

IMPROVING TENURE SECURITY FOR THE RURAL POOR

KENYA, TANZANIA AND UGANDA – CASE STUDY



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FORMALIZATION AND ITS PROSPECTS

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Photograph by the author
(Cattle grazing in the pastoral plains in Ngorongoro)

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Most of the world's poor work in the "informal economy" – outside of recognized and enforceable rules. Thus, even though most have assets of some kind, they have no way to document their possessions because they lack formal access to legally recognized tools such as deeds, contracts and permits.

The **Commission on Legal Empowerment of the Poor** (CLEP) is the first global anti-poverty initiative focusing on the link between exclusion, poverty and law, looking for practical solutions to the challenges of poverty. CLEP aims to make legal protection and economic opportunity the right of all, not the privilege of the few. (see <http://legalempowerment.undp.org/>)

CLEP has identified specific tenure issues, including i) how to make property rights accessible to all, especially poor and marginalized communities, groups or individuals and ii) how to ensure that property rights of the poor function as means of achieving economic and social empowerment, particularly in the context of gender equity and those affected by HIV/AIDS.

There is growing empirical evidence that giving legal recognition to informal property rights in urban areas brings positive results. However, a similar body of evidence does not exist for the empowerment of people in rural areas. Instead, the signs are mixed, resulting in a largely sterile and divisive debate on formalization of rights.

FAO, with donor funding from Norway, has undertaken a set of activities for "Improving tenure security of the rural poor" in order to meet the needs of FAO member countries and, in turn, support the CLEP. This work falls within the FAO corporate strategy on "Sustainable rural livelihoods and more equitable access to resources". Recognizing that secure access to land and other natural resources (forests, water, fisheries, pastures, etc.) is a crucial factor for eradication of food insecurity and rural poverty, FAO's cross-departmental and cross-disciplinary work focused 2005-2006 activities on sub-Saharan Africa which has the world's highest percentage of poor and hungry people.

This paper is part of FAO's effort to inform the CLEP through its working group on property rights. It was prepared for the regional technical workshop on "Improving tenure security of the rural poor" held in Nakuru, Kenya, October 2006, at which issues relating to property rights were reviewed and actions were initiated to develop common strategies for improving the protection of rights to land and other natural resources of the rural poor.



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LIST OF ACRONYMS

ACTS	-	African Centre for Technology Studies
CCF	-	Christian Children's Fund
CLEP	-	Commission on Legal Empowerment of the Poor
FAO	-	Food and Agriculture Organization of the United Nations
ILD	-	Institute for Law and Development
LC	-	Land Council
MAAIF	-	Ministry of Agriculture, Animal Industries and Fisheries
MFPED	-	Ministry of Finance, Planning and Economic Development
URT	-	United Republic of Tanzania
WTO	-	World Trade Organization

EXECUTIVE SUMMARY

This paper identifies the key issues of land tenure security for the rural poor, vulnerable and marginalized in the East African countries of Kenya, Tanzania and Uganda. The report finds that most of these issues are common across the three countries, both in terms of the challenges that the communities face and imperatives that inform policy interventions and responses. In all three countries, plural systems operate side by side and, in all three, there is a tendency for policy and legislative frameworks to privilege the modern systems of property relations over traditional ones, even as national rhetoric indicates recognition and support for the latter.

Formalization is not new. It has been a reality of property relations in the three countries since the advent of colonization. The paper concludes that formalization has not always benefited the rural poor. Instead, an elite minority has tended to benefit from reforms while the majority of the poor and vulnerable end up worse off as institutions and systems that supported their livelihoods and gave them a sense of security are marginalized and replaced by modern institutions.

The paper presents a number of examples of formalization efforts in the region, identifies their key aspects and analyses their impacts. For example, the “group ranch” experience in Kenya is presented to demonstrate the challenges that formalization poses in terms of implementation and its consequences. Group ranches have, in the end, been individualized with devastating consequences for local communities. This example illustrates the need to view formalization within the broad context of national policy direction. The paper contends that formalization can only succeed and be useful for the rural poor if the policy framework does not see it as a transition to individualization.

The Commission for Legal Empowerment of the Poor (CLEP) provides an opportunity and a forum for interrogating key aspects of land tenure in rural areas. It should benefit from previous analyses of rural property rights and scaling-up experiences from across East Africa that have provided a tenure security framework outside the formal legal framework. The challenge in this regard is determining how to create innovative policy and legal instruments that recognize and formalize tenure in rural areas without necessarily individualizing them.

The paper argues that formalization can only succeed within a context of governance in which there is a culture of legality. This culture cannot be imposed through an initiative. It has to evolve over time as a function of dynamics and processes within society. Only through such an evolution can the social context be established that makes formalization work, and only when that context is right can formalization produce the benefits that are attributed to it.

The paper takes issue with the general assumption that one formalization regime can be appropriate for all situations and all land-based production and livelihood systems. It suggests that the diversity of land use and production systems has to be reflected in formalization processes and secured in legal frameworks. In this connection, the paper advocates for support to the structured evolution of customary land laws so that space can be provided for them in statutory systems.

Conclusions

The paper makes the following conclusions.

1. The vast majority of the rural poor and vulnerable in East Africa depend on land and natural resources for their livelihoods, and their access to land and natural resources is governed by customary land tenure.
2. Customary land tenure continues to be relevant for the livelihoods and development of rural areas of East Africa notwithstanding more than 100 years of neglect and deliberate policy interventions aimed at outright extinction or substantial transformation of the tenure system.
3. The policy and legal framework in the three countries is, for the most part, not conducive to the orderly and systematic evolution of customary land tenure, even where the rhetoric supports and encourages its evolution.
4. Since the establishment of colonial rule, the overall tenor of policy and legislative reform has encouraged private land tenure based on Western notions of property rights with a focus on individual ownership and the creation of land markets. Thus, successive governments, both before and since political independence, have focused on development of private land tenure and paid little attention to customary land tenure. As a result, customary land tenure policy remains undeveloped, unclear and inadequately articulated even though it is the basis of property relations for the majority of the people in the rural areas.
5. Formalization of property rights is not new in East Africa. It has been the thrust of policy and law since colonialism. It has succeeded in urban areas and high potential agricultural areas, but has failed particularly in arid and semi-arid areas in which property relations are defined by common property resource management regimes.
6. While formalization is needed in East Africa, it is important to be clear about where it would be most useful. An analysis of the agenda and conceptual framework of the CLEP shows that it would be most relevant to urban and peri-urban environments where there is interface between customary land tenure and statutory tenure. In these areas, the conditions exist for the success of formalization. The same is not true of rural areas occupied by peasant farmers and pastoralists.
7. Experience with formalization in East Africa shows that the social, political and economic context in which formalization is implemented is the key determinant of whether or not formalization succeeds in benefiting the target group and securing property rights. Unless the context is right, formalization may, in fact, exacerbate the situation while introducing new problems and challenges. When that happens, those who suffer the most are the poor, marginalized and vulnerable in society, including women and children, pastoralists and hunter-gatherers.
8. There is danger in trying to impose property rights in a top-down reform process. By their nature, property rights have to evolve over time as a function of internally generated dynamics that respond to changes in a specific society, to relations within that society and to changes between that society and other societies. Formalization does not serve to create or transform property rights. Instead it serves to clarify, articulate and regularize what already exists within an overall governance context in which the conditions for the enjoyment and protection of those rights exist.

Recommendations

The following recommendations are made to address some of the challenges identified and to build on the opportunities.

- Implementation of formalization in East Africa should be targeted specifically to addressing the challenges of property rights in urban and peri-urban areas that are presently characterized by an interface between customary land tenure and formal statutory tenure. To try to introduce formalization in rural areas, especially in the low potential areas occupied by pastoral and agropastoral groups, is likely to cause more harm than good as the conditions there are not conducive to formalization.
- The formalization agenda pursued by the CLEP, with its focus on improving access to justice for the rural poor, can be useful for customary land tenure. In order for the rural poor to be truly integrated into the legal and justice systems of East Africa, the legal framework must provide for recognition of customary law generally and customary land law in particular. To this end, ongoing reforms of the administration of justice need to address customary law more specifically, provide for its orderly development and allocate resources to support research and scholarship on its key characteristics.
- Providing for recognition of customary law requires the legal system to create a framework for the orderly development of a jurisprudence of customary law. This would strengthen what is good in custom and, at the same time, subject it to overarching values contained in the constitutions and global human rights instruments to which the East African countries are parties. This will ensure that customary law is able to develop and assimilate the ethical standards of the countries in such areas as gender and minority rights.
- Further research and analysis need to be undertaken to document case studies of customary land tenure practices that are appropriate for sustainable management of rural land and natural resources and, in turn, support the livelihoods of the rural poor. This would clarify and articulate substantive and procedural aspects of customary land tenure and provide a basis for their recognition and enforcement through the statutory frameworks of the East African countries.

1 INTRODUCTION

This report is based on a case study conducted in Kenya, Tanzania and Uganda for the Food and Agriculture Organization of the United Nations (FAO). The study was designed to identify the key issues of land tenure security for the rural poor, vulnerable and marginalized people of East Africa. It, along with similar studies undertaken in other regions of sub-Saharan Africa, was presented at the FAO Regional Workshop on Improving Tenure Security for the Rural Poor held in Nakuru, Kenya, October 2006, and it has benefited from feedback received at the workshop.

The case studies formed the basis for discussions held to help formulate FAO's presentations to the Commission for Legal Empowerment of the Poor. FAO's goal is to ensure that the commission recommendations consider ways to help secure tenure rights of the rural poor in Africa.

The report is divided into five sections. This section introduces the case study and outlines its objectives and the methodology used. It is followed, in section two, by a background discussion on the historical context of the tenure situation in rural East Africa that, in actuality, grew out of a shared colonial heritage that extended from the 1880s until the three countries achieved independence in the 1960s.

That heritage was characterized by the introduction of policy, legal and institutional changes based on Western concepts and perceptions of property rights and relations. Resistance to those concepts, particularly those relating to land and natural resources, gave impetus to the struggle for political independence because of the expectation that political independence would check the spread of those ideas. However, this did not happen. Instead, in the period after independence, the introduced Western-based models were consolidated, strengthened and extended in all three countries. They have been further strengthened in recent years and legitimized through the process of globalization.

Section three identifies and analyses the key issues for tenure security among the rural poor, vulnerable and marginalized of East Africa, noting that most issues are common across the three countries, both in terms of the challenges that the communities face and the imperatives that inform policy interventions and responses. All have a plurality of systems operating side by side. Similarly, their policy and legislative frameworks tend to value modern property systems over traditional ones even though their rhetoric indicates they recognize and support the latter.

Section four analyses the formalization agenda of the Commission for Legal Empowerment of the Poor (CLEP), looking for anything new about this initiative. Formalization has been attempted since the establishment of colonial rule and, as the analysis shows, other than its key players and its timing, nothing is really new about this initiative. This, in turn, raises questions about what difference the initiative might make and the extent to which it actually might achieve more than has been achieved by past efforts.

An examination of the assumptions underlying the initiative leads to the conclusion that formalization can only succeed if the governance context has a culture of legality. In addition, the examination finds that this culture cannot be imposed through an initiative – it must evolve over time as a function of different dynamics and processes within society. Only such an evolution can establish the social context that makes formalization work, and only when that context is right can formalization produce the benefits that are attributed to it. Short of that, the good intentions behind formalization may, in fact, further undermine the security of rural livelihoods in Africa. Section five sets out the conclusions and recommendations on the way forward.

1.1 Objectives of the case study

The overall objectives of this case study are to i) clarify the specific issues that arise when attempts are made to strengthen property rights in rural Kenya, Tanzania and Uganda and ii) generate new empirical material that will serve as arguments for casting messages for the CLEP. An analysis of a number of experiences across the region is included in order to illustrate the issues, highlight constraints and limitations, and help define the appropriate approach for strengthening property rights among the rural poor.

1.2 Methodology

The case study involved a desk review of both published and grey literature about security of tenure issues in the three East African countries. The review focused on rural areas, particularly pastoral areas where access to land is still based on customary tenure. The review also considered gender issues, particularly with regards to the land rights of women and children. In many parts of rural East Africa, access to land by women and children through allotment and inheritance is governed largely by customary rules and procedures.

2 BACKGROUND AND CONTEXT

Land is the key resource that defines not just rural livelihoods but also economic development prospects in East Africa. Access to land and natural resources is a key determinant of livelihood security and opportunities across the region. Land is also a critical factor in the political economy of the region. The history of the region and the evolution of political governance structures in the three countries have been defined in large measure by issues touching on access to land and natural resources.

Although controlling land and natural resources may not have been the reason for Britain's initial interest in East Africa,¹ it nevertheless became the key reason for its 70-year colonization of the region. The need to establish jurisdiction over the territory by colonization arose from the desire to have control over the land and natural resources and to exploit them for the benefit of the economy of the colonizing power. Since the same land was the basis of livelihoods of the local people, taking such control meant they were dispossessing the local people of their land and, thus, their livelihood security.

Political independence did not change land relations in any significant way. Indeed, the hopes that political independence would lead to a restructuring of the land sector and a strengthening of customary land tenure through law and policy were never realized. Instead, all three countries retained and in some cases expanded the scope of their inherited colonial land law and policy (Okoth-Ogendo, 2000). Although the three countries followed different political trajectories in the period following political independence, there was a striking commonality in the manner in which they continued to weaken community control of their land rights and appropriated authority over land from communities and their institutions.

The situation in Kenya was aptly captured by H.W.O. Okoth-Ogendo who wrote:

¹ This has been attributed to an imperial strategy aimed at securing and controlling the source of the Nile, acknowledged to be the lifeline of Egypt. Egypt and the Suez Canal were critical for the realization of Britain's imperial designs on the east. By extension, in the logic of imperialism, controlling the source of the Nile was critical for securing a hold on Egypt (Mungeam, 1966).

Private ownership rights derived from the sovereign (now the President) remain as legitimate as they ever were in colonial times. Native lands (now called trustlands) are still held by statutory trustees rather than directly by indigenous occupants. Unalienated land remains the private property of the government, and as such no obligation exists in law to consider the public interest when allocating land. In other words, government conduct in respect of such land is not subject to a public trust. Although attempts to convert trustland into individually held absolute ownership rights have thrown the country's tenure system into confusion, in general terms, however, not much has changed since 1938 (2000).

In Tanzania, the period immediately after independence was defined by the ideological leanings of its President, Julius Nyerere. In the run up to independence, he had asserted opposition to individualization of land, arguing that land belongs to the whole nation with the individual only entitled to a leasehold interest that assures “sufficient land, security and a way of raising capital” (Nyerere, 1966). Once he assumed power, Nyerere presided over the expansion of the domain of “public land”, in effect dispossessing communities of land in much the same way as the colonialists had done. As the Presidential Commission of Inquiry into Land Matters observed in relation to the continuity of policy after independence, “The conceptual framework that lay behind the Land Ordinance has been inherited virtually unaltered. The most significant amendment of the Land Ordinance was to replace the term ‘Governor’ wherever it appeared in the Land Ordinance with the term ‘President’” (URT, 1994).

Of the three countries, Uganda has had the most traumatic political history since independence, thanks to the near decade-long (1971-1979) despotic rule of Idi Amin. Yet despite this, its land tenure system did not change from what had been defined by the British in the 1900 and 1901 Buganda Agreements until reforms were introduced by the 1998 Land Act. The 1975 Land Reform Decree was an attempt during the Amin era to abolish all feudal and private tenure and declare all land in Uganda “public land”. However, the decree was never implemented in any substantive way and was ultimately repealed by the Land Act of 1998 (Mugambwa, 2002).

Despite modernization and increased urbanization, customary land tenure continues to govern land relations across rural East Africa, which is where the majority of the people live. Yet the application of customary land tenure poses serious challenges with regards to certain groups, particularly women and children. These challenges have assumed greater seriousness and urgency as a result of the HIV/AIDS pandemic which has left many women and children in charge of households following the deaths of their husbands and parents. The absence of secure access to land compromises the capacity and opportunity for widows and orphans to secure their livelihoods.

The protection of the land rights of pastoralists is another challenging land issue. There are substantial pastoralist and agropastoralist populations in all three countries who occupy a substantial portion of land in the rural areas. Their land relations are governed by customary rules under which communities access land in common. Since colonial times, they have experienced pressure from governments over their land. Apart from the changes in land tenure introduced by the colonialists and inherited by the independence governments, the pastoralists' lands have been appropriated for all manner of state uses including national parks and game reserves, military training camps and institutions, and refugee camps. These appropriations have reduced the land available for use by pastoralists and, in turn, constrained their mobility which is critical for the proper functioning of the pastoral livelihood system.

In all the three countries, reforms have been or are being undertaken to address the challenges associated with land tenure. Kenya has a long history of land reform starting in the 1950s, but it

has never had a national land policy. This problem has long been recognized. Reform recommendations were made both by the Constitution of Kenya Review Commission and the Commission of Inquiry into the Land Law Systems. In early 2004, the government launched the National Land Policy Formulation Process and, in October 2006, issued a Draft National Land Policy with recommendations and proposals for far-reaching changes in tenure and land administration.

Tanzania undertook radical tenure reforms in the 1990s. A Presidential Commission of Inquiry into Land Matters, established in January 1991, submitted its report in November 1992. A National Land Policy was passed in 1995, and a new land tenure law was enacted in 1999. The new law reaffirmed that all land in Tanzania would continue to be public land, vested in the President as trustee for, and on behalf of, all citizens of Tanzania. It categorized land as: general land, village land and reserved land. Two land laws, the Land Act and the Village Land Act, were enacted simultaneously to govern the different categories of land.²

The 1995 Uganda Constitution vests land to the citizens of Uganda, to be owned in accordance with four land tenure systems: customary, freehold, *mailo* (a freehold system in Central Uganda) and leasehold. It enjoined Parliament to enact a land law within two years of its coming into force and, thus, Parliament conformed and enacted the Land Act in 1998. However, subsequent to the coming into force of the Act, it became clear that the absence of a policy framework for its enforcement constrained its effectiveness. A process for the promulgation of a national land policy was initiated and is presently at an advanced stage.

2.1 Land forms the basis of rural livelihoods and national development

The majority of East Africans live and derive their livelihoods directly from the land as subsistence farmers, pastoralists and agropastoralists. The figures are 75 percent for Kenya, 80 percent for Tanzania and 86 percent for Uganda. Thus, it is not surprising that key strategies for economic development in all three countries focus on stimulating rural production, especially agriculture. They appreciate the development significance of secure access to land, recognizing it as critical for sustainable management and development of land and land-based resources as well as for increased agricultural production.

In addition to providing subsistence for rural livelihoods, land is also the basis of economic development in all three countries. Key economic sectors such as agriculture, tourism, mining and livestock production depend directly on the use of land and natural resources. Even the region's industrialization hopes are pegged on more efficient use of land and natural resources as well as value adding to primary products.

Kenya's framework for industrial transformation pegs the country's industrialization to increased production and value adding in the primary sectors, principally agriculture, mining and natural resource exploitation (Republic of Kenya, 1996). Tanzania plans to transform its economy into "a semi-industrialized one led by modernized and highly productive agricultural activities which are effectively integrated and buttressed by supportive industrial and services activities in the rural and urban areas" (URT, 2000). Uganda, recognizing that agriculture and its natural resource base provide the foundation for industrialization, is pursuing a strategy of development and poverty eradication focused on adding value through the processing of agricultural products (Republic of Uganda, 2000, 2004).

² Acts No.4 and 5 of 1999

3 TENURE SECURITY FOR THE POOR IN EAST AFRICA: THE ISSUES

Land tenure security in rural East Africa is underpinned by a common colonial heritage and post-colonial history. Common global and regional imperatives have led to the evolution of land tenure systems with common characteristics that pose similar challenges with respect to security of access and control over land by the rural poor. Even though there were different national policy contexts and imperatives after independence, the impact of government policies and actions on land relations among the rural poor is much the same across the three countries.

Their formal regimes for managing access to land and natural resources are based on the system imposed during the colonial period that was designed to subjugate the local economy and resources to the dictates and needs of the imperial economy. What is more, that system was based on values and perceptions of property rights applicable in England at the end of the nineteenth century – perceptions that had evolved from social, political and cultural changes over a long period of time. The resulting common law regime was founded on customs of the British people and developed by decisions of the country's courts (Burn, 2000). Its character and content were defined mainly by the nature of the society in which it evolved and the dynamics that informed that evolution. It had little or no relevance to the reality that it was made to serve in East Africa.

When common law was imposed on the people of East Africa, it marginalized communal land and natural resource governance systems and institutions and deliberately sought to replace the customary rights and practices of the local people in traditional livelihood systems and the management of land and natural resources. Further, it sought to extinguish the rights of the local people to their land and to vest absolute rights to the land in the British Crown in order to serve the needs and concerns of imperial authority.

When Kenya became a colony, all land was designated Crown Land and deemed available to white settlers as private property. The local people became tenants of the Crown in the real sense of the term (Okoth-Ogendo, 1991). Even land formally reserved for the use of natives was not protected from appropriation for the benefit of colonial settlers and the colonial government. Titles were issued for the land appropriated for the use of colonial settlers, while the land in actual occupation of the natives was declared trust land to be held on their behalf by the Crown. In practice, that trust only operated as long as the colonial administration did not need the land for allocation to settlers.

Tanzania had a slightly different colonial history, with ultimately the same results in terms of community access to land and natural resources. The German imperial authorities that governed the country until the defeat of Germany in the First World War assumed ownership of all land not directly in use and allocated it to settlers as freehold grants. When the British took over the running of the country under a mandate of the League of Nations at the end of the First World War, they were restricted in the way they could deal with the land occupied by the natives. However, restrictions notwithstanding, the British undermined native control of the land by declaring all land, whether occupied or not, to be public land.

In Uganda, where there was an established feudal system in place before the arrival of British colonialists, the colonial government enticed the traditional kingdoms by granting them private estates (known as *mailo* in Buganda and native freeholds in Toro and Ankole) and assuming control of the remainder as Crown Land. The private estates were closely modelled on the English freehold but subject to obligations in favour of customary tenants. In the end, laws were enacted that required *mailo* tenants to pay rent and tribute to landlords, thereby equating this tenure system to English feudal tenure.

3.1 Defining the tenure problematique in rural East Africa

As a result of the foregoing, the land tenure problematique in rural East Africa can be defined in two dimensions: internal and external. The internal dimension results from contradictions or in-fighting within specific communities over land and natural resource relations as defined by communal power relations and other dynamics. This is where challenges relating to gender and equity arise.

The external dimension relates to the interface between customary systems and institutions for the management of land and natural resources on the one hand and the structures established by the state for the management of the same resources on the other. Although customary systems are defined by customs and traditions of specific communities, there are sufficient commonalities across the communities to justify a categorization of traditional land and resource tenure. The state systems on the other hand are defined politically and applied to all communities within the borders of the countries. It is the external dimension that defines, to a large measure, what happens even with the internal dimension of the problematique.

3.1.1 *The state and the community: a question of governance*

The external dimension of the land tenure problem may be summarized as a problem of governance. It has to do with the location of authority and decision-making over land and natural resources. The colonial authorities introduced policies and laws governing land and natural resources that sought to achieve two objectives simultaneously.

First, they sought to wrest control of key natural resources from natives. This was essential if the colonial enterprise were to achieve its key objective of servicing the needs of the imperial economy. Second, they sought to neutralize the influence of natives and their institutions over the management of natural resource. One way of doing this was introduction of new property relations and concepts to replace the traditional regimes. This situation did not change with the establishment of the post-colonial state, hence the continued pervasive presence of the state in the administration of land and natural resources. The state remains the ultimate authority over land and natural resources in all three countries.

As a result of the state-centric approach to land administration, the evolution of systems and institutions of land administration has been defined more by administrative law than by property law. This explains the top-down character of land administration as well as the lack of a jurisprudence of land and natural resources. The result is that “what counted as land law was, in effect, the law of land administration” (Okoth-Ogendo, 2000).

A key pillar of the centralization of authority over land in the national governments is the existence of eminent domain, i.e. the authority to expropriate private land in the public interest. Eminent domain was always expressly reserved to the state, thereby giving it the power to expropriate and take over the control and management of any land, regardless of the tenure system under which such land is held. In Tanzania, this was reinforced by the vesting of the radical title, i.e. the ultimate ownership and control of all land in the President. The importance of these powers for the state can be discerned in the fact that the Uganda government began making strenuous efforts to amend the Constitution and the Land Act after questions arose about whether the state could still purport to exercise these powers when the Constitution has vested land in the citizens.

In recent years, this situation has been further complicated by the integration of the states in the region into the global economic framework. As the countries have become part of the global system, policy interventions relative to the management of land and natural resources have

increasingly been responses to imperatives from the global domain. For instance, opening East African countries to international trade within the framework of WTO means ensuring access to land and natural resources for international capital investments by multinational corporations. These corporations and the global framework have put pressure on the three countries to create an enabling environment for foreign direct investment in land and natural resources in areas such as commercial agriculture, mining, tourism and water resources management. Policies generated for these purposes have further alienated communities and their institutions from the control of land and natural resources.

The policy and legislative frameworks established for the foregoing purposes have demonstrated, according to Okoth-Ogendo, general contempt for customary land tenure. They have explicitly set out to dismantle the customary tenure system and replace it with modern tenure based on the Western perceptions of property. The trajectory of policy and legislative development in the land sector throughout East Africa has been informed by the perception that customary land tenure is backward and should be replaced by the more modern tenure system introduced by colonialism. As a result, there has been little investment in developing a jurisprudence of customary land law to define the content of customary land rights. In this regard, customary land tenure has suffered the fate of customary law as a whole – it has been ignored by both legal scholars and political leaders, in spite of the fact that it continues to govern relations over land and natural resources for the vast majority.

In **Kenya**, the overall direction of policy and law is to replace customary land tenure through adjudication, consolidation and registration. This is happening despite the fact that customary land is the only land category specifically provided for in the Constitution. Chapter IX of the Constitution vests trust land in county councils within whose jurisdictions the land is situated, to hold the said land “for the benefit of the persons ordinarily resident on that land and (to) give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual” (Republic of Kenya, 2001).

This provision may be criticized on two fronts. First, it perpetuates the patronizing colonial perception that natives could not manage their rights, and provides for natives’ rights over land to be managed and mediated by a trustee (then known as the Native Commissioner). Second, the Constitution, by providing that “no right, interest or other benefit under African customary law shall have effect ... so far as it is repugnant to any written law,” makes the customary land law subject to the same laws that were promulgated with the explicit purpose of extinguishing them.

Although the Constitutional provision provided a useful starting point for developing a jurisprudence of customary land law, there was no interest on the part of the key players in government. Instead of county councils protecting the customary rights of landholders in the rural areas, they have proceeded to abuse the trust bestowed on them and presided over the expropriation of these lands without regard to the Constitution or the Trust Land Act and without reference to the communities. Coupled with the failure to develop a jurisprudence of customary law generally and customary land law in particular, and facilitated by an overall policy framework that is contemptuous of customary tenure, the promise of the Constitution for rural land rights has been totally undermined.

In **Tanzania**, customary tenure has always been a victim of the modernization ideal, even during the *Ujamaa* period that grew out of the 1967 Arusha Declaration and its villagization programme. Ideological differences in the periods before and after *Ujamaa* only affected the details rather than the overall policy orientation with reference to customary tenure. The

position of the colonial government with regards to customary tenure was the same in Tanzania as it was in Kenya and Uganda. Following the Arusha Declaration, villagization entailed expropriation of lands held under customary tenure and a forcible reorganization of the rural sector with little regard for the values and systems of peasant farmers and pastoralists. Since the liberalization of the economy in the mid-1980s, customary land holders have come under a new threat – the external investor. Tanzania's land and natural resources form the basis for attracting foreign direct investment.

However, land policy reforms that started in the early 1990s have sought to address the position of customary land tenure. The National Land Policy specifies the recognition, clarification and securing of the existing rights of customary land holders as one of its objectives. It declares that a dual system of tenure that recognizes customary and statutory rights of occupancy as equal in law will be established. In furtherance of this commitment, the 1999 Village Land Act provides for registration of village communal lands and land held under customary rights of occupancy. The act also recognizes use of customary law in determining disputes relating to land held under customary rights of occupancy.

Uganda had virtually no legal recognition of customary land tenure until the 1975 Land Reform Decree. Customary landholders were, in legal terms, “tenants at will” and could be evicted at any time by the state or individuals who had leaseholds from the state. In fact, the Land Reform Decree did not really strengthen the position of customary landholders. All it did was extinguish the security that non-customary land holders had enjoyed, bringing them to the same level as customary land holders in terms of tenure security. Under the decree, customary land holders continued to be tenants at will, save that now they could only be evicted by the state.

Although the Land Reform Decree was never really enforced, it remained the legal basis of land relations until the 1995 Constitution abolished it. The Constitution recognized customary tenure for the first time in the history of Uganda. Yet even with constitutional recognition, the idea remains that customary tenure is a stage in the transition towards other forms of tenure. The Constitution provides that land under customary tenure may be converted to freehold by registration; it does not envisage that the reverse could occur.

3.1.2 *Intra-community dynamics: managing change*

Challenges within communities often have resulted from the dramatic transformations introduced by the integration of diverse communities into political units of nation states. The establishment of East Africa's nation states created one huge disruption of a diversity of communal governance frameworks, systems and institutions. As with the rest of Africa, the borders of present day Kenya, Tanzania and Uganda were determined through a process and at a forum in which no East African participated and with no reference to the peoples of the region. More importantly, despite the rhetoric of introducing the three “cs” – commerce, Christianity, civilization – to the Africans, in reality, the scramble for Africa was done to meet the needs of the imperial powers represented at the 1884-1885 Berlin Conference not of the local populations (Pakenham, 1991).

The imposition of colonial rule and establishment of nation states disrupted the evolution of traditional communities and transformed them from self-sustaining and self-reinforcing socio-cultural systems to appendages of the capitalist economy at a time when these systems had not developed internal capacities for dealing with capitalism (Rodney, 1972). The disruption of livelihood systems was more marked for resource-dependent communities that had highly developed communal governance and resource management frameworks. Because colonialism was a resource-exploitation project, natural resource management institutions and systems that existed within pre-colonial communities had to be neutralized for the process to proceed

unimpeded. That these institutions doubled as resource management and political governance frameworks made them all the more susceptible to colonial disruption (Odhiambo, 2002).

The disruption entailed the introduction of new dynamics that continue to define these communities today. Inter-communal relations previously defined largely by war and conquest were now mediated by the fact of being the subjects of one sovereign and the citizens of one country. Education, migration, trade, religion and urbanization introduced new dynamics in the governance of these communities as well as in their property relations. Increased interaction among communities meant exposure to different influences. These influences introduced new challenges while also exacerbating existing ones in communities that had never really been homogenous and were already differentiated by their power, wealth, gender and generational considerations. The situation was compounded by the weakening of traditional institutions and systems of governance that, in turn, undermined the capacity of the communities to manage emerging challenges and conflicts.

But what was the nature of the customary land and natural resource tenure system, and how and to what extent did it protect the rights and secure the livelihoods of rural communities in East Africa? The ensuing section proceeds to answer this question.

3.1.3 *The nature of customary land tenure*

In essence, there were just two strands of customary land tenure in pre-colonial East Africa: i) the socio-political organization (feudal or non-feudal) and ii) the land use system (nomadic pastoralists or settled cultivators). A number of subclasses can be identified between these two general extremes. These characteristics ultimately determined the degree of disruption caused by the establishment of colonial property relations as well as the capacity of respective communities to manage the challenges arising from them.

In the feudal system, land tenure was defined by a feudal authority that controlled access to land and allocated land to those under its control. Security of tenure depended on continued loyalty to the feudal authority. Such loyalty was demonstrated through service to the authority such as participating in tribal inter-communal wars or paying tribute in the form of farm produce and gifts. Feudal land relations existed in chieftancies and kingdoms across the region, the most organized of which were found in Uganda and Tanzania.

In the arid and semi-arid areas occupied by pastoralists and agro-pastoralists, the land tenure system was defined by territorial control. In these communities, access to land was critical. The livelihood system was based on reciprocal bonds within families, lineages and larger social units that protected and guaranteed customary individual and community rights by enforcing mutually agreed norms.

Intricacies of pastoral tenure systems

Customary pastoral tenure systems assign rights according to categories of resources, such as water points, arable field sites, transhumance routes, trees, riverine pastures and wet season pastures. Generally, in a communal system, these resource categories are not held by a single ownership unit. Rather they are governed by an intricate system of organization. Thus, arable field sites might be controlled by households but riverine grazing by a group of co-resident households (e.g. compound or homestead). Some water points and grazing may be owned by still larger kinship groupings (or neighbourhood units), while routes for movement of people are open to, or controlled by, ethnic or inter-ethnic confederations. Within these tenure regimes, the hierarchy of rights is divided among ownership groups, ranging from the individual producer to the largest ethnic group. The regime is communal, since these ownership groups are not territorially distinct, thus mobility remains possible.

Lenaola, et al., in Juma and Ojwang, 1996

For non-feudal, settled cultivators, land relations were defined by the use and investment of labour on specific parcels by specific families. As long as a family used a piece of land, it had rights thereto to the exclusion of every other member of the community. Similarly, individual cultivators had exclusive rights to the produce of the land resulting from their labour. Land no longer used by the individual or family reverted to the community and was available for allocation to any other member of the community by the allocating authority.

A common feature of all the categories of customary land tenure referred to above was the vesting of the radical title to the land in the community as a corporate entity rather than in the political organs through which control of the territory or the resources of the land was exercised or mediated (Republic of Uganda, 2004). Thus, even in a feudal system, when the land was vested in the feudal authority, it was on behalf of the entire community.

Under customary systems, secure access to land is incidental to having membership in a community and meeting the reciprocal obligations that come with such membership. The system for the administration of land rights, including allocation and dispute settlement, is part and parcel of the political organization of the community. This ensures both inter- and intra-generational equity among members of the community who are bound together through common descent. Because land relations reproduce kinship ties and associations in a system where land is the basis of livelihoods, they form an integral part of the social, political and economic reality of the community.

Since community membership is the basis for acquiring rights to land, loss of membership entails loss of those rights. For men, this is not a problem as they are more or less assured of life membership in their communities. However, it is a major problem for women whose access and use rights are pegged to their membership of communities through their relationships with male members of those communities. In most communities, when a woman marries she loses membership in her birth community and becomes a member of her marriage community, a membership therefore pegged to the sustainability of the marriage. She effectively loses the membership if her marriage collapses, although traditionally she would have been assured of access to land as long as she had borne male children. The changes that have resulted in greater insecurity for women are a function of the weakening of customary institutions.

Whether individuals enjoy security of tenure under customary land tenure has exercised the minds of many commentators over a long period. Security of tenure may be defined broadly as “the perceived right by the possessor of a land parcel to manage and use the parcel, dispose of its produce and engage in transactions, including temporary or permanent transfers, without hindrance or interference from any person or corporate entity” (Bruce and Migot-Adholla, 1994). In reality, no tenure system provides absolute levels of freedom or security. Perhaps it is not appropriate to talk of security of tenure in blanket terms, but to be specific about different aspects of such security.

The tendency has been to critique security of customary tenure largely from the perspective of freedom to sell, which is probably not the most important concern for customary land holders. In other words, if security of tenure is judged on the basis of what is important for the land users, then the right to manage and use the land and its produce means that there is security of tenure. The emphasis in customary tenure is on use rather than the freedom to transfer.

Membership in a community qualifies members for access to land, but the amount of land they will hold is dependent on their user needs. Land is allocated on the basis of need. As Okoth-Ogendo observed:

... the quantum of access rights depends, in the first instance on the category of membership each individual or collective holds, and secondly on the specific function for which access to the resources are required. Consequently, although access rights automatically vest once membership is established, and are permanent within and across generations, their quality and quantum will vary from one membership category to another. The fact that access rights vest in terms of specific functions also means that the use of the resources is available to individuals as well as collectives whether exclusively, concurrently or sequentially (2004).

These positive attributes of customary land tenure should not blind us to its shortcomings or even the challenges it faces in light of changes taking place in communities subject to it. One major limitation of customary tenure is that its substance and institutional framework are defined in community-specific terms. The essence of membership in a community as the basis of rights and obligations means that the system excludes outsiders, thereby limiting the scope of its benefits. It also means that the system functions effectively within very limited spheres and, thus, loses effectiveness outside the restricted spheres of its specific community. This has limited the utility of customary tenure in mediating relations across communities. Given the diversity of communities within the countries of East Africa, this aspect of customary land tenure is a major disincentive for seeing it as a useful mechanism for organizing property relations in the context of a nation that brings together many different communities.

Another major challenge for customary land tenure is gender, which is underpinned by the patriarchal nature of traditional communities in rural East Africa. This means that talk about rights is often really about the rights of male members of the community. The patriarchal land tenure arrangements are based on the assumption that women and girls will gain access to land through their male kin at every point in their life cycle. As girls and unmarried women, they lay claims to land through their fathers. Once married, they make the claims through their husbands.

Traditionally, this worked well and women were assured of access rights that were nearly as secure as those of men. Through marriage, a woman entered into a relationship and association with the family of her husband and through them with the community and, thus, her access to land for use was assured during and beyond the life of her husband. Because she, in effect, married into the community, even the death of her husband did not undermine her rights. Moreover, since effectively all members of the community, both male and female, only had rights of access and use, there was little difference in reality between the rights of men and the rights of women. Divorces were rare in traditional communities but, whenever they occurred, the woman would return to her home and claim the same rights of access and use through her father or brothers. Customary institutions were available to protect the rights of the woman as a member of the community, whether of her parents or of her husband (Bior, *et al.*, 2005).

Today, things have changed and this reality no longer holds true. Women can no longer be guaranteed access to land through their male kin. With increasing population, scarcity of land and deepening poverty, men no longer fulfil their obligation of providing women with land and tools of production. In addition, not all women get married or stay married, and not all male children take care of the land needs of their mothers (Kharono, 2002).

A woman's position has become less secure as the customary systems and institutions that protected her have collapsed while the traditions that deny her direct access to land have persisted in rural East Africa. Moreover, certain assumptions about the woman, such as that she would always have a man through whom to make claims for land, are no longer true. Many women live outside wedlock either because they choose not to marry or because their marriages collapse. Moreover, as a result of the HIV/AIDS pandemic, many women are widowed much

earlier in life and left to fend for themselves. In rural areas, such women need secure access to land in order to support themselves and their children.

Indeed, the AIDS pandemic has expanded the discourse on gender and land rights to include the need to address the land rights of children. This is because many child-headed households now exist in East Africa, due to AIDS-related deaths. The case study “Lost future: the case of Achola” tells the story of one orphaned girl from Lira in northern Uganda but also demonstrates some of the regional challenges the pandemic has caused.

Lost future: the case of Achola

Achola was orphaned at age 19/20. Her father died of AIDS in 1997 (when she was about 14) and her mother died two years later. She dropped out of school when her father died as the family could not afford to pay the school fees. When her mother also fell sick and gradually became weak and unable to work, she nursed her and also took over her home responsibilities. Before she died, her mother introduced Achola’s brother, Ayo, to Christian Children’s Fund (CCF), an organization that helps orphans with school fees. That way, her brother was able to remain in school, and at the time of the research, he had completed primary school and joined a technical college in the neighbouring district of Soroti. Meanwhile, Achola continued to take care of the home and her younger brother and two sisters who were still in primary school.

They have been living in the home left by their parents. With the exception of one hut that had broken down, the rest of the buildings and compound were well maintained. She reported that they have three gardens that she cultivates. Achola’s parents did not tell her or her brother which land belongs to the family. When the parents died, the orphans simply continued to cultivate the same pieces of land next to their homestead that they had seen their parents cultivating. Achola reported there have been problems of encroachment on their land by a neighbour. She and her brother reported the matter to the Local Council chairman who declined to handle the case because he was their relative. Instead, he advised them to arrange for a meeting of all the members of the Land Council. Because Achola’s brother had to go back to school, and they did not have money, the meeting had not been arranged by the time of the interview.

Achola said that she did not find the work in the home and in the gardens too much, as she started doing it when her mother was still alive. However, she admitted that she could not cultivate all the gardens because she did the work alone. Her siblings were too young to do much work and the brother who could help her was in boarding school.

Asked about her own life aspiration, Achola said that she could not think of marriage because her young brother and sisters still needed her. She would consider marriage after they were grown. In a separate conversation, Achola’s brother said his sister was “misbehaving” and he was concerned about whom to leave at home to take care of the young ones.

Kharono, 2002

A crucial question relating to customary tenure is whether there is a land market. The absence of a land market is often presented as one of the critical shortcomings of customary land tenure. Sale and purchase of land are not considered part of traditional land relations because land is not seen as a commodity to be exchanged in the market place. However, this does not mean that there are absolutely no market relations in land within customary tenure. Think of customary tenure as a continuum – diffuse and collective rights at one end and specific and exclusionary rights at the other. In moving toward the specific and exclusionary end of the continuum, there will be some form of informal property markets. These are likely to be more in the nature of leaseholds or temporary transfers than purchases or absolute transfers. They are consistent with the stage of the evolution of these societies and form the foundation upon which more advanced land markets can grow in time.

These informal markets function on the basis of mutually agreed norms within specific communities and depend for their validity on such mutuality. Any attempt by an external process to move them to the next level of complexity will corrupt them. At most, what can be done is to create an environment for their orderly development over time in response to internally generated imperatives that come from change within these communities and their interaction with other communities as well as with statutory systems.

4 FORMALIZATION IS NOT NEW IN EAST AFRICA

The criticism that customary land tenure is not conducive to the operation of a free land market has been voiced since the arrival of colonialists in East Africa more than 100 years ago. The most eloquent and influential statement on this was made by the East African Royal Commission in its push for the creation of a free land market as the foundation for economic use of land.

A free market gives to the buyer access to land for those economic purposes which are consistent with the price which he has to pay for it and ensures to the seller the opportunity to dispose of the land which he is unable to utilize adequately in relation to the price which it would fetch. Where the market is not free, either because of tribal restrictions which prevent its purchase, sale or lease, or because it is encumbered with restrictions on transfer which have no relation to economic circumstances, access to land may be rendered impossible for those members of the community who are best able to use it in accordance with its market value (quoted in Shivji, 1998).

The Commission also pushed for individualization of tenure, arguing that its advantage lay “in giving the individual a sense of security in possession and enabling, by purchase and sale of land, an adjustment to be made by the community from the present unsatisfactory fragmented usage to units of an economic size” (quoted in Okoth-Ogendo, 1991). Of course, over time it became clear that individualization alone could not create the conditions for the development of a land market.

These arguments are similar to arguments that inform the formalization agenda that is being promoted by the CLEP, even though the wording is different. The acceptance of the arguments by the colonial government and the tenure reforms that were subsequently initiated across the region show how formalization of property rights has been going on in East Africa in earnest since the mid-1950s. Transforming customary rights to fit a market system in order to make it possible for peasants to access credit and thereby be integrated into the formal economy is not new in this region.

Perhaps the most well known example of formalization in East Africa is the group ranches in Kenya. Implemented within the framework of the Land (Group Representatives) Act, the scheme led to the establishment of group ranches as a form of tenure that gave recognition to the customary tenure of the pastoral Maasai. In the end, however, the legislation appears to have done more harm than good to the pastoralists.

The short-term objective of the act was to secure the land rights of the Maasai by removing their lands from the designation as Crown Lands that they had at independence. In the medium term, the aim was to provide a basis for local investment in ranch development by making it possible for the Maasai to secure commercial loans using the titles as collateral. However, as Galaty has argued, it was the long-term objective of the legislation, “seldom stated and then only in low tones” that was most important. This objective was not so much about securing the interests of the pastoral Maasai on their land as it was about integrating them into the national economy. It was:

... to take this relatively large portion of land adjacent to the Kenyan highlands and to the capital city of Nairobi out of “communal” hands and make it accessible for individual ownership through market mechanisms: this would theoretically put the land into the hands of those “most suited” to using it effectively, and would provide an outlet for the densely populated communities nearby, characterized by land scarcity (Galaty, 1992).

The policy thinking that informed the passing of this legislation believed that common property led to overgrazing, inefficient use of resources and low levels of investment and herd offtake by pastoralists. Those who promoted the implementation of this law were keen to see the emergence of modern ranching among the Maasai. Indeed, the ultimate aim of the exercise was to individualize tenure. Even as group ranches were being created, individuals deemed to be progressive were being encouraged to establish individual ranches. It became clear that group ranches were considered a transitory measure to the attainment of the ultimate objective of individualization. The fact that many of the group ranches have subsequently been subdivided and individual titles issued just goes to confirm that this was indeed the policy objective right from the beginning.

The fate of the group ranches, particularly their ultimate subdivision and the impact of this on the local Maasai, is a matter of ongoing debate. While there are those who see it as an inevitable evolution in response to new notions of property relations and market forces, it is also clear that it has led to dispossession of a large number of peasants at the hands of the local elite. In Kajiado, individualization of tenure has compromised the viability of the range for pastoralism, with the result that many Maasai are selling off their land and moving into trading centres and into Nairobi in pursuit of petty trade and menial jobs (Rutten, 1992).

What is clear from the experience of the group ranches is that formalization is a technical process with benefits based on a diversity of factors that have to do with the structure of society, the governance system and the institutional linkages among and within communities that define production and relations. As a technical process, formalization is neither good nor bad. Rather, the social, cultural, political and economic context in which it is implemented will determine whether it benefits or hurts the target group. An important consideration in this regard is the readiness of a society in terms of the existence of factors and circumstances in the political and economic governance realm that would make it possible for the citizens to take advantage of a formalized tenure system. Otherwise, as the box “Dispossession in Iloodo-ariak” shows, formalization may in fact expose its intended beneficiaries to exploitation from the elite within and without.

Dispossession in Iloodo-ariak

The Iloodo-ariak area of Kenya fell victim to Kenya’s 1977 Land Adjudication Act that allowed the government to sell pastoral lands. The process was handled so corruptly that many people were dispossessed of their lands without their knowledge. Indeed for many of them, the first time they became aware that the lands they had lived on since time immemorial were no longer theirs, was when the new owners showed up to claim their lands. The people who had been allocated these lands were not even residents of the area. They had no right to any of this land. A total of 362 such persons were nevertheless recorded and registered as owners of land in the area while 1 200 indigenous families, rendered landless, got nothing out of the adjudication process.

Ochieng Odhiambo, 2000

The Iloodo-ariak problem is only one example of how processes of reform have impacted negatively on pastoral land rights, even when some of these reforms were touted as being meant to benefit the pastoral communities. Although this is clearly an extreme case of corruption and misuse of power with the distinction of mainly pitting the local population against outsiders, similar cases exist across East Africa. Indeed, there are many other instances where pastoralists have been dispossessed by their own elite, especially committee members of the group ranches (Galaty and Ole Munei, 1999).

This clearly indicates that it is the nature of the society in which formalization is undertaken that determines whether and to what extent it benefits the target groups. This is as it should be, since property rights are attributes of relationships and cannot be created through a reform process. Instead, the proper role of reform is to clarify, articulate and recognize pre-existing rights.

Moreover, property rights evolve over time and in tandem with other changes within a society. This is why there has been no great difficulty in formalizing property rights in high potential, settled agriculture areas such as central Kenya, the area around Mt. Kilimanjaro in Tanzania and much of southern Uganda. With good soils for agriculture, a settled population and high population densities, the tenure systems moved towards individualization purely on the basis of internal dynamics, making them appropriate for formalization.

It is appropriate that the CLEP is talking about the formalization of property rights as part of a larger package of reforms that includes among other things, access to justice. The CLEP recognizes that, unless the overall governance context is taken into account, there is a real danger that formalization may, in fact, exacerbate existing inequities by making it possible for those with capacity, knowledge and resources to take advantage of the situation for their benefit and further marginalize the poor. Concerns expressed by Julius Nyerere almost half a century ago are as valid today as they were then:

... there would emerge rich and clever Tanganyikans. If we allow land to be sold like a robe, within a short time there would only be a few Africans possessing land in Tanganyika and all the others would be tenants (1966).

However, one is tempted to question whether the CLEP agenda is not too large given its nature, the timeframe for its work and the manner in which it shall work. For example:

- What difference will the CLEP bring into the discourse since all the issues on its agenda are issues that have been subject to discussion and action for many decades in many countries where there are already ongoing processes seeking to address the same problems?
- Is it realistic to expect to address these issues from a global perspective?
- Are these not issues that need to be addressed at national level in accordance with the specific context of each country?

In terms of formalization of customary land tenure, the Commission appreciates that customary tenure has traditionally “bestowed a relatively high level of tenure security and property rights, similar to those offered by individual freehold titles” (CLEP, 2006). This then begs the question: Why formalization, and why now?

It is important to be careful in planning and implementing formalization, lest in the process worsen the situation of the poor and marginalized in rural areas. It is probably appropriate to ask whether those promoting formalization are not trying to fix what is not broken. It may be true that there is a strong case for formalization in urban and peri-urban areas, which constitute the interface between customary tenure and statutory systems. Indeed, the studies by ILD that have informed the formalization agenda and the formation of the CLEP have mainly been conducted in urban and peri-urban areas. The circumstances in these areas are markedly different from the rural areas of East Africa.

5 CONCLUSIONS AND RECOMMENDATIONS

This paper has examined the relevance of the ongoing formalization agenda for the East African countries of Kenya, Uganda and Tanzania. On the basis of a historical review of the policy and legal framework for the management of land and natural resources, we have arrived at the following conclusions and recommendations.

5.1 Conclusions

1. The vast majority of the rural poor and vulnerable in East Africa depend on land and natural resources for their livelihoods, and their access to land and natural resources is governed by customary land tenure.
2. Customary land tenure continues to be relevant for the livelihoods and development of rural areas of East Africa notwithstanding more than 100 years of neglect and deliberate policy interventions aimed at outright extinction or substantial transformation of the tenure system.
3. The policy and legal framework in the three countries is, for the most part, not conducive to the orderly and systematic evolution of customary land tenure, even where the rhetoric supports and encourages its evolution.
4. Since the establishment of colonial rule, the overall tenor of policy and legislative reform has encouraged private land tenure based on Western notions of property rights with a focus on individual ownership and the creation of land markets. Thus, successive governments, both before and since political independence, have focused on development of private land tenure and paid little attention to customary land tenure. As a result, customary land tenure policy remains undeveloped, unclear and inadequately articulated even though it is the basis of property relations for the majority of the people in the rural areas.
5. Formalization of property rights is not new in East Africa. It has been the thrust of policy and law since colonialism. It has succeeded in urban areas and high potential agricultural areas, but has failed particularly in arid and semi-arid areas in which property relations are defined by common property resource management regimes.
6. While formalization is needed in East Africa, it is important to be clear about where it would be most useful. An analysis of the agenda and conceptual framework of the CLEP shows that it would be most relevant to urban and peri-urban environments where there is interface between customary land tenure and statutory tenure. In these areas, the conditions exist for the success of formalization. The same is not true of rural areas occupied by peasant farmers and pastoralists.
7. Experience with formalization in East Africa shows that the social, political and economic context in which formalization is implemented is the key determinant of whether or not formalization succeeds in benefiting the target group and securing property rights. Unless the context is right, formalization may, in fact, exacerbate the situation while introducing new problems and challenges. When that happens, those who suffer the most are the poor, marginalized and vulnerable in society, including women and children, pastoralists and hunter-gatherers.
8. There is danger in trying to impose property rights in a top-down reform process. By their nature, property rights have to evolve over time as a function of internally generated dynamics that respond to changes in a specific society, to relations within that society and to changes between that society and other societies. Formalization does not serve to create or transform property rights. Instead it serves to clarify, articulate and regularize what already exists within an overall governance context in which the conditions for the enjoyment and protection of those rights exist.

5.2 Recommendations

The following recommendations are made to address some of the challenges identified and to build on the opportunities.

- Implementation of formalization in East Africa should be targeted specifically to addressing the challenges of property rights in urban and peri-urban areas that are presently characterized by an interface between customary land tenure and formal statutory tenure. To try to introduce formalization in rural areas, especially in the low potential areas occupied by pastoral and agropastoral groups, is likely to cause more harm than good as the conditions there are not conducive to formalization.
- The formalization agenda pursued by the CLEP, with its focus on improving access to justice for the rural poor, can be useful for customary land tenure. In order for the rural poor to be truly integrated into the legal and justice systems of East Africa, the legal framework must provide for recognition of customary law generally and customary land law in particular. To this end, ongoing reforms of the administration of justice need to address customary law more specifically, provide for its orderly development and allocate resources to support research and scholarship on its key characteristics.
- Providing for recognition of customary law requires the legal system to create a framework for the orderly development of a jurisprudence of customary law. This would strengthen what is good in custom and, at the same time, subject it to overarching values contained in the Constitutions and global human rights instruments to which the East African countries are parties. This will ensure that customary law is able to develop and assimilate the ethical standards of the countries in such areas as gender and minority rights.
- Further research and analysis need to be undertaken to document case studies of customary land tenure practices that are appropriate for sustainable management of rural land and natural resources and, in turn, support the livelihoods of the rural poor. This would clarify and articulate substantive and procedural aspects of customary land tenure and provide a basis for their recognition and enforcement through the statutory frameworks of the East African countries.

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