting land use management plans, which stipulate how common property and natural resources will be managed. In order to for these bodies to exercise these new powers, the village boundaries must first be adjudicated and demarcated by local government authorities and approved by the Commissioner. The law requires that all villages have their boundaries demarcated, which is designed to prevent land grabbing by outsiders and illegal land sales by village authorities and residents.

As part of the Ujaama reforms and decentralization efforts, elected Village Councils were established in 1975 to undertake local governance, including overseeing land usage and land transfers. Despite having replaced traditional authorities, Village Council decisions are often based on traditional institutions. Rules for land administration and management processes may adhere to customary law, except where such law contradicts the principles of the National Land Policy. For example, customary law that denies women the right to own or occupy land is considered invalid. Moreover, it is required that at least 25% of the 15-25 member Village Council and three of the six to nine person Village Adjudication Committee are women.

Village Land Councils represent the first instance for resolution of land disputes concerning village land. Consisting of village elders, their jurisprudence is founded in customary law. Three of the seven members must be women. However, these bodies are not vested with any formal judicial authority and disputants are not required to use them. The second tier for village land is the Ward Tribunals, which are judged as largely ineffective and in many regions are defunct. Above these, two new classes of tribunals were created: the District Land and Housing Tribunals and the Land Division of the High Court.

### Performance

The 1999 Village Land Act has won praise for both the depth and democratic nature of its decentralization of land administration and management, which hands powers and authority over to fully

elected, village level councils. While, like many such reforms, implementation of the Village Land Act has been protracted, notable progress has been achieved in recent years. As of June 2006, all 175 villages in Mbozi District had had their boundaries demarcated, and within those 1,117 Certificates of Customary Rights of Occupancy had been issued.<sup>78</sup> By the same time, 1,088 certificates had been issued in an additional 10 districts within villages that had had their boundaries demarcated. As of October 2004, 23 districts were served by Land Tribunals and the High Court Land Division has been established.

More rapid progress has been hampered by local authorities lacking the knowledge and equipment to effectively survey village land; many are still unfamiliar with the law's provisions. At the village level, limited capacity exists for establishing and managing village land registries. No provisions are made for compensating Village Councils for the added responsibilities of land administration and management, which are not only substantial, but complex. A decade after its passage, many villages and their authorities remain largely unaware of the new law.

## Mozambique

Mozambique's 1997 Land Law is a departure from most African land tenure reforms preceding it and even most that followed its enactment. Rather than attempting to formalize customary tenure at an individual or household level, which involves defining the specific rights associated with that customary certificate or title, Mozambique has chosen to embrace all forms of customary tenure. Formalization of customary tenure is only available at the community level, not the individual or household level, such that communities are free to abide by their own customary rules and governance structures within their collective holding and adapt them as needed. The exception is when such customary rules violate the principles of the constitution in which case they are not legally valid; this includes principles of gender equality when it comes to land rights.

Community land areas are meant to encompass not only occupied land, but also common lands and land anticipated to be needed to meet the needs of future generations. Rights to these land areas are vested in all adult members of the community, and can be established through the oral testimony of community members in addition to documentary proof. Community land rights and the rights of community members within their boundaries are entitled to full legal protection, whether titled and registered or not. The same is true for persons who have occupied land for 10 years or more in good faith prior to the enactment of the law. Only those seeking new rights post-reform are required to have these titled and registered. Nevertheless, communities may have their land delimited and thereby have their rights to that land reflected in the national cadastre.

Mozambique subscribes to a single type of tenure called the DUAT. Hence, land claimed by communities affords members the same rights as land claimed by good faith individual occupiers of land and land allocated by the State to those seeking rights following the enactment of the law. The DUAT affords communities and good faith occupiers perpetual use and exploitation rights; DUATs for economic activities incur 50 year terms and are renewable for an additional 50 years. Right holders are also able to transfer their rights to the land to others (in rural areas, this requires permission from the provincial land administration), but they cannot sell the right in the sense of capturing a profit from the value of the land. They may only capture the value for the improvements made to the land, a provision that was meant to curb speculation. Communities are also afforded the option to enter into agreements with outsiders who wish to acquire rights to use their land.

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<sup>7</sup> Only 3.8% of certificates were issued in the names of women and 27.8% issued jointly.

<sup>8</sup> Unfortunately, we were unable to uncover comprehensive nationwide data on the implementation progress of the reforms.

## Performance

The Mozambican system embodies many advantages over other African countries' attempts to assimilate customary tenure. Formalization of land rights at the community level obviates the need to codify customary tenure, which can lead to stifling its adaptive capacity and disempowering its governance institutions. It also reduces the heavy administrative burdens on the state's land administration system, especially since communities are not required to have their lands delimited to enjoy full legal protection of their rights.

Yet, what is guaranteed on paper has not necessarily been upheld in practice. Increasing demands for land by foreign investors and local elites has made land rights that are not visible on the cadastre vulnerable to expropriation and concession to others. Failure to have community land delimited stems from lack of awareness of the law's provisions (including the right to have community land delimited) both on the part of communities and some local land administration offices, the high cost of surveying and demarcating land, and the rudimentary equipment and limited capacity available for these services in the rural provinces. Millennium Challenge Account (MCA) Mozambique recently made a major investment in addressing these shortcomings in four of Mozambique's northern provinces.

## South Africa

South Africa's Communal Land Rights Act (2004) perhaps comes the closest to Mozambique's approach to legally embracing customary tenure. It provides for the state via the Minister of Agriculture and Land Affairs<sup>9</sup> to formally endow communities residing on land according to rules of customary tenure with statutory communal rights to that land. Rights are to be registered in the name of the community, which in turn can allocate and administer land according to its community rules without the need to have these household rights in common formalized.

However, unlike Mozambique (and more akin to Tanzania), the Act stipulates that responsibility for land allocation and administration within the communal areas is to be assigned to Community Land Administration Committees. In most cases, these Committees are to be democratically elected. However, where traditional councils exist (the majority of which are comprised of unelected tribal leaders), these councils can assume the duties of land administration. This last proviso has been the subject of considerable public outcry by civil society organizations in South Africa, though lauded by political interests rooted in traditional authority structures.

Once established, Land Committees inherit a responsibility for resolution of land disputes in their jurisdiction, though this does not appear to exclude other mechanisms for resolving land disputes, whether formal or informal. In the process of adjudication of communal rights to land, the Minister is required to create a land rights enquiry that is responsible for resolving disputes arising from that process in addition to other duties.

## Performance

We were unable to find readily available information on the progress of reforms.

## Mauritania

Unlike the other African countries discussed above, production from pastoral activities contributes to 80% of the country's gross domestic product (GDP) and pastoralists exert considerable influence over

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<sup>9</sup> Now the Ministry of Rural Development and Land Reform

the country's political system. As such, law governing land tenure is primarily enshrined in the Code Pastoral enacted in 2000 and published in 2004.

Embodying a combination of both traditional and Shari'a law, the Code Pastoral represents one of the most far reaching examples of national codification of customary tenure of nomadic pastoralists. The law, drafted by tribal leaders and herders together with support from Islamic scholars, provides that overlapping, collective seasonal use rights to pastoral resources (land, water, forage, salt licks) prevail over individual cultivation rights. Rights to pastoral resources are exclusive to those who practice nomadic herding. Mobility is upheld over sedentarization. Collective or private interests seeking to establish land rights must first obtain the permission of customary land users.

The law is concise and clear, assigning specific rights to specific groups' land that is identified as "pastoral area" is completely excluded from private ownership. Water rights are an integral part of the Code, giving herders the right to drill wells in delineated pastoral areas.

Conflicts, whether between herding groups or between herders and settlers, are to be settled by arbitration involving representatives of both parties and the administration closest to the location where the conflict occurred. Taking a conflict to the courts is only as a last resort and judgments are rendered within a 15 day limit.

### **Performance**

Despite launching a widespread information campaign on the law in 2003, many government officials and herders are still ignorant of the law or how to implement it. A 2005 study found that the extent of codification of customary tenure in the law made implementation cumbersome and slow. Nevertheless, little information was available (at least in English) documenting the implementation experience of the Code Pastoral.

## **Kyrgyz Republic**

After independence from the former Soviet Union, a new institution, the court of *aksakals* (court of elders), emerged in rural areas. In Central Asia, elders have always been respected as holders of wisdom. Hence, the court of *aksakals* was institutionalized in 1995 by a Decree of the President of the Kyrgyz Republic. The main focus of the institution is enforcement of legal and moral norms that are based on historical customs and traditions that do not contradict the existing legislation. The court works through persuasion and social pressure, and the goal of the court proceedings is peaceful resolution of the problem. The court services are free of charge.

This institution was created in response to an increase in petty crimes such as livestock stealing or non-payment of debt. The court of *aksakals* is responsible for enforcement of customary law along with written laws. Rural people often cannot afford to appeal to the civil court because the courts are generally far from rural villages and require fees, and the court is not highly trusted.

In most villages, there is a court of *aksakals*. The court of *aksakals* is usually elected by a general village meeting, but may be elected by the village *kenesh* (parliament). By law, the term of office of court members is four years, but in most cases they serve a life term or are re-elected repeatedly. There may be from three to nine members of the court according to the regulations, and the number must be odd. The members of the court of *aksakals* are unpaid.

Court members are respected community members who in the past were in a high position at the village level: heads of collective farms, members of village government (*aiyl okmotu*), schoolmasters, or policemen. Many court members are retired schoolteachers. In some cases there are mullahs on the court of *aksakals* as well. Members do not have to be elders, although for the most part they are.

People generally go to the village heads and court of *aksakals* following an unsuccessful attempt to resolve the conflict within the family. Issues that people bring to the court of *aksakals* include: land boundary disputes, divorces and property division, spousal abuse and drunkenness, livestock stealing, water disputes, and other village related disagreements. The regulation lists a broad range of issues that the court of *aksakals* can hear. The decisions of the court of *aksakals* may be appealed at the rayon court within 10 days. The court of *aksakals* may impose fines to be paid to the *aiyl okmotu* budget, but most often they impose other types of sanctions, including behavioral changes, which are then monitored by community members. The court of *aksakals* cooperates with the local police. Most courts require written complaints to start the proceedings, have registration journals, and send copies of their decisions to the court and police office.

## Performance

In many parts of the Kyrgyz Republic, the court of *aksakals* is the predominant forum for bringing land disputes. There are, however, villages where the courts are weak and inactive.

## International Law

While most examples of integrating or giving recognition to customary tenure exist at the national level, such efforts are beginning to emerge in international law as well. The Protocol on the Property Rights of Returning Persons (aka the Great Lakes Pact), established in 2006 to address the rights of internally displaced persons and refugees to recover land and other property, calls for special protection of the land rights of communities and pastoral groups whose livelihoods depend on land. It also provides that traditional authorities may assist in the process of restituting property to returnees, that property disputes be handled by alternative and informal resolution processes, and that property registration mechanisms be established that are affordable and accommodate both customary and statutory rights to land.

## Conclusion

While there has been a growing trend to afford legal recognition to customary law governing land tenure, the means by which these eight countries have done so is notably varied. Table I provides an overview of some of the distinguishing features of the different approaches.

Some countries have sought to codify dominant forms of customary tenure and either fully or partially replace the role of traditional authorities in land administration with formal, state-sanctioned administrative bodies (e.g. Uganda, Botswana). Tanzania falls into this mold as well, though village councils had been established to replace traditional authorities several decades ago and the addition of land administrative duties was not wholly new, though certainly reflected a more complete decentralization of powers. In these three cases, land is most often certified or titled in the name of individuals or households, though Tanzania does provide for the delimitation of village boundaries as well.

Another model is one where community-areas are delimited and traditional governance institutions are allowed to continue to administer land according to customary practices (e.g. Mozambique). In South Africa, the administrative body can either be a traditional council or a land administration committee elected by the community. Namibia represents a hybrid of these models whereby customary rights are allowed to vary and traditional authorities continue in their roles, but their decisions are now subject to the approval of local land boards. Kyrgyz Republic represents another case where traditional institutions of dispute resolution based on customary rules and norms of justice are sanctioned.

Mauritania sits off in a class by itself. On the one hand, it provides for a rather loose set of codified rules on which nomadic herder groups have rights to which pastoral resources. However, it makes no efforts to certify these rights, a process that could be highly complex given the temporal, collective, and overlapping nature of rights and the mobility of right holders.

**Table 1: Elements of Models for the Legal Recognition of Customary Land Tenure in Six Countries in Sub-Saharan Africa**

Country	Land vested in	Customary tenure rules codified in statutory law (Y/N)	Administration authority for customary land	Delimitation/certification/titling at community/group, individual/ household level, or both?
Botswana	Land boards, on behalf of Batswana citizens	Yes, partially	Main land boards and subordinate land boards	Individual/household level
Namibia	State	No	Traditional authorities and communal land boards	Individual/household level for certain. Community/group – unclear.
Uganda	Ugandan citizens	Yes, partially	District land boards	Both
Tanzania	State	Yes, partially	Village councils	Both
Mozambique	State	No	Provincial land administration services (SPGCs),	Community
South Africa	Communities (communal land)	No	Community land administration committees or traditional councils	Community
Mauritania	State	Yes	N/A	N/A

Given that many of these reforms have been on the books less than 10 years, there is still limited information on their performance. Reviews of the Botswana experience, however, suggest that it has been largely successful, crediting much of this success to the gradual adaptation of the law over time. The earliest version was one that included traditional authorities on the land boards and only provided for customary land allocations to tribesmen originating from each board’s particular tribal territory. Later the law was amended to remove traditional authorities from land boards and to expand eligibility for customary land rights to all Batswana citizens. Application procedures are also simple and low cost, keeping administrative costs reasonable.

The more recent reforms of Uganda and Tanzania have no doubt encountered problems, but part of this may still reflect their relative newness. In Uganda, the extent of decentralization implied by the reforms was drastic and beyond the government’s capacity (and perhaps will) to fulfill. In Tanzania, the bodies charged with administrative duties already existed, but it was expected that they undertake these extensive new roles in land administration without any additional compensation. In both of these countries and in Mozambique, local capacity to implement their duties was very limited. Moreover, efforts by the government and non-governmental organizations (NGOs) to disseminate knowledge about the laws to local governments and local communities was either minimal or truncated, crippling both the demand for and supply of certification to document customary rights. This does not mean that the models of legal recognition of customary rights are themselves flawed or inoperable. Rather, significant and sustained investments are needed to enable rural citizens in these countries to claim these state-sanctioned rights and for land administration bodies to meet their needs.

## References

- Adams, Martin, Faustin Kalabamu and Richard White. 2003. Land tenure policy and practice in Botswana – Governance lessons for southern Africa. *Austrian Journal of Development Studies*. 19(1): 55-74. URL: <http://www.scribd.com/doc/9162130/Land-Tenure-Policy-and-Practice-in-Botswana>.
- Ahmed, Mohamed Mokhtar Ould and Thomas Sommerhalter. 2003. The people of the clouds in search of their rights: First experience with application of the Mauritanian Pastoral Code.
- Busingye, Harriet. 2002. "Customary Land Tenure Reform in Uganda: Lessons for South Africa." Programme for Land and Agrarian Studies.
- Chakanga, M and H.O. Kojwang. 2001. "The Forest Revenue System and Government Expenditure on Forestry in Namibia." Food and Agriculture Organization. Available online. URL: <http://www.fao.org/docrep/008/ae894e/ae894e06.html>, accessed June 30, 2009.
- Government of Botswana. *Tribal Land Act, 1968* (as amended in 1993).
- Government of Mauritania. *Code Pastoral, 2000*.
- Government of Namibia. *Communal Land Reform Act, 2002* (as amended in 2005).
- Government of South Africa. *Communal Land Rights Act, 2004*.
- Hayuma, M. and J. Conning. 2006. Tanzania land policy and genesis of land reform sub-component of private sector competitiveness project. Land Policies and Legal Empowerment of the Poor, 2-3 November 2006, Washington DC. URL: [http://74.125.155.132/search?q=cache:NNfWFc\\_KfuEJ:siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S7\\_Hayuma.doc](http://74.125.155.132/search?q=cache:NNfWFc_KfuEJ:siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S7_Hayuma.doc).
- International Conference on the Great Lakes Region. 2006. Protocol on the Property Rights of Returning Persons. URL: [http://www.internal-displacement.org/8025708F004BE3BI/\(httpInfoFiles\)/84E06BF26DBB560BC12572FB002C02D6/\\$file/Final%20protocol.PropertyRights%20-En%20r.pdf](http://www.internal-displacement.org/8025708F004BE3BI/(httpInfoFiles)/84E06BF26DBB560BC12572FB002C02D6/$file/Final%20protocol.PropertyRights%20-En%20r.pdf).
- Kamanakao Association. 2002. The Land Issue in Botswana and How It Is Affecting the Wayeyi. Submission to the IUCN Botswana Consultants. URL: <http://kamanakao.tripod.com/landuseandwayeyia.pdf>.
- Kironde, J.M. Lusugga. 2006. Making property rights work for the people of Tanzania. High-level Commission on Legal Empowerment of the Poor Working Paper.
- Kirsch-Jung, Karl and Lars Soeftestad. 2006. Regulating the Commons in Mauritania: Local agreements as a tool for sustainable resource management. Presented at "Survival of the Commons: Mounting Challenges and New Realities," the Eleventh Conference of the International Association for the Study of Common Property, Bali, Indonesia, June 19-23, 2006. URL: <http://dlc.dlib.indiana.edu/archive/00001939/>.
- Legal Assistance Centre. 2006. Our Land They Took: San Land Rights Under Threat in Namibia. Land, Environment, Development Project. URL: <http://www.lac.org.na/projects/lead/Pdf/landtheytook.pdf>
- Mathuba, B.M. 2003. Botswana Land Policy. Gaborone: Ministry of Lands and Housing.
- Namibia: Residents get land rights, *All Africa*. July 9, 2008. URL: <http://allafrica.com/stories/200807091002.html>.

- Ntsebeza, Lungisile and Ruth Hall. 2007. The land question in South Africa: The challenge of transformation and redistribution. Cape Town: HSRC Press.
- Odendaal, Willem. N.d.. San community land contested: The battle over N#a Jaqna Conservancy. URL: <http://www.lac.org.na/projects/lead/Pdf/bushmanland.pdf>.
- SARPN. Growing Land Hunger in Botswana. Organized by BOCONGO and FONSAG.
- Sundet, Geir. 2005. The 1999 Land Act and Village Land Act: A technical analysis of the practical implications of the Acts. Draft paper.
- Tembo, Emmanuel, and Julian V Simela. 2004. Optimizing Land Information Management in Tribal Lands of Botswana. University of Botswana.
- Tijiramba, Shadrack and Willem Odendaal. 2005. A review of environmentally sustainable land use practices and their benefit to Namibia's communal communities. Legal Assistance Centre. Land and Development Project. URL: <http://www.lac.org.na/projects/lead/Pdf/envicomm.pdf>.
- Wabnitz, Hans-Werner. 2007. The Code Pastoral of the Islamic Republic of Mauritania. Return to the Sources: Revival of Traditional Nomads' Rights to Common Property Resources. In *Law in Africa*. Gesellschaft für afrikanisches Recht, eds. Cologne: Ruediger Koeppe Verlag. URL: <http://www.glin.gov/view.action?glinID=201724>.
- Werner, Wolfgang. 2003. Recent development in land issues in Namibia. Discussion Paper for the Inception Meeting on Land Issues in Southern Africa held at the Manhattan Hotel, Pretoria, 1-2 March 2003.
- Wildlife Working Group. 2004. Land and Natural Resources Law Policy Syllabus: A plain language guide to the United Republic of Tanzania's land, forest and wildlife laws and policies. Arusha: Hakikazi Catalyst.
- Wily, Liz Alden. 2003. Governance and land relations: A review of decentralization of land administration and management in Africa. International Institute for Environment and Development.