



Renegotiating customary tenure reform – Land governance reform and tenure security in Uganda

Mathijs van Leeuwen*

Centre for International Conflict Analysis and Management, Institute of Management Research, Radboud University Nijmegen; African Studies Centre, Leiden University, the Netherlands

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ABSTRACT

In academic and policy debates on how to effectively secure land tenure, an uncompromising belief in the need to formalize and title landownership has increasingly given way to an acknowledgement of the contributions non-state, 'customary' or otherwise local institutions may make in securing tenure. However, the question remains as to how different tenure systems may most effectively complement each other. This paper argues that the debate needs to give more attention to the local dynamics and politics of tenure reform, and how reforms are locally renegotiated as part of local institutional competition. It reflects on the case of Uganda, where legislation and policies over the last 15 years have promoted formalizing land titles and modernizing land law in combination with recognizing customary ownership and land governance. Fieldwork in Mbarara District in South-western Uganda shows that, although reforms delay, they increase institutional multiplicity and fuel contestation among local authorities and about the norms applied. Rather than strengthening local mechanisms to make small customary landowners more tenure secure, renegotiating of the reforms results in delegitimizing customary authorities and the reforms do not succeed in 'modernizing' the customary rules and conventions applied. Moreover, reforms fail to generate confidence in both statutory and customary land governing authorities as protectors of smallholders' claims to land.

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Introduction

The notion has long prevailed that to secure land tenure, customary tenure rights and authorities were inadequate. Instead, it was believed that titling and privatizing property were necessary to protect both the land and rights to it (Cousins, 2002). Such ideas resurged strongly at the beginning of the New Millennium, when Peruvian economist De Soto vigorously argued for the necessity of formalizing and individualizing land rights to generate growth and development (De Soto, 2000). His argument resonated in the policies of institutions like the World Bank, promoting the formalization of property rights (Deininger, 2003), or market-led agrarian reform (see Lahiff et al., 2007). However, as early as the 1980s, it was observed that registration and titling programmes in Africa failed to increase productivity and access to credit. Today, critiques of De Soto, also argue that titling might contribute to inequality and exclusion, decrease tenure security for women, and

disregard communal rights as well as the variety of rights of different people on the same property (see e.g. Musembi, 2007; Sjaastad and Cousins, 2008). Others problematize assumptions about relationships between formalizing land rights, tenure security, and productivity (Place, 2009).

At the same time, there is increasing acknowledgement of the potential contributions of non-state institutions in securing tenure. Many have high hopes in so-called 'customary' or otherwise local institutions, which are often seen as more legitimate, accessible and accountable than institutions of the state and as being capable of resisting the power of intrusive outsiders and the state. However, it is also argued that customary institutions may discriminate against women and youth, marginalize non-indigenous community members and non-residential user groups, such as pastoralists (Meynen and Doornbos, 2004), and mainly benefit local elites. And while customary institutions in the past were often characterized by flexibility, negotiability, and adaptation, intensifying competition on land seems instead to contribute to increasing exclusion, and deepening social divisions under customary arrangements (Peters, 2004).

Scholarly debate, moreover, underscores how the dichotomy between 'state' and 'custom' is deceptive. What is called 'customary' may in reality be a product of colonization and the

* Correspondence to: Centre for International Conflict Analysis and Management, Radboud University Nijmegen, PO Box 9108, 6500 HK Nijmegen, The Netherlands. Tel.: +31 024 36 11 649/06 3926 9338/06 4096 4636.

E-mail addresses: m.vanleeuwen@fm.ru.nl, mathijs.van.leeuwen@hotmail.com

acknowledgement of *certain* versions of traditional land regulation (see [Benjaminsen and Lund, 2002](#): p. 2). Moreover, the dichotomy hides that tenure systems are not static and are constantly reinterpreted and renegotiated, and fails to acknowledge the actual hybridity of and continuities among tenure systems (see [Peters, 2009](#)). What is called 'customary' regulation does not necessarily exist of indigenous rules only, but is often the result of '*institutional bricolage*', of borrowing and adaptation between the formal and informal, the traditional and non-traditional ([Cleaver, 2002](#)). Finally, while the label 'customary' may suggest homogeneity, its meaning may differ from place to place, while interpretations of what constitutes a 'custom' in a particular setting may differ strongly and be contested.

Against the background of those debates, policy makers and development practitioners tend to take a middle position, seeing potential complementarity between statutory and customary tenure systems. Land governance reforms since the 1990s increasingly acknowledge the roles local and customary authorities and regulations may make in securing tenure ([Deininger, 2003](#); [Peters, 2009](#)). Such recognition may take different forms. Land policy may recognize customary rights collectively, through acknowledging certain areas as 'customary land', or instead promote individual titling or granting certificates to customary landholders. Policy may fully recognize customary authority within designated areas, or only devolve certain land governance roles to customary leaders (see [Bruce and Knox, 2009](#)). The degree of state intervention in tenure arrangements may vary considerably; ranging from a minimalist approach in which customary regulations are unregulated, to codification and registration, or 'harmonizing' regulation to principles promoted by the state ([Cousins, 2002](#); see [Fitzpatrick, 2005](#) for an overview of different arrangements). It might be that the popularity of customary tenure and an inclination towards 'mixed' approaches is a pragmatic response to the impossibility and un-desirability of full-fledged formalization at short notice. After all, many development practitioners and academics assume that formalizing tenure should remain the end-goal, or that in the long-term tenure regimes will inevitably evolve towards formalization anyway (see e.g. [Platteau, 1996](#)). Even then, such thinking underwrites that so-called customary tenure systems can have a valuable contribution to securing tenure.

Inevitably, the implementation of reform strategies based on the notion of complementarity between tenure systems poses challenges. Many customary arrangements are not codified, and local people do not know what existing rights and procedures are in place. Codifying existing arrangements is difficult if there is diversity and evolution in local regulations or if different rights overlap, and may undermine the flexibility such arrangements entail. Harmonizing and conforming customary regulations to state regulations or international human rights law may meet local resistance. A key challenge is that acknowledgement of customary authorities next to those of the state implies a multiplication of arbitration and administrating authorities. This may add to local confusion about who is in charge of what land governance roles. And while it is sometimes argued that institutional multiplicity facilitates local actors' possibilities for negotiation or enlarges the scope for locally adequate solutions ([Unruh, 2003](#)), institutional proliferation may turn out to be more beneficial to some than to others ([Peters, 2004](#)).

The paper takes no principled position in those debates. Instead, it is more interested in analysing how the management of institutional multiplicity works out in practice. To do so, it explores how the recognition of customary tenure plays out in Uganda, where legislation and policies over the last 15 years have promoted formalizing land titles and modernizing land law, alongside recognizing customary tenure systems and decentralizing land services provision. The paper discusses the case of local farmers in Mbarara

District in South-western Uganda, and how their tenure security has been affected by the reforms.¹ Earlier research found that land reforms in Uganda have not been very effective in improving tenure security, due to limited institutionalization and lack of access to land services for the rural masses (see e.g. [GOU, 2001](#); [Bosworth, 2003](#); [Hunt, 2004](#); [Rugadya et al., 2004](#); [Francis and James, 2010](#); [Harterter and Ryan, 2010](#); [GOU, 2010](#)). My analysis confirms such earlier assessments of limited implementation. Yet, in contrast to those analyses, the paper argues that land governance reform has nonetheless transformed land governance and tenure security in important ways. The central argument is that the reforms are locally renegotiated, as they inevitably become part of the competition for authority and legitimacy among local land governing authorities, thereby transforming tenure security at the local level.

This argument is developed as follows. The next section presents the notions of institutional multiplicity and competition used in this paper to analyze how land governance reform impacts local institutions governing land and local tenure security. Section three introduces changes in land policy and legislation in Uganda and highlights the ambivalent position regarding customary tenure engrained in the reforms and the institutional confusion and multiplicity it fuels. Thereafter, a case study of Mbarara District, in South-west Uganda shows that the central state is hardly capable of implementing the reforms and enforcing state legislation at community level. Yet, the reforms provide opportunities for diverse local leaders to re-negotiate their legitimacy and assert authority in governing land, setting the multiple regulatory frameworks to their hand. Consequently, rather than strengthening customary mechanisms that make small customary land owners more tenure secure, the reforms introduce new forms of insecurity. Critically, they fail to generate confidence in both statutory and customary land governing authorities as protectors of customary claims to land.

Analyzing land tenure reform

To understand how recognition of customary tenure works out locally, this paper uses the notion of 'institutional multiplicity'. In practice, state and so-called 'customary' authorities seldom operate in isolation, but co-exist, and are in competition with each other over what norms, rules and procedures apply, and which organizations are authorized to take charge under particular circumstances. Such 'institutional' or 'legal pluralism' (e.g. [Von Benda-Beckmann, 2008](#)) results in a certain level of negotiability, flexibility, and local adaptation of the normative order ([Merry, 1988](#)) or the regulatory framework in place. For instance, institutional pluralism provides parties with competing claims on land opportunities for 'forum-shopping': contesting parties seek out the authority most likely to support their claims. Similarly, public bodies and their functionaries may also try to acquire or fend off disputes to pursue their own (political) interests ([Von Benda-Beckmann, 1981](#)).

¹ The paper is based on a year of fieldwork in Uganda (2011–2012), in the context of the research programme 'Grounding Land Governance', funded by WOTRO Science for Global Development. 'Research in Uganda aimed to acquire insights in local land disputes and governance and how this was affected by ongoing reforms, notably decentralization. Fieldwork in Mbarara District took place in collaboration with the Mbarara District Farmers' Association (Mbadifa), which hoped to deepen its knowledge of how local farmers perceive tenure security, what knowledge of and experience they have with actual reforms, and how this could be taken into account in intervention strategies. Research was conducted in 10 rural communities in Mbarara District between June and October 2011. Fieldwork included a series of 7 focus-group discussions, convened by Mbadifa-staff and led by the researcher; 70 individual interviews with farmers and representatives of local government in those same communities by the researcher assisted by a field-assistant; and verification sessions in 3 communities and at Mbadifa headquarters. Additional interviews were conducted in Ibanda, Ntungamo and Isingiro Districts, as well as in Kampala.

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