



Africa Community
Rights Network



The state of Community Land Rights in Africa

**African States can better
protect community land rights**

December 2016



© Téodyl Nkuintchua/ CED

Community land meeting in North Congo Brazzaville

Executive summary

Investment on land depends largely on land tenure security, and without secured tenure many investors will not commit to the investments in order to support the so long awaited economic development in Africa. Most African countries become so aware of this fact that they have recently initiated two major processes that are progressively transforming the land governance landscape. On the one hand, they are making massive land allocations to national and foreign investors (agribusiness, mining, infrastructures, oil, etc.). On the other hand, many countries are reviewing their land laws with the aim of creating business environment, free from factors that could lead to the hostility of local peoples. One defining feature of the African continent is that its rural communities depend heavily on land (mostly lands currently sought by investors) and claim customary ownership of up to 80% of all lands. In this context, designing land laws that are in full accordance of protecting customary land rights of those communities' is crucial.

The literature on land issues illustrates that the legal protection of community land rights varies hugely from country to another: it is deemed advanced, progressive in some countries, and very poor in others. The differences are even more marked when it comes to the enforcement of the land laws, whether or not these are protective of community land tenure arrangements. However, there is no single measurement tool that can provide effective comparisons. The ultimate purpose of ACRN's African Community Land Transparency Index is to close this gap by providing updated and comparable data to decision-makers, communities, academics, NGOs and others key stakeholders involved with the land administration and management. The Index is driven by many innovations. One of such innovation is its ability not just assessing the law, but also the extent to which the law is implemented and enforced. Another crucial innovation of the Index is the Naming and Praising approach, which is an attempt to showcase countries with good legislations and practices, and commend them as best practices to share for others to emulate. The Index therefore aims to offer a learning platform for exchange among different African countries, instead of endlessly reinventing the wheel.

This report synthesizes the results from the very first analysis conducted using the Index. The data have been collected in eight African countries – Congo Brazzaville, Democratic Republic of Congo, Uganda, Liberia, Senegal, Burkina Faso, Nigeria and Ghana – by senior NGO experts. Research consisted of qualitatively responding to 28 indicators (the Index) using personal expertise, a literature review and interviews with relevant actors in the countries. Data were then peer-reviewed by ACRN's senior advisors and experts, including through workshops. However, ACRN acknowledges that these precautions may not have eliminated all inconsistencies and discrepancies from the data presented here. Moreover, as this report is based on a pilot initiative and grounded on our analysis, there may be bias. We therefore hope to receive feedback from you, the readers.

Results

It is striking that not even one of the eight countries can readily provide disaggregated data on the size of land under different customary arrangements, although in all countries those lands are deemed to represent more than half the national territory. Indeed, there are no reliable data even on the number of registered land titles, including individual titles. Generally, only urban titles are approximately documented. The total surface of rural lands which cover the bulk of the entire land mass is unknown.

Overall, the protection of community rights over those rural lands appears to be weak. Uganda and Ghana offer the best laws, from their Constitutions to their enabling laws. There is less variation in law enforcement across the countries, which unfortunately is very poor. Ten key features characterize the level of protection to customary rights:

1. Uganda's Constitution explicitly protects customary land arrangements with the same force as other 'modern' types of rights. Other Constitutions notably guarantee 'access' to land for those communities, though without a clear explanation of what 'access' means.
2. Three types of rights are common in all the countries: access, use and management. Exclusion and alienation rights are better protected, though not fully, in Ghana and Uganda. However, the laws do not consider the complexity of customary land arrangements which are often bundles of rights (simultaneously comprising various types of rights on the same land).
3. Forest countries provide other specific forest rights of access, use and management. Use rights in DRC and Congo Brazzaville are essential in the context of large-scale forest management, but these are limited as they poorly represent the type of rights claimed by forest populations.
4. The main holder of land rights is the Individual. While some laws (in Burkina Faso, Uganda, Ghana, Congo Brazzaville and Nigeria) explicitly provide certain rights on lands and other resources to communities as entities, mechanisms to ensure full implementation of these community rights are absent, leading de facto to the superiority of individual rights.
5. Other specific groups, however, are generally ignored in land legislations and law enforcement. Those include the youth, migrants and women. Congo Brazzaville is a positive exception, having a law that provides more security to Indigenous Peoples' land rights than the rest of the rural populations.
6. Registration is the ultimate guarantee to security even in Ghana and Uganda, where land laws provide same security to unregistered community lands. Uganda, Burkina Faso and Ghana have put mechanisms in place to facilitate the registration process, though in none of these countries are the mechanisms fully functional. In general, a variety of cultural, institutional, economic and political obstacles make it impossible to secure community land arrangements through registration, as currently provided by the most advanced laws. This ultimately leads to land insecurity even in good contexts such as Uganda and Ghana.
7. Moreover, the laws give communities only partial power to make decisions. Most notably, they have the right to claim compensation on all rights claimed (in Ghana and Uganda) or on lands with demonstrated uses (in other countries). But beyond such compensation, they have little power to oppose large-scale investments authorized by the central or ever local institutions, especially mining projects that appear to be deemed superior to all others.
8. While central institutions are generally in place and functional, local institutions – where they exist – suffer from poor capacity and resources. This is the most significant barrier to implementation of the law. In Burkina Faso, Ghana and Uganda, where the law says that it will provide local institutions to support the securing of community land tenure systems, in practice they barely exist because of the lack of enabling documentation, resources and technical capacity. Community institutions tend to become increasingly unaccountable to their communities, and many traditional rulers in all the countries are engaged in or support land grabbing.

9. Along with the inadequacy of the institutions, all eight countries are facing growing land conflicts: within communities, against local and national elites, and against public and private large-scale investors. These conflicts emphasize the need for urgent land reforms, with rural communities playing a central driving role.
10. All the countries except Nigeria are currently (or have recently been) reviewing their land laws. These reforms have so far been conducted in a manner that offers a window of opportunity to secure and safeguard the rights of rural populations. Indeed, all have proved to be participative and inclusive of a range of relevant actors. Improvements are already perceptible: the draft land law of Liberia appears to be dramatically different from its previous land law as it better recognizes and protects community land rights.

Analysis

Overall, the eight countries have no reason to be proud of the way that they protecting their communities' land tenure systems. Conflicts between modern land systems and those community (customary) arrangements are generally mentioned as the main drivers of such insecurity. But the imbalance between the two systems is historical and complex. The time it has taken to make land reforms, the growing number of stakeholders and the hesitation of states to even start those reforms (e.g. in Senegal and Nigeria, which have made many failed attempts in the past 40 years) demonstrate that the causes of the insecurity of community land rights, and therefore for injustice, described here are very deep-rooted. We highlight seven of these root causes here:

1. Historically, newly independent African countries considered more control over their lands as a sign of sovereignty and an intrinsic part of development.
2. This belief is still held today, as the continent is rapidly allocating large tracts of land to private investors. The uniqueness of today's context is that arguments for development arguments are competing with aspirations for sovereignty: countries are ceding large parts of their territories, including at the borders (Congo Brazzaville is a good illustration).
3. Development is primarily and almost exclusively considered to be the reserve of corporates. States are failing, and do not appear actually to want, to value their citizens' ability to drive economic growth. This misconception has led many African governments to make highly controversial decisions, such as allocating lands used for crop production to cash-crop companies (Uganda, Senegal, and Congo Brazzaville).
4. Systemic governance problems reflect on land sector. Countries with no land use plans have little chance to ensure even the security of commercial land titles, let alone those of communities. Moreover, the strategic economic agenda seems unprecise, with countries shifting from one strategic initiative on natural resources to another.
5. Lack of capacity at community level condemns those communities to suffer injustice, even when their country's laws are protective. But capacities to advocate and defend their rights are also eroding: exposed to 'modern', values including individualism, many collectively driven communities find it increasingly difficult to speak with one voice on land matters.
6. Another consequence of this modernity is contact with the market economy. The rising land market is still influenced by strong customary ties, feeding and fed by individualization. The existing one million African communities are therefore experiencing major social transformations which may affect what we currently call community land rights.
7. Various external factors are affecting the protection of community land tenure systems, most notably civil war, climate change and migration.

The results of this pilot and the ensuing analysis identify converging and diverging points between African land laws. Countries like Uganda, Ghana and to a certain extent Burkina Faso have the most advanced land laws of the eight countries. Those are the examples to follow. The situation in the conti-

ment is moving fast, and many countries are improving both their land laws and their implementing institutions. Just this year (2016), Kenya has also promulgated a long awaited improved land law. Liberia's land law is also promising. However, the difficulties that the same countries have implementing their own laws are an invitation to mobilize all necessary resources. Current land conflicts are an obvious symptom of deeper problems in Africa's land laws and law enforcement. These conflicts not only affect rural communities who are the first victims: they also constitute a barrier to investment. Various Indexes assessing the business environment, including the World Bank's Doing Business, rank the continent among the least welcoming environments. While such economic analyses should not be taken too seriously, it is certainly true that investors coming to Africa often struggle to secure land.

ACRN believes that securing community land tenure systems is the first step towards securing business on the continent. The Index can help provide up-to-date and comparable data on what works well and what does not, from country to country, with the goal of helping to improve those that are slow in coming. We do not think that the Index can answer all the questions, however, especially not the systemic ones regarding development pathways or general environment of governance. But it may provide an opportunity for open debate on those issues, and for rural communities and NGOs to join in.

ACRN has elaborated a three-level agenda

First level: ACRN-wise priorities

- Use the Index as an empowering tool for NGOs in Africa. The Index's guidelines are simple training materials on land issues
- Support Index users to guarantee best quality of information collected
- Improve the Index while keeping its key principles
- Perfect the narrative of *Naming and Praising* countries with good laws and practices

Second level: Engage more NGOs in our effort

- Validate the data collected through the Index with networks of national and regional NGOs.
- Reach out more African NGOs, and expand the network in order to be more efficient with decision-makers

Third level: Associate the communities

- Adapt our different guidelines including current our definitions of key concepts (**community, community land, statutory land law and community land rights**) into locally understandable language
- Adapt the Index for data collection from community level.



This report has been produced with the generous contributions of:



Contact us

Téodyl Nkuintcha
Coordonnateur ACRN
tnkuintchua@cedcameroun.org

Mireille Tchiako
Chargée de la Communication
mtchiako@cedcameroun.org

contact@cedcameroun.org
Tel: (+237) 243 52 51 51