



LAND TENURE SECURITY IN SELECTED COUNTRIES

Global Report

SECURING LAND AND PROPERTY RIGHTS FOR ALL

LAND TENURE SECURITY IN SELECTED COUNTRIES

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PREFACE

It is well recognized that secure land and property rights for all are essential to reducing poverty because they underpin economic development and social inclusion. Secure land tenure and property rights enable people in urban and rural areas to invest in improved homes and livelihoods. Although many countries have completely restructured their legal and regulatory framework related to land and they have tried to harmonize modern statutory law with customary ones, millions of people around the world still have insecure land tenure and property rights.

Lack of access to land and the fear of eviction epitomize a pervasive exclusion of poor people from mainstream social, economic and civic opportunities, especially women. To address these problems, tools and strategies to increase poor people's access to secure land and housing tenure need to be devised. The Global Land Tool Network (GLTN), whose Secretariat is hosted by UN-Habitat, recognizes that security of tenure for the poor can best be improved by recognizing a range of types of land tenure beyond individual titles. The current thinking focuses on a "continuum of land rights" that is being promoted and increasingly accepted worldwide.

In this report, the issue of tenure security is addressed and assessed in several countries where government, civil society, the private sector and development cooperation initiatives have been implemented for decades. The selected case studies from fifteen (15) countries ensure not only a geographic balance but they also represent countries with different socio-economic and land-related histories and that have

followed different pathways. The studies' key findings underline the still precarious state of tenure security in many countries.

The findings also show best practices for legal and administrative reforms that have generated incentives for long-term investment in land, or incentives to include the poor more comprehensively. The case studies will hopefully work as a kind of "compendium" on the current state of tenure security, its future challenges and perspectives. They will allow for comparisons between countries and regions and address, besides others, policy makers, the private sector, civil society organizations and donors. Also, they will help applied researchers and implementers of "ground checks" and may support students of different disciplines to cope better with complexity in tenure issues.

This work was undertaken through a joint endeavour with the Chair of Land Management at Technische Universität München (TUM) and the Sector Project Land Policy and Land Management of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). The findings will enhance our knowledge of serious tenure security challenges and hopefully will inspire additional policy debate on implementation, inclusion, or incentives, as well as new research on secure land and property rights for all. The findings will also be useful to GLTN's global partners (currently more than 63 consisting of professionals, development partners, research and training institutions, technical and civil society groups) to address land tenure and land reform, amongst other issues.

BACKGROUND

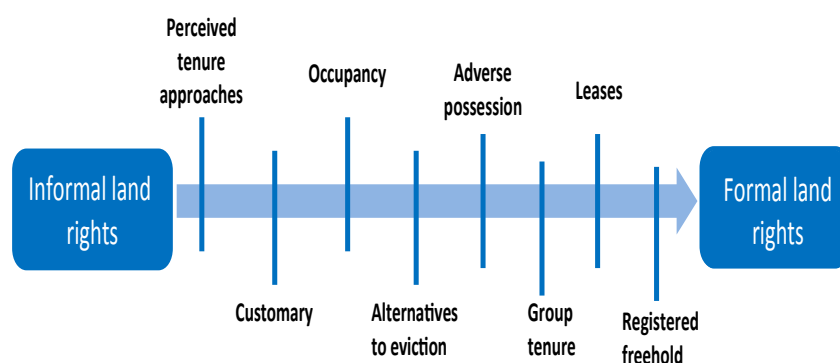
Secure land and property rights are critical for reducing poverty and for enhancing economic development, gender equality, social stability and sustainable resource use. When land is poorly managed, the associated problems often lead to disputes, land degradation and lost socio-economic development opportunities. Secure land tenure and property rights can exist in a variety of forms. Secure tenure is, in part, a matter of perception and relationships of trust and it can be safeguarded by various mechanisms provided that the rights of land users and owners are clearly assigned. In addition to formal titles, security can be achieved through long-term rental contracts or formal recognition of customary rights and informal settlements. This range of possible forms of tenure has become internationally recognized as being a continuum, along which each form of tenure provides a different set of rights and different degrees of security and responsibility.

While some governments have, to varying degrees, recognized a range of different forms of tenure as being legitimate, “tenure security” still tends to be strictly defined in more statutory forms of legal security, such as individual land titles. This not only fails reflect realities on the ground, but it severely reduces the number of women and men who can afford such “formal” tenure security, particularly those living in poverty and in rural areas. The problem is especially acute in Africa, where the majority of the populations

It is likely that less than 30 per cent of developing countries are currently covered by some form of land registration - that is, about 70 per cent of people in developing countries are outside a register. To bridge this gap, UN-Habitat's Global Land Tool Network (GLTN) partners have supported the use of a continuum of land rights

will be unable to afford such secure forms of tenure for generations and who will be increasingly marginalized by market-based statutory tenure systems that emphasize individual rights. It is likely that less than 30 per cent of developing countries are currently covered by some form of land registration - that is, about 70 per cent of people in developing countries are outside a register. To bridge this gap, UN-Habitat's Global Land Tool Network (GLTN) partners have supported the use of a continuum of land rights (see diagram below), or a range of rights, to make it possible for the majority of people, including the poor, to have security of tenure.

Given the limitations of land titling, and the value of incremental approaches to secure tenure, UN-Habitat advocates the use of a variety of alternative tenure options that can be easily adapted in developing countries. While the continuum approach is increasingly being endorsed, important work is still needed to change deeply rooted mind-sets on what secure tenure entails.



Source: UN-Habitat (2012)

INTRODUCTION


Land tenure systems are the product of historical and cultural factors and they reflect the relationships between people, society and land (Payne, 2002). Land tenure comprises the customary and/or legal/statutory rights that individuals or groups have to land and related resources, and the resulting social relationships between the members of society (Kuhnen, 1982). Each country has developed specific land tenure concepts that are based on historical and current values and norms. The concepts determine the present tenure systems and they have often been shaped by an evolutionary process. In many cases, endogenous forces act as drivers that sharpen and change tenure systems, for example population growth, industrialization and urbanization, or accelerating natural resource exploitation. In addition, there may have been external influences, such as the imposition of a colonial power's legal system in the past or more recently through internationally harmonized statutory law and global treaties such as those on indigenous peoples, the environment or gender equity. In some cases, tenure systems have been determined by revolutionary processes and the resulting turnover of

existing land tenure systems through redistributive land reform or forced land collectivization. Even in countries where gradual changes in land tenure systems were initiated, policy makers may have strengthened the role of the (central) state in allocating and even managing land. Often in these cases, this vision materialized with the nationalization of non-registered lands held under customary tenure and of forest or pasture resources, and the influence of government organizations that directly interfered in land use and management.

However, because these state-led tenure reforms had disappointing results with regard to economic development, efficiency and even equity and local participation, most of the policies and experiments have been criticised and partly revised since the 1990s, paving the way for far-reaching, market-driven tenure reforms and a redefined role for the state. These initiatives initially concentrated on reforming the complex statutory legal framework; later they tried to identify ways to better integrate customary rules and regulations into modern tenure systems. Together with



Remote village in the mountains of the Yun'nan plateau in China © Rui Ding




decentralization and de-concentration of decision-making powers, many countries attempted to bring land administration closer to its clients in urban and, particularly, rural areas. This was done to support systematic titling of land, to enhance the efficiency of land administration, to address the poisoning impact of corruption at all levels and to settle different kinds of land-based conflicts. All these efforts aimed to significantly increase tenure security. In a few cases, they explicitly focused on the poor and marginalized groups in society; in other countries, reforms aimed to unleash the potential of working land tenure systems for economic growth, sectoral and structural change, and for domestic and foreign investment. Further, governments were reacting to the strong demands from an increasing (mainly urban) middle class that invests in property in order to ensure their financial future and to finance the education of their children due to insecure or no alternative investment opportunities within the countries (e.g. bonds, bank savings).

Common trends in tenure systems can be observed for most of the countries despite remarkable differences in geographic location, historical development or economic performance. This is partly a result of shared historical background, new international regulations and influences on basic human rights initiatives (e.g. gender focus, indigenous peoples, landless). It is also a result of a painful learning process on the power of economic (dis-)incentives emerging from different property rights systems and tenure-related rules and recognition of the power of the private sector in a liberalized and globalized world and an acknowledgement of state failure in the past. What is more, in all countries people have clearly expressed their on-going strong emotional and physical attachment to land, thus confirming that land tenure systems are indeed an integral part of any nation's or society's culture and history. This may contrast with the actual situation in Western post-industrial societies where this emotional-spiritual connection has been limited to agriculture and rural areas, and where anonymous land sale and tenure markets dominate urban development.

Tenure systems, in particular tenure security, therefore, reflect a lot about the nature of society, the development and performance of its informal and formal institutions, and the ways of dealing with change under globalization and factor market liberalization (linking land to capital markets through collateral delivery). Modern tenure systems are based on formal, statutory together with more informal, customary rules and regulations. The statutory / conventional system normally includes private freehold and leasehold rights, as well as public or state land that is often leased out to private concerns. The customary system is based mainly on communal/common regulated tenure or, in the worst case, open access. This leads to cases where property rights in land or other resources are too weak to be enforced at a local level or are non-existent, leading to long-term overuse, resource degradation and therefore the de facto expropriation of use rights and benefit claims from these lands. Rights, restrictions and responsibilities can vary considerably with each tenure system and society. The current pace of urbanization in almost all developing and industrializing countries has resulted in the rise of tenure system insecurities, particularly in urban informal settlements.

New challenges, therefore, arise for governments, civil society, the private sector and international donors with regard to land tenure, tenure security, and land policy in countries with different gross domestic products, different levels of industrialization and urbanization, inequality and varying qualities of the

Globalization, the liberalization of capital markets and raising incentives for foreign direct investment directly affect (mainly rural) land tenure. Direct investment in land is either a blessing or a curse for different stakeholders; tenure security is guaranteed mainly for investors but not for rural dwellers whose lands – which are often held under customary tenure – are part of the negotiations between investors and hosting countries.



natural environment. “Poorer” countries may have to focus on functioning tenure systems in agricultural and rural areas because both are an important source of growth, income generation and employment. Other, more affluent, newly industrializing countries may concentrate on the booming urban land sale and rental markets with their inherent dangers of speculative bubbles and uncoordinated land development, but which are potential sources of tax and fee revenue for the central state and local municipalities.

Globalization, the liberalization of capital markets and raising incentives for foreign direct investment directly affect (mainly rural) land tenure. Direct investment in land is either a blessing or a curse for different stakeholders; tenure security is guaranteed mainly for investors but not for rural dwellers whose lands – which are often held under customary tenure – are part of the negotiations between investors and hosting countries. Property rights are changing quickly; expropriation without compensation may occur and new land-related conflicts may arise. These conflicts raise questions about the neutrality and service function of a decentralized land administration where there is rampant corruption and abuse of power at all levels. The behaviour of

traditional authorities who are responsible for land allocation also comes into question.

Most countries have concentrated on land tenure reforms related to urban and agricultural lands while also developing legal frameworks for sustainable use and the protection of related natural resources, such as forests, lakes, rivers and pastures. As these resources will fulfil key functions for ecosystem service delivery in the future and are essential to maintain global commons, such as biodiversity, a stronger integration of sectoral land tenure approaches is urgently needed. It will be a major challenge in the future for governments, civil society and donors to prepare land tenure systems for their environmental functions, to provide incentives through newly and more widely defined property rights to protect the environment, and to follow a more inclusive approach that does not leave the poor behind. The following country case studies underline similarities between tenure issues in diverse systems. They focus on actual strengths and options for the future, but they also address weaknesses in and threats to tenure security, the inclusiveness of poverty groups, land management, land administration and knowledge generation.

01

Ghana

Benin

Côte
D'ivoire

Togo

1. INTRODUCTION

For all countries in the sub-Saharan region of Africa, land is a key asset for sustainable livelihoods, economic growth and development. Agriculture, natural resource use and other land-based activities are important sources of livelihoods, income and employment. Thus, land lies at the heart of social, political, and economic life in most of Africa (IIED, 2005). For Ghana, the importance of land and other natural resources to the economy cannot be over-emphasized. It is specifically stated in the 1999 National Land Policy (NLP) document that land is “the nation’s socio-economic backbone, the basis of its wealth, the realm of its physical and political strength and the source of its sustainable livelihood and very survival”.

The linkage that is reflected in forms of land use, such as agriculture, forestry, manufacturing, and extractive industries including mining, human settlement, military and defense applications, transport networks and various other infrastructures, are obvious (NLP, 1999). The Ghana Poverty Reduction Strategy (GPRS) also says that farming is the main economic activity for over 60 per cent of Ghanaians who live in rural areas.

Defined as “the degree of confidence held by people that they will not be arbitrarily deprived of the land rights enjoyed and/or of the economic benefits deriving from them...” (Lavigne-Delville, 2003), land tenure security is a key development issue. Secure rights to land are a pre-condition for sustainable development. Security of tenure has, however, been a big challenge in Ghana for some years now. According to a study conducted by Wily and Hammond (2001) on Land Security and the Poor in Ghana, insecurity of tenure now affects a greater proportion of Ghanaian society including the economic poor, those who hold derivative rights (that is, those who access land belonging to others: tenants, sharecroppers, youth and women) and the body of ordinary occupants of land.

This paper discusses the status of land tenure security in Ghana within the context of land tenure systems and the various historical periods and their influence on land rights. It also discusses the regulatory framework on land tenure and critical emerging issues as well as current efforts at resolving any imbalances.

1.1 General Country Information

Ghana is on the West Coast of Africa between latitudes 4 and 11 degrees and a few degrees north of the Equator. It shares boundaries with Burkina Faso, Togo, Cote d’Ivoire and the Gulf of Guinea to the north, east, west and south respectively and has a total surface area of about 238,837 km². The population is 24,658,823 (2010 National Population and Housing Census) with a population density of 103 people per square kilometer and a population growth rate of 2.5 per cent (Ghana Statistical Service, 2012). Ghana is an ethnically diverse country made up of over 100 ethnic groups with over 47 languages. English, however, is the official language, a legacy of British colonial rule. Ghana (formerly known as the Gold Coast) was the first country in sub-Saharan Africa to gain independence from the British. Administratively, the country is divided into 10 regions and 171 districts and the urban-rural divide is approximately equal, with the urban area accommodating 50.9 per cent of the population (Ghana Statistical Service, 2012). Physically, the country is generally characterized by low physical relief. The highest elevation¹ is only 880 meters above sea level. There are five different geographical regions. One of these, the high plains, includes the northern and north-western sectors of the country. Ghana’s climate is tropical and therefore very warm with an annual mean temperature between 26°C and 29°C.

There are two main seasons in Ghana: the wet and the dry season. Southern Ghana has evergreen and semi-deciduous forests consisting of trees such as mahogany, odum and ebony. It also contains much of Ghana’s oil

1 Mount Afadjato in the Akwapim-Togo Ranges.



Public space along the coast of Accra, Ghana © UN-Habitat

palms and mangroves. Northern Ghana's vegetation is savannah grassland. Ghana is well-endowed with natural resources including gold, bauxite, diamonds, manganese, fish and, recently, oil. The country is drained by a large number of streams and rivers; there are a number of coastal lagoons, the world's largest man-made lake - Lake Volta - and a natural lake, Lake Bosomtwi. About 17.54 per cent of Ghana's land area is arable and 9.22 per cent is used for permanent crops ² (CIA World Fact book, 2010). Ghana's economy is therefore dominated by agriculture which constitutes about 35 per cent of the GDP (real GDP growth rate in 2008 and 2009 was 7.2 per cent and 4.7 per cent respectively) and employs about 54 per cent of the work force, mainly small-scale farmers (Ghana Statistical Service, 2009). The heavy reliance on agriculture makes issues of land tenure critical; in particular secure access to land, because land tenure plays a vital role in achieving sustainable rural development, increasing technological change and economic integration (FAO, 2002). The religious composition of the country is Christian 68.8 per cent, Muslim 15.9 per cent, traditional African beliefs 8.5 per cent.

1.2 Land Tenure System in Ghana

The concept of "tenure" is a social construct and defines the relationships between individuals and groups of individuals in relation to their rights, restrictions and obligations (with respect to control and use of resources) (ECA, 2004). Thus, land tenure is the relationships that link people to land and to each other. Ghana's Ministry of Lands, Forestry and Mines (MLFM) report on emerging issues on land tenure, however, defines land tenure as the system of landholding that has evolved from peculiar political and economic circumstances, cultural norms and religious practices of a people regarding land as a natural resource, its use and development (MLFM, 2003). A more broad definition is that land tenure is the relationships, whether statutory or customarily defined, between people as individuals or groups with respect to land (that is, it defines how land is alienated or access is granted to use, control and transfer land, as well as associated responsibilities, duties, privileges and restraints) (FAO, 2002). These relationships include the institutions that administer these rules/ laws and make them relevant and operational.

Ghana has a peculiar land tenure system. It is complex and reflects the unique traditional political organizations, socio-cultural differences and attributes of the various ethnic groups, clans and families who, through wars,

² Mainly cocoa, palm nuts and palm products, timber, coffee, shea nuts and cashew nuts.

conquests and assimilation of the conquered and early settlement came to acquire ownership of land (Fiadziagbey, 2006). Differences in natural endowment between the southern and northern parts of the country, colonialism and the subsequent introduction of tree crop farming, the exploitation of timber and mineral resources to feed the factories of the western world have equally played a role in influencing land tenure. As a result, land tenure systems are very diverse and vary from region to region, and between ethnic communities. Studies show there are two main forms of land tenure in Ghana – customary/traditional/informal and formal/statutory. Kasanga and Kotey (2001) reiterate that “plurality of a land tenure system, comprising mainly of the customary land tenure systems and statutory systems, which often overlap and contradict each other, prevails”. Each tenure system can be described in terms of the characteristics and forms of management that distinguish them (Benneh, 1975; Woodman, 1996 quoted in Sewornu, 2010).

Before colonization, the dominant form of land tenure was customary, also referred to as traditional, informal or indigenous. Today, virtually all countries within the sub-region have a dual land tenure system in which a customary system coexists with a statutory system (Cotula, 2007). Customary land tenure is characterized by its largely unwritten nature, based on local practices and norms that are flexible, negotiable and location-specific. Customary systems are usually managed by a traditional ruler, land or earth priest, council of elders, family or lineage head. State systems of land tenure, or statutory land tenure, are usually codified, have written regulations based on laws stemming from the colonial era that outline what is permissible and the penalties and sanctions to be levied for contravention. Management of such codified systems is usually by government administrators or bodies with delegated authority. The principles underlying such systems derive from citizenship, nation-building and constitutional rights. Land rights are allocated and confirmed through the issue of titles or other forms of registration of ownership (Bentsi-Enchill, 1964).

Agbosu et al. (2007) and Cotula (2007), however, warn that although there are fundamental differences underlying the principles and systems for managing both tenure systems, the distinction between customary and statutory land tenure systems is considerably blurred and therefore a too simple definition of dichotomies between the two must be avoided. Cotula (2007) argues that during the over century long contact, colonial and post-colonial governments have transformed the customary systems of land tenure. Equally, the statutory system, which is thought of as inflexible, also operates with considerable room for negotiation. Between the ideal-type “customary” and the ideal-type “statutory”, a great deal of hybrid “in-between” exists (Cousins and Hornby, 2006).

In reality, therefore, the situation in Ghana is one of “legal pluralism” in which customary laws, rules and statutory laws co-exist in a complicated mix, together with institutions that oversee land administration and the resulting challenges (Sewornu, 2010). Undoubtedly, the co-existence of customary or informal land tenure systems with statutory/formal legislations has created uncertainty in the administration of land rights because different systems stipulate different conditions for the security of title, thus engendering conflicts and contradictions. Managing these two systems to ensure security of tenure for all sections of society has been a formidable challenge for Ghana’s legal system (Dowuona-Hammond, 2003). Customary land tenure however remains the predominant model of landholding in Ghana and is the dominant system through which the majority of Ghanaians assert their rights to land.

“the situation in Ghana is one of “legal pluralism” in which customary laws, rules and statutory laws co-exist in a complicated mix, together with institutions that oversee land administration and the resulting challenges



A section of the busy urban area of Kumasi, Ghana © Uchendu Chigbu

Concept of Land in Ghana

Viewed broadly as the ground, water, air and other natural resources tied to the Earth's surface, "land" is understood and expressed differently depending upon the context in which it is used and the circumstances in which it is considered (Barlowe, 1986). For Ghanaians, the term land³ connotes two things - the land itself made up of the soil or the earth plus natural attachments (e.g. water bodies, trees etc.) and artificial attachments (e.g. houses and other improvements); and the rights and interests that can be held in it, e.g. rights to farm, to collect snails, rights of way, easement (Sewornu, 2010). Also, within the traditional context, the conception of

land transcends the material realm. For instance, Asante (1975) notes that the whole system of land ownership under traditional land tenure in Ghana revolves around religious precepts. For Kludze, "Land is conceived of as a principle – which has certain observances that must be obeyed in order to ensure fertility and progress and to avoid personal misfortune" (1975).

2. HISTORICAL REVIEW AND CURRENT STATUS OF LAND TENURE SYSTEM

2.1 Different historical periods and their relevance on land rights and the land tenure system

No land tenure system has maintained its indigenous nature; rather the systems are continuously evolving to reflect changing circumstances. Ghana's land tenure and land management systems have changed greatly over the years as it has adapted to societal changes. Although the premier land tenure system primarily

3 There are two accepted definitions of land in Ghana – the statutory definition and legal text book definition. The Interpretation Act, 1960 (CA4) section 32 defines land as including "land covered by water, any house, building or structure whatsoever, and any estate, interest or right in, to or over land or water". Ollennu, a prominent Chief Justice, in his book "Principle of Customary Land Law in Ghana", also defined land to "include the land itself, that is, the surface soil; it includes things on the soil which are enjoyed with it as being part of the land by nature, e.g. rivers, streams, lakes, lagoons, creeks, growing trees like palm trees and dawadawa trees, or as being artificially fixed to it like houses, building and structures whatsoever. It also includes any estate, interest or right in, to or over the land or over any other things which land denotes e.g. the right to collect snails, herbs or to hunt" (Ollennu, 1962).

draws its legitimacy from tradition or custom⁴ it has been profoundly changed by decades of colonial and post-independence government interference and has been continually adapted and reinterpreted because of social, economic, political and cultural change. Cotula and Neves (2007) identified demographic growth, urbanization, monetization of the economy, livelihood diversification, greater integration in the global economy and cultural changes as the major drivers of change on the African continent. Today, high population growth, rapid urbanization and the recognition of land as a marketable commodity have intensified the changes in land relations in Ghana. All these processes have greatly impacted on the land tenure system with serious implications for tenure security. The various periods through which Ghana's land tenure system has evolved are the pre-colonial era, the colonial era and the post-independence period.

2.1.1 Pre-colonial period

Before the arrival of the Europeans and their subsequent influence, Ghana was made up of many independent tribal states and kingdoms. Prior to 1471, land tenure was based purely on the customs and traditional practices of the people involved and it varied between tribes and villages. The traditional authorities (the fetish priest/tribal head/family head and council of elders) formed the regulatory body. The significant features of the pre-colonial land tenure system were its largely unwritten nature, hence the lack of contemporary detailed literature on land dealings. Whitehead and Tsikata (2003) note that the many implicit and explicit contestations over the meaning of customary land tenure that run through literature is because most of the historical evidence about the local level was collected after rural localities had been affected by colonialism. Thus, perspective, concepts and meaning attached to African ways of land tenure arise as much from the framework of colonial history and the forms of

evidence this produced, as they do from the nature of the land holding itself (Whitehead and Tsikata, 2003).

It is, however, noteworthy that in pre-colonial times, land had no monetary value. This was rightly captured by Pottier (2005) who argues that for most of pre-colonial sub-Saharan Africa, with its low population densities and relatively limited population movements, land was mostly conceived of as an unbounded resource to be used, not as a commodity to be measured, plotted, sub-divided, leased, pawned or sold. Under these conditions, land rights were rarely defined since they were rarely questioned. This was the case in Ghana; Kasanga and Kotey (2001) say that in the past land was abundant and those seeking land had free access to it. With subsistence agriculture, no economic value was put on land and it had an opportunity cost of practically zero. Under such a system, women's access to land was guaranteed and secured, as was men's.

Another important feature of the pre-colonial land tenure and land right system was that land was considered communal property.⁵ Access to land therefore depended on community membership. "Strangers" or non-members of a community may gain access through a gift or permission by the leadership of the community. Women generally did not have land ownership rights but they had access and use rights through male relatives, which were believed to be secure.

4 The normative order derived from the usages of the community, encompassing the whole cultural spectrum of the people in question (Asante, 1975).

5 Ollennu, (1962) says that the notion of individual land ownership was foreign to customary law. Land belonged to the community, the village or the family, never to the individual. All the members of the community, village or family had an equal right to the land.

2.1.2 Colonial era (1471 – 1957)

Ghana's indigenous land tenure systems were greatly influenced by the colonial masters.⁶ Whether manifested as the settler type, indirect rule or the plantation type, colonialism introduced new dimensions to land ownership and title, land management, as well as to the rights and responsibilities related to land and natural resources.

The people of Ghana had their first encounter with Europeans in 1471 when the Portuguese arrived on the West Coast of Africa. The period marked the start of a new development in the land tenure and land rights system in Ghana. The Europeans initially acquired lands through negotiations to build a number of forts and castles where they lived and carried out their trading activities in gold, ivory and slavery.

The colonial administration, keen to establish its right to control the people and resources under its rule, extensively exercised the power of "eminent domain" and so existing forms of customary land tenure were either ignored or overridden. The colonial administration also used selective policy instruments for land resource management rather than developing an overall policy framework. The selected policies related to timber and mining concessions and land policies mainly focused on expropriation (with compensation) and appropriation (without compensation) of land.

Parallel to the assertion of colonial power was the contempt shown for customary powers. The contempt of customary system occurred with the introduction of "Indirect Rule" and English law from 1867 when the British firmly established the Gold Coast colony.. For instance, Kasanga and Kotey (2001) indicate that the chieftaincy institution was introduced by the colonial government in northern Ghana. Kotey (1995) also

Ghana, like most African countries, still has an agrarian-based economy but the character and pattern of agriculture underwent a radical metamorphosis during the colonial period.

says that the assertions of power over land by chiefs are relatively modern developments with no basis in indigenous systems and practices. Until then, there had always been a clear distinction between the duties of chiefs and those of the traditional land administrators, such *tendamba/tindana*⁷ in some areas in Ghana. This ritual ownership of land has however been modified.⁸

The result of the introduction of English law is that a substantial part of Ghana's current land law is derived from English common law and equity (Da Rocha and Lodoh, 1999) and the use of common law terms in describing property rights, for example leasehold, freehold, easement etc. The outcome has been the dual, unequal and hierarchical system of land tenure, in which common law interests such as freehold and leasehold land rights are treated as superior to customary land rights.

Another significant influence of colonial administration is the push towards individualization and commercialization of property rights. Ghana, like most African countries, still has an agrarian-based economy but the character and pattern of agriculture underwent a radical metamorphosis during the colonial period. As mentioned earlier, before the mid-nineteenth century, agriculture involved no more than the simple phenomenon of peasant farming for food in a typical subsistence economy. With the advent of cash crop farming and the exploitation of timber and mineral resources to feed the factories of the western world, agriculture was commercialized throughout the

⁶ According to the Economic Commission for Africa's (2004) report on land tenure systems, although there are sub-regional variations, the African historical context is essentially that of colonialism, and the legacy of colonial land policies is the major framework through which sustainable livelihoods at the individual country level has been conditioned.

⁷ Spiritual leaders and land administrators.

⁸ The *tendamba/tindana* have lost their ultimate authority in land in much of the northern, upper east and upper west regions. Some chiefs now assert land holding rights and management functions and no longer consult the local *tendamba/tindana*.

country. Cash crops such as cocoa, coffee, coconut and kola are tree and perennial crops that continue to yield for decades. The economic yields of commercial agriculture led to a marked appreciation of land as a commodity for commerce and an unprecedented demand for land. Land was no longer the object of transient regimes of farming but a highly valuable base for the erection of a permanent and clearly defined interest (Asante, 1975).

This, together with the mining boom of the late nineteenth century, introduced new forms of land relationships where the prospect of monetary transactions began to erode the basic tenet of trusteeship and other pertinent principles in customary land law. Asante (1975) recounts that, far from the right of occupancy usually given to strangers or the interests of a customary *abusa*⁹ or *abunu*¹⁰ tenant, mining concessions were granted in the form of long-term leases; these were unprecedented powers of exploitation practically amounting to a transfer of ownership. It is crucial to note that although these developments started and grew during the colonial era, the situation expanded dramatically in the post-colonial period and continued until today.

During the colonial era, attempts were also made by colonial governments to usurp customary land rights. In 1894, the Crowns Lands Bill was introduced vesting all lands of the Gold Coast Colony in the British Crown. The Lands Bill of 1897 was more comprehensive in its efforts to transform property rights in land. It declared all unoccupied lands were public and vested the power of administration of all public lands in the colonial state (Tsikata, 1984). However, as a basic principle in customary land law in Ghana, there is no land without an owner. Every inch of land in Ghana

has been vested in somebody (Ollennu, 1962). Hence, the introduction of the Lands Bill of 1897 was vehemently opposed by the people of Ghana through the Aborigines Right Protection Society (ARPS).¹¹ It is believed that the attempts to pass this Bill ignited the struggle for independence. Following the failure to pass the Crowns Lands Bill in 1897, the Land and Native Acts Rights Ordinance of 1927 was passed. The colonial government, realizing the strong opposition of the people to any attempt to intervene in the system of land holding, had to greatly modify its land policy into one of minimal government intervention (Annor, 1992).

2.1.3 Post-colonial period (1957 – today)

After Ghana became independent in 1957, the post-colonial government continued to interfere with the customary land tenure system through numerous legislative interventions. It is believed by most researchers and academics that most direct policy interventions with respect to land relations happened during the post-independence era. The Convention Peoples Party's (CPP)¹² economic and social policies were predicated upon the "Big Push" paradigm of development orthodoxy prevalent at that time (Aryeetey and Harrigan, 2000).

To meet the land requirements of the state-contrived industrialization drive, the administration devised several instruments to control land ownership, land transactions, land use and development. Even though it can be said that the post-independence government adopted a socialist paradigm of economic development, it enacted legislation to control virtually every aspect of land ownership, the creation of tenure and the handling of land revenue. Larbi (1995) catalogues 22 intervention instruments that affected every aspect of land tenure, ownership, transfer, revenue, development, etc. Key among these were the Local Government Ordinance

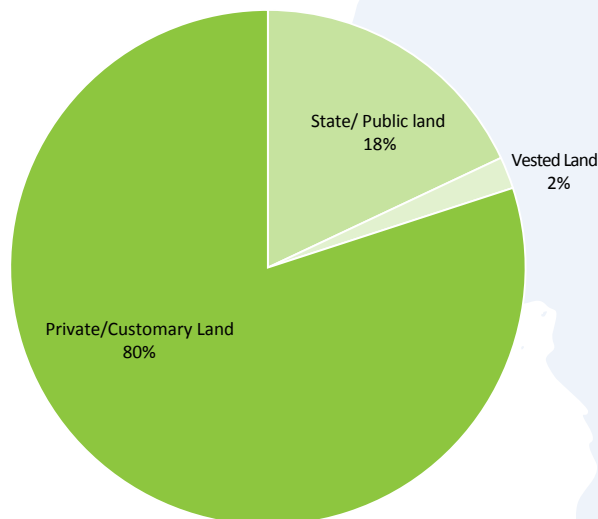
9 An older customary contract arrangement by which shares are divided into three parts; either the crop or the land or the tenant eventually receives a third of the land as his own in return for developing the whole.

10 A customary share contract arrangement by which the harvest or the land is divided into two parts, one for the landlord, one for the tenant.

11 A pressure group against the enforcement of the Crown Land Bill.

12 The first post-independence government.

Figure 1: Categories of land ownership



Source: Authors

1951, State Council (Ashanti) Ordinance No. 4 1952, State Council (Northern Territories) Ordinance No.

5 1952, and State Council (Colony and Southern Togoland) Ordinance No. 8 1952, the Akim Abuakwa (Stool Revenue) Act 1958 (Act 8), the Ashanti Stool Act 1958 (Act 28) and the Stool Lands Control Act 1960 (Act 79), all of which “in various ways, gave the state power over stool¹³ and other lands” (ISSER, 2007). The collective effect of these measures was to render land ownership by stools empty and devoid of any economic value to the owners as all the major incidents of ownership were taken over by the state.

Subsequent governments (both civilian and military) continued this tradition of piecemeal reforms, passing a flurry of legislation between the mid-1950s and the early 1960s, establishing land administration institutions

and working through the courts to settle land disputes. This complicated the problems of land tenure even further. Over 166 legal instruments promulgated during different regimes currently exist in the statute books, some of them overlapping and others conflicting, that regulate land relationships alongside customary laws. Although numerous laws and regulations were formulated on land by various governments, a critical analysis indicates that the land issue has not been seriously factored into the national development agenda. Even when land is considered, it has been only in relation to agriculture and rural development indicating that the land problems are primarily that of rural land and not urban land problems.

However, a pragmatic approach to land issues requires an integrated land management system taking into account both urban and rural land dynamics. Meanwhile, a high percentage of frustrations of the private sector in land acquisition and land development are related to urban and peri-urban areas. Serious dislocations and landlessness occur in many peri-urban areas and create tensions and conditions not conducive for private sector development. From the 1970s onwards, fresh initiatives to reform land sector were taken, starting with a review of existing land legislation.

13 “Stool” in Ghana, generally refers to the customary throne occupied by a tribal leader. In the northern part of the country, a ‘skin’ represents the customary throne. Stool land as defined in Article 295 (1) of the 1992 Constitution include “any land or interest in or right over any land controlled by a stool, skin, and the head of a particular community or the captain of a company, for the benefit of the subjects of that stool or the members of that particular community or company”. The Constitution stipulates that such land “shall vest in the appropriate stool on behalf of and in trust for the subjects of the stool in accordance with customary law and usage” (Article 267 (1) of 1992 Constitution)

Several pivotal studies on land tenure were conducted and the debate on the direction of land reforms was also intensified

The Ghana Vision 2020 document,¹⁴ even though it had very little input on land tenure, identified a lack of comprehensive policies on land use and development resulting in inappropriate uses of land and the long-term effect on economic potential of natural renewable resources. Recommended actions resulted in the formulation of a comprehensive national land policy in 1999 to provide general direction and guideline to land use, management and administration for sustainable development. The Ghana Poverty Reduction Strategy (GPRS) I and II represent the development agenda for the New Patriotic Party (NPP).¹⁵ The GPRS notes that reform of the land administration system is urgently required, as insecurity of tenure is endemic and has bearing upon both poverty reduction and economic growth. Failure to protect land rights and prevent the abuse of traditional and institutional procedures places the poor, the illiterate and women at most risk. The GPRS proposes the provisions for protection of land rights and prevention of abuse of traditional and institutional procedures.

2.2 Current property regimes

There are three categories of land in Ghana: state land, vested land and customary/private land (See figure below). Held under varying tenure arrangements, the landholders include: stools/skins, sub-stools; clans/families; spiritual leaders such as tendamba; government or state; individuals.

State Land

State land is defined as land compulsorily acquired by the government through invocation of the appropriate legislation, vested in the president and held in trust by the state for all the people of Ghana. All previous

interests are extinguished and people who previously held recognizable interests in such lands are entitled by law to compensation, which could be monetary or a replacement with land of equivalent value. Currently, Article 20 of the 1992 Constitution, State Lands (Amend) Act, 1962, (Act 125), the Administration of Lands Act, 1962 (Act 123) and the Land Statutory Wayleaves Act, 1963 (Act 186) govern compulsory acquisition of land by the state. State lands constitute about 18 per cent of total lands in the country.

Vested Lands

This is an unusual type of land ownership brought about by state intervention in land administration. Vested land has a dual land ownership system in which the legal title is transferred to the state and the original traditional owners retain the beneficiary interest. Thus, under vested lands, the state takes over the entire management responsibilities of the land, including the right to sell, lease, receive income etc., but any accruing benefit such as revenue from the land is paid to owners of the land. In this case, no compensation is payable for the vested land. Currently, the legislation governing vested lands is the Administration of Lands Act, 1962 (Act 123). Such lands are in the northern, Brong Ahafo, eastern, Ashanti and other regions.

Private/Customary Land

Customary lands constitute about 80 per cent of all lands in Ghana and include predominantly stool, skin, clan and family¹⁶ land. They have a common trait of communal or cognate ownership and are guided by the customary tenets expressed in the saying that Ollennu attributes to the late Nana Sir Ofori Atta, that "[...] land belongs to a vast family of whom many are dead, a few are living and countless hosts are still unborn"(1985). Individual lands constituting grants emanating from common law freeholds are acknowledged in the

14 The development plan of the National Democratic Congress (NDC) Government (1992-2000).

15 Immediate past government (2000 -2008).

16 "Family land" is defined as land or interest in land owned by a family where the "family" includes any group of people recognized by an applicable customary law as constituting a family or other corporate person with the capacity to be the single proprietor of a land or an interest in land (Land Title Registration Law, 1986 (PNDCL 152) s.139).

National Land Policy document to be part of customary lands. This has been, however, a bone of contention among some scholars; some acknowledge the existence of such lands, while others vehemently disagree with them (see Kludze, 1973; Ollennu and Woodman, 1985).

2.3 Recognized interests/tenure arrangements in Ghana

Land administered in a plural legal environment inevitably has had a bearing on interest and rights that are recognized in land. Section 19 of the Land Title Registration Act, 1986 (PNDCL 152) identified the following interests in land: (i) allodial interest; (ii) customary freehold; (iii) common law freehold; (iv) leasehold including subleases; and (v) customary tenancies. These interests held in land are either derived from Ghanaian customs and traditions or assimilated from English Common Law and Equity.

Allodial interest

This is the highest title in land recognized by law in Ghana, beyond which there is no superior title. It is sometimes referred to as the absolute title. In the words of Da Rocha and Lodoh (1999), "...the allodial title is the basis of the customary law scheme of interests in land in Ghana". Depending on the applicable customary law, the allodial interest in land is held originally by stools, skins, tendama, sub-stools, clans or families (CDD, 2002). The allodial title is vested in the head of the land-owning group, who manages it on behalf of the community with the consent and concurrence of the principal members of the community. Historically, allodial title has been created or assumed through discovery or conquest and subsequent settlement thereon and use thereof by the stool/skin and family. This interest in modern time can be transferred from one owner to the other through:

- Purchase by another community.
- Gift to another community.

It is further noted that each of these methods involves either the sacrifice of lives of subjects, or the expenditure of energy, or contribution of money by subjects, and use and occupation of the land by the subjects. All the rights constituting an allodial interest are "rights in rem" (i.e. against the whole world). There are, however, extensive legislative controls on the allodial interest. The state has completely taken over ownership of minerals and forestry resources and the Minerals Act, 1962, for example completely vests all minerals in the state.

Customary Freehold

Also called usufruct, it is an interest in land to which indigenous members of the landowning community that holds the allodial interest in land are entitled as of right, according to the customary law of that community. Members of that community acquire an interest by first cultivation or by allotment from the land owning group of which they are members. This interest, so long as it is held and exercised by an indigenous person, assumes indefinite duration and prevails against the whole world, including the allodial titleholder. Any group, sub-group or individual member of a community owning the allodial title may acquire the customary freehold title or interest in land by exercising his or her inherent right to develop such vacant virgin communal land.

The customary freehold includes the right to occupy and derive economic use from any portion of the communally owned land that has not been occupied previously by any member of the community. Thus the usufruct can cultivate, build or enjoy the use of the land in any manner he chooses, provided he does not invade the stool's and state's right to the minerals therein. Such rights are limited to the area occupied. Hunting by an indigene, however, does not appropriate customary freehold title; it is rather a derived right. Other derived rights include rights to water, rights to non-timber forest products and minerals. These derived rights, also referred to as group rights, are distinct from customary freehold.

The customary freehold is freely transferable and the freeholder may dispose of his interest both inter vivos or by testamentary disposition to members of the community as he pleases. Transfers to persons outside the group, i.e. strangers, may be done only by the holder of the customary freehold with the consent of the appropriate head and principal elders of the land-owning community (CDD, 2002). This is due to the fact that such alienation to a stranger implies admitting an outsider to the ancestral heritage of the state, and by extension granting the stranger citizenship rights. A customary freehold is an interest held in perpetuity by the beneficial user; the only caveats are that the land must not be abandoned and the members' lineage must not become extinct. The allodial owner of the land has a reversionary interest in such land in the rare event of abandonment or the extinction of the beneficial user's lineage.

A customary freeholder's current position in the face of rapid population growth coupled with urbanization and scarcity of land is that the subject/member of the landowning group needs to obtain the custodian's consent before carving out any land for himself, for any purpose such as farming or residential, and in some cases they must pay for it just like strangers. Customary freehold is secure and, in principle, the subject/member customary freeholder is never to be made to look like a tenant, such as by paying periodic "rent". Also, the subject usufruct, can never be overridden in favour of another subject or stranger, irrespective of the circumstances unless with his consent (Ollennu and Woodman, 1985).

Common Law Freehold

This is an interest in land that arises out of a grant in the nature of a freehold made by the holder of the allodial title by way of sale or gift. It is an interest that is held for an indefinite period and is derived from the rules of common law. It is created only by express grant. Previously, members of the stool, family or skin that holds the allodial title, strangers (i.e. Ghanaian citizens

outside the allodial title holding community) and foreigners alike, could acquire common law freehold. However, in 1969 non-Ghanaians' rights to hold such interests were abolished and automatically slashed to a maximum 50-year lease term to be granted at any one time (1969 Constitution). The 1979 Constitution also abolished the granting of freehold rights in stool and skin lands to Ghanaians whether they are strangers or members of the land owning group. This presupposes that from 1979 such rights emanating from stool and skin lands could no longer be granted in the country. Both common law and customary freeholds can, however, emanate from family lands.

Leasehold

These are rights granted to a person to occupy and use land for a specified term subject to certain agreed covenants and the payment of an agreed rent. As a convention, a lease may be granted for a period as short as one year or as long as 99 years (Da Rocha and Lodoh, 1999). However, Article 266 (4) of the 1992 Constitution specifically limits the leasehold of non-citizens of Ghana to 50 years at any one time.¹⁷

The allodial titleholder or a customary/common law freeholder can grant leasehold in respect of land over which he/she has not already granted a conflicting interest. The grant of leasehold interest is subject to the payment of an agreed rent and certain agreed covenants that control the manner in which the land is to be used and the exercise of the lessee of his/her rights as the owner of the lease. The lessee may create a sublease or assign the residue of the unexpired period of the term granted to him/her unless there is an express or implied covenant which prohibits this.

Lesser Interests

Customary tenancies - holders of an allodial title, customary freehold or common law freehold - may

¹⁷ No interest in or right over any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a leasehold for a term of more than 50 years at any one time.

also create various lesser interests under customary law. These are usually share-cropping contractual arrangements by which a tenant farmer gives a specified portion of the produce of the farm to the landlord at each harvest time. The two best known of such tenancies are the abunu (the produce is shared 50:50) and abusa (one-third to the landowner and two-thirds to the farmer). There are other forms of customary tenancies in which the consideration for the grant is not the sharing of farm produce but monetary payments, for example, periodic (fixed) rents. In addition to these interests, certain rights recognized by law also exist in land. Examples are easements, profits à prendre, restrictive covenants, reversions and common law licences. All these terminologies, though importations from English or French common law, describe lesser interests in customary law for which local phraseology has been lost over the years.

2.4 Regulatory Framework on the Current Land Tenure System

2.4.1 Legislative Framework

The legal environment for the management of land in Ghana is essentially pluralistic, based on the co-existence of different regulatory systems – customary, religion, statutory and constitutional (Dowuna-Hammond, 2003). Specifically, in the context of land relationships in Ghana, legal pluralism is represented where customary laws and practices are heavily overlaid with formal policies, enacted legislations following English common law principles in the administration of land rights (Bortei-Doku Aryeetey et al. 2007). Article 11 of the 1992 Constitution enshrines legal pluralism within Ghana's legal system: "[...] the laws of Ghana shall comprise - this Constitution; enactments; Orders, Rules and Regulations, the existing law; and the common law. The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature. For the purposes of this article, "customary law" means the rules of law, which

by custom are applicable to particular communities in Ghana" (1992 Constitution).

The overall legal regime on land tenure in Ghana therefore consists of constitutional provisions, policy documents, statutory enactments, judicial decisions, common law principles and customary laws and practices that have been enacted and developed over the years to regulate land rights in generally. Formal laws on land have developed since colonial times in a piecemeal and ad hoc manner in response to specific issues or political dictates resulting in some overlapping and conflict. Problems with the legislative regime for land administration include the fact that there are too many laws, (creating confusion and uncertainty), gaps and overlaps in the laws; inconsistency with the Constitution, and duplication of provisions dealing with the same issues in different laws.¹⁸ In 1999, however, a land policy was developed to provide a comprehensive policy to provide overall direction for effective and efficient management of land. It must also be mentioned that under the ongoing Land Administration Project (LAP-1) two pieces of legislation have been promulgated; the Land Bill, which deals with the land management/administration, and Land Use Planning and Management Bill.

2.3.2 Institutional Framework

These are state land sector agencies that collaborate in order to manage all state lands in Ghana as well as to enforce regulations regarding the administration of customary lands. These responsibilities are shared among three public agencies under the three ministries – Ministry of Land and Natural Resources, Ministry of Environment and Science and the Ministry of Local Government and Rural Development. The six land sector agencies comprising of Lands Commission (with its four divisions: survey and mapping, land registration, land

18 See C. Dowuona-Hammond, GTZ Report on State Land Management Regime: Impact on Land Rights of Women and the Poor in Ghana, p 23. See also, G.A. Sarpong, The Legal Framework for Policy Planning: Final Report on Legal Aspects of Land Tenure, Planning and Management in Ghana, FAO, November 1999.

valuation, and public and vested land management), Office of the Administrator of Stool Lands (OASL) and Town and Country Planning Department and their mandates and functions of these agencies are attached as Appendix II:

Customary Institutions

Although customary land tenure system varies from place to place, especially between the centralized, chieftaincy-based, matrilineal Akan system and the lineage-based landholding systems of the patrilineal Ewe and Ga, customary lands are generally governed by authorized “representatives” of the people, who are either the chiefs or the family/clan heads. There are areas where “traditional priests” (*tendana* and to a lesser extent the *wulomei*) are the authorized representatives of the people. They representatives are commonly referred to as custodians and are responsible for managing and administering these lands on behalf of their people, with the consent and concurrence of the principal members of the land-owning community (council of elders). The position of every custodian of customary land in theory, however, is that of a titular holder, holding the land in trust for the whole community or group of people (Kotey, 1999; Kasanga and Kotey, 2001).

This principle is upheld by both customary laws and the Constitution. Article 36(8) says that “[...] the state shall recognize that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the state shall recognize that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin or family concerned and are accountable as fiduciaries in this regard”. The council of elders alienate, collect and distribute revenue and other benefits accruing from land, adjudicate, manage etc. through customary laws, the norms and cultural practices recognized by ethno-cultural groups (MLFM, 2003). The council often arrives at a decision by consensus and in some instances the chief/head

may give specific instructions to be implemented by the council. The councils have procedures through which they allocate land to forestall any disputes or multiple sales as well as for the management of common resources.

A few customary institutions, especially in urban areas – *Gbawe* family land secretariat and Asantehene have modernized their land administration system by establishing land secretariats or land management committees that mediate land allocation, documentation and record keeping. Such customary institutions are “neo-customary” institutions. Capacity is low, however, and professionals are not often engaged in the process. Another major drawback of customary institutions in the governance of land is that the council of elders is mainly comprised of male members without representation from women and the youth. The system is also not participatory since the view of the community/family members is never sought in the management and administration of their lands (Ministry of Lands, Forestry and Mines, 2003).

Non-Governmental Organizations (NGOs)

Until recently, NGOs had virtually no presence generally in the land sector. This was due to the perception that land tenure issues are too complex and too difficult to handle and activities do not get readily visible results (MLFM, 2003). Two organizations that have shown an interest in the sector are Land for Life and CARE International. Through the Land Administration Project, a Civil Society Coalition on Land has been formed with a current membership of more than 30 NGOs. The main duties of the NGOs are to create community awareness and to educate and sensitize the public on sound land management practices, especially at the customary level. Some NGOs included are Debasin Consult, Community, Land and Development Foundation, Ecological Restoration, Centre for the Development of People, Rural Initiators, Network for Communication and Planning, Centre for Indigenous Knowledge and Organizational Development. The roles of the NGOs are that of advocacy and sensitization.

It must be noted that their coverage and influence is very limited in the country. Other institutions involved in land administration include Ghana Institution of Surveyors, Ghana Institute of Planners, Ghana Real Estate Developers' Association, the Judiciary, Ghana Bar Association, Environmental Protection Agency, District Assemblies, and the Ministry of Food and Agriculture.

3. ANALYSIS OF LAND TENURE SECURITY IN GHANA

A satisfactory system of land administration should give ordinary people a sense of security concerning the lands they hold and freedom from fraudulent claims, it should provide a man who lays out good money, whether as a purchaser of land or as a lender against the security of a mortgage of land, with some independent means of assuring himself that he is obtaining good title and not a law suit (Bentsi-Enchill, 1964).

3.1 Critical constraints within Ghana's land tenure and land administration system

The land tenure systems and land administration in Ghana have a number of constraints that greatly undermine tenure security for all sectors. These constraints are captured in the 1999 National Land Policy as general indiscipline in the land market that is characterized by land encroachments, multiple land sales, use of unapproved development schemes, haphazard development, indeterminate boundaries of customary-owned land, a lack of reliable maps and plans, and compulsory acquisition by government of large tracts of land that have not been used and for which compensation has not been paid. The constraints include a weak land administration system and conflicting land uses, for example, the activities of mining companies that leave large tracts of land denuded as compared with farming, which is the mainstay of the rural economy, and numerous land

Insecurity of tenure occurs in both rural and urban areas under both statutory and customary land tenure systems. Within the customary land tenure system major sources of insecurity of tenure are the changing institutions and rules in customary land tenure that are primarily driven by demographic factors, rapid urbanization, and the commoditization and commercialization of land.

disputes.¹⁹ As of July 2004, there were about 66,000 land disputes before the courts, crowding out other cases (LAP, 2004). The net effect of these constraints is a distorted and dysfunctional land market that is not investor or development-oriented, and which cannot guarantee security of tenure. This results in high transaction costs and a high incidence of poverty.

Insecurity of tenure occurs in both rural and urban areas under both statutory and customary land tenure systems. Within the customary land tenure system major sources of insecurity of tenure are the changing institutions and rules in customary land tenure that are primarily driven by demographic factors, rapid urbanization, and the commoditization and commercialization of land.²⁰ Under the statutory system, insecurity of tenure arises out of the particular way and manner in which the state acquired private properties.²¹ In addition, the public

¹⁹ For details, see the National Land Policy (1999).

²⁰ As land values rise, custodians of land – either the chief, the head of clan/family and their respective elders – mostly assume the position of landowners and sell off lands for housing and other developments, regardless of the views of those they hold the land in trust for (community or family members as the case may be) or who are actually farming this land.

²¹ The Government of Ghana has, over the years, applied its powers of eminent domain through compulsory acquisition of land. In many cases the purpose of the acquisition is not clearly spelt out in the executive instrument by which the acquisition is made. Governments have re-zoned lands compulsorily acquired for specific public purposes into residential and industrial zones and allocated them for private development, heightening the tension between the state and expropriated owners. In some cases, such uses are completely unrelated to the original purpose and are clearly unjustifiable. The uses of 3,030.64 ha (5.6 per cent) of total lands acquired in Accra have changed from the purpose of acquisition and similar changes have taken place in other regions.

laws and policies that were formulated to protect property rights did not fully take into account the local system. Instead of legally entrenching rights arising out of customary patterns of landholding, many rights have been reconstructed in ways that either resulted in their loss or conflicted with social norms.²²

Land tenure insecurity is assuming wider dimensions in the country, particularly in peri-urban areas where customary rights come under formal or informal conversion. Ghana has experienced rapid and consistent urbanization since the 1960s,²³ which has resulted in the uncontrolled development of peri-urban areas and the development of informal settlements in the cities. The unregulated urban expansion of cities to the peripheries not only results in the loss and degradation of agricultural lands, but also a loss of valuable ecological sites and the degradation and pollution of water bodies etc. The phenomenon further threatens the livelihoods and the land rights of the majority of peri-urban dwellers (who are mostly farmers) since the processes are usually accompanied by the erosion of customary tenure systems.²⁴

3.2 Recent efforts to improve land tenure security

3.2.1 Land Documentation

Tenure insecurity in Ghana, particularly within the customary land sector, is largely due to the lack of written documentation and the absence of uniform units of measurement for land transactions (Sarpong, 1999). Studies suggest that less than 10 per cent of Ghana's land is registered. Of this, about 8 per cent is state land, including the Volta Dam. To ensure a

measure of security, deed registration²⁵ was initially introduced and is still practiced in most parts of the country. The deed registration was not satisfactory due to several factors such as lack of accurate maps to identify land parcels and some deficiencies in the enabling law. To resolve this and improve security of tenure, land title registration was introduced in 1986. This registration has two fold purposes: first to give certainty and facilitate proof of title; second, to render dealings in land safe, simple and cheap and to prevent fraud against purchasers and mortgagees.²⁶

The land title registration system currently operates in the Greater Accra region (comprising 22 registration districts) and Kumasi (only one registration district); the deed registration system operates in all parts of the country. The procedure for land titling is set out in Figure 2 below:

The title registration scheme is also severely handicapped by a number of design and implementation defects. Its implementation has been fraught with many fundamental problems that have limited its impact and created significant problems for the land market in Ghana. For instance:

- The exercise was fashioned and implemented using individual title certificates. This is not necessarily the best method for land registration in a predominantly illiterate population that is governed largely by customary land law (Kasanga, 2002). Considering the nature of the customary landholding patterns, the registration exercise should have started at the level of the allodial landholdings, and then moved down to the community/village and individual levels. This approach would have helped to identify the real landholders.

22 See Wily and Hammond (2001).

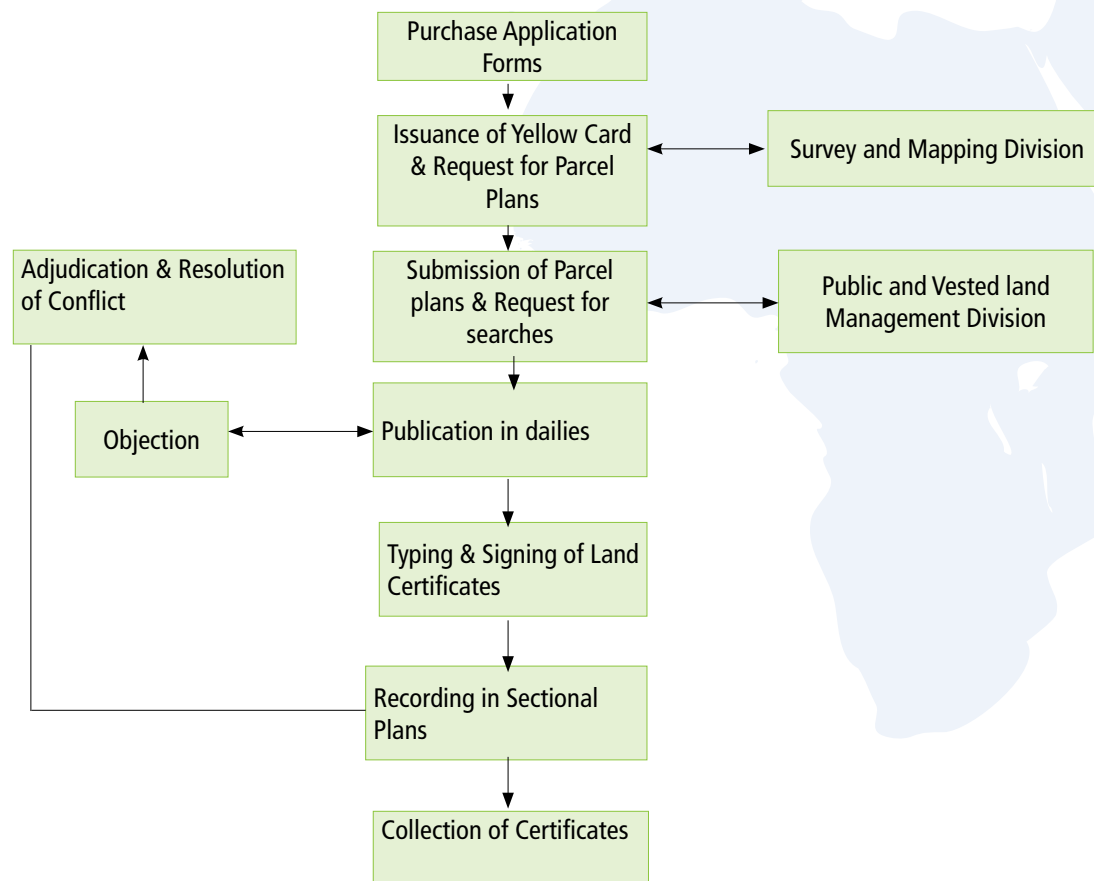
23 The population living in urban areas rose from 23 per cent in 1960 to 32 per cent in 1984 and 44 per cent in 2000.

24 Studies have shown that the high rate of conversion of agricultural lands into urban lands has rendered some farmer completely landless or they have had their land sizes reduced considerably. The chronic tenure insecurity in peri-urban areas is accelerated by influential people - the rich - in authority etc. who are able to buy these land, either for personal use (residential or commercial agriculture) or for speculation purposes (Larbi, 1995).

25 Under the Registration Ordinance of 1883, Land Registry Ordinance of 1895 and Land Registry Act 1962, ACT 122.

26 The Law provided for accurate parcel or cadastral maps which would reduce fraud, multiple registrations and reduce litigation. It also provided for publication and adjudication of conflicts. Title certificates issued was indefeasible and can only be cancelled by a court of law.

Figure 2: Process of land title registration in Ghana



Source: Sittie 2006 (modified)

- The registration exercise was implemented in a vacuum. Private and customary land transactions had previously been governed by the deeds registry system which was widely accepted, so the Deeds Registry should have formed the nucleus of the new Compulsory Land Title Registry.

Land title registration is currently carried out in a sporadic manner making it difficult to get a complete record of parcels within a declared registration district.

3.2.2 National Land Policy

As mentioned before, until 1999 there was no comprehensive land policy to provide overall direction for effective and efficient management of land in Ghana. The whole process of land management and land administration had therefore been on an *ad hoc* basis. The policy basically provides the framework and direction for dealing with the issues of land ownership,

security of tenure, land use and development, and environmental conservation on a sustained basis. These will be supported by appropriate institutional structures.

3.2.3 The Land Administration Reform Programme and its impact

In order to implement the broad objectives of the National Land Policy, the Land Administration Programme was conceived. It is a long-term vision for the country and it seeks to enhance economic and social growth by improving security of land tenure, tenure, simplifying the process for accessing land, and fostering prudent land management by establishing an efficient system of land administration. With it, both state and customary land allocation is based on clear, coherent and consistent policies and laws supported by appropriate institutional structures. It is to be implemented in five-year phases that will be implemented over 15 to 25 years (LAP 2003).

The first phase of the Programme, the Land Administration Project (LAP-1), ended in 2010. Its main objective was [...] to undertake land policy and institutional reforms and key land administration pilots for laying the foundation for a sustainable decentralized land administration system that is fair, efficient, cost effective and ensures land tenure security.” LAP-1 had four components:

- Harmonizing land policy and the regulatory framework for sustainable land administration;
- Institutional reform and development;
- Improving land titling, registration, valuation and information systems;
- Project management, monitoring and evaluation (World Bank, 2001; Ministry of Lands and Forestry, 2004).

As a result of the positive impacts, the second phase of the programme, LAP-2, began in August 2011 “to consolidate and strengthen urban and rural land administration and management systems for efficient and transparent land service delivery.” (World Bank, 2011)

3.2.4 Impact of LAP on improving tenure security Legal Reform

A major achievement of LAP is a comprehensive review of the legislative regime for land administration in Ghana. Agreement has been reached to reduce the numerous laws in Ghana to only three laws, namely the Land Act, Land Use Planning Act and the Lands Commission Act. Acting complementarily, these Acts are to provide a comprehensive legal regime for the land sector, and to support decentralized land service delivery to bring about efficiency, cost-effectiveness and enhanced accessibility to land. The framework documents to guide the preparation of the two other Bills have also been completed.

Institutional Reform

As part of institutional reform and development component under LAP-1 that aims to provide a one-

stop-shop (OSS) for land service delivery, a new Lands Commission has been instituted, and is a merger of four of the land sector agencies - Land Valuation Board, Survey Department, Lands Commission Secretariat and Land Title Registry. The “new” Lands Commission is now the constitutional body and the focal agency charged with the management of lands. It has four functional divisions: Survey and Mapping Division; Land Registration Division; Land Valuation Division; and Public and Vested Lands Management Division. The other major land sector agencies, namely the Office of the Administrator of Stool Lands (OASL) and the Town and Country Planning Department (TCPD), could not be merged due to some constitutional limitations; they continue to exist as they are and perform their normal functions, whilst working closely with the Lands Commission.

Strengthening of Customary Land Administration

Under component 2 of the project, support has been given to the Customary Land Administration to enable the system function effectively and efficiently. The support is to lay the foundation for clearer and more cohesive development in the customary land administration sphere and for its further consolidation and evolution in subsequent land administration projects. To lay such a foundation, the project will work directly with customary land authorities to help them improve and develop customary land administration through establishment of customary land secretariats (CLS) in some 30 areas. In others areas, village land committees or similar institutions will be the formal administrative authority under the aegis of the local chief, tindana or family head. In all cases, the aim is to develop institutions and systems that are participatory and accountable to community membership.

Within the first phase of LAP, 37 CLSs were established or strengthened across the country. It is clear that even though LAP embodies an improved approach to customary land administration, there is little intention to devolve the state agencies’ existing controlling mandates to traditional authorities.

Pilot Customary Boundary Demarcation (CBD)

The lack of demarcation of boundaries between customary landowners is a major source of land disputes and insecurity of tenure and there is a need to methodically identify, adjudicate, demarcate and register the boundaries of allodial owners. It is anticipated that the demarcation of boundaries will minimize litigation emanating from indeterminate boundaries, ensure certainty in land ownership, land tenure and land rights, it will facilitate the registration of rights in customary land and subsidiary interests and will promote sustainable land-use practices. At present, the boundary demarcation of 10 customary allodial areas across the country has been completed. However, customary land sizes are usually large and surveying costs are likely to be high.

Ascertainment of Customary Law Project

The Ascertainment of Customary Law Project, a joint research project established by the National House of Chiefs and the Law Reform Commission with support from the Good Governance Programme of the German Development Cooperation (GTZ, now GIZ) has as its purpose, the ascertainment and codification of customary law on land and family law in Ghana. The project appreciates challenges with tenure on customary lands and its concomitant effects. Considering the wide range of variants of local land tenure practices applicable in the various geographical and ethnic communities in Ghana, there is the need to

agree on a uniform terminology with regard to land administration. The meanings of key concepts such as “allodial title”, “usufructuary interest”, “freehold”, among others are to be ascertained and documented as part of the basic terminology applicable in land tenure administration in Ghana. The outcome of the study will be fed into the establishment of Customary Land Secretariats under the Land Administration Project. The first phase of the project, which was piloted in twenty-two (22) traditional areas – two from each of the ten (10) administrative regions of Ghana- has successfully ended.

Establishment and Automation of Land Courts

Statistically, land cases account for more than 80 per cent of all new cases filed in court each year and for about 50 per cent of all new civil cases filed (Judicial Service, 2010). Traditionally, land cases were filed in the ordinary High Courts alongside other civil cases. Even though land cases crowded out other cases, their sheer numbers have resulted in backlogs. According to figures available at the beginning of the project, there were an estimated 35,000 land cases in the courts (PAD, 2003).

In support of the National Land Policy agenda, the Judicial Service with the support of the LAP has established a specialized, fully automated Land Court in Accra to deal exclusively with land-related cases. The court began operating in the 2009 legal year²⁷ and

Table 1: Number of deeds registered from 2005-2009

Disaggregation	2005	2006	2007	2008	2009	TOTAL
Male	199	3,006	2,444	4,377	4,657	14,683
Female	78	1,104	930	1,641	1,683	5,436
Institution	13	568	398	640	631	2,250
Joint	30	390	349	668	911	2,348
Total	320	5,068	4,121	7,326	7,882	24,717

Source –LAP M&E Annual Report, 2009

²⁷ Legal year is October 2008 - June 2009.

figures available show that 3,684, approximately 52 per cent, of the backlog has been cleared (M&E Annual Report, 2009).

Impact of LAP on Land Registration in Ghana

Until the project came into effect, only two land registries were in operation for registration under the deeds system; these were in Accra and Kumasi and applicants had to travel from all parts of the country to these two centres for registration. Under the LAP, eight new registries have been established; these are at Koforidua, Tamale, Sunyani, Sekondi, Ho, Wa, Cape Coast and Bolgatanga. Thus, there is now a land registry in each of the ten regions of the country.

The result has been a drastic reduction in the turn-around time²⁸ for the registration of deeds from the baseline (2003) of 36 months to the current 2.5 months. In addition, the number of deeds registered by women has increased from 288 in 2003 to over 1,500 in 2009 (M&E Annual Report, 2009). Table 1 shows details of number of deeds registered from 2005 to 2009.

As a further step to deepen the decentralization and efficiency of the land registries, a system is being implemented to provide a very efficient mechanism and methodology for capturing and digitizing manuscripts and documents in the Land Registry. This change from paper format to electronic format is, among other things, to preserve the valuable land records and to make access to them easy.

Approximately 30,000 titles have been registered within the registration districts after 25 years of land title registration and there are about 75,000 applications currently awaiting registration in Greater Accra alone (LAP M&E Annual Report 2009, Hatch Report, 2003). LAP is piloting systematic land titling procedures in

selected urban areas in Accra and Kumasi. It is envisaged that the systematic boundary survey and titling will result in better tenure security, because all neighbours in a block are expected to participate in boundary determination at the same time. An estimated 8,000 land parcels will be registered under these pilots.

Other interventions

With regard to foreign direct investment in land, the 1992 Constitution limits the type and the duration of interest that a foreigner can hold in land but there are no clear provisions on this in the national land policy. With the recent wave of large-scale land acquisition by foreign investors, multinational corporations etc. a strong argument was made for policy actions, including a review of the current land policy to deal with the phenomenon.

The Millennium Development Authority (MiDA): A five-year, approximately USD 547 million Millennium Challenge Compact, aims to reduce poverty by raising farmer incomes through private sector-led, agribusiness development. MiDA's Land Facilitation Activity (LFA), under its Agricultural Project, has five components. These are a pilot programme for area-wide registration of rural lands; improvement of the court's ability to process land disputes; facilitation of land transactions through on-demand land services; public education and information dissemination on land rights and laws; and capacity building for land administration agencies. In October 2009, 103 individual rural people received land title certificates in the Awutu-Senya land title registration pilot area. This was the first registration activity of its kind in Ghanaian history; 40 per cent of titles were given to women.

3.3 SWOT analysis

As Kasanga (1988) rightly points out, there is no ideal land tenure system for development purposes. Each system must be judged on its own merits and weaknesses and against the values/goals of the society concerned. He outlines certain goals, though not a

28 This is determined from the date a land document is submitted to the former Lands Commission (Public and Vested Land Management Division) to the date it is registered at the Land Registry. It depends on the type of document or the type of land ownership pertaining in the area.

blueprint, against which land tenure systems may be evaluated in a rural and agrarian economy. These include:

- An equitable distribution of land resources amongst people.
- Landholding should not create a land-less class, marginal farmers, unviable farm units or absentee landlordism.
- Access to land must be guaranteed and rights should be secure for the majority if not all people.
- Poverty, unemployment, under-employment, social, economic and political insecurity for the majority, as against a minority, landholding class should be avoided.
- The interests/rights acquired must be certain and clear to all concerned – eliminating land disputes, litigation, indebtedness and the forceful displacement of people.
- Individual and family effort should be recognized and rewarded accordingly, within the limits of other relevant statutory provisions; land-use decisions such as improvement, investments and conservation can be carried out without any hindrance.
- If landlord and tenant arrangements are practised, the terms, including duration, rent, taxes and inputs, must be fair to all parties to such transactions. Tenants should not shoulder any more burden than landlords should.
- Land speculation – the buying of land with the aim of selling it again at a higher price – irrespective of what the land will produce, but for what it will sell - should be discouraged
- The free mobility of individuals/families outside their own villages/towns should not be checked by tenure. Such migrants should be able to acquire rights in land in their destination areas.
- The government machinery with regard to land transactions must be clear, understandable to the majority of people, and fair and reasonable in its operation and implementation.
- Tenure should not impede other aspects of development, such as the exploitation and

In Ghana a lack of transparency and accountability in the management of customary lands is evident in the disposal of land and distribution of benefits

exploration of mining operations, and setting up of industries. However, the benefits from these ventures should not go to a small minority class within or outside the country.

The interests of the neglected, small-scale farmers should be upheld.²⁹

The purpose of a SWOT analysis is to reveal the full picture of land tenure security and to make practical recommendations to improve the land tenure insecurity. Strengths are considered to be the traits and assets internal to current land tenure systems that have ensured land tenure security; weaknesses as the innate deficiencies or shortcomings that have undermined the systems of land tenure from ensuring security of tenure for all sections of the population, but especially for women and the poor. Opportunities are understood to be the potential external factors or circumstances that could enhance land tenure security. Threats are those potential external factors or circumstances that can deter efforts to improve tenure security.

3.4 Outlook on land tenure security

In Ghana a lack of transparency and accountability in the management of customary lands is evident in the disposal of land and distribution of benefits. The challenges confronting Ghana's land tenure and administration system have made land tenure insecurity endemic in the country. This has serious implications for the sustainable development of the country because of the agrarian nature of the economy. The impacts of insecure access to land have been particularly

²⁹ See Kasanga Kasim (1988).

Figure 4: SWOT Analysis of Ghana's Land Tenure System

Strengths	Weaknesses
<ul style="list-style-type: none"> Promising conditions exist for more inclusive and effective tenure management to be developed Customary land tenure systems and management mechanisms remain strong, dynamic and evolutionary, having existed alongside the statutory system with a considerable level of sanity Advantageously, clear socio-institutional constructs of community exist in Ghana upon which local tenure development may draw and evolve. In the process, "customary" tenure will have the opportunity to modernize into more fair and democratic modes The socially embedded nature of customary land tenure "ideally" ensures access to land for all sections of the society, particularly in rural areas There are enough land related professionals with qualifications to provide services necessary for security of tenure The chieftaincy institution provides a potential avenue for developing and operationalizing Alternative Dispute Resolution in settling land disputes There is a great deal of political will to ensure security of tenure. Successive governments with different political orientations have over the years shown keen interest in land administration reform Statutory tenure is gender neutral. 	<ul style="list-style-type: none"> Although the current legal regime and institutional arrangements appear to have been improved, there are still problems with staffing, lack of support services, low morale and pervasive corruption in the land sector agencies Inadequate consultation coordination, cooperation among land sector agencies Indeterminate boundaries of stool/skin lands - resulting directly from the lack of reliable maps/plans, and the use of unapproved, old or inaccurate maps leading to land conflicts and litigation between stools/skins and other land-owning groups. Poor record keeping, which also sometimes results in multiple allocations of land Weakening and the breakdown of the trusteeship ethos of the traditional land institution resulting in some traditional leaders declaring themselves owners of communal lands rather than being custodians. The end product is landlessness, homelessness and general insecurity for women and men alike, particularly in peri-urban neighbourhoods. Lack of transparency and accountability in the management of customary lands, either as it concerns the disposal of land or in the distribution of benefits Corruption in the public and sector agencies Abuse of power of eminent domain by the state. This has served as an avenue for encroachment and conflict between the state and the general public Inadequate documentation on transactions on land throughout the country. This has aided the indiscipline in the land market, particularly multiple sale of lands, and thus undermines the ability to access credit from financial institutions Unclear and diverse nature of customary land laws Gender disparity in land relationships under the customary land tenure system Non-participatory approach to land management under the customary land tenure system Varied tenure arrangements in different parts of the country. Weak legislative framework
Opportunities	Threats
<ul style="list-style-type: none"> A successful completion of LAP (discussed in detail above) greatly increase the chances of improving Ghana's land tenure system and ensure land tenure security. The Land Tenure Facilitation Activity of Millennium Development Authority (MiDA) if completed will improve tenure security for existing land users and will facilitate access to land for commercial farming. Ascertainment of Customary Laws Project (ACLP): Even though customary law is an important area of law in Ghana, what constitutes customary law in a particular community is not always clear. Most laws are still unwritten and make their enforcement very difficult. The project is aimed at the ascertainment and codification of the customary law rules and practices on land and family in the country. 	<ul style="list-style-type: none"> Global development of new technology: New technologies such as Land Information System and National Spatial Infrastructure are not yet available for effective and efficient land administration in the country. This can inhibit the efforts to develop a land tenure and management system that fully ensures security of tenure There is also the risk of development partners withdrawing their support for the successful completion of LAP. The ever-increasing commoditization and commercialization of land. This has the potential to encourage land grabbing and speculative land acquisition, which will result in further weakening of the land rights of the poor and other vulnerable groups There is a possibility that traditional institutions will resist the mechanisms that will try to make their roles in the management of customary lands transparent and accountable

Source: Authors, 2010

devastating for vulnerable groups such as women, migrants and landless youth. These groups are often uninformed of their rights or options to acquire land with assured security. They are also not included in mainstream decision-making processes and are denied the benefits of other opportunities available to make critical choices on things that affect their lives. There are grounds for concern that as land becomes scarcer, the poorer and more vulnerable groups will see their claims weakened, leading to their increasing marginalization and impoverishment.

The predominance of patriarchy in law, policy and practice as related to land tenure within customary land sector in Ghana ensures that tenure security is not guaranteed for women. For law and policy to influence gender relations in the tenure realm, there is a need to deconstruct, reconstruct and re-conceptualize customary law's position on the issues of access, control and ownership. The view should be to intervene at points when it would make the most difference for those who are easily marginalized, especially women. State institutions charged with land management are understaffed, lack basic systems and lack transparency and accountability to its wider constituents. They have been ineffective and have tended to exacerbate the problems. Indeed, improving land administration through equity and transparency in land governance needs attention more than ever before.

The following conclusions can be made about Ghana's land tenure security status:

- There is the need for innovative approaches to land tenure security that are simple and less expensive. This should be developed for the documentation of rights, such as use rights and tenancy rights under new customary land management systems (CLSs and land committee). This would further enhance tenure security women and the poor who usually hold such rights.

- It would be useful to develop a wider range of interventions to enhance tenure security. Development of more accessible alternative dispute resolution mechanisms and tackling specific elements of insecurity, such as the rights of wives over productive land within the household and eviction rights, are pre-requisite in this regard.
- A community-based approach, particularly with customary land management, holds the key to ensuring an efficient and effective land tenure system that ensures security of tenure. This is because the majority of the population operates within rural and rural-urban economies and asserts rights to land through the customary system. Urban centres will, however, need a different approach, but whatever the approach; effective participation by citizens is a must.

4. CONCLUSION

In order to ensure that LAP achieves its objectives, including security of tenure, it is very important that the following issues are attended to:

Institutional Reforms

The new Lands Commission established under Act 767 is yet to undergo the transformation required to make it an efficient manager and deliverer of services. There is a need to

- Strengthen the institutional arrangements, in terms of its leadership, its operational management and its supporting communication;
- Provide the most effective delivery structures possible through contracting services, commercialization and public private partnerships (PPP), if appropriate;
- Simplify processes, particularly the documentation on land through new IT-enabled and management systems
- Support all institutions - Lands Commission and its head office and regional structures, the Town and Country Planning Department and the Office of the Administrator of Stool Lands including CLS;

- Prepare five year business and strategies rolling plans.

Legislation

Whilst the preparation of the land and land-use bill is progressing, it is critical that key issues such as gender and eviction rights of informal settlers be identified at an early stage in the process to enable adequate views to be collated and provision made for them in that regard.

Customary Land Administration

There is the need for more elaborate consultations on the shape CLS will or should take. It is therefore essential that the following issues are addressed: (i) the legal status of the CLS; (ii) roles and relationships with the community and other land agencies as well as the district councils; (iii) vision and working framework; (iv) capacity and skill mix; and (v) minimum requirement for setting up of a CLS.

Capacity Building

There is the need for massive capacity building of all categories of staff in modern methods of land management/administration. This is crucial in view of the fact that a computerized Land Information System (LIS) is a necessity for effective land management and administration.

Land Documentation

The land registration system will have to be reviewed with a view to determining the way forward regarding the type of land registration system to implement. This is because Land Title Registration is still very limited in the country. The opinion of this paper's authors is that the current deed registration should be improved by:

- Making sure the registration is done under improved records management, including better administrative arrangement,
- Introducing a parcel-based system of registration,
- Introducing a computerized LIS (to provide quicker access to the important pieces of information),

- Standardizing forms and procedures to expedite the routine processing of documents,
- Introducing more realistic and more flexible standards for surveying and mapping, so that cheaper survey methods become possible,
- Examining title documents,
- Making registration compulsory so that there is complete record of all transactions.

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02

Ethiopia

Uganda

Kenya

Somalia

Tanzania



1. INTRODUCTION TO COUNTRY CONTEXT

Land is a critical resource for the socio-economic and political development of Kenya as spelt out in Kenya's Vision 2030.³⁰ However, tenure insecurity has been a feature of Kenya's history from pre-colonial days. The onset of colonialism however set the stage for a more complex nature of insecurity with the introduction of new forms of tenure over land that were protected by statute law and which, by definition, were superior to and overrode pre-existing tenure types. These insecurities manifested themselves in different ways ranging from contestations on access to and ownership of land to the power to alienate land in specific places (Mbote, 2003) with ethnic, gender and generational flavours. De Soto (2000) observed that uncertainty over land tenure and clouded transaction of land titles inhibit improvements to the quality of human settlements, impedes access to formal credit for land development and hampers efforts at improvement of resource generation from property rates and land taxation. The need for thoughtful and careful stewardship of land, together with the more intensive use and management of its resources, has therefore emerged as a matter of national concern. Secure land rights are now considered to be a basic need whereas land is increasingly seen as an asset.

Over the years, land tenure laws have come under sharp scrutiny in Kenya as questions have been raised about the manner of land acquisition, distribution and use. For the first time, however, the government has embarked on a path that might finally settle the "land question".

The adoption of a Land Policy, the promulgation of a new Constitution and the passing of new land laws³¹ herald a new phase for the country, one that will address important issues such as land administration, access to land, land-use planning, restitution of historical injustices, environmental concerns as well as land allocation and distribution.

This paper discusses the status of land tenure security and is structured into six sections. Part 1 introduces the paper. Part 2 provides general information about Kenya as well as an overview of the country's land tenure systems, focusing on existing tenure systems, property regimes, land rights and land registration. Accounts of how much land has been registered, the estimated number of land titles already registered and the steps followed in registering land are also outlined in this section.

Part 3 is an historical review and outline of the current status of the land tenure system. It traces the tenure systems from the pre-colonial period through the colonial era under the British Government to post-independence Kenya. The resultant land rights, land tenure systems and property regimes and regulatory frameworks are outlined in this section. Part 4 looks at the factors that contribute to tenure insecurity. Part 5 identifies innovative practices geared towards improving tenure security and features a SWOT analysis of the existing tenure system. Part 6 presents a conclusion.

Kenya became a British Protectorate in 1895 and a colony in 1920. It gained its political independence in 1963 and became a republic in 1964 with Jomo Kenyatta as the country's first president. Parliament is elected directly every five years. In 2008, Kenyan political leaders formed a coalition government to heal political differences that emanated from the disputed 2007 general elections. The Constitution of the Grand Coalition Government saw the creation of the posts

³⁰ Kenya's Vision 2030 is the country's development blueprint covering the period 2008 to 2030. It aims to transform Kenya into a newly industrializing "middle-income country providing a high quality life to all its citizens by the year 2030". The vision is based on three "pillars": the economic, the social and the political. The adoption of the vision by Kenya comes after the successful implementation of the Economic Recovery Strategy for Wealth and Employment Creation, which has seen the country's economy back on the path to rapid growth since 2002, when Gross Domestic Product grew from a low of 0.6 per cent and rising gradually to 6.1 per cent in 2006.

³¹ National Land Commission Act, The Land Registration Act and The Land Act.



Insecure tenure affects livelihoods of slum dwellers in Kenya ©UN-Habitat/Noor Khamis

of prime minister and two deputy prime ministers. In August 2010, Kenya promulgated a new Constitution which is set to change land issues and will help to resolve many land-related problems. It is important to note that land grievances were at the root of the post-election violence that followed the elections in 2007, when thousands of people were driven off lands that local communities believe had been given to them illegally in past decades.

2. HISTORY AND GOVERNMENT

2.1 Population

According to the 2009 Census, Kenya's population at that time was 38.6 million, with a growth rate of 3 per cent per annum (Republic of Kenya, 2010). That figure is expected to rise to 65 million by 2050 (Sessional Paper No. 3 of 2009). The population is relatively young with 60 per cent below the age of 18 and 32.3 per cent of Kenyans living in urban areas.

2.2 Land use

Kenya has a total area of 582,646 km² comprised of 97.8 per cent land and 2.2 per cent water. Forests, woodlands, national parks and national reserves account for about 10 per cent of the land area and the country also has Africa's second highest mountain, Mount Kenya, at 5,199 meters above sea level. Between 20 per cent and 30 per cent of the land area is medium to high potential agricultural land, while the rest of the country is arid and semi-arid (Ministry of Lands, 2007). Approximately 70 per cent of the land area³² is under a customary tenure system, 20 per cent of the land is estimated to be private land and 10 per cent is classified as government land (Njuguna & Baya, 2001). The main economic activities in the high and medium potential areas are intensive agriculture and livestock husbandry while in the low potential areas, pastoralism, ranching, wildlife-based systems and dry-land farming are the main activities. In urban areas, land use is determined by various zoning laws, which classify the areas as commercial, residential, industrial, and recreational or for public use.

32 Mostly in the arid and semi-arid parts of the country

Figure 1: Structure of the Ministry of Lands



Source: Authors

2.3 Economy ³³

Kenya's economy is market-based with a few state-owned enterprises and it maintains a liberalized external trade system. In 2011, the economy grew at 4.1 per cent, largely because of expansions in tourism, telecommunications, transport, construction and a recovery in the agriculture sector. The World Bank predicted growth of 4.3 per cent in 2012 and potential growth of 5 per cent in 2013. The major risk to the economy in 2013 is from the weather. Poor rains would not only disrupt output in the important agriculture sector but would also keep inflation high and the currency weak; these would have a negative impact on non-agricultural sectors of the economy. Also, uncertainty over the 2013 elections is likely to have a negative effect on growth prospects.

Kenya's service sector, which contributes about 63 per cent of Gross Domestic Product (GDP), is dominated by tourism. The country is rich in natural resources that attract tourists; Kenya's wildlife and game reserves are home to all the "big five".³⁴ The annual wildebeest migration to and from the Mara to the Serengeti in northern Tanzania is the largest migration of mammals in the world (Republic of Kenya, 2004), and lakes Nakuru, Baringo and Bogoria host huge flocks of flamingos that attract thousands of visitors. The tourism sector has shown steady growth in most years since independence and by the late 1980s had become the country's principal source of foreign exchange.

³³ Kenya is generally perceived to be the Eastern and Central Africa's hub for financial, communication and transport services. Its manufacturing output is concentrated in consumer goods such as processed foods, beverages, textiles, leather products, pharmaceuticals, furniture and car parts.

³⁴ Lion, leopard, elephant, rhino and buffalo.

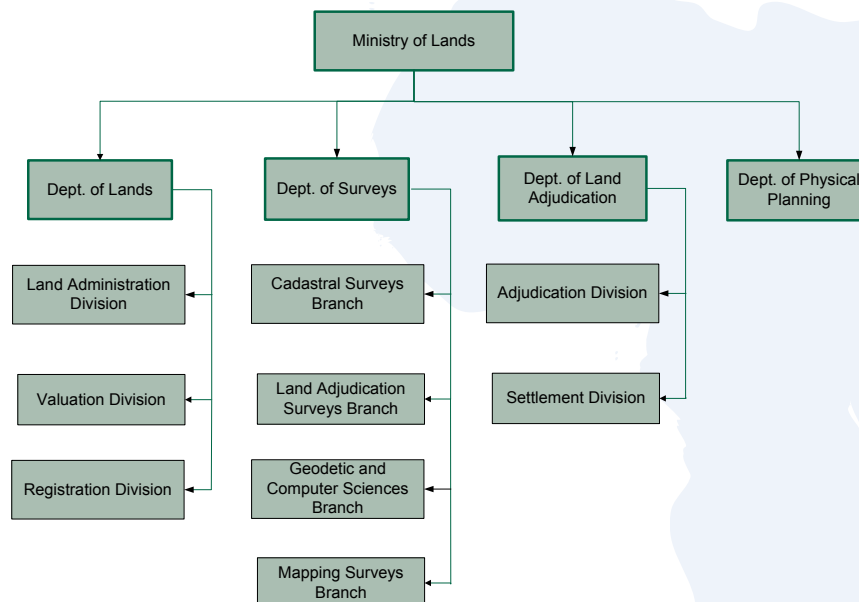
The land problem in Kenya was aggravated by the onset of colonialism where the objective was to entrench a dominant white settler economy while subjugating the African economy and social structures through administrative and legal mechanisms.

Agriculture is the second largest contributor to Kenya's GDP. The most important cash crops are tea, horticultural produce, and coffee; horticultural produce and tea are the main growth sectors and the two most valuable of all of Kenya's exports. The production of major food staples such as maize is subject to sharp weather fluctuations, and production downturns periodically necessitate food aid. Tea, coffee, sisal, pyrethrum, corn and wheat are grown in the fertile highlands, one of the most successful agricultural production regions in Africa. Livestock predominates in the semi-arid savannah to the north and east. Coconuts, pineapples, cashew nuts, cotton, sugarcane, sisal and corn are grown in the lower-lying areas. The economies of nearly all Kenyan communities remain largely dependent on land (Sessional Paper No.3 of 2009).

2.4 The Land Problem in Kenya

The land question in Kenya has manifested itself in many ways including fragmentation of land holdings, breakdown in land administration, disparities in land ownership and poverty. This has resulted in environmental, social, economic and political problems, including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and

Figure 1: Structure of the Ministry of Lands



Source: Authors

abandonment of agricultural land, tenure insecurity and conflict (Sessional Paper No.3 of 2009).

The land problem in Kenya was aggravated by the onset of colonialism where the objective was to entrench a dominant white settler economy while subjugating the African economy and social structures through administrative and legal mechanisms.

According to the National Land Policy, several developments in the country brought the land question into sharp focus:

- Rapid population growth in the small farm sector, the systematic breakdown in land administration and land delivery procedures, and inadequate participation by communities in the governance and management of land and natural resources;
- Rapid urbanization, general disregard for land-use planning regulations, and multiple laws related to land;
- Gross disparities in land ownership, gender and trans-generational discrimination in succession, transfer of land and the exclusion of women in decision-making processes;

- Lack of capacity to gain access to clearly defined, enforceable and transferable property rights, general deterioration in land productivity in the large farm sector; and
- Inadequate environmental management and conflicts over land and land-based resources.

These developments have had major impacts and have led to low productivity and poverty.³⁵ Impacts include:

- Severe land pressure and fragmentation of land holdings into sub-economic units;
- Deterioration in land quality due to poor land use practices;
- Unproductive and speculative land hoarding;
- Under-use and abandonment of agricultural land;
- Severe tenure insecurity due to overlapping rights;
- Disinheritance of women and vulnerable members of society, and biased decisions by district tribunals, committees and boards;
- Landlessness and squatter phenomenon;
- Uncontrolled development, urban squalor and environmental pollution;

³⁵ Refer to Sessional Paper No. 3 on Land Policy.

LAND TENURE SECURITY IN KENYA

Authors: Agatha Wanyonyi, Eric Nyadimo and Judy Kariuki Wambui

Table 1: Process of Land Registration

Function Description	
Function	Create Parcels
Actors	Commissioner of Lands, Director of Surveys, Director of Physical Planning, Licensed Surveyor, Chief (Principal) Land Registrar, ³⁹ land owners, Land Adjudication Committees, Land Adjudication Officer, Director of Land Adjudication, District Land Registrars, Minister of Lands

First Scenario: New Grant (Government land to private holdings through leasehold)

- The Director of Surveys prepares a general base-map showing government land in a defined region;
- The Director of Physical Planning uses base-map to prepare Physical Development Plans⁴⁰ (PDP);
- The Commissioner of Lands uses the PDP to identify suitable land that can be alienated. The Commissioner of Lands then identifies prospective land owners;
- Licensed Surveyor uses PDP as a basis for the Title Surveys and sets out the parcels and lodges the survey with the Director of Surveys for authentication;
- Director of Survey checks and authenticates survey and requests Licensed Surveyor to prepare an amended Registry Index Maps⁴¹ (RIM) or Deed Plans⁴² (DP);
- Director of Survey signs and seals amended RIM or Deed Plans and forwards the same to the Chief (Principal) Land Registrar for registration;
- Chief (Principal) Land Registrar effects registration and issuance of titles.

Second Scenario: Land Adjudication (Customary Land to private holdings through freehold)

- Land owners identify boundaries;
- Demarcation of identified boundaries by demarcation officers using enlarged photographs or by ground methods or both;
- Ascertainment of rights and interests in land through Land Adjudication Committees, including arbitration;
- Director of Surveys prepares RIM showing land parcels and approximate areas;
- Objections to the Adjudication Register are heard by the Land Adjudication Officer (LAO)
- Appeal cases are determined by Minister of Lands after which the Director of Land Adjudication signs the certificate of finality;
- Chief Land Registrar effects registration and issues title deeds.

Source: Nyadimo, 2006

- Destruction of forests, catchment areas and areas of unique biodiversity;

Desertification in the arid and semi-arid lands; and

Growth of extra-legal land administration processes.

The proper management of land is crucial for economic growth, poverty reduction and environmental protection and this has been clearly recognized by various government initiatives including the National Poverty Eradication Plan (1999-2015) and the subsequent Economic Recovery Strategy for Wealth and Employment Creation Programme 2003-2007 (GoK, 2003) and now Vision 2030. Secure land rights are critical to increasing productive investments in urban and rural Kenya, and to encouraging the sound and sustainable

management of land and natural resources. This would enable people, especially the poor, to contribute and benefit from economic growth and transformation.

2.5 Land Administration

At the political level, the Ministry of Lands is responsible for land administration through its departments of Survey, Lands, Physical Planning, Land Adjudication, and Settlement. The various departments in the ministry depend on each other for information to administer land on a day to day basis.

2.6 Registration of Land ³⁶

In Kenya, both the deed and titles are used to formally confer rights of ownership to land and these documents are a guarantee of secure tenure. However, other documents offer some form of tenure security, including Temporary Occupation Licenses issued by the Ministry of Lands, permits issued by the local authorities and share certificates for cooperative tenure. Steps involved in registering land in Kenya differ for freehold tenure and leasehold tenure. The steps leading to registration of freehold tenure are: adjudication, demarcation, surveying and recording as shown below.

For leasehold, the process includes: preparation and approval of Part Development Plans (PDP), surveying, balloting, allocation, acceptance of offer, and preparation of the lease document which is executed by the Commissioner of Land and the Land Registrar as well as passing other offices for auditing purposes. Table 1 provides a description of the process and the actors that are involved.

Though no reliable figures are currently available, the number of properties under the fixed boundaries system is estimated to be over 300,000³⁷ (Mwenda, 2009) while the total number of titles deeds issued since 1903 is estimated to be 4.6 million (East African Standard, 30 December, 2012).

2.7 Land Surveying, Adjudication and Settlement

Surveying of land for the provision of title has taken place in Kenya since the founding of Survey of Kenya in 1903 (Ministry of Lands, 2008; Njuki, 2001) and the Director of Surveys has played a pivotal role in quality assurance of these surveys. Fixed boundary surveys have existed since the beginning of the last century but it was not until the 1950s that the concept of general

boundary surveys was introduced to Kenya. Fixed boundary surveys³⁸ are found mainly in areas that were occupied by European settlers and urban areas, which are also areas with high land values

The Ministry of Lands (2008) indicated that coverage of general boundary surveys as a result of conversion from customary tenure was approximately 11 million hectares (comprised of 1.5 million parcels and 338 group ranches). Conversion from a fixed boundary system to a general boundary system is taking place in settlement schemes and on farms owned by companies, cooperatives and self-help groups. The 325 settlement schemes⁴³ are on 960,000 hectares of land while land-buying organizations are estimated to have bought around 2.2 million hectares (Njuki, 2001). It is estimated that about 14 million hectares⁴⁴ of land is under the general boundaries survey system. By the end of 2011, 1,934 adjudication sections⁴⁵ on 8.55 million hectares of land (2.03 million land parcels) were surveyed. The government re-settled 268,505 families in 459

38 Under the fixed boundary system, land parcel boundaries are defined by imaginary lines running between mathematically defined boundary marks.

39 The term Chief Land Registrar is employed under the RLA whereas the term Principal Land Registrar is employed under RTA, but the terms refer to the same office.

40 Physical Development Plan (PDP) refers to a physical land-use plan prepared for all land within the jurisdiction of a city, municipal, town or urban council and which sets planning standards in terms of land parcel sizes, density of use and accessibility requirements.

41 Registry Index Map (RIM) is a map showing land parcels in a given section and is used to support registration.

42 A deed plan is a map showing an individual land parcel, duly sealed and signed by the Director of Surveys, to support registration.

43 Settlement schemes have been an integral part of Kenya's land tenure system. At independence, one of the main preoccupations of the Government was to settle the citizens who had been displaced from their lands through discriminatory colonial policies of land alienation giving rise to the settlement schemes. Towards this end an agreement was reached between the Kenyan and British Governments whereby the latter agreed to finance through loans and grants the purchase of land to settle the landless people. Additional financing was received from the World Bank and other agencies.

44 About 24 per cent of the total land area of Kenya, a figure slightly higher than the estimate of about 20 per cent given by Syagga (2006).

45 An adjudication section refers to the area demarcated by an Adjudication Officer over which a land adjudication process will be carried out.

36 Land registration is the process of official recording of rights in land through deed or titles on properties.

37 The estimate is based on the figure of 250,000 properties given in Nyadimo (1990).

settlement schemes and 2,700 cooperative farms, while 2.2 million hectares of land were subdivided.

2.8 Physical planning

Physical planning information is handled by the Department of Physical Planning. The department deals with preparation of Physical Development Plans (PDPs) for urban and rural development. It works closely with the Department of Lands and other central and local authorities in the preparation of PDPs to:

- Provide proper physical development of the land;
- Provide the necessary infrastructure;
- Secure suitable sites for commercial, industrial, residential and recreational areas for the reconstruction or re-planning of the whole or part of a town;
- Control the order, nature and direction of development by making suitable provision for the use of land and buildings.

PDPs include a survey of the area in which the plan is to be effected and descriptions of how the land will be used.

3. INTRODUCTION TO PROPERTY REGIMES⁴⁶ IN KENYA

While the concept of land as property is deeply entrenched in the Kenyan society, the use and enjoyment of land by its owners is profoundly modified by the demands of society. The interaction of private rights and social responsibilities becomes complex with increasing demand for space. Deininger (2003) and the Food and Agriculture Organization (2002) identify four similar property rights related to different land types: open access, communal property, private and state or public properties.

⁴⁶ Property regimes are systems comprising of a bundle of property rights that are held by different groups.

“I conceive that land belongs to a vast majority of whom many are dead, a few are living and countless host are still unborn”

With open access,⁴⁷ property rights are not assigned at all. In this case there is no defined group of owners hence the benefits are available to everyone and no duties or obligations can be enforced. With common property, there is an aggregate body that has ownership and rights to exclude non-members. Individual members have both rights and duties with respect to the use and maintenance of the property. With private property, individuals have rights of ownership, tempered with responsibilities and restrictions, usually placed by the state or other third parties. With state property, public agencies set rules for access and use of the property and individuals have to respect these rules.

Property classifications in Kenya are: private property, where rights are held by an individual or a corporation; **state property** where rights are held by the government or council; and **common property** where rights are held communally by members. An **open access system** with unrestricted access to land and other resources only existed in the pre-colonial period when the population was small and land was abundant (Okoth-Ogendo, 1991).

3.1 Historical review and development of land tenure regimes

The Pre-colonial Era

The exact nature of Land Tenure Systems in pre-colonial Kenya is unknown for many reasons. According to Kibwana (1990), deliberate misrepresentation of the tenure system occurred for instance when some Western anthropologists refused to acknowledge the existence of communal land tenure. A critical point is

⁴⁷ This rarely exists nowadays.

that land tenure in Africa was predominantly based on unwritten laws; Kenyatta (1938) points out: “The rules governing land tenure, like many other social customs, were taught to me by my father, who is a land owner.”

Kenya, with its diverse ethnic composition, had many customary tenure systems which varied mainly due to different agricultural practices, climatic conditions and cultural practices (Waiganjo and Ngugi, 2001). While most African customary laws recognised a measure of individual control over the broad interests that were hosted by land, paramount or allodial title was perceived as vested above society and whatever rights any one person had to the land were subordinate to the entire community's rights. The saying by the Ghanaian Chief Nana Ofori “I conceive that land belongs to a vast majority of whom many are dead, a few are living and countless host are still unborn”, succinctly captures the conception of land ownership by a majority of African communities.⁴⁸

Land in the pre-colonial period belonged to a group or family linked by descent or cultural affiliation. It was not owned in the sense that the group enjoyed unlimited rights to exploit and dispose of it at will, but it was held in trust by the living for future generations. Although customary land tenure bestowed equal rights to all members of a given tribe, with membership being the basis of access to land (Yahya, 1998), there was often a bias towards men.

To ensure that the future generations inherited the land, rights were limited to usufruct.⁴⁹ Land administration systems were based on a communal system controlled by tribal chiefs or village elders, and there was no limit to the amount of land one could cultivate as it was available in large quantities. The population was scant then and the communities' needs were simple and concerned mostly with subsistence. The sale and

transfer of land were not carried out from an economic perspective but was considered more as a gift.

Wayumba (2010) notes that with the emergence of European colonial administration in Africa towards the end of the nineteenth century, the traditional administrative systems began to collapse. The authority over land vested in the tribes, clans, and family heads began to wane as the colonial governments asserted themselves through the newly established public administration system. Colonial governments found the traditional land tenure system, with its local variations and fluctuating membership, untenable and consequently it evolved into a Eurocentric land tenure system.

The Colonial Era

The introduction of colonialism halted the spontaneous, evolutionary development of indigenous (customary) land tenure. According to Kibwana (1990: 233), colonization introduced an alien concept of property relations to Kenya in which the state or protectorate as a political entity came to own land and granted only subsidiary rights to land users. This was deemed necessary so as to introduce a tenure system similar to that which existed in Britain and which would motivate Europeans to settle and invest in Kenya.

The process of land tenure transformation therefore began with colonization. This is supported by the somewhat ambiguous proclamation by the British Government in 1897 declaring all “waste and unoccupied land” Crown Land hence vested in the imperial power (Okoth-Ogendo, 1991). The colonial period witnessed the alienation of land and the displacement of the local people from their land-s into what were famously called Native Reserves. Thereafter, Kenya slipped into being a territory of individual private estate owners, the legitimacy of whose titles were derived from the imperial power. The colonial regime set in motion discriminatory policies, which maximised the exploitation of land resources and instituted colonial agriculture (Wanjala, 2002).

48 Attributed to Nan Sir Ofori Atta. N.A. Ollennu, *Principles of Customary Land Law in Ghana*, 4 (Sweet & Maxwell, 1962).

49 The right to enjoy the product of land was conditional on it not causing damage and reducing its future productive capacity.

By 1920, when Kenya was formally declared a colony, all land in the country, irrespective of whether it was occupied or unoccupied was regarded by the British authorities as Crown Land and available for alienation to white settlers to use as private estates. Even when attempts were made in 1922 and later to address the issue of land rights and security for Africans, the device then used - to create "reserves" for each ethnic group - offered no protection. The Maasai tribe, for example, discovered to their detriment that not even land treaties⁵⁰ similar to those concluded elsewhere in central and southern Africa, offered protection (Kameri-Mbote, 2003). Land reserved for Africans was still Crown Land hence and could be alienated at any time (Okoth-Ogendo, 1999). It was only after several inquiries and commissions that a clear separation in colonial law was made, in 1938, between Crown Land to which private titles could be granted, and native lands which were to be held in trust for those in actual occupation.

Post-Independence Period – 1963 to 2010

The constitutional negotiations that preceded independence revolved around the land question and the independence Constitution was a product of a negotiated settlement, which ensured that the interests of the white, land-owning minority were safeguarded (Mbote, 2003 and Wanjala, 2002). The Constitution recognized and protected private property in an elaborate Bill of Rights that obliged the Kenyan Government to pay compensation for settlers' farms in case of seizure (Odinga, 1967:259). This led Okoth-Ogendo (1999) to conclude that in general terms, not much had changed since 1938, even though a great deal of policy development had occurred.

Independence in 1963 did not reverse the effects of colonialism on land tenure. The 1915 Ordinance was merely renamed the Government Land Act Chapter 280 of the Laws of Kenya, while Crown Land became Government Land (Kibe Mungai, 2004). The Indian Transfer of Property Act introduced in 1897 remained in force until 1968 when it was repealed and replaced with the present Land Acquisition Act. The nationalist government sought to appease the institutions that were crucial for the supply of finance capital by not embracing radical redistributive land reforms. According to Odinga (1967: 259), the government not only recognized the sanctity of private property in land, but also legitimized the colonial expropriations. Similarly, Okoth-Ogendo (1999) argued that despite Kenya's long experience with comprehensive land tenure reforms, little effort was made to design innovative land rights systems. Up to 2010, private ownership rights derived from the sovereign (now the president) were still as legitimate as they were in colonial times; "native lands" (renamed as "trustlands") were still held by statutory trustees rather than directly by indigenous occupants, and un-alienated land remained the private property of the government, hence subject to no public trust.

3.2 Land tenure systems in the post-independence period – 1963 to 2010

The systems of land tenure in the post-independence period, i.e. from 1963 to 2010, were largely derived from various policies adopted during the colonial period. The three⁵¹ systems of land tenure were freehold tenure, leasehold tenure and customary tenure. The following rights to land were discernible: right to use land; right to manage land; right to generate an income from the land; right to exclude; right to transfer; and right to compensation. These rights were, however, subject to a number of restrictions. The right to use land was subject to environmental legislation and zoning regulations; the right to manage had special restrictions for foreigners; the right to income restricted some income over generations; the right to exclude others could not limit

⁵⁰ Under these so-called "treaties" of 1904 and 1911, the Maasai "of their own free will" agreed that "their removal to definite and final reserves was for the undoubted good of the Maasai race". In other words, the Maasai supposedly concluded that it was in their own best interest to give up the best-watered and most productive lands and move to lands they knew to be arid, unproductive and unfavourable to their way of life. All told, the British took roughly 60 per cent of the land the Maasai had once used.

⁵¹ See Njenga (1978), Nyadimo (1990), GOK (2002).

pastoralists and indigenous groups' access to the land. On the other hand, the right to transfer restricted to whom the land may be transferred to, while the right to compensation may limited the maximum amount of money paid.

Freehold (absolute) tenure⁵²

Freehold tenure was the highest form of land holding in the country since it created perpetual interests in land that could only be terminated by compulsory acquisition under the provisions of the Land Acquisition Act, 1968 (Cap 295) on payment of fair compensation. Some restrictions on the use of freehold land included provisions in the Planning Act, 1996, The Environmental Management and Coordination Act, 1999, and various building codes and regulations by local government authorities. Freehold land tenure arose in a number of ways:

- i Land granted under the Crown Lands Act, 1902, or the Government Lands Act, 1915, and land converted to freehold in 1961 under the Conversion of Leases Regulations, 1961. Land converted to freehold under these regulations was restricted to agricultural use.
- ii Land arising from issuance of individual title of ownership after adjudication and/or consolidation and subsequent survey of Trust Land⁵³ under the provisions of the Land Adjudication Act, 1968 (Cap 284), the Land Consolidation Act, 1968 (Cap 283) and Land (Group Representatives) Act, 1968 (Cap 287). This also included land granted after adjudication of claims under the provisions of the Land Titles Act, 1908 (Cap 282) (Coastal Areas only).

- iii Any agricultural land alienated by the government after 1961 upon fulfilment of a short development lease granted under the Government Lands Act.

Freehold tenure was the most common type of land tenure and was even found within townships, municipalities and cities, which were mainly leasehold areas. Freehold tenure was issued as 999 year leases to British colonialists with agricultural farms during the colonial period.

Leasehold⁵⁴

In Kenya, leases were granted for 30, 33, 50, 99, 999 and 9,999 years (Wayumba, 2010). The 33 and 99 years leases were granted by the Commissioner of Lands for urban plots. The 30 and 50 year leases were granted by the Local Authorities. The 999 year leases were granted to white settlers in 1915 under the Government Lands Act. The 9,999⁵⁵ years leases were found in parts of the coastal province, the former white highlands and Nairobi (*ibid*).

Leasehold ownership has always been interpreted as having permanency owing to the long period of 99 years. This was put to test, however, in 1999 when most of the leases issued in the 1900s expired. This created a lot of anxiety because the government was not clear about whether the lease agreements would be renewed or not. Most of the leases were renewed, which endorsed leasehold tenure as a secure system of land ownership.

52 The distinction between freehold and absolute proprietorship is vague. Freehold interests were held under either the Land Titles Act or the Government Lands Act while absolute proprietorship was introduced under the Registered Land Act (Cap 300).

53 The term "absolute proprietorship" is used under the Registered Land Act (RLA), the statute used for registration of land converted from Trust Land to private land in the mentioned process. Government of Kenya (2002) says that there is no need for separate classification of what is essentially the same form of tenure as "freehold tenure".

54 With leasehold tenure, the freehold owner, who may be the state or a private entity - relinquishes most of the rights to the land for a set period of time during which the leasehold owner has the use of the land or property but at the end of which the title reverts to the freehold owner (United Nations, 2006). A leasehold interest is usually allocated for a determined period and is subject to direct payment of a land rent, land rates and other conditions and covenants. Terms with respect to government or Trust Land are known as development leases and their terms and conditions differ with the permitted use of the land. Any change in the use of the land requires sanction by the government (Mwenda, 2009).

55 These are special leases that were granted alongside the 999 years leases.

Customary Land Tenure

Customary land tenure exists in areas where individual rights to land have not been ascertained under statutory law. With its ethnic composition, Kenya has multiple customary tenure systems, which vary mainly due to different agricultural practices, climatic conditions and cultural practices. The tenure system is currently governed by the Trust Land Act Cap 288 of 1939 for the former Native Reserves.

At present, land under customary tenure is approximately 70 per cent of the total area of the country and most of these lands are gradually being converted to private tenure through the process of land adjudication.⁵⁶ Customary tenure systems are generally mixed with other tenure systems in the Group Ranches,⁵⁷ the Trust Lands.

Non Formal Tenure Systems ⁵⁸

In Kenya, non-formal tenure is prevalent in urban areas due to population increases and a rise in the demand for land (Wayumba, 2010). Non-formal tenure was a response to the inability of the public allocation systems or commercial markets to provide for the needs of the poor and operate on a socially determined basis. These non-formal tenures have now been recognized under the new Constitution

The continued increase in informal settlements indicates among other things the authorities' failure to enforce planning regulations. In some of the informal settlements the inhabitants now claim ownership to the land. This is typified in Kibera, Nairobi's largest informal settlement, where uncertainty about land ownership

has often led to clashes between the landlords and the tenants who live in the buildings. Matters are further complicated by claims to the land by the Nubian community, who argue that the land in question was allocated to the Nubians of the King's African Rifles and their descendants in 1904, surveyed in 1917, and formally gazetted in 1918 (Ramadhan, 2004).

Status of Land Tenure⁵⁹ Systems in Kenya today – post 2010

In August 2010, Kenya promulgated a new Constitution which aims to address the current problems with land related to allocation, distribution, acquisition and ownership. The section on land sets out broad principles on land matters and establishes an efficient, equitable, institutional and constitutional framework for land ownership, administration and management. The Constitution now classifies land as public, community or private.

The Constitution has taken away the powers of the president to allocate land, which had been blamed for numerous land problems. The power to manage public land will be held by an independent National Land Commission, with the chairperson and members identified through a transparent and competitive selection process and ultimately approved by Parliament. To carry out its functions effectively, the Commission will be required to devolve the administration of land. Consequently the Commission will be required to establish offices and land management boards at the county level.

The enactment of the new Constitution provided for the revision, consolidation and rationalization of land laws has led to the enactment of the Land Act 2012,⁶⁰

56 The programme that was initially designed to take just 10 years from 1954 when it was initiated, has become almost permanent due to the complicated cultures of the local communities, the administrative bureaucracy, and several unresolved land disputes.

57 Group Ranches are as special form of communal tenure established under the Land (Group Representatives) Act of 1968 and were granted to a group with common customary rights over a defined piece of land.

58 Non-formal tenure systems include a wide range of categories with varying degrees of legality or illegality. They include squatting, pavement dwellers, tenants in an unauthorized subdivision, legal owner with unauthorized construction and unofficial rental arrangements.

59 Land tenure comprises the habitual as well as the legal rights individuals or groups have to land and the resulting social relationships between members in society (Wehrmann and Kirk, 2006).

60 An Act of Parliament to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land-based resources, and for connected purposes.

the Land Registration Act 2012,⁶¹ the National Land Commission Act 2012,⁶² and the Environment and Land Court Act 2012⁶³ to replace the various laws that hitherto dealt with the management, administration, registration of land, and to reduce the confusion arising from the numerous land laws in the previous Constitution.

The enactment of the Environment and Land Court Act 2012 will speed up justice on land and environmental matters. To regulate the recognition and protection of matrimonial property and the matrimonial home during and on termination of marriage, the current Constitution provides for the enactment of the Matrimonial Act which will enhance tenure security of property for both spouses.

The Community Land Bill⁶⁴ is being developed and will provide for the allocation, management and administration of community land; establish Community Land Boards, define functions and powers of Community Land Boards; provide for the powers of county governments in relation to unregistered community land; and make provision for incidental matters.

Some of the key changes are summarized as follows:

- Allocation of public land to private persons will now be managed and supervised by the National Land Commission. This will create independence in the allocation process because the executive arm of the

government will no longer control the process. In addition, land available for allocation will now be gazetted and notices published in at least two local daily newspapers prior to the commencement of the allocation process. This will create transparency and encourage public participation in the allocation process;

- The new laws require all land in Kenya, whether private, public or community land, to be registered and so make provision for the registration of community land.⁶⁵
- Under the old land law, title deeds were issued under any one of the following statutes: the Registered Land Act (RLA); the Registration of Titles Act (RTA); the Land Titles Act (LTA); and the Government Lands Act (GLA). There are ⁶⁶ Title Deeds issued under the RLA and RTA that continue to be valid notwithstanding the new laws. In due course, the registrar will issue new title deeds in the newly prescribed form. Title deeds issued under the GLA and LTA on the other hand, will have to be examined and registered afresh under the new laws.⁶⁷
- All land held on leasehold titles will revert to the government on expiry of the term. However, where the immediate past owner of the land is a Kenyan citizen, the Commission is required to grant them the right to re-acquire the land, as long as the land is not required for public purposes.

61 An Act of Parliament to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.

62 An Act of Parliament to make further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission; to give effect to the objects and principles of devolved government in land management and administration, and for connected purposes.

63 An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment, and the use and occupation of, and title to, land, and to make provision for its jurisdiction, functions and powers, and for connected purposes.

64 An Act of Parliament to give effect to Article 63 of the Constitution.

65 Substantive provisions on the administration and management of community land will be enacted by 2015 as required by the Constitution.

66 Some of the main characteristics of GLA and LTA title deeds are as follows: GLA title deeds: most were issued prior to independence. They contain the words "Indenture", "Conveyance" or "Indenture of Conveyance" as part of their heading. They were issued mostly for land that was designated as "farm land" prior to independence and shortly thereafter. Such land includes some parts of Central Province, Kericho and Nairobi, especially Karen. LTA title deeds: these were issued for land at the coast and Lamu Island only.

67 There are no specific timelines prescribed for the examination and fresh registration, only that this has to be done "as soon as conveniently possible", as provided for in the new laws. This does not mean that GLA and LTA title deeds are invalid, but they will only be recognized under the new laws after their examination and fresh registration. The new laws are silent on whether holders of GLA and LTA title deeds will be allowed to transact with their title deeds, pending their examination and fresh registration. This appears not to be permitted and will almost certainly cause delays in ongoing transactions related to land held under such title deeds.

- Following the promulgation of the Constitution, foreigners who held freehold titles or leasehold titles that were for a term exceeding 99 years, had their titles reduced to 99 year leasehold titles. There has been debate on when the 99 year period is deemed to commence; unfortunately, the new laws do not provide clarity on this.
- Where a person is registered as the owner of a long-term lease over apartments, flats, maisonettes, townhouses or offices, the registrar will now be required to issue them with a certificate of lease (title deed). The registrar is required to register such long-term leases where the property is properly geo-referenced and approved by the government's survey department.
- Transfer of portions of land will only be completed upon undertaking a subdivision and a new register being opened for the new subdivisions. This means a new title deed for the subdivision will have to be obtained prior to completing the transfer of a portion of land.
- The process of compulsory acquisition of land is now more transparent and will be managed by the Commission. In addition, the process is more just and fair to the owner of land because the award of compensation (the determination of the amount payable) will be made prior to the government taking possession of the land. The Commission is expected to promulgate rules to regulate the assessment of just compensation.
- A scientific study to determine the economic viability of minimum and maximum land sizes will be commissioned within one year (by 1 May 2013). The findings of the study will be subjected to public comments and thereafter debated and, if deemed fit, adopted by Parliament. Rules prescribing the minimum and maximum acreages, based solely on the report adopted by Parliament, will then be published by the cabinet secretary in charge of matters related to land.

The task of enacting new land laws in Kenya is by not easy, not least because land has always been an

emotive subject, eliciting views from people across the economic spectrum. There is, however, a lack of clarity and depth in the transitional provisions of the new laws. In addition, vacuums have been created by the repeal of most of the previous land laws which are not addressed in the new laws.

4. FACTORS LEADING TO TENURE INSECURITY IN KENYA

4.1 Historical injustices

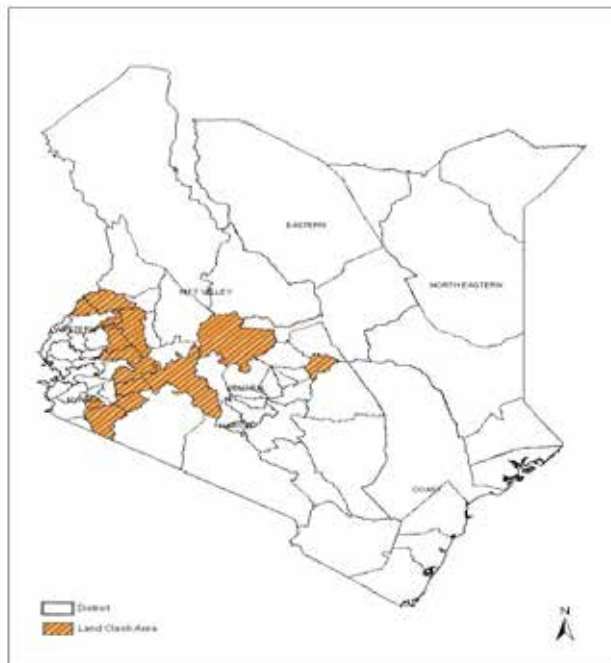
A historical analysis of conflict over resources in Kenya, and the role of the state, suggests that there are continuities, as well as changes, from the colonial period to the present. The colonial period was characterized by the use or threat of violence to acquire land, population displacement and oppressive rule. The concept that land in Kenya was "*terra nullius*", and its citizens "tenants of the Crown", was at the heart of colonial land tenure system (Okoth-Ogendo, 1991). According to the legal argument, Africans did not have legal ownership rights to the land they customarily owned; instead, they had only user rights.

This paradigm of dispossession and disenfranchisement has been fundamental to the history of land tenure in Kenya and these injustices were not addressed at independence. Instead, the new government inherited the existing land tenure systems, which led to dissatisfaction among various communities and land conflicts that created tenure insecurity.

Land settlement

At independence, the issue of the landless "natives" proved to be a thorny one for the new government and it was prompted to appease the vocal Africans still claiming the land taken from them (Mbote, 2003). The new government continued with the land settlement programmes initiated by the colonialists in 1960 with the aim of settling landless families on individual parcels of land to improve their standard of living. To do this,

Map 1: Areas in Kenya prone to land clashes. Source: Authors.



Source: Authors

the government had to buy farms from the settlers on a willing seller basis using funds borrowed from the British Government and the World Bank (Odinga, 1967). The settlement schemes included the one million acre scheme of Haraka, the Shirika Sugar Settlement Scheme, the Ol' Kalou Salient and the Magarini Settlement schemes (Njuki, 2001). Through these land buying schemes, various community members were able to purchase land in regions customarily belonging to other communities and these are now some of the regions that are most affected by land clashes that threaten the land tenure security of the affected. Map 1 shows the areas that are perennially affected by land clashes.

The 10-Mile Strip

The colonial government introduced a system whereby those claiming ownership rights within the 10-Mile Coastal Strip could get titles under the Land Titles Ordinance. The 10-mile strip covers an area of 5,480 km² and is approximately 536 km long, stretching from the mouth of the River Uмба at the Kenya-Tanzania border to Kipini at the mouth of the River Tana (Map 2)

(Wayumba, 2010). This process gave undue advantage to the few who were aware of the ordinance but the majority of local inhabitants at the coast, were ignorant of it and could not lay any claims of ownership as envisaged in the Ordinance. All land inhabited by the indigenous inhabitants was consequently declared Crown Land. Many people of Arabic origin had, by then, acquired titles to vast parcels of land within the Ten-Mile Coastal Strip. There was also a twin problem of absentee landlordism⁶⁸ and landlessness. Many of the people who currently reside within the 10-mile coastal strip are technically squatters on their own land. As evidenced above, land titles were issued to people who were not originally from the coastal area, contrary to the provisions of the Constitution on the privatization of trust land. Such titleholders are viewed as aliens by the indigenous people who have cheated local people out of their land.

Urbanization

The urban population in Kenya increased from 280,000 in 1948 to 9.9 million in 1999 and 12.5 million in 2009 (Republic of Kenya, 2010). In 1969, the two largest cities in Kenya, Nairobi and Mombasa, accounted for 70 per cent of the urban population, but by 1999, the population of the two cities was only 29 per cent of the total urban population. Nairobi, Kenya's capital city, employs 25 per cent of the country's workers and 43 per cent of urban workers. The increasing demands of the growing population has led to the rapid expansion of major urban areas like Nairobi into the peri-urban areas of Kitengela, Ongata Rongai and Kiambu among others. This expansion has been rapid and unplanned and has led to the growth of informal settlements and the development of residential houses that do not have access to essential utilities such as water, sewerage and

⁶⁸ According to Sessional Paper No. 3 of 2009, Absentee Land Owners refers to: (a) entities whose land is under occupation or is used by others, but who themselves are not regularly in residence or have supervision of the land; (b) entities whose conduct amounts to abandonment of the land. In this case, the time period in relation to absence is important in determining abandonment; and (c) owners of land along the coast of Kenya, who seldom use land of which they are the registered owners; such land, where managed at all, being ordinarily under agents who may or may not have been validly appointed by the registered owners.

Map 2: The 10-Mile Coastal Strip



Source: Authors

electricity. In these areas conflicts and competition for land are bound to increase unless a system is put in place to ensure proper management of land.

To redress this, the Kenyan Government has now embarked on an Informal Settlements Improvement Project with the help of development partners to improve living conditions in informal settlements in selected municipalities. This will be achieved by enhancing security of tenure and improving infrastructure based on plans developed in consultation with the community. This project has four components. Component 1 focuses on strengthening institutions and program management by supporting institutional strengthen

and capacity building of the Ministry of Housing, the Ministry of Lands, and the selected municipalities. Component 2 enhances tenure security by supporting systematization and scale-up of settlement planning and tenure security in urban informal settlements. Component 3 will invest in infrastructure and service delivery. Component 4, planning for urban growth, will support planning and options to deliver infrastructure services, land, and housing for future population growth.

Human-Wildlife Conflict

According to Odemba (2004), Kenya adopted an ambitious wildlife management and conservation arrangement by gazettement large tracts of community lands as national parks, game reserves and conservancy sanctuaries. In the process, communities that had until then lived in harmony with wild animals were excluded from such areas, which are now managed as public trust land managed by the Kenya Wildlife Service (KWS). Because most of these lands have eaten into the rangelands of pastoralist communities and the land of agricultural communities, permanent and potential land-related conflicts occur between these communities and the KWS on the one hand, and with wildlife on the other.

The subdivision of group ranches has led to the intensification of human-wildlife conflicts (Wayumba, 2004). One main problem has been the fencing of ranches which has blocked the wildlife migration routes. This has led to wild animals straying into agricultural lands leading to human-wildlife conflict. This conflict has resulted into destruction of crops, killing of wild animals and even killing of human beings and domesticated animals by the wild animals. Owners of such lands therefore feel insecure leading to tenure insecurity.

Individualization of Tenure

Kibwana (1990) has written that upon adjudication of claims under customary law and the consolidation of an individual's separate holdings where necessary, such land was registered in the name of the successful claimant. Kibwana (*ibid*) points out that from a legal perspective it is impossible to translate group rights under customary land tenure to an exact equivalent under individual tenure, and during the conversion process property rights under Customary Land Law will necessarily be extinguished. This violated the indigenous rights of the natives who held land under customary tenure.

Fragmentation of Land Holdings

Land fragmentation that occurs as a result of inheritance is an important tendency in nearly all types of land holdings. Rules of inheritance by all sons in a family and a large family size imply rapid fragmentation. In areas already heavily populated with average land plots of less than 2 hectares, such as Vihiga and Kisii districts in Western Kenya, land fragmentation continues to be well below plot sizes that would have economic value. This fragmentation threatens tenure security and needs to be controlled. The newly adopted Constitution empowers Parliament to prescribe minimum and maximum land holding acreages in respect of private land. It is hoped that such legislation would control fragmentation and ensure efficient use of resources.

5. INNOVATIVE PRACTICES ON IMPROVING LAND TENURE SECURITY

5.1 Trust Land⁶⁹

Trust lands are found in the pastoralist districts of Turkana, Marsabit, Isiolo, Mandera, Garissa, Ijara and parts of Lamu District. Such land is administered under the Trust Land Act Cap 288 and the land is vested in the local authorities within whose area of jurisdiction it is situated. It is held by the county council on behalf of the people who are ordinarily resident there.

Map 3: Trust land areas in Kenya



Source: Authors

69 This refers to the land which was formerly known as the special (native) reserves, temporary special reserves, special leasehold areas and special settlement areas.

Customary land rights are applied within the Trust Lands. According to Doyo (2003), while Trust Land is perhaps the most significant legal compromise related to communal land, it has been ineffective in protecting the rights and interests of the local community. Map 3 shows areas that are predominantly under Trust Land.

5.2 Group Ranches⁷⁰

Communal ownership is common in the arid and semi-arid areas where land has been registered as group ranches. Group ownership is granted to a group of herders who have customary rights over the range or pasture land in question (Mbote, 2003; Doyo, 2003; Wayumba, 2004). This type of land is administered under the Land (Group Representatives Act) Cap 287 of 1968 where a group is defined as a tribe, clan, family or other group of people, whose land under recognized customary law belongs communally to them.

Each group must have a constitution and at a meeting of all the members elect between three and ten people to represent the group. The group gets a certificate of incorporation thus becoming a body corporate. Group representatives have the power to sue and be sued in the corporate's name, acquire, hold, charge and dispose of property of any kind and borrow money. They have ownership of the land in question in perpetuity and can only cease to be a group by a vote of all members.

In the recent past, an increasing population in the areas where group ownership has been applied and agitation by members of the groups have led to the sub-division of the group ranches into individual parcels (Wayumba, 2004). This is especially the case in Narok, Kajiado and Laikipia districts, shown in Map 4. This move to subdivide group ranches portends an economic,

Map 4: Areas under Group Ranches in Kenya



Source: Authors

ecological and a cultural disaster for the communities, especially the Maasai who live in the districts mentioned (Ogolla, Mugabe 1996, Wayumba, 2004), and creates tenure insecurity for the members. Despite the challenges however, group ranches have protected the customary land rights of many communities, especially the pastoralists whose activities need extensive land.

5.3 SWOT analysis of the land tenure systems

5.3.1 Strengths of the current land tenure system in Kenya:

Well-defined tenure systems: The three main land tenure systems are well defined and all the land in Kenya is classified as either private, communal or public tenure.

Individualization of tenure: Kenya is perhaps the best example of an African country that has attempted to establish a European cadastral system for its land registration programmes. This was achieved through a systematic adjudication of existing traditional land

⁷⁰ The Group Ranches concept originated from the East African Royal Commission, which thought that tribal lifestyle of the herding communities, needed to be protected. The Commission felt it would be a mistake to interfere with tribal life everywhere at once and it would be best to begin the matter by a series of experimental ranches. This was an attempt to provide for customary rules within a statutory framework (Wanjala 2000).

rights in the African Reserves,⁷¹ Land Resettlement Programmes and the Land Group Representative Act. Since the government adopted the land adjudication programme ⁷²in 1956, about 60 per cent of the country has been brought under registration (Caukwell, 1977 in Wayumba (2010); Njuki, 2001).

The Registered Land Act of 1963 has been used to achieve individualization of tenure, which was justified in the 1966-70 Development Plan. The plan pointed out that the consolidation of land holdings, as well as individual tenure for farmers, had stimulated increases in efficiency and outputs far out of proportion to the costs of the processes. Larsson (2000) also observed that Kenya's cadastral system had inspired agricultural production in a region where many economies were stagnant. Osterberg (2001) further observed that the early establishment of this cadastral framework and the adoption of an open market economy have propelled Kenya's economic development to a level far beyond countries that have a similar economic status but which lack such a well-established cadastre (Wayumba, 2010).

5.3.2 Weaknesses of the Current Tenure System

- The an over-emphasis of freehold as the most secure mode of land tenure;
- The current land tenure systems may, in some cases, be in conflict with the semi-disintegrated customary tenure systems;
- The bureaucracy of land transactions has slowed down land registration processes;
- The individualization of tenure under the land adjudication programme has taken too long to be completed, hence would-be beneficiaries are still waiting to benefit from individual tenure.

71 The African Reserves (formerly known as Native Reserves) were created by the colonial government in 1918 to control the movement of the indigenous people in Kenya and to provide a ready pool of labour for the newly-acquired European settlements.

72 Land adjudication is the systematic determination of land rights (including ownership) through community participation. Elders in a community identify the land boundaries, which are then demarcated and a preliminary index map is prepared for registration.

5.3.3 Threats

Population growth: High rates of population growth and land fragmentation are a threat to current tenure systems because other, secondary land-rights arrangements are created that are not legal;

Land clashes: Recurrent land conflicts could render tenure systems in affected areas insecure.

5.3.4 Opportunities

Market economy: Kenya has an open market economy hence individual property rights are well documented and respected;

New Constitution: Once the new legislation is finalized, it will ensure that land is held, used and managed in a manner that is equitable and efficient. The numerous land dispute cases will be drastically reduced because the Constitution encourages alternative dispute resolution mechanisms, including recognized community initiatives, an issue that is bound to increase tenure security.

Land Policy: Kenya has developed a Land Policy that will address the critical issues of land administration, access to land, land-use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, the outdated legal framework, institutional framework and information management. It also addresses constitutional issues, such as the eminent domain and police power as well as tenure.

The Land Policy ⁷³ will facilitate the process of land administration, the computerization of land registries,

73 The formulation of the National Land Policy started in February 2004. In April 2007, a Draft National Land Policy was adopted by stakeholders through a National Symposium. The National Land Policy is based on views and expert opinions collected and collated through a structured, all-inclusive and consultative process that brought together stakeholders drawn from the public, private and civil society organizations.

the establishment of national spatial data infrastructure in order to track land use patterns, and the introduction of an enhanced legal framework for faster resolution of land disputes. The land policy also recognizes and protects private land rights and provides for derivative rights from all categories of land rights holding.

Land administration and management problems will be addressed through streamlining and strengthening surveying and mapping systems, adjudication procedures and processes, land registration and allocation systems and land markets. To ensure access to justice in land related matters, land dispute institutions and mechanisms will be streamlined through the establishment of independent, accountable and democratic systems and mechanisms including Alternative Dispute Management regimes.

The institutional framework will be reformed to ensure devolution of power and authority, participation and representation, justice, equity and sustainability. Three institutions will be set up: the National Land Commission, the District Land Boards and Community Land Boards. District Land Tribunals will also be established, as will be a National Land Trust Fund to mobilize finances. The Ministry in charge of Lands will continue performing residual roles including policy formulation and enforcement, resource mobilization, and monitoring and evaluation.

6. CONCLUSION

From the advent of colonialism, Kenya has grappled with the land question as has been discussed in this paper. The post-colonial period was also characterized by many land institutions in an attempt to solve various land management challenges. This created a lot of sensitivity around land issues that led to conflicts ranging from communal to individual conflicts, landlessness and inequity in land distribution, the phenomenon of squatters, etc. The adoption of the new Constitution however heralds new land policies that will have an immense impact on tenure security.

The new land laws are expected to bring about change, consistency and a consolidation of land laws in Kenya. A key and very positive achievement is the enactment of the National Land Commission Act, which provides a framework for the Commission to become operational. This should bring about positive change in land management and administration. However, the new laws were possibly passed in haste in an attempt to meet the deadline set by the Constitution. This is evident in their lack of clarity or substance, which is likely to cause much more than just “teething problems” in the implementation of new land management. Going forward, the issue of land tenure will focus more on the social, economic, political and religious spheres of the society. Efficient land management will be dependent on the political, legal, and administrative capabilities of communities to determine their own future and to protect their natural resources and other economic interests.

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03



Eritrea

Saudi
Arabia

Yemen

Sudan

Djibouti

Somalia

Ethiopia

South
Sudan

1. INTRODUCTION TO COUNTRY CONTEXT

Ethiopia has an area of 1.1 million kms² and a total population of 73,918,505. Of this, 27, 158,471 are Oromo people. In Ethiopia there are more than 80 ethnic groups with diverse cultures, languages, religions and customs. Christianity and Islam are the major religions in the country. Major languages spoken in the country are Afan Oromo, Amharic, Tigrinya, Somali, Guraginya, Sidama, etc. Oromo and Amahar are the major ethnic groups in the country.

Ethiopia has recently shown a fast-growing annual GDP and it is amongst the fastest growing non-oil dependent

the smallholder, cash crop and livestock sector. Principal crops include coffee, pulses, oilseeds, cereals, potatoes, sugarcane and vegetables. Exports are almost entirely agricultural commodities with coffee as the biggest foreign exchange earner. The flower industry is becoming a new source of revenue. Livestock population number is believed to be the largest in Africa and accounts for about 15 per cent of GDP. Live animals, meat, hide and skins are exported.

The major portion of Ethiopia lies in the Horn of Africa, which is the easternmost part of the African landmass. Bordering the country are Sudan to the west, Djibouti to the East, Eritrea to the north, Somalia to the South-east



Rural Ethiopian Farmer © Adugna Mekonnen

African nations. The economy is based on agriculture, which accounts for 46 per cent of GDP, 60 per cent of exports, and 80 per cent of total employment. Many other economic activities depend on agriculture, including marketing, processing and export of agricultural products. Production is overwhelmingly of a subsistence nature and a large part of commodity exports are provided by

and Kenya to the south. Within Ethiopia a vast highland complex of mountains and dissected plateaus is divided by the Great Rift Valley, which runs from southwest to northeast and is surrounded by lowlands, savannah regions or semi-deserts. The diversity of terrain determines wide variations in climate, soils, natural vegetation and settlement patterns. Ethiopia is one of the seven

fundamental and independent centres of origin of the cultivated plants of the world and the origin of many cultivated crops, such as coffee Arabica, which is the backbone of the country's foreign currency earnings.

Deforestation is a major concern for Ethiopia. Studies suggest that the loss of forest contributes to soil erosion, loss of nutrients in the soil, destruction of animal habitats and reduction in biodiversity, which in turn contribute to low productivity of land and food insecurity. These are the results of past authorities' lack of sound land use policies and insecure property rights systems and are problems which have not been adequately addressed by those currently in power either.

Ethiopia has a history of different forms of government, each with different land tenure or property rights. The three most recent government systems were feudalism up to 1974, the "Derg"⁷⁴ regime from 1974 to 1991 and the recent government led by the Ethiopian People's Revolutionary Democratic Front (EPRDF), all of which pursued different land policies. Each government had its own characteristic features on land tenure that have had lingering impacts on resources management as well as the land and labour productivity. Tenure insecurity of the pre-EPRDF regime especially was the cause of resource depletion and food insecurity.

This paper deals with issues related to land tenure security and land administration in Ethiopia. It touches briefly on land tenure systems of the three aforementioned government regimes. It also describes indicators that show the magnitude of tenure security, the capacity of the country to implement a functioning land administration, current project work on land administration, and institutional arrangements based on an assessment of development around regional land bureaus.

The pre-1975 land tenure system in Ethiopia was one of the most complex on the continent. The country's geographical, ethnic and cultural diversity and its historical background were among the factors that produced highly different forms of land use and ownership

2. HISTORICAL BACKGROUND OF LAND TENURE SYSTEMS IN ETHIOPIA

Land tenure comprises the habitual/customary and/or legal rights that individuals or groups have to land and the resulting social relationships between the members of the society (Kuhnen 1982). Land is part of the broad set of natural resources so natural resources systems should be the term of reference. A broad understanding of land tenure is that it must always be considered as resource tenure. Property rights may be described as private, communal or state property rights to the whole landscape or ecosystem.

2.1 Imperial era

The pre-1975 land tenure system in Ethiopia was one of the most complex on the continent. The country's geographical, ethnic and cultural diversity and its historical background were among the factors that produced highly different forms of land use and ownership. The system had a lot of power imbalances between landlords and peasants and its complex nature played a major role in hindering any serious progress towards meaningful reform. Land tenure systems and tenure insecurity was inherited from the land tenure arrangements of the imperial era. One of the important factors that contributed to the military coup (1960), and later the communist revolution which swept away the long-entrenched imperial government, were the problems inherited by the land tenure systems of that period (Birihanu 2002).

⁷⁴ This is the name the Military Junta that deposed the imperial government gave to itself.

The major tenure or property rights systems during the imperial time were communal and free hold or private property. Communal tenure interspersed with other types of tenure were common in the northern part of the country. The major property rights of the time were: *Gult*, *Rist/Kingship*, *Semon* and *Mengist*, being synonymous with government land (in Amharic language).

Gult rights were given to members of the military ruling elite and were passed on by them to local notables as a reward for royal service or as an endowment to religious institutions. A *Rist* right in its most basic sense refers to a person's right to inherit the property rights from his or her parents. It is the oldest and most common usufruct system in the northern part of Ethiopia. The community retains the ultimate reversionary rights over land. Holders of this land could bequeath it, but they could not sell, mortgage or exchange it. The security of individuals was protected through honouring hereditary rights (Ahmed et al. 2002)

Semon land is that owned by the Ethiopian Orthodox Church and is exempted from property tax. This land was given to the church by the Crown for the role it played in conservative rule of the empire. The church was not directly involved in farming and so leased out the land.

Mengist land was owned by the government. These were large areas of state forests, national parks, lowland rangelands and lands owned by nomads (pastoralists). All unoccupied rural land fell under this category. *Mengist* land had different names according to its use: *Gebertel* land was taken over by the government when the owner failed to pay land taxes; later it was leased out or given as a grant. *Palace* land was selected for its fertility to cultivate or for the grazing of royal family animals. *Madeira* was land granted to a government employee in place of a salary or pension. The employee had a right to lease the land; it was exempted from land taxes but could not be transferred by sale, gift or inheritance. The government land tenure systems

covered nearly 47 per cent of all the land of the country and this meant there was unjustifiable control over most of the nation's land by a small elite who derived legitimacy from a self-proclaimed, God-given right. About 12 per cent of agricultural land was held under this title.

A private tenure system, *gebbar*, was recognized as the most dominant system in the last days of the imperial regime. It was largely created by land being granted by the Crown to those members of the army who went from the north and those who were loyal to the regime in conquered areas. Under this system, land was sold and exchanged, but since all the land was originally state property and private holders had no absolute rights, it was different from the Western concept of a freehold system. Land concentration in the hands of the few, exploitive tenancy relations, and tenure insecurity characterized the private tenure system. This was a tenure arrangement whereby people in some parts of the country were dispossessed of their land in a system that was meant to create and maintain patronage in favour of the imperial regime and local elites.

This system was peculiar to the western and southern parts of the country. In those areas agricultural activities were performed by tenants working on small plots of land provided by absentee landlords. The contractual agreement was based either on rents or on sharecropping; the tenants were obliged to pay a certain proportion of their produce to the landlords. Three major types of sharecropping existed: In *siso* (a one-third arrangement), tenants supplied all inputs and paid one third of the produce to the landlord. In *irbo* (one-quarter) tenants supplied all inputs and paid one quarter. In *equl* (equal), landowners supplied part of the inputs and shared the harvest equally with the tenant (Cohen and Weintraub, 1975, cited in Ahmed et al, 2002).

The land tenure system of the imperial regime was considered to be a huge hindrance to the country's development and the most important cause of political

grievances that led to the overthrow of the imperial regime. Institutional inadequacy, no legal framework, arbitrary control of land rights, and no organized and transparent land administration characterized the Imperial government's land tenure systems. Land concentration in the hands of absentee landlords and its underuse for political reasons, unchecked and exploitive tenancy relations, tenure insecurity including arbitrary eviction, diminution and fragmentation of farm holdings, and other problems were noted features that hindered the development of agriculture in general and the country as a whole (Yigrem, 2002).

During the latter period of the imperial era there was a push to introduce large scale commercial agriculture. A paradox was observed when landlords began to increase the use of hired labour and improved technology (including farm machinery) while at the same time evicting poor peasants who worked on the same farms. Northern Oromia farmers were the victims of this type of eviction in the feudal history of the country; they had to leave their native land and settled in other parts of the Oromia region (Adugna 2004).

The Salale Oromo farmers at that time would sing songs to the landlords in Afan Oromo (Oromo Language) to show the scale of evictions and land tenure insecurity during that period.

*Sii ka'ee kuno sii ka'ee yaa abbaa lafaa sii ka'ee,
Yoo Jaldeessii ciisii sii ta'ee,
Yoo Sardidon daboo sii bahee,
Yoo Qamaleen olla sii ta'e.*

"I left my birth place for you because you took the land I used through your oppression. You can use it if Monkey could be your tenant, if Fox came and worked on your estate, and Ape would be your neighbour." This implied that the farmers had already left the area because the landlord evicted the tenants to mechanize

their land used in sharecropping. This meant that all farmers were evicted but the wildlife was not (Adugna 2010, personal elders' interview).

2.2 The Derg regime's land tenure system (1974-1991)

The 1975 land reform of the Derg was considered by many as a radical measure that initiated a uniform land reform programme in all parts of the country. The Derg introduced land reform proclamation 31/1975 which nationalized all rural land and put it into the "collective property of Ethiopian People". It prohibited private ownership of land, transfers of land by sale, lease and mortgages as well as hiring of labour and other forms of peasants' dependency on landed classes. Under the programme, all customary and other pre-existing land rights were extinguished and all land was declared to be public property. Traditional institutions were abolished, Peasants Associations and Agriculture Producer Cooperatives were established for administration and for the first time there was a uniform tenure system throughout Ethiopia.

At first glance, the proclamation solved the inequality of holding and the exploitation of farmers who were under tenant-landlord relations during the imperial era. It only acknowledged a maximum of 10 hectares per household with usufruct rights and there was no compensation for the former owners of the land. The land reform was strongly influenced by Marxist-Leninist ideologies and experiences in other socialist countries and was the single most important land reform that the country has ever undertaken and one that resulted in huge support for the military government. The joy did not last long, however, because unpopular measures that jeopardized tenure security soon followed. Of these, the problem that emanated from rural collectivization measures was the main one.

Further, population growth pushed land redistribution to accommodate new households in the system; this was a major issue because population growth and increasing households remained high. Periodic land redistribution was the major cause of insecurity in long-term investment for resource management activities. It was also a major impediment to farm land improvement and contributed to the degradation of natural resources, thus contributing to climate changes evident in Ethiopia at present.

2.3 Land tenure systems of the EPRDF government

The Derg regime's land tenure policy was characterized by periodic land redistribution and eviction of landholders without compensation. This and other undemocratic practices and policies contributed to the overthrow of the system through protracted armed struggle by the EPRDF in 1991.

The EPRDF-led government introduced some notable changes on land tenure systems through the Constitution enacted in 1995. Though there were hiccups here and there (e.g. the infamous Amhara land redistribution in 1996 which was modelled on land reforms in liberated areas of the north), the new rulers made several changes without relinquishing the state's control over all land. Thus the primary rights to land are still vested in the state and people have usufruct rights only. In addition, the current government has followed a decentralization policy; land administration was made the responsibility of the regions, thus regional governments can make laws about land rights, transfer and taxation issues, and they are responsible for the general administration of land in their respective regions. Land rentals have also been officially allowed. The Constitution protects people against forced evictions and recognizes their right to compensation.

According to Helland et al (2006), 10 per cent of Ethiopians are pastoralists and about 40 per cent of the land area is suitable for pastoral livelihoods. Land

tenure issues in relation to pastoralists are not given much attention in the public policy though they exist in reality. Pastoralists only have limited rights to access and to use the land, but the overall rights remain with the state.

2.4 Urban Land Tenure System

In urban areas residents who have no house or any plot of land for residential purposes had the right to get a plot of land where they could construct a house to live. Kebele Administration, which was the lowest administrative structure in the country as well as in the region, registered all applicants and made identification of the registered as per pre-developed criteria. When the number of applicants was higher than the land available a lottery system was used. Anyone who won paid the necessary fees and received a title deed with all rights and restrictions.

Another form of land access was through auction and agreements to allow for leasehold. The leasehold period for residence was 99 years. Leasehold time was also based on intended projects and the service rendered by that project. In urban areas there was no problem with having leasehold titles after urban reforms were implemented. Those who obtained land before this reform, however, had no title deeds and even the government could not get revenue from this land. This is now changing in all major urban centres because the government has stepped up its effort to raise more tax revenue from all eligible sectors, including the occupation of land and creation of property.

The land tenure system implemented by the past two government regimes was completely different from the present government's (EPRDF). Both had tenure insecurity as the common denominator. That means that sharecroppers were never certain about how long they could cultivate their land, or when they would be told to give it up. Evictions were common, especially in the last days of the Imperial era when mechanization was introduced and as a consequence

of land redistribution in the Derg regime. This was the root cause of tenure insecurity that led to a depletion of resources and low productivity of the land, food insecurity and an increased vulnerability of the poor.

3. CURRENT LEVEL OF LAND TENURE SECURITY IN ETHIOPIA

There are currently three main elements of tenure security that affect households. First, greater security against eviction, which in practice is often equivalent to longer periods of land right possession, reducing the need to spend resources on defending land rights and the probability of getting caught up in land conflicts. This is likely to increase the demand for land-related investment. Second, a greater ability to transfer land, while unlikely, affects the probability of conflict or eviction, which will increase the payoff from investments linked to the land. It will allow the person who made the investment to benefit from it even if, for some unforeseen reason, he or she will not be able to use the land. Third, greater tenure security can enhance access to credit, thereby increasing the value of investment undertaken in situations in which limited credit supply constraints investment (Klaus, 2003).

In the context of the Ethiopian land tenure systems, the difference between the previous two government regimes and the current government land tenure system starts with the Ethiopian Constitution, confirmed by Ethiopians in 1995. Article 40 (3) of the Constitution states that the right to ownership of rural and urban land as well as all natural resources, is exclusively vested in the state and in the people of Ethiopia and shall not be sold or exchanged by other means. However, Article 40 (4) states that Ethiopian peasants have the right to obtain land without payment and to be protected against eviction from their possession.

Article 40 (8) states that without prejudice to the right to private property, the government may expropriate private property for public purpose subject to payment

in advance of compensation commensurate to the value of the property. It is also states in the Rural Land Administration and Use Proclamation 456/2005 Article 8 (4) that any rural land use rights of peasant farmers, semi-pastoralist and pastoralists shall have no time limit. In the same sub article (5), it says that any holder shall have the right to transfer his rural land use right through inheritance to members of his family. Any investor who has leased rural land may present his use right as collateral.

There are, however, some elements of tenure security on which the Constitution is unclear, especially on the duration of usufruct rights. Whether these rights are permanent or temporary is not clear. State ownership of land limits the development of proper formal land markets and discourages farmers to invest in their land (Wibke et al. 2008). In general, land tenure appears to be insecure due to the limited transferability of the rights, thus landowners perceive expropriation in future based on past experiences. Land distribution should provide secure tenure, not only access to land.

Tenure insecurity in Ethiopia is also caused by the high number of land disputes as a result of tenure related issues and the lack of a national institutional body that coordinates all land policy and administration issues. The major land conflicts in Ethiopia in general and in Oromia state in particular are trans-regional and regional. The trans-regional conflicts are resource conflicts between different ethnic groups over grazing land, water for cattle, farmland and other natural resources use. Conflict is pronounced around pastoralist areas where resources are used communally.

The major land conflicts that are regional in nature in both rural and urban areas are inheritance issues and boundary conflicts. These conflicts also include violations (perceived or actual) of agreements by different parties. If the rights, responsibilities and restrictions on land and other natural resources are clearly defined and there is a functioning legal framework, most of these conflicts would be avoided.

4. EFFORTS TO IMPROVE LAND TENURE IN ETHIOPIA

Regional governments are now allowed to formulate land administration policies, based on the authority granted to them and without violating provisions in the Federal Constitution⁷⁵ and other relevant federal proclamations and laws. Though the institutional structures vary between regions, they have made provision for an equal distribution of land between man and women. Even though all land is owned by the state, land markets have been legalized in recent years. Landowners now have the right to lease out land with some restrictions (USAID, 2004).

According to a Rural Land Use Planning and Land Administration Physical Activities Programme (2009-2010), there is an on-going programme to strengthen land tenure security in Ethiopia. Rural land titling certificates issuing started in four major regions: Oromia, Amhara, Tigray and Southern Nations, Nationalities and Peoples Regional State (SNNPRS). These are regions considered to be more “developed” than others with the exception of two cities (Addis Ababa and Dire Dawa), which have special administrative status under the federal government. Rural land titling certification has been going on in Tigray regional state for eleven years, in Amhara regional state for six years and in Oromia and SNNP for the last four years. At the end of August 2009, the total landholders who received first level land certificates was 5.5 million which was 44.3 per cent of the total. The government’s plan was to cover all rural landholders issuing first level rural land titling certificates by September 2010. These certificates were to improve tenure security and to reduce existing boundary conflicts. This underlines the willingness of the government to secure landholders’ rights. For this, all human resources, materials and technical capacity are accessible and planned. In the four regions, second level land certification has started with technical aid from different donors.

In pastoralist and semi-pastoralist areas, such as Somali, Afar, Gambella, Benishangule Gumuz, SNNPRS and part of Oromia, rural land certification will be totally completed in the coming five years.

As a result of the decentralization policy, tenure security varies from one region to the other. Some regions, such as Oromia Regional State, have done a lot to improve tenure security. The regional government has endorsed a regional constitution that confirms the security of the land to ensure economic growth with the strategy of ADLI.

Article (52) of Ethiopia’s 1995 Constitution states that the regional government has the duty to administer land and other natural resources according to federal laws. This law was enacted in July 1997 with Rural Land Administration Proclamation, No. 89/1997. The regional government is given the power of land administration; based on this provision, Oromia Regional State administers the land resources in the region.

Like the federal constitution, the regional constitution also has a firm guarantee on land tenure security. The regional states have formulated a Rural Land Use Administration Proclamation 130/2007, which states in detail that farmers must use their land in a sustainable way and enjoy their right to lease, rent, to give it by inheritance to their children and anyone else who has the right to inherit and to give share cropping the protection of law. Article 6 (1) states that any peasant, pastoralist or semi-pastoralist who has the right to use rural land shall have the right to use and lease out his holdings, transfer it to his family members and dispose of property produced there on, and to sell, exchange and transfer the same without any time restriction. Land holders are protected from any illegal act which may evict landholders. Also Article 6(5) states that any peasant, pastoralist or semi pastoralist shall not be evicted from his holding and his holding shall not be transferred to anybody due to any liability or execution of judgment.

⁷⁵ Regional states in the country have their own constitutions.

Renting private holdings is possible in the region. The rental period is restricted to the time determined by the agricultural technologies the farmer uses. Three years are deemed appropriate for those who apply traditional farming and 15 years for mechanized farming. Land rent should not be paid on more than half of the total holdings in order to protect the farmers from total eviction by investors and land speculators. The agreement made on renting land shall have the consent of all individuals who have rights to the land, which means both the wife and the husband must assent to the arrangement. Also, their land use right is not alienated in case of change of their residence.

5. LAND ADMINISTRATION IN ETHIOPIA

To minimize tenure security problems in urban areas of the various regions, the establishment of a cadastre and real property registration started at different times in some towns and cities. The cities and towns covered by cadastre so far are:

- Tigray regional states in Mekele, Humera and Alamata towns;
- Amhara regional states in Dase, Bahirdar, Kombolcha and Gonder towns;
- Oromia region in Adama, Laga Tafo Laga Dadhi, Dukam and Burruiyyu are partially covered. The regional state of Oromia Land and Environmental Protection Bureau has a plan to cover 42 big towns in the region in the five-year development plan (2010-2015);
- SNNP regional states only Hawasa recently started;
- Addis Ababa also started its cadastral surveying in different times and until now it has not yet succeeded.

5.1 Reasons for cadastral failure in some areas

The major reason for failure is the choice of land administration technology which, in most cases, is not

appropriate. The mismatch between technical solutions on the one hand and the weakness of the underlying institutional support systems on the other has meant most projects fail to continue once donors, political champions and others providing technical assistance withdraw their support. Likewise, the absence of a well-articulated strategy and the tendency to pursue isolated solutions (often donor-driven) contributed to the abysmal failure of the system, even in the nation's capital, Addis Ababa, where capacities are far stronger and technical assistance is easy to access. Lack of transparency among other weak land governance characteristics has compounded the problem of land tenure insecurity. As a result, Addis Ababa, for example, has overhauled its land office almost every year. Other reasons are: the lack of a sound technical structure that can take over the business and be implemented in the regions, a lack of guiding law procedures, and failures in the selection of technologies. Furthermore, all these activities have to start with a multipurpose cadastre.

5.3 Institutional framework

Within the communities in general, and households in particular, the level of tenure security, transparency and accountability of the institutions administering land rights will affect governance. It will also affect the extent to which conflicts will arise or can be resolved without having negative effects on social cohesion, productivity and natural resources degradation. Policies, laws and proclamations are not yet adequate to ensure land tenure security throughout the whole country. It is important to establish strong and transparent institutions which are able to handle every aspect related to land administration and environment. Fortunately, a Land Administration and Land Use Directorate at the federal Government level was established in 2010. The main task of the directorate is to coordinate land administration activities of all regions and manage partnerships with donors and other partners.

5.3 Land Administration Projects

Projects implemented by different institutions or donors in relation to land administration in particular are dependent on the willingness of the government to intervene. These projects may contribute positively or negatively on land tenure security and may impact directly or indirectly. In Ethiopia, different multilateral and bilateral organizations participate in land administration activities (e.g. USAID, DFID, Finland, World Bank and Sweden). They facilitate the capacity building of land related professionals in the country as well as abroad. SIDA mainly intervenes in the Amhara regional states in human resource development and in institutional development; the organization works especially to upgrade the capacity of Bahirdar University and the Amhara Land and Environmental Protection Authority office. For example, in Amhara regional state, 2,500 rural landholders received 2nd level land certificates with technical aid from SIDA and 143,450 rural landholders received 2nd level land certificates

with technical aid from USAID in four regions. These two organizations also contribute to land administration guidelines, to the development and supply of technical instruments and to different training activities. GIZ is the most experienced of all institutions working on land administration areas in the country, with ARD (2001) Rural Land Use Planning and Land Administration Physical Activities Programme (July 2009-2010).

USAID funded two projects from 2005 to 2013, namely Ethiopia Land Tenure and Administration Programme (LTAP) – 2005 to 2008 and Ethiopia-Strengthening Land Administration Programme (ELAP) – 2008 to 2013. The two projects have considerably supported the land sector in strengthening legal frameworks, land holding certification, public information and awareness and institutional capacity development. This shows that the government's willingness to secure land tenure is the key for investment as well as resource management in the country.

6. SWOT ANALYSIS

The level of land tenure security in the country is associated with strengths, weaknesses, opportunities and threats when an analysis is made based on internal and external factors.

Strength	Weaknesses
<ul style="list-style-type: none"> • Tenure security issues clearly addressed in federal and regional constitutions • Land use and land administration proclamation • Government commitment to implement land tenure security • Land administration institutions established • Rural land certification started and in progress • Government collaboration with donors to work on land tenure • Human resources development started on land issues • Land tenure issue is government's top agenda 	<ul style="list-style-type: none"> • Slow implementation of land policy, regulations and low enforcement • Low awareness of the community on land laws and regulations • Implementation of land certification is slow • No regular update on land policy • Environmental degradation not controlled • Land conflicts are immense • Re-establishment of compensated party is weak
Opportunities	Threats
<ul style="list-style-type: none"> • Community eager to get land tenure security • Donors interest in working on land tenure issues increased • Development of the country demands high land tenure security • Foreign investors need high land tenure security • Global climate change needs long lasting resources conservation 	<ul style="list-style-type: none"> • Lack of finance to implement land tenure security indicators • Few donors work on land tenure issues in the country • Lack of skilled man power on land administration and land management areas • World economic crises

CONCLUSION

Tenure insecurity has been cited as one of the limitations on the pre-1975 reform of the land tenure system. This insecurity had different forms, ranging from endless litigations over land rights to the complete eviction from holdings. Arbitrary peasant evictions were among the major sources of insecurity. Even periodical land redistribution was the main cause for land tenure insecurity during the military government's regime.

During the past two government regimes the tenants' major factor for dependency and the chief obstacle to improve agricultural production and resource management was a lack of security of tenure. Because each sharecropper could never be certain on how long he would cultivate his holdings' or when he or she would be told to give it up, insecurity was a daily issue. Security of tenure and land user confidence starts with the Constitution and other land laws. Land is regarded as an important factor of production and the basis of any development, including the development of commercial agriculture and the emergence of more vibrant cities. Unless land users are guaranteed their land rights to manage in a sustainable way and to make long-term investment it is not possible to ensure the country will attain its developmental goal of becoming a middle-income country in the next 20 years.

Land tenure security is not only determined by freehold property rights, but also by land use rights and their transferability; this is reflected in different laws of the federal and regional laws and land polices of Ethiopia. Polices, laws and proclamations are not the only instruments to ensure land security; institutions that enforce rights and obligations of the law are crucial as well as. For this and other land related issues, the Oromia regional state, for example, has established the Bureau of Land and Environmental Protection, which deals with issues raised in relation to land. The bureau has a mandate on behalf of the government to calculate the compensation to the parties leaving the land, in the public interest, independently and without any interference.

Even if the above mentioned aspects of land tenure security have been established, land disputes arise due to boundary conflicts, the overlapping of title deeds (two certificates for one parcel in urban areas), inheritance quarrels, urban waste dumped in rural areas or peri-urban areas, and land rent collected by a husband without recognizing the wife's needs; all of which require government attention. Most of the lower level courts are trying to solve land conflict cases. In order to upgrade the level of land tenure security of the country it is still necessary to accelerate the issuing of rural land holding certificates and to modernize urban and rural land administration and management.

With these facts it can be concluded that the level of land tenure security in Ethiopia in general, and Oromia regional states in particular, is improving and has had a positive impact on the country's former agricultural development led industrialization (ADLI) policy and probably the most recently approved Growth and Transformation Plan (GTP). Attention should, however be given to the causes of conflict and land speculation in urban and rural areas. Evidence based policy review and policy-making is still very much in demand as the country becomes more urbanized and seeks to become a middle-income economy in the near future.

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Mali

04

Niger

Chad

Togo

Nigeria



1. INTRODUCTION TO COUNTRY CONTEXT

Nigeria is a federal republic divided into 36 states (excluding the capital city, Abuja, which has the quasi-status of a federal state administered by a minister under the federal executive). The country has a varied topography and a range of natural features, including a coastline, extensive wildlife, vast tracts of tropical forest and different landforms.

How land is used affects the user, the land itself and the environment in which the land is located. The ways in which a society allocates title and property rights over land reflect the nature of that society (Payne, 1997). This is why the issue of land tenure is very important. The FAO (2005) defines land tenure as “[...] the relationship among people, as individuals and as a group with respect to land and other natural resources.” Several factors affect the livelihood of people, however, “[...] land tenure has the most profound effect on livelihoods” (UNECA, 2004). Nigeria is a country with livelihood problems, and most of these problems can be traced to its land tenure system. People are engulfed by a sea of confusing pluralism in land tenure.⁷⁶ The social and cultural relationships people have with land are highly heterogeneous and land reform that is suitable for one part of the country may be unsuitable for another part. Because of this, a study of the status of land tenure security in the country is important and an understanding of the country’s disjointed tenurial structures is necessary for the design of a specific reform model. Although the country’s main land policy purports to transfer ownership and management of land from individuals and communities to the government, it does not eliminate other modes of land tenure and has, in fact, reduced the degree of land tenure security. This is why most Nigerians have low security of tenure and are therefore under constant threat of eviction. Without secure tenure, people cannot get credit for housing and are not motivated to protect their environment.

This paper contributes to on-going debates on improving land tenure security in developing countries. It investigates current land tenure security in Nigeria through an analysis of the country’s tenure and property systems by outlining the current strengths, weaknesses, opportunities and threats. The data for the SWOT analysis is based on already published research on land tenure and tenure security as well as primary information from formal and informal discussions. The analysis led to the development of a model for future improvements in Nigeria.

The paper has six parts. Part one provides background information on land tenure and land tenure security in Nigeria. Part two highlights the evolution of land tenure in Nigeria and the legal frameworks behind it. Part three elaborates on Nigeria’s land tenure and property rights system. Part four outlines the perceptions of tenure security on land. Part five features a general analysis of the status of land tenure security, while part six is a discussion of important elements derived from the analysis.

1.1 Land and Geography

Nigeria has a total area of 923,768 km², of which approximately 910,770 km² is land. Of this, 80 per cent is rural (Nuhu, 2007) and 42 per cent is cultivable (Oji and Omenma, 2005). The country has five international boundaries: in the north, its borders with Chad and Niger are 87 km and 1,497 km respectively. In the west, its border with Benin is 773 km and in the east, its border with Cameroon is 1,690 km. The south coast, formed by the Atlantic Ocean, is 853 km.

1.2 Population, Politics and Economy

With a population of over 167 million people (NPCN, 2012), Nigeria has the largest population in Africa and accounts for 47 per cent of West Africa’s population (WB, 2010). It has about 250 ethnic groups (NG, 2009). The country has the second largest economy

81 In Nigerian cultures, land is inseparable from the concept of society.

in sub-Saharan Africa⁷⁷ and is heavily dependent on oil earnings, which provide 20 per cent of the country's GDP, 95 per cent of foreign exchange and about 65 per cent of budgetary revenues (Nwilo and Badejo, 2007).

1.3 Most important Land-based Resources and Sectors

The use and management of land-based resources are important aspects of Nigeria's national development policy. The country's forest has three major vegetation types: swamp forest, tropical rain forest and savannah. The tropical forest is Nigeria's major source of timber; it has great plant diversity with over 4,600 plant species⁷⁸ and more than 560 tree species (Akindele, 2005). Forests cover about 15 per cent of the Nigeria's land area. Areola (1991) estimates that about 170,000 people were involved in forestry activities in 1933, which increased to 360,000 in 1947, to 586,000 in 1966 and to one million in 1983. From 1983, more people have got involved in forestry activities in Nigeria. The majority of Nigerians depends on forest wood for fuel and other basic means of livelihood. In 2000, 67,767,000 m³ of round wood were produced and 85 per cent of this was used for fuel. That year, Nigeria's consumption of fuel wood and charcoal was the third highest in Africa. The consequence of this consumption is a huge loss of about USD 2 billion worth of timber annually due to deforestation (Eboh, 2005). Nigeria's loss of forests is such that even though it is about three times the size of Germany, for example, Nigeria has less forest (Stimm, 2010).

Oil is Nigeria's major mineral resource. Commercial oil production and export began in 1958 and currently there are about 606 oil fields in the country, of which 360 are on-shore and 246 offshore. Although the country earns considerable income from its oil exports, oil mining also causes a great deal of damage to the environment and its value. Between 1976 and 1996,

4,647 incidents resulted in over 2 million barrels of oil spilled into the environment; and between 1997 and 2001 there were 2,097 oil spill incidents (Nwilo and Badejo, 2007). In 2005 Nigeria's oil reserve was estimated to be 35.2 billion barrels and its natural gas reserves were estimated at 176 trillion cubic feet (OGJ, 2005; Nwilo and Badejo, 2007).

Agriculture is another very important aspect of Nigeria's land-based activities. More than half of the country's population lives in rural areas and depends on land for sustenance and there is evidence that Nigeria's poverty is linked to the neglect of its rural and agricultural sector and its high dependence on its oil sector. A critical look at the impact of oil on growth in Nigeria shows that Nigeria's "[...] dwindling agricultural production is affected by a crowding-out-effect as a result of the oil dependence" (Chigbu, 2005). The trend in the country's poverty incidence is shown in the table below:

Table 1: Trend of absolute poverty incidence for Nigeria ⁷⁹

Period (years)	Absolute Poverty Incidence (%)
1960	15
1980	28.1
1985	46.3
1992	42.7
1996	65.6
2004	54.4
2009	70
2012	54.7

Table 1 shows the extent of poverty in Nigeria and illustrates the increase in poverty from the time of country's independence from Britain in 1960. It also shows that between 1960 and 1980 (when the country was more rural), there was less poverty than there is today. This was due to higher agricultural productivity and dependency during that period. Irrespective of its

⁷⁷ See *Country Brief of Nigeria* on the World Bank website.

⁷⁸ Ranked 11th in Africa.

⁷⁹ Table was compiled by author from the following: 1960 – 2004 figures from the National Bureau of Statistics of Nigeria; 2009 and 2012 figures from the World Bank.

current poverty level, Nigeria's rural people could still lift the country out of poverty if the policies on agriculture and rural development were improved. According to NBS (2012)), the agricultural sector contributed 40.2 per cent of the GDP in 2012 and the years before then and now dominates economic growth.

1.4 People, Ethnicity and Religion

Nigeria is a blend of many independent ethnic nationalities, of which the largest three in population are: Hausa-Fulani (29 per cent), Yoruba (21 per cent) and Igbo (18 per cent) (Oji and Omenma, 2005). These three groups are located in the northern, south-eastern, and south-western parts of the country respectively.⁸⁰ Northern Nigeria is mostly Islamic and southern Nigeria is more urbanized than the north (*ibid*). It is estimated

that about half the Yoruba are Christian and half are Muslim, though many maintain traditional beliefs. The Igbo in the south-east are mostly Christians. There are about 500 languages, all wrapped up within two major religions - Islam and Christianity.

The map illustrates the number of ethnicities in Nigeria. Each of these groups traditionally had their own land tenure system within their customary environment and, general customary laws on land are not uniform across the various ethnic groups. This can be traced to differences in their historical, linguistic, socio-structural and politico-economic development (Kuruk, 2004). However, there are more remarkable similarities between these customary land practices than there are differences.

Figure 1: Map showing Nigeria's ethnic and linguistic configuration



Source: CIA 1979

⁸⁰ Other ethnic groups include: Isoko, Nupe, Kanuri, Edo, Gwari, Esan, Igala, Idoma, Ijaw, Ibibio, Efik, Tiv.

2. HISTORICAL EVOLUTION AND THE REGULATORY FRAMEWORKS OF LAND TENURE IN NIGERIA

Prior to the conquest of the northern region by the Fulani⁸¹ Islamic Jihadists from 1802 to 1804, the various ethnic groups practiced customary tenure that was based on their different forms of African traditional religion. After the Fulani conquest, the system of land tenure changed in the conquered areas; a type of Islamic feudalism developed in the north while the south retained its original customary system. During the colonial period (1900 to 1960), a formal monetary economy was introduced. This brought about the introduction of freehold interest in land and led to the development of a property market. The British colonialists instituted expropriatory powers and exercised planning and regulatory measures for the use of land in all parts of Nigeria. The ownership and use of land during the colonial period emphasized the economic aspects of land ownership. This affected the customary law, which was based on Islamic and traditional religions in the north and south respectively. Since there were no formal records of land transactions then, the colonialists introduced the formal documentation of rights and interests in 1863 with the land registration law in Lagos, which was extended to other parts of the country in 1894 (Ukaejiofor, 2007). Even with these laws, 30 years later there was still a large shadow of incomprehension over the general tenure system.

2.1 Customary Land Law – Pre-colonial Era

The term “land” conjures up an important notion in the traditional Nigerian society – a gift of nature. Traditional Nigerian societies believe that God created

land for everyone’s use and is sacred. Mbadiwe (1998) notes that “[...] the deification of land or the belief in a guardian deity of the Earth is especially strong in rural society, whose very existence depends directly on the fruitfulness of the Earth.” Amongst the Igbo ethnic group, *ala* (land) – considered to be the Earth-deity, “[...] is regarded as the protector of the moral and political wellbeing of a community as well as of its economic survival” (*ibid*). The value attached to land in traditional Nigerian societies stems from this concept and is the basis of customary land tenure. “Land is the foundation of shelter, food and employment. It can rightly be said that land is inseparable from the concept of society” (Adekunle, 2009).

In these societies, when land was sold, it was “[...] not considered a purchase as granting freehold rights as it is in Europe, rather, it was considered only as a right of occupancy” (Ojike, 1946). This is because in these societies, “[...] no man, not even the king, had a monopoly or private ownership of land, because if that were the case, many people –especially the future generation - would be deprived of the land” (*ibid*). The implication being that “[...] ownership of land was vested in the community as a cooperate entity, every member of which had the right to share in the bounties which he helped to produce. Consequently, not individuals, but the family or clan or village had the power to alienate land. The king, like any other family head [...] had no power to sell the land; he could dispose of it only on behalf of his community in accordance with the law and custom of the people” (*ibid*).

Such dispositions could be in the form of a gift to another community, village or clan. There were people who were knowledgeable in land matters (elders) because of their experience and they served as surveyors and valuers of land. It was the duty of these specially privileged and respected people to measure and appraise the value of land. This was necessary because, even though land was commonly owned (as in

81 The Fulani conquered the Hausas of northern Nigeria, enforced Islamic rule in these areas – that is how the northern part of Nigeria has come to be majority of Hausa-Fulani ethnic group and with a Muslim majority.



Rural market in Achara Community in Nigeria © Uchendu Chigbu

republican societies like the Igbo) or held for the people by their kings and chiefs (as in monarchical societies like the Hausa and Yoruba), citizens and immigrants were granted land for their personal use, and valuation and measurement played an important part of the process of land transfer. For instance, “[...] once in 1789, Captain Thompson, an Englishman to whom a king of Nigeria granted a lambe,⁸² erroneously declared that he had purchased the property as a freehold. The king with his council terminated the lambe immediately with, of course, three days’ notice. The settlers were formally notified they must leave. They resisted, thereupon, the natives reclaimed their land [...]” (Ojike, 1946). In pre-colonial Nigeria, “[...] land was neither a commodity which could be bought nor sold, nor a factor of production, but rather a partner on which the people living on the land depended” (Münkner, 1995). Customary tenure is therefore the original tenure system of all Nigerian societies. This type of tenure system was dependent on traditions or customary law. Cotula (2007) rightly explained customary law as

“[...] a body of (usually unwritten) rules founding its legitimacy in “tradition”, i.e. in its claim to have been applied for time immemorial.”⁸³

2.2 Native Land Acquisitions of 1900 – the colonial era

During the colonial era (1900-1960), the colonial administration needed land for development and expansion. Crown Lands were acquired by the British Crown by virtue of treaty, cession, convention or agreement.⁸⁴ According to Famoriyo (1973) in Adedipe et al. (1997), the entire southern Nigeria region (except Lagos) was included under the Native Land Acquisitions of 1900. Later the Lands and Native Rights Ordinance of 1916 established the formal land tenure system for the south. These laws created room for private ownership but the colonial government did not interfere much

82 A word used for “land” by the then native Nigerians who found it difficult to pronounce “land” in English.

83 Although the Islamic land law is based on the Koran, it is considered customary tenure in this study because, to the northern Nigerians, Islam is considered to be a custom just as the southern Nigerians consider traditional pre-colonial practices as their custom. The Islamic law was used in pre-colonial times by northern Nigerians.

84 When Nigeria attained independence, such crown land became state land.

The differences in tenure practices between southern and northern Nigeria was a worry to the British colonialists, so much that they attempted to unify them for more convenient land administration. To effect this, the British colonialists later declared all land in the northern part of the country as public land and they created ordinances to empower themselves to expropriate these lands.

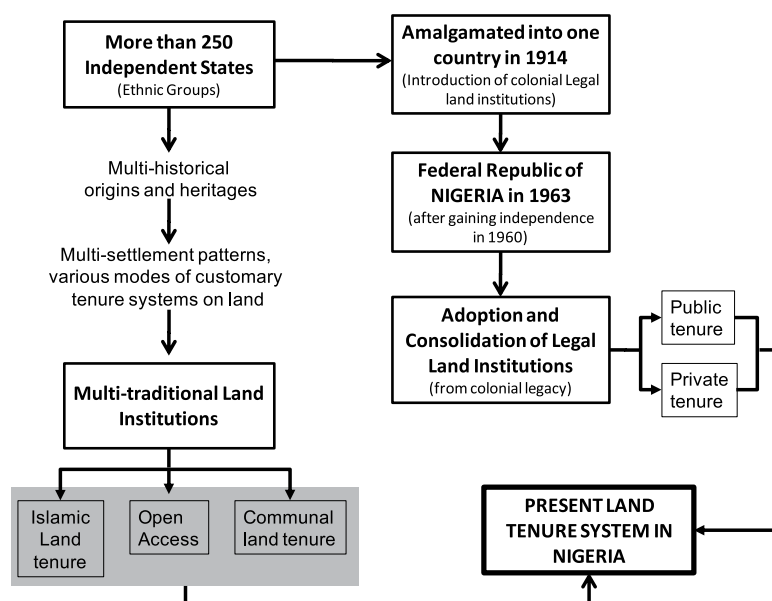
in the customary tenureship of the southern people, except in the case of expropriation for public interests (Adedipe et al., 1997). This was not possible in the northern part of the country because of the centralized powers wielded by the traditional rulers in that part of the country. The differences in tenure practices between southern and northern Nigeria was a worry to the British colonialists, so much that they attempted to unify them for more convenient land administration. To effect this, the British colonialists later declared all

and they created ordinances to empower themselves to expropriate these lands.

2.3 Land Use Act (1978) (Nigeria's Land Policy) – post-colonial era

In 1962, two years after independence, the northern government created a land tenure law that brought all land in that region under the control of their governor (for the use and benefit of the northern people). Following this, in 1978, a new land law (policy) was passed to unify tenure systems all over the country. The law is termed the Land Use Act (1978), however, it is a law on land administration. According to the government, the main rationale for the Act was that all forms of customary tenure systems were outdated and could not meet the demands of modern Nigeria, especially in the fast-changing agricultural sector. The Act vests all land in the state through the office of the governor of each state of Nigeria.⁸⁵ The law empowers the state governors to grant statutory rights

Figure 2: Framework of the evolution of land tenure systems in Nigeria



Source: Author

land in the northern part of the country as public land

⁸⁵ The land is held in trust and administered through the government's authority to the use and benefit of all Nigerians.

of occupancy of fixed periods. On the other hand, the local governments are empowered to grant customary right of occupancy on land in their municipalities (or local government areas) for agriculture, grazing, etc. The Act does not recognize freehold interests in land and specifies that a Land Use and Allocation Committee should decide on compensation issues. Figure 2 below illustrates how Nigeria's land tenure system evolved:

Nigeria's land tenure system consists of a combination of factors – social, religious, historical and legal that have brought Nigeria where it is today in terms of land tenure.

2.4 Constitution of the Federal Republic of Nigeria 1999

Nigeria's current Constitution was instituted in 1999⁸⁶ and is the highest law in the land (section 1:1). It categorically states that if any other law is inconsistent

with its provisions, the Constitution will prevail above such laws (section 1:3). It also guarantees freedom of property ownership as a fundamental human right by stating that, subject to its provisions, "every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria" (section 43). It also purports to guarantee tenure security:

"No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things: (a) requires the prompt payment of compensation therefore and (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria" (Section 44: 1a & b).

Table 3: Three main surveying professions dealing on different aspects of land management

Surveying body	Year founded	Legal backing	Professional services	Institutional affiliation	Practising membership
Nigerian Institution of Surveyors ⁹²	1934	CAP 425, Laws of the Federation of Nigeria. ⁹³	Cadastral, geodetic, cartographic, remote sensing, photogrammetric and mapping services	International Federation of Surveyors (FIG).	≤ 2,000 (Students, associate members, full members and Fellows.)
Nigerian Institution of Estate Surveyors and Valuers ⁹⁴	1969	Estate Surveyors and Valuers Act of Nigeria: Decree No. 24 of 1975.	Estate management: valuation (including plant and machinery), facilities management, conflict resolution and land compensation appraisals	International Federation of Surveyors (FIG); International Real Estate Federation (FIABCI); and Commonwealth Association of Surveying and Land Economy CASLE).	≤ 2000 (Students, associates members, full members and Fellows.)
Nigerian Institute of Quantity Surveyors ⁹⁵	1969	Decree No.31 of 1986 of Nigeria.	Engineering costing and engineering construction management	International Federation of Surveyors (FIG); Commonwealth Association of Surveying; and Land Economy CASLE).	≤ 2000 (Students, associate members, full members and Fellows.)

⁸⁶ The Constitution recognizes the Land Use Act, making it Nigeria's highest law on land tenure.

2.5 Legal establishments of professionalism in land management in Nigeria

Surveying is the main land management profession in Nigeria and surveyors are trained in land surveying, property and land development. The first professional surveying body, founded in 1934, was the licensed surveyors' association. However, due to fast-growing demand for specialization in the profession, in 1969 two other surveying bodies were founded: the Nigerian institution of estate surveyors and valuers, and the Nigerian institute of quantity surveyors. These bodies are legally empowered to perform different land management duties and the table below contains key information about them:

in addition to these three bodies, architects, planners, builders and environmentalists are very involved in land and land-related development.

3. LAND TENURE AND PROPERTY RIGHTS IN NIGERIA

Land tenure system in Nigeria is closely related to inheritance practices. Apart from producing a framework for economic use of land in conformity with traditional customs, it serves as a control mechanism of the socio-political life of most Nigerian communities. Land tenure in Nigeria affects every aspect of people's activities due to its embodiment of the values and beliefs that people attach to the use and ownership of land. Social influences, customs and traditions, economic needs, religion and public policy on land are the main determinants of land tenure. Current land tenure systems are explained next.⁸⁷

3.1 Private or Individual Tenure

Private ownership is widely evident in Nigeria and developed from colonial laws on land. Despite the

nationalization of land, private ownership by individuals and groups has prevailed. Individuals and institutions exercise strong and extensive land rights unlike the rights associated with other systems in Nigeria (such as communal, open access, etc.). They enjoy superior⁸⁸ rights of ownership. Rights such as the right to sell, lease, mortgage, grant easement, subdivide, take rent, control use and dispose of property at death is exercised within private tenure. Real properties to which these rights relate are wide-ranging but do not include open access and reserved areas. Within this practice, market forces and commercial transactions have become the major determinant of land transfers, leaving family structures with less influence over land matters.⁸⁹ Also, access to land is primarily through purchase or lease agreements. This is the conventional practice all over the country but especially in urban areas. Even in rural areas, where land is still held as communal, private tenure has overlapped with communal tenure to such an extent that most rural people define their communal holdings through individual perceptions. Although they depend on communal lands, they use them as if they have specific rights over their individual patches.

3.2 Communal Tenure

Unlike private tenure, with communal tenure, the property rights of a family or community are stronger than those of individuals and this system is characterized by strong family and community property rights. This is a sort of corporate aggregate through which groups such as villages, patrilineal or matrilineal groups and family systems (Emery, 2005) hold land. Land can be used jointly by any member or divided amongst families. Such land may be distant farmland, forest or communal spaces such as market-squares. People get access to land through membership of a particular community. Traditional rulers, whose authority over land derives

⁸⁷ The listed tenure systems do not exist in isolation in Nigeria, in most places these tenurial practices overlap, complement, override and compete with each other.

⁸⁸ This absoluteness is relative to the specification of Nigeria's main land policy, the Land Use Act (1978).

⁸⁹ Because the economic law of demand and supply acts as a major influence.

from their lineage to the ancestral heritage in the area, play a dominant role in this (Afeikhena, 2002). Families and their members are recognized by the community as having rights to arable land for farming and other uses. In accordance with different customs, land is allocated, acquired or transferred between family members in the community through pledging,⁹⁰ inheritances, sharecropping, and borrowing and as gifts. Alienation of such land is not possible without the consent of the community, which is a traditional rule of law and not a matter of convenience (Emery, 2005). Land plots, such as market places, cemeteries, shrines, town halls, distant farmlands, rivers and lakes, quarry sites, forests, etc., are some of the real properties held and controlled commonly. The right to sell is usually restricted. The mode of practice of communal land tenure varies from community to community, depending on traditional farming practices. This communal system of land tenure is most common in southern Nigeria and accounts for about 65 per cent of the total number of landholdings in communities there (Arua and Okorji, 1997).

3.3 Open Access (non-property)

There are some cases where rights are not principally assigned to anyone and no one can be excluded (except for specific reasons or by the state). Open access can be found enmeshed within the communal and public tenure. In certain cases, this can be found in the northern part of Nigeria among Fulani pastoralists, whereby access to rangelands is open to anyone. Unlike the communal system, which excludes non-indigenes or non-members of the community from using common areas, the open access is open for all. Often, these open access situations are the unintended results of inadequate state management and land policies.

3.4 Public or State Tenure

In this case, all the superior rights over land belong to the state. The state system was first practised in Nigeria in 1904 (in northern Nigeria) after the collapse of the Fulani Empire's feudal system, which was diluted by the British colonialist government. This tenure system was made legal in 1962 through the enactment of the Land Tenure Law of Northern Nigeria. Nigeria's Land Use Act (1978) is, by implication, an extension of this tenure system to the entire country. Individuals, private investors, cooperative societies or groups of individuals, on request, can access state-held land; however, it is subject to the approval of the state governor. Land so acquired can be used for agricultural, industrial, commercial or residential purposes but may not be transferred without the formal consent of the governor. Based on the Land Use Act (1978), two formal ownership structures are the statutory and the customary right of occupancies, the latter of which provides the more secured title on land (Certificate of Occupancy). It is interesting to note that all other aforementioned tenure systems are practiced within the ambit of this law in Nigeria.

3.5 Other Emerging Tenures

Other hybrid forms of land tenure have emerged, especially in major cities. This has been especially evident in Abuja, Nigeria's federal capital, where some forms of long-term leases have emerged and are used. There are also cases where some interested groups have taken long-term leases on pieces of land to build markets and shops.⁹¹ Also, a lot of public private partnerships (PPP) have emerged based on build-operate-transfer (BOT)

⁹⁰ Pledging is a sort of customary mortgage through which an owner gives possession and use of land to another in return for a token to be paid periodically – e.g. weekly, monthly.

⁹¹ This is the case in the building materials market in Mararaba, Karu Local Government Area, of Abuja region (located in Nasarawa state).

tenure. The PPP of BOT approach makes it available to developers on operate-and-transfer basis.⁹²

4. PROPERTY RIGHTS AND LAND TENURE SECURITY

Although the history of private property dates back at least two millennia in some European countries (Bethell, 1999),⁹³ in Nigeria it dates to the colonial era (Nwanekezie, 1996). The philosophy behind private property seems to have been embraced by Nigerians in their quest to build a better society and it has therefore become one of the most fundamental institutions in the country. That is why the transfer of property, although still mainly through inheritance, is increasingly “becoming horizontal – from seller to buyer – and decreasingly vertical –from father to son” (Bethell, 1999).

Property rights have been defined as a quantum of all interests, inheritabilities, transferables, characteristics, exclusivities and enforcement mechanisms on land (Alchain and Demsetz, 1973). It includes the right to use an asset, to manage, to permit or exclude its use by others, to collect the income generated by the asset, and to sell or otherwise dispose of it.

The nature and extent of property rights significantly influences the rate of resource depletion and degradation (Afeikhena, 2002). In all parts of Nigeria, “ownership (at least nominal ownership) of natural resources within the community’s geographical area is vested in the community. Most resources, such as forests, water and grazing land, are used and managed collectively by the community; the great exception is agricultural land, which is allocated to individual households” (Afeikhena, 2002). However, due to

“In all parts of Nigeria, “ownership (at least nominal ownership) of natural resources within the community’s geographical area is vested in the community. Most resources, such as forests, water and grazing land, are used and managed collectively by the community; the great exception is agricultural land, which is allocated to individual households”

the current land policy,⁹⁴ “[...] the certainty that a person’s rights to land will be recognized by others and protected in cases of specific challenges” (tenure security) is not really guaranteed (FAO, 2002). This leaves communities and people vulnerable to threats from competing claims. The adoption of the Land Use Act (1978) resulted in three major changes. According to Butler (2009):

“First, it ended private ownership per se and established statutory rights of use which may be alienated in market transactions (including sale and mortgage of rights) only with the consent of the governor, necessitating elaborate land bureaucracies and administrative procedures. Second, though the Land Law essentially nationalized all land, persons in occupancy at that time, and whose land has not since been subjected to a specific government acquisition action, remain in possession. They are entitled to convert their rights to a statutory certificate of occupancy, and their rights to do so are frequently traded, as it is possible for any current holder to convert the right by establishing the chain of title. Such rights are actively traded despite the lack of a statutory certificate of occupancy. Arguably, the Land Law created a vibrant informal land market that did not theretofore exist. Finally, the Land Law created the primary market for state land grants, as it induced significant state land acquisition and re-distribution activity, which continues today to a somewhat lesser extent. The size of the primary state market may differ

92 Build–operate–transfer (BOT), sometimes referred to as build–own–operate–transfer (BOOT), is a form of project financing, wherein private entities get concessions from the public sector to finance, design, construct and operate a facility stated in the concession contract, while the project proponent will recover their investments while operating and maintaining expenses in the project.

93 From The Wall Street Journal, 27 December 1999, p. 19a.

94 The Land Use Act of Nigeria 1978.

significantly among the Nigerian states, depending on many factors, including the amount of unused or unallocated land controlled by the state and the local willingness to engage in further land acquisition.”⁹⁵ The resulting implication of the law (explained) is that there

are different forms of tenure rights with varying levels of security. The table below is a summary of the various property rights that exist in the Nigerian property market, with their various levels of perceived tenure security:⁹⁶

Table 4: Some major forms of property rights in Nigeria

Tenure system	Features	Degree of security and remarks
Registered private or individual leasehold	Could be individual or group-based. It provides the right to hold or use property for a fixed period, usually 99 years. This right is exercisable under all tenures systems, except in open access.	This is mistakenly thought to be a freehold right in Nigeria. Individuals only enjoy usufruct rights for a period of 99 years because of land nationalization in the country. <ul style="list-style-type: none"> Provides high degree of security Enjoyed by the affluent.
Registered cooperative leasehold	Ownership is vested in the co-operative or group of residents who are co-owners. It could be residential, agricultural or another type of real property (excluding rivers and lakes, grazing land open access).	Here, cooperative members own land for their common purpose. <ul style="list-style-type: none"> Provides mid-level security The social cohesion enjoyed by members provides extra security.
Public rental	Rental occupation of publicly owned land or house (for example, management rights for game reserves, etc.).	Here people rent publicly marked out land or house. It is common for corporations and individuals to rent space on government land or houses (such as government secretariats, housing estates) and pay rent to the government. <ul style="list-style-type: none"> Provides high level security for the specified period Enjoyed by the affluent.
Private rental	Rental of privately owned land or property (for example shopping malls, office blocks, residences, etc.) and rent is paid to the owner.	People rent privately marked out land or housing estates. <ul style="list-style-type: none"> Provides mid-level security for the specified period Enjoyed by the middle-class.
Community-based rental	This can take several forms of rent agreements by a community (not vested in the clan or kinship) of generally private land for an agreed period. At the end of the period, an extension may be agreed or the community is given notice to leave within an agreed period.	A group of settlers come together for a common purpose, for example a tomato women's association could rent space for evening, day, weekly or monthly markets. Groups are common in urban squatter settlements such as Ajagunle (in Lagos), Bundu (in Port Harcourt) etc. that group-rent for settlement but not as cooperatives. <ul style="list-style-type: none"> Provides low level security for the specified period The social cohesion enjoyed by members provides extra security.
Common tenure	Ownership is vested in the clan or kinship whereby land is allocated by customary authorities (forests, rivers and lakes, farmlands, grazing land, markets, etc.).	Families, communities and their members are recognized by the community with the provision of right to arable land for farming and other uses. <ul style="list-style-type: none"> Provides very low level security – people tend to lose their legal status as their region becomes urbanized The ancestral heritage and cohesion enjoyed by members provides extra security.

⁹⁵ The Land Use Act (1978) has restricted all property rights in land in Nigeria to customary and statutory rights of occupancy. However, because of poor enforcement of the Act, rights over properties are (to an extent) still being treated as though they are beyond *occupancy*. For instance, the first two categories of tenure could exist as *unregistered*, such unregistered tenures are illegal under the LUA, so have not been shown in Table 3.

⁹⁶ Their level of security has been rated as follows: high, middle, low and very low.

From the above table, it is obvious that Nigeria's Land Use Act has abolished freehold interest in land in the country. It has also distorted aspects of the tenure system practised in the country. For instance, although

the government that customary tenure was outdated and did not offer tenure security, there is evidence that people were more comfortable with customary tenure than they are with the Land Use Act (1978).

Table 5: Land Rights within customary law/tenure

Types of rights	Degree of positive responses (%)	Degree of negative responses (%)	Degree of security
Right to choose type of farming	99	1	Very high
Right to leave the land to fallow	100	0	Very high
Right to develop the land	100	0	Very high
Right to gather firewood	100	0	Very high
Right to gather wild fruits	100	0	Very high
Right to fell trees for sale	74	8	High
Right to graze livestock	50	38	Low
Right to prevent livestock grazing	80	0	High
Right to collect the entire yield	80	2	High
Right to loan out one's land	54	33	Low
Right to give out one's land	50	38	Low
Right to bequeath one's land	51	36	Low
Right to hire out one's land	52	35	Low

customary ownership rights are common within rural communities, they are not deemed as being legal per se. It merely represents a sum of all social practices that regulate people's access to land. It tends to lose its perceived legality in urban areas due to the need to acquire a Certificate of Occupancy. On the other hand, in practice "[...] one of the problems associated with the Certificate of Occupancy is that it does not, in reality, transfer any interest in land" (Dada, 2010). In the case of *Ogunleye vs. Oni*,⁹⁷ (SCN, 1987: No. 193) it was held by the Supreme Court of Nigeria that "a Certificate of Occupancy issued pursuant to the Land Use Act (1978) only gives the right to use and occupy land. It neither confers nor is it necessarily an evidence of title." In addition, contrary to the pre-LUA claim by

Rural communities tend to feel more secure within the customary law or its tenure system – so far they are ignorant of the provisions of the Land Use Act. Afeikhena's (2002) research⁹⁸ highlights this. See table below:⁹⁹

One obvious point the above table reveals is that customary property rights and tenure create the perception of a higher level of security than the Land Use Act does; that is, if rural people were allowed to

⁹⁷ This is a landmark ruling made by the Apex Court of Nigeria. The implication of this judgment is that the LUA erodes tenure security rather than protects it.

⁹⁸ His methodology was based on interviews with 80 respondents (68 natives and 12 migrants; 95 per cent males and 5 per cent females) drawn from 13 villages – about their perception of tenure security on the different rights they hold on land. The rating is the same as for Table 3.

⁹⁹ Afeikhena has, however, amended the table by rating and inputting the degree of security. It is important to note that the rights shown in the table are permanent, except in the case of rights to fell trees, graze livestock, loan out, give out, bequeath and hire out one's land, where some of the respondents have to get the approval of the village head or family.



Rural Market for oil palm in Akure, Nigeria © Uchendu Chigbu

adopt their customary tenurial practices, they would feel more secure on land where they have customary tenure.

Overview of Nigeria's Property Market(s)

A further implication of the nationalization of land in Nigeria is that it has resulted to three different land markets in Nigeria. It has led to a primary market for direct state allocations; a secondary market for statutory land rights, which are documented by official Certificates of Occupancy; and a market for pre-1978 land rights which have not yet been converted to statutory rights, and for which no statutory Certificate of Occupancy exists (Butler, 2009).

The table (below) shows a category of the markets with specific issues involved:¹⁰⁰

Based on Butler's (2009) findings, estimates of what percentage each of the three markets makes up of the total land turnover in two of the major states, Lagos and Kano (see the Nigerian map in Figure 1), suggest that direct government land allocations account for less than 1 per cent of the total market. Registered transactions with statutory Certificates of Occupancy for which official consent has been obtained account for less than 25 per cent; and the remainder of transactions, which account for more than 70 per cent, are in the informal

¹⁰⁰Their level of security has been rated as follows: high, middle, low and very low.

Table 6: Types, Characteristics and issues of Nigeria's property markets (Butler, 2009)

Market	Characteristics	Major issues
Primary market	<p>Direct State Land Grants</p> <ul style="list-style-type: none"> • Most new lands need to be taken by the state from current occupants, who may hold equitable rights and be entitled to compensation • First-come-first-served • Deep subsidies regardless of wealth or use • Development covenants • Required infrastructure contribution 	<ul style="list-style-type: none"> • Scarcity – opening up new lands • Compensation issues associated with compulsory state land acquisitions • Misdirected subsidies • Speculation - development covenant rarely enforced • Inability to deliver infrastructure • Inadequate generation of state revenue • Long delay between “paper” allocations and actual delivery of sites • Illegal occupation - squatting
Organized Secondary Market	<ul style="list-style-type: none"> • Trade in Statutory Rights/Certificates of Occupancy • Mostly Registered Land Rights • Common law conveying rules and procedures 	<ul style="list-style-type: none"> • Burdensome land transaction procedures – the “Governor’s Consent” • Burdensome official fees for land transactions • Growing incidence of informality – tax/fee avoidance
Informal Secondary Market	<ul style="list-style-type: none"> • Pre-1978 Land Rights – “Customary” rights • No statutory certificates of occupancy • Equitable right to obtain a statutory certificate of occupancy • Characterized by unregistered transfers of title documents using common law conveying rules and procedures 	<ul style="list-style-type: none"> • Burdensome land transaction procedures and official fees discourage formality • Strict and (arguably) inflexible standards for establishing valid pre-1978 titles and converting to statutory rights • Long delays in conversion of pre-1978 rights to statutory rights of occupancy

market (meaning that they consist of trade in equitable pre-1978 land rights or trade in statutory land rights without consent or registration). Records from the Land Allocation Department of the Lagos Lands Bureau show that in 2007 there were only about 300 applications for direct grants of state land, and only about 30 of those were for non-residential land. In Kano, in recent years there were about 20 applications for direct state allocation of industrial or commercial land, only six or seven of which were actually granted. In 2007, Lagos’s land records showed that only 2,714 applications were received for consent to transfer statutory rights of occupancy. The same year, also in Kano, less than 400 applications were received for the governor’s consent to assignment of statutory rights of occupancy. In Lagos, annual gains in land prices are estimated to have been over 30 per cent in 2007 and 2008.¹⁰¹ Butler (2009) asserted that it could take as much as three years from

registration to get the Certificate of Occupancy and this is a conservative estimate (see Figure 3 for more details).

5. ANALYSIS OF LAND TENURE SECURITY OF NIGERIA

Land tenure security for rural people, especially farmers, is becoming a fundamental political, social and economic issue in Nigeria. It has also raised institutional questions on the efficacy of the present rules and laws guiding the issue. All these questions tend to hinge on one major issue – the Land Use Act (1978) of Nigeria. The current Nigerian Government, as with previous governments, has had to face accusations over what is perceived to be an exercise of state monopoly over land ownership in the country through its Land Use Act. Since the enactment of the Act in 1978, the government has used the policy to acquire large areas of land for housing, irrigation schemes, industries,

101 All figures reported here are derived from Butler (2009).

universities and other projects. However, compensation has generally not been paid and smallholder farmers and pastoralists have had major financial losses. Since the government has the sole right to freehold interest in land, it has created a world of uncertainty about land tenure and has made it difficult for rural people to obtain titles on land. The procedures and administrative bureaucracy a rural person has to go through to obtain a C of O – which is registered leasehold (as shown in Table 3) is very discouraging. From the map¹⁰² shown in Figure 3, it is obvious that apart from the conversion process that poses a barrier to a secure tenure title, the “[...] consent process is more of an annoyance than a barrier” (Butler, 2009). Worst of all, the fact that such certificates when acquired can be revoked by a politician (such as a governor) creates great insecurity. This is a major problem in Nigeria. Note the number of years it could take to get title and the more than three dozen steps involved in the process. Of the 35 steps shown in the below map, the World Bank (2006) estimates that “21 pens-mid paper procedures” could be involved. Under normal circumstances, the entire process could take 274 days and requires official fees of more than 27 per cent of the property value” (Nuhu, 2007). However, it usually takes much longer – there have been cases that have taken three years (Butler, 2007) or longer. A look at the various steps in the process shows the difficulty in registration of titles in Nigeria.¹⁰³

5.1 Recent Country Efforts

The current Nigerian Government has created a seven-point agenda for immediate action¹⁰⁴ and land reform is featured. According to the government, land reform is urgently needed to “provide proper ownership”. The president forwarded a bill to the country’s National Assembly in which he proposed some amendments to

the Land Use Act.¹⁰⁵ The amendments being proposed relate to Sections 5, 7, 15, 21, 22, 23 and 28 of the Act – and deal mainly with the following:

- The restriction of the requirement for a governor’s consent in land transactions to assignments only
- Make land a more easily convertible asset that can be used with less hindrance to raise capital for ventures in other sectors of the economy
- To render such consent unnecessary for mortgages, subleases and other land transfers
- To make land transactions less cumbersome and facilitate economic growth, etc.

Individual states are also working on their own initiatives, including updating remote sensing data, developing electronic registration systems, simplifying procedures and lowering transactions costs. States like Rivers, Lagos and Abuja are already doing this. According to Butler (2009), in Lagos, the government has implemented several major initiatives:

- Lowering official fees and taxes for consent to assignment of land rights to 15 per cent of asset value from the previous level of 30 per cent.
- Lowering the official fee for consent to mortgage from 0.25 per cent of mortgage amount to 0.20 per cent of mortgage amount.
- Developing an electronic deeds recording system within a PPP venture. This includes scanning and indexing existing records and documents.
- Developing Detailed Action Plans for the reform of land management and administrative procedures concerning land within a PPP initiative.

On 2 April, 2009, the then President Musa Yar’Adua inaugurated an eight person Presidential Technical Committee on Land Reform with seven terms of reference:

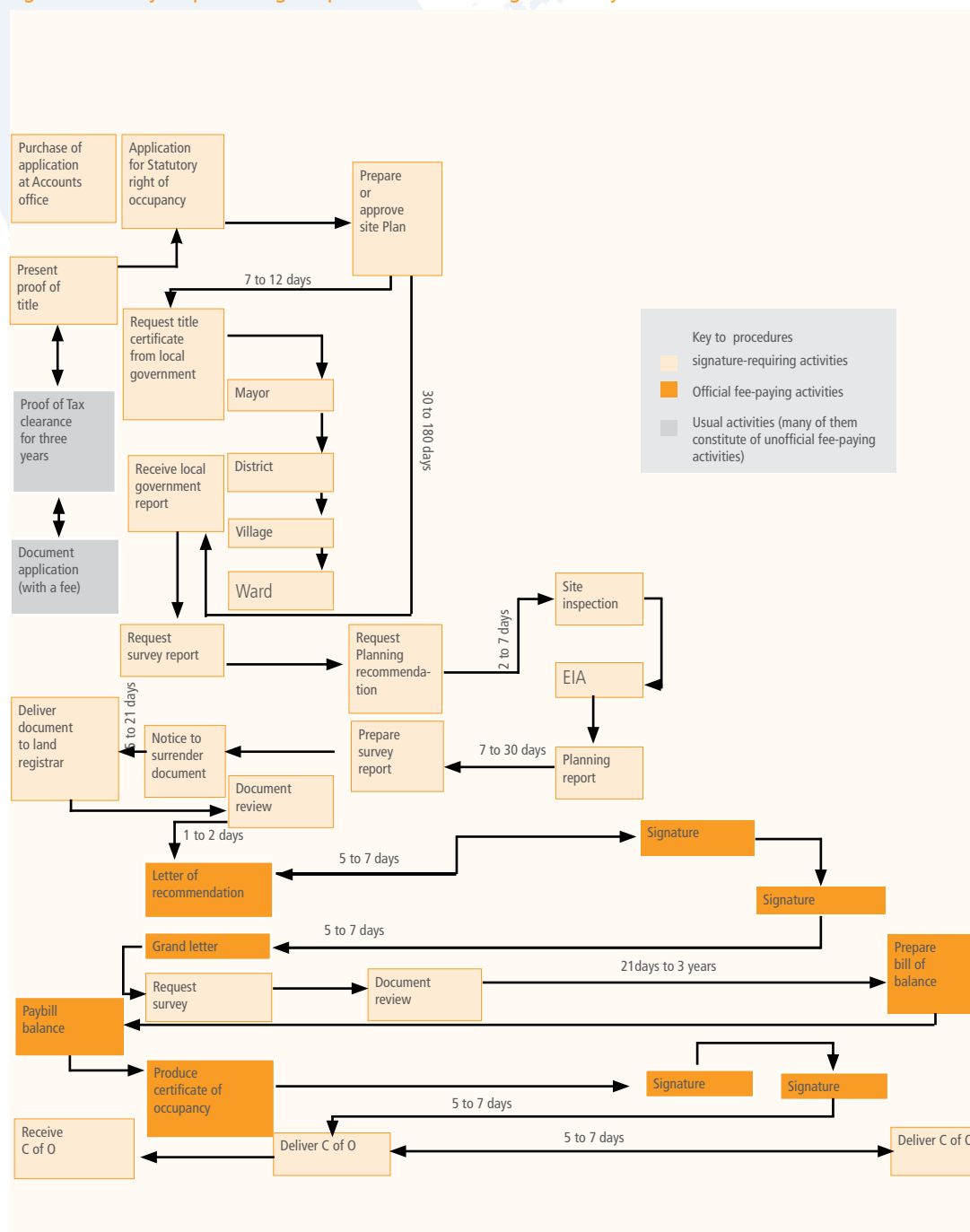
¹⁰² The procedural map is adopted from Butler (2009) based on his Kano state case study.

¹⁰³ See the key to understanding the procedural map.

¹⁰⁴ Seven priorities recognized by the government as needing urgent action, it was instituted by the then President Musa Yar’Adua, who came into office in 2007 for four year.

¹⁰⁵ This is undergoing parliamentary deliberations at the moment.

Figure 3: Activity map showing the process of converting customary title to C of O



- To collaborate and provide technical assistance to state and local governments to Create a nationwide land cadastre;
- To determine individuals' "possessory and use" rights by adopting best practices and appropriate technologies to determine the process of identification of locations and registration of title holdings;
- To ensure that land boundaries and title holdings are demarcated in such a way that communities,

hamlets, villages, village areas, towns, etc. are recognizable;

- To encourage and assist state and local governments to establish an arbitration/adjudication mechanism for land ownership conflict resolution;
- To make recommendations for the establishment of a national depository for land title holdings and records in all states;
- To make recommendations for the establishment of a mechanism for land valuation in both urban and rural areas in all parts of the federation; and
- To make any other recommendations that will ensure effective, simplified, sustainable and successful land administration in Nigeria.

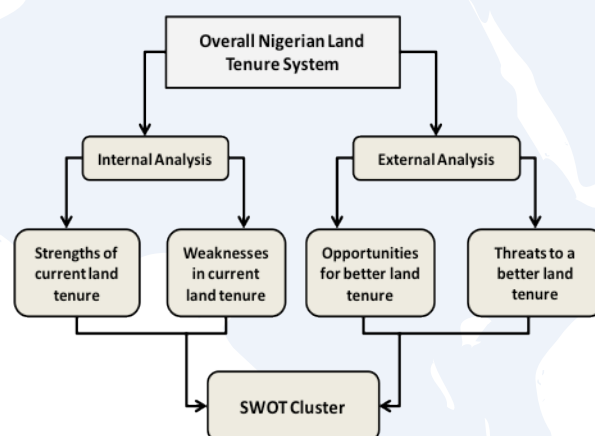
The Presidential Technical Committee on Land Reform was reconstituted in November 2011 by the current president, Goodluck Jonathan. The committee is under the office of the secretary to the government. It is hoped that the committee will help pave the way to improved tenure security, especially identifying and removing bottlenecks in obtaining land titles, the registration procedure and other processes.

5.2 SWOT analysis of Nigeria's land tenure system

A SWOT analysis provides reliable data on Nigeria's current land tenure and security situation as the country moves towards sustainable development. The following diagram shows the framework of the SWOT analysis:¹⁰⁶

The SWOT analysis is an important tool for policy decision-making and strategy formulation on land tenure. It is an investigation of the overall Nigerian land tenure system, from where the internal and external issues that affect Nigeria's land tenure practices were classified as strengths, S, or weaknesses, W, (internal) and opportunities, O, or threats, T, (external).

Figure 4: Framework of SWOT Analysis



5.3 SWOT cluster of land tenure and land security in Nigeria

In this analysis **strengths** are those things that are helpful in achieving sustainable pro-poor development; **weaknesses** are features that are harmful to its achievement; **opportunities** are conditions that provide advantages necessary for achieving sustainable pro-poor development; **threats** are conditions that constitute potential damage to its achievement. The main purpose of a SWOT analysis in this study is to identify strategic actions that could be taken by the government, private sector, non-governmental organizations and other stakeholders. The analysis is based on data from publications and primary data obtained from open (non-structured) discussions with key informants working in Nigeria's land sector.¹⁰⁷

The SWOT analysis highlights the details and significance of helpful and harmful aspects of tenure security in Nigeria. If the country's land tenure system were full of strengths, it would be logical to suggest the need for a consolidation of existing land tenure successes. Unfortunately, this is not the case. As a result, focus towards devising a pathway for improved land tenure security.

¹⁰⁶ The framework was adopted from Bradford et al's (2000) explanation of the SWOT as a strategic planning tool.

¹⁰⁷ See introduction to this paper.

Figure 5: SWOT cluster showing helpful and harmful aspects of land tenure security in Nigeria

	HELPFUL TO TENURE SECURITY	HARMFUL TO TENURE SECURITY
	STRENGTHS	WEAKNESS
INTERNAL ISSUES	<ol style="list-style-type: none"> 1. Vibrant land market 2. High level land-based response 3. Easy accessibility of land for public use 4. Country-wide land law applicability 5. Emerging private sector 6. Nigeria is a regional economic power 7. High rural and agricultural potentials 8. Capital gains tax on land rights transfer is 2% of the value of the land this can be as high as 15%-40% in other countries (Butler, 2009) 9. Constitution is against unfair expropriation 	<ol style="list-style-type: none"> 1. The land Act of 1978 2. Rural poverty 3. Restriction of property rights in estate in estate to rights of occupancy 4. Highly pluralized legal framework on land 5. High level of land inaccessibility 6. Lack of electronic cadastre, title and planning records land information systems, unreliable and poor land registration systems (Butler, 2009) 7. Existence gender discrimination and ignorance 8. High administration cost for land transaction and registration (in terms of time and finances) 9. Inability of small holders to increase the size of their holdings (Arua and Okorji, 1997) 10. Racketeering and land speculation 11. Conflicting and overlapping land laws 12. Vesting land in one person governor of a state 13. Excessive land conflict 14. Land fragmentation 15. Land concentration 16. Land tenure insecurity 17. Lack of clarity between land and resource tenure 18. Absence of effective policy on optimum land use (Arua and Okorji, 1997) 19. Excessive land conflicts 20. A will cannot split rights of occupancy 21. Permission is needed in order to transfer license 22. Approval is needed in order to alienate
	OPPORTUNITIES	THREATS
EXTERNAL ISSUES	<ol style="list-style-type: none"> 1. Good geographical location for land-based investment 2. Easy acquisition of land by the government for development purposes 3. Emerging democratic society 4. High active population for land-based production 5. Taxation and rating for development 6. Proposed land reform by the current government 7. Use of Land consolidation as development instrument 8. Public/Private partnerships and land concessions (Butler, 2009) 	<ol style="list-style-type: none"> 1. Poor enforcement of laws, rules and regulations 2. Poor Land Management education within Nigeria and the West African region 3. Lack of relevant institutions to deal with policies on land (Enemark, 2009a) 4. Natural resource "curse". e.g. Oil 5. The country's poor reputation in the international community 6. Political, social and economic instability 7. Unreliable land information systems 8. Inability of smallholders to increase the size of their holdings (Arua and Okorji, 1997) 9. Constitutional rigidity for the amendments of the land Use Act 10. The challenges posed by institutionalized corruption

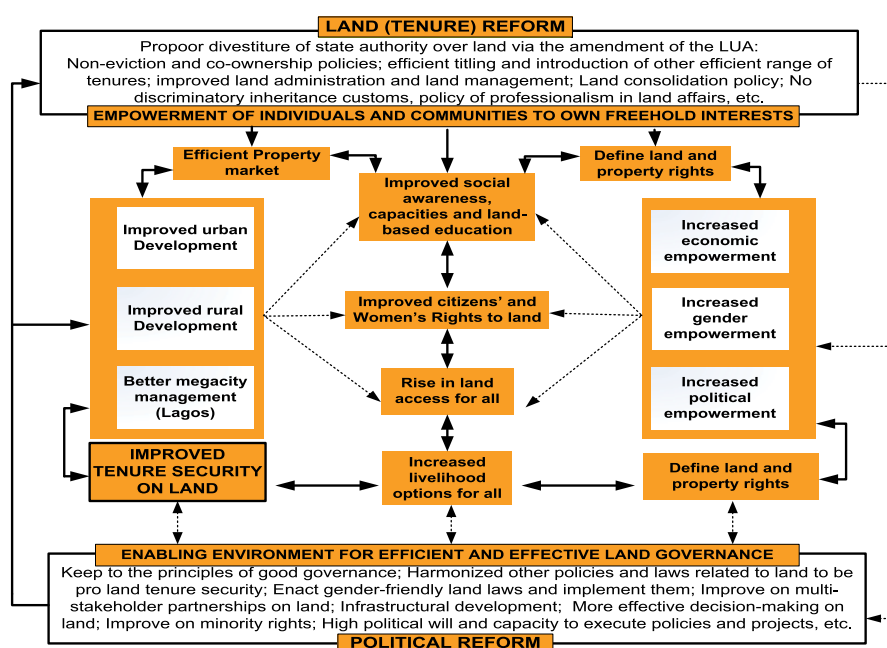
6. DISCUSSION AND RECOMMENDATIONS FOR ADDRESSING LAND TENURE PROBLEMS IN NIGERIA

The fact that there are so many weaknesses and threats in the Nigerian land tenure system indicates that the present land tenure law has either failed or is being wrongly implemented. However, considering that land nationalization does not pave the way for guaranteed freehold tenure, which is a major driver in a free-market system, a better (i.e. a pro-poor and tenure-security-oriented) land policy is needed. Major issues have been selected from the SWOT analysis for discussion on how best to improve the land tenure security.

6.1 Tenure security as a prerequisite for development

Security of tenure is closely linked to three central objectives of the MDGs — eradicating extreme poverty, promoting gender equality and empowering women, and ensuring environmental sustainability. For Nigeria to achieve its MDGs, security of tenure is a necessary condition. This demands a national land policy that is accepted by Nigerians and that recognizes informal (including customary) land rights; the legal recognition of formal and informal land institutions; a policy of land consolidation that is backed by adequate procedures. A functional but cost effective land valuation system is also important. MLHUD et al. (2006) note that “[...] in all considerations of pro-poor land tenure security, land should not be viewed only from the perspective of its asset value, but also as an integral part of the cultural and social fabric and dignity of a community. Customary tenure is usually better able than statutory to respond to these critical social and cultural dimensions.” These factors are lacking in the Nigerian system and a total transformation of the country’s present land policy is needed. As a suggested solution, a model for achieving

Figure 6: Pathway to Achieve Improved Land Tenure Security in Nigeria



improved land tenure security (based on the issues raised in the SWOT analysis) is presented in Figure 6:¹⁰⁸

The above diagram has two important points on how improve tenure on land in Nigeria: first, there must be political reform and second, there must be pro-poor land (tenure) reform. These should not take place in isolation. Political reform is important so that there is an enabling environment in which defined land tenure systems can work. The land and political reforms must define land and property rights in homogeneity (across the whole country). Political reform (based on political will) means land reform will be well implemented, which will lead to an efficient property market, improved awareness of land-based issues and will provide a well-defined property rights system. These results could eventually lead to better options for livelihoods through which people may become confident of having the necessary resources to perceive and exert security on their ownership structures. According to Willy (2013), decisions concerning alienation and lease of lands are not made by farmers themselves, but by the government. This sort of situation can be changed through reform. "All activities, programmes, planning, projects etc. focusing on secure tenure have to be part of an integrated, comprehensive approach" (Magel, 2001). This is why "providing legal security of tenure and equal access to land to all people" ¹⁰⁹ in Nigeria should be made a prerequisite for human development in the country.

6.2 Land tenure reform for Nigeria – amending the Land Use Act (1978)

For more secure tenure to be achieved, there is need for a policy and institutional reform process. The LUA grants only "limited beneficial ownership" (Ogbuefi, 1998) and conflicting legal judgments on its status pose a problem for conflict resolution. The lack of fair

compensation has also been a social and economic challenge. Sections 5, 7, 21, 22, 23 and 28 of the Act need to be amended to restrict governors' consents for land transactions –politicians, such as governors, having the authority to give consent is prone to abuse. Generally, the worst aspect of this is the non-flexibility of the Act for amendment purposes. The Act is recognized by the Constitution and no changes can be made to it without a formal constitutional amendment. While these changes are necessary, they should be viewed as part of an "on-going process" (FIG, 2010a) that ensures "land tenure, land value, land use and land development are dealt with in such a way that the issues of today still take the future into account" (Enemark, 2009a). A constitutional amendment is therefore a necessary first step.

A major aspect of addressing the Land Use Act should include the issue of the dichotomy between rural and urban land. Under the Act, the governor or state government manages any land declared as urban. In rural areas, the chairperson of the local government (municipality) takes charge. Due to this, in all the capital cities of the states, the local government has no jurisdiction over land.

6.3 Improving the land administration system

Under the uniform system of land tenure, land administration is too centralized and autocratic. A system that is more decentralized is needed to increase citizens' participation in decision-making, which may in turn improve efforts to encourage land access (Fajemirokun, 2003). As already shown in Figure 5, formal titling is extremely difficult to get. Fully decentralized land registration processes would serve to recognize and protect customary rights. The system should be incorporate norms of best practices; this will improve land markets and access to credit facilities, which may help to fight poverty. As Nuhu, (2009) suggests, cadastral survey/registration, simplification of customary title registration, adoption of STDM are ways

¹⁰⁸ The arrows show direction of influence. Bold lines indicate high influence or input while the dotted-line show inputs that may not be very high. However, all influences (or inputs) in the diagram are positive.

¹⁰⁹ Quoted in Magel (2001) as one of the major aims of - UN-Habitat.

the land administration system could be improved. Land management and the operational component of land administration systems therefore need high-level political support and recognition (Enemark, 2009b).¹¹⁰ Issues related to “landed property taxation and rating in Nigeria” should be addressed to suit the present situations and are practised in “a fit and proper manner” (Igwe-Kalu, 1998). With costs, in the long run states should plan to obtain most land revenues from recurring taxes such as ground rents, tenement charges and neighbourhood improvement charges, and less from transactional taxes, which tend to encourage informality (Butler, 2009). This could create confidence in property ownership.

The roles of the three arms of governments need to be reviewed as they relate to land administration and management. For instance, local governments have key functions in rural areas but lack the capacity and expertise to discharge these functions effectively. On the other hand, local governments in urban areas are barred from making reasonable inputs on land management matters because the Constitution empowers governors to manage lands within these jurisdictions.

6.4 Capacity building and land management education

Capacity building is needed in educational and training institutions specifically to meet the need for technical and developmental skills in land tenure reforms and other land issues. This involves channelling efforts or activities towards the improvement of knowledge, skills, awareness, motivation, commitment, confidence and abilities of people to fulfil their development challenges (Magel, 2009) through land management. Table 2 clearly shows that there is a need for more trained surveyors. Highly differentiated property markets in a country where there are several million people (see Table 5) cannot function with fewer than

6,000 surveyors. The inference is that quackery is taking over because of the lack of professionals. Since land tenure and tenure security are important management components on land, professionals, rural people and institutions need to respond to its challenges through effective and proper knowledge and skills (Espinoza et al., 2009). “Focused capacity-building strategies and activities of state and non-state actors need to be a part of the entire policy formulation process” and should “be incorporated at the outset of the various stages of the process to ensure continuity, ownership and sustainability” (MLHUD et al., 2006). This should be based on an “end-to-end principle” whereby knowledge is transferred from the instructor to the instructed (FIG, 2010b).

6.5 Land consolidation

Considering the high fragmentation of land in Nigeria, rights, privileges and interests in land have become highly fragmented as well. Land consolidation would not only provide for reallocation of parcels to remove effects of fragmentation, but it would integrate similar rights to parcels into broader bundles of rights for easier management. Land consolidation serves to modernize tenure arrangements by eliminating outdated rights of use, including some rights of access, grazing, haymaking, timber felling, fishing and boating, and the extraction of peat, clay and sand (FAO, 2003). At the same time, legislative provisions have to be made to adjust to the new requirements demanded for the implementation of land consolidation (Magel, 2000). This can be fed into the reform process.

6.6 Good land governance and enabling environment

Land tenure security cannot be achieved without an enabling environment or/and good land governance.¹¹¹ There must be an enabling environment for success to

¹¹⁰ From lecture delivered by FIG president, Stig Enemark, at the 27th Olumide Memorial Public Lecture of the Nigerian Institution of Surveyors (NIS) in Abuja, on 29 October 2009.

¹¹¹ Land governance is good only if it fits the demands of the people (in this case, Nigeria) and effectively and efficiently tackles their land problems.

be achieved on issues like capacity building and formal education, land consolidation, development of an effective land administration system and total reform of the Nigerian land sector. This implies that there must be functional accountability, gender equality, respect for human rights and the rule of law; and a response to the economic and social needs of the people (UNDP, 2002). Community byelaws could be instituted and used as local instruments to provide for an enabling environment within rural communities (GTZ, 2005)¹¹².

6.7 Better collaboration and research on land tenure and tenure security

There is little or no interaction between the various Nigerian professionals working on issues of land tenure and tenure security and those people working on economic development policies, agriculture, rural development and in poverty reduction sectors. The different branches of surveyors are yet to find common ground on research on land tenure and tenure security. A lot is still unknown and uncertain and more research is needed. Surveyors currently seem more like rivals than colleagues and there is need for more collaboration on finding solutions. More interdisciplinary research needs to be done to determine the impact of Nigeria's current land tenure security on the country's economic development, the socio-political development of the people and its impact on the environment. Understanding these issues could pave the way for better policy making on tenure issues.

CONCLUSION

After tracing the evolution of land tenure systems and policies in Nigeria, this study highlights the importance of amending or expunging the LUA from the Constitution. This is necessary to achieve a more people-centred policy on land as a major step in the development of a secure tenure on land. With 80 per cent of Nigeria's land identified as rural area, there is great population

pressure on the 20 per cent identified as urban. On the other hand, rural people have high insecurity on land due to their inability to acquire customary rights of occupancy, which must be converted to C of Os to become legally secure. Yet whatever right the C of O actually confers on its owner is not truly secure. This paper has exposed the need for Nigeria to move from its present, highly controlled policy on land, to a more decentralized and participatory policy. It calls for land reform process that provides for security of land tenure in Nigeria. The paper recognizes that there is no quick fix or short-cut strategy for achieving land tenure security so the model recommended is a long-term process. It explains that effective land (tenure) reform cannot truly work in Nigeria without corresponding political reform that will create an enabling environment for the institutionalization of a tenure security that works for all. This is important for Nigeria because general economic transformation will depend on food security and rural development in the country – meaning that land tenure security will play the most vital part.

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South
Sudan

05

Democratic
Republic
of Congo

UGANDA

Kenya



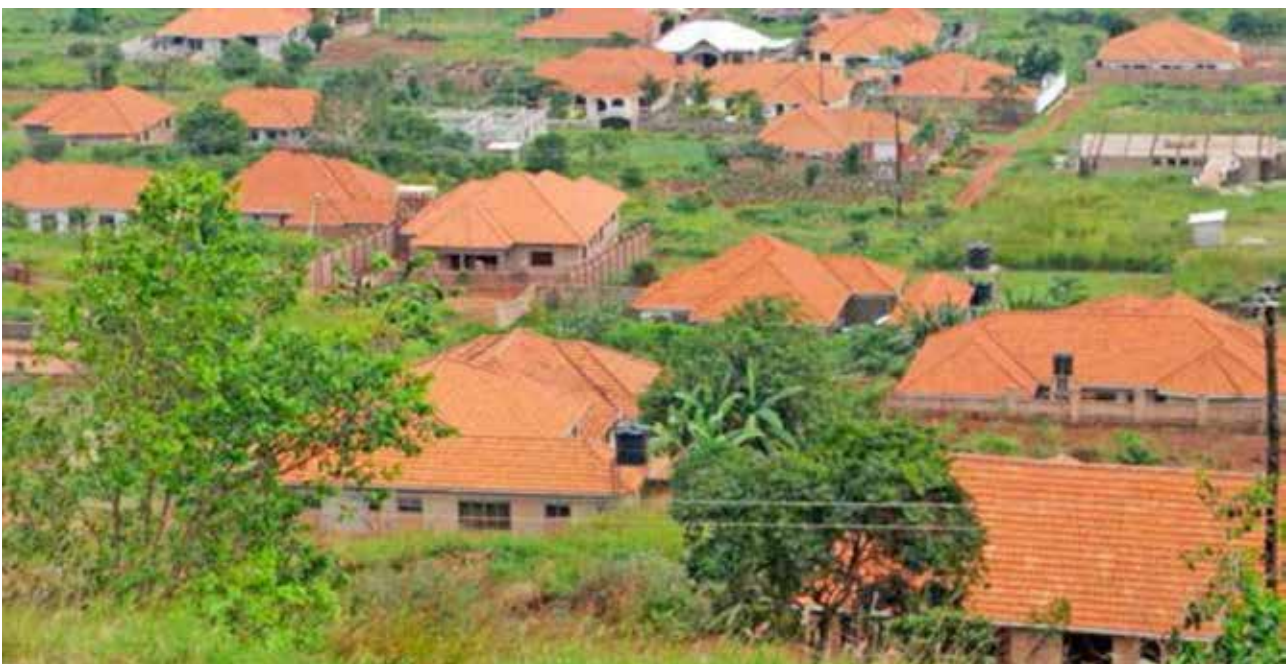
1. INTRODUCTION

Uganda is an agricultural based economy where agriculture contributes 43 per cent, industry 18 per cent and services 39 per cent of the Gross Domestic Product (GDP). Land is therefore an essential factor in natural and people-managed production systems, influencing the level of natural capital and social, economic development. This means that access to, ownership of and use of land, and importantly land tenure security, offer perhaps the only means of survival to the vast majority of Ugandans. To clearly understand existing land tenure systems requires a general review of historical trends in land tenure in the country. The annals of land tenure systems in Uganda go hand in hand with the country's colonial and political past. The foundation of today's land tenure systems lie in complex economic, social and environmental factors that originated under colonialism and have survived since 1900 to date.

New tenure systems were introduced and old ones (especially customary systems) were suppressed but not eradicated. A step towards modifying the old systems

and introducing a new tenure system was the publication of the East African Royal Commission (EARC) Report in 1955 on land tenure and economic reform in Britain's East African territories (Uganda, Kenya and Tanzania). Customary tenure, with its typically communal nature, was based on a subsistence economy and inherent social relationships. Thus, a different perception of land as an economic commodity with customary tenure as an impediment to land markets - land sales, leases and mortgages etc., - formed the first steps towards robust property rights to land.

Okoth-Ogendo (2006) traces the origins of the land tenure problem back to the colonization of Africa when colonial powers promulgated decrees that converted land in the colonies - the ownership of which could not be proved by documentary evidence - into the property of their respective sovereigns. This imposition was enforced by a complex system of foreign property laws that now forms part of the legal system of independent Africa, and it set in motion a process of transformation in land relations. The consequences of this are at the root of the current land (tenure) rights debate in sub-Saharan Africa (*ibid*). The debate is about the relevance



Uganda's real estate industry is affected by land tenure insecurity © Samuel Mabikke

Essentially, for many people in Uganda, land is owned on behalf of their ancestors and in trust for the future generations. This notion makes land more than just an economic asset - it is part of the social and cultural fabric of the society.

of tenure security and the dangers of its absence. At the international level, the Istanbul Declaration and Habitat Agenda are evidence of efforts to ensure easy access to land and land tenure security.

1.1 Land Tenure Systems and Tenure Security

Land tenure systems are a product of historical and cultural factors reflecting relationships between people and society, and between land and land (Payne, 2002). This notion has become the background against which land tenure has been defined and approached on a practical level. This paper adopts a working definition of land tenure as “[...] the relationship, whether legally or customarily defined, among people as individuals or groups, with respect to land and associated natural resources” (Food and Agriculture Organization, 2002). The rules, norms and traditions of access, use and transfer of land play a big role in defining tenure systems. They define the manner in which property rights are allocated within societies (FAO, 2003), i.e. whether societies prioritize communal or private interests. The respective communal (e.g. customary tenure) and private land tenure systems are embraced in several countries in sub-Saharan Africa, but the inherent interests represent the needs of the society. Thus, the common land tenure systems are private, communal, open access, or state. Each system features special forms of property rights distribution, diverse levels of tenure security for members, and different actors who determine the land allocation, its control and its transfer.

Tenure security – “[...] the certainty that a person’s rights to land will be recognized by others and protected in cases of specific challenges” (FAO, 2002) - is the basis of sustainability. Challenges to people’s rights may include (but are not limited to) unjustified claims and forced evictions. While all tenure systems have advantages and disadvantages, private tenure is the most preferred system; it confers full security to the owner. State land tenure (land nationalization) has often resulted in bureaucratic inertia and clientelism, while the customary tenure system is under pressure from commercialization and the breakdown of the social fabric from which it derives legitimacy. Practice has shown that customary tenure is subordinated to the statutory system, especially in Uganda, and as such, the customary systems are prone to local elite capture by crowding-out the poor through unlawful and unfair forced evictions, often through collusion with corrupt elements in statutory land administration systems. Private tenure systems, despite their inherent levels of transparency and efficiency, have proved to be weak in enabling the poor to access land (Payne 2002).

Land tenure systems draw their legality from the country’s legal frameworks and these frameworks further define mechanisms for ensuring tenure security. Essentially, for many people in Uganda, land is owned on behalf of their ancestors and in trust for the future generations. This notion makes land more than just an economic asset - it is part of the social and cultural fabric of the society. It therefore makes access to land and security of tenure critical issues for poverty reduction and conflict resolution, especially among the rural poor who constitute over 80 per cent of Uganda’s population.

2. THE CONCEPTUAL FRAMEWORK

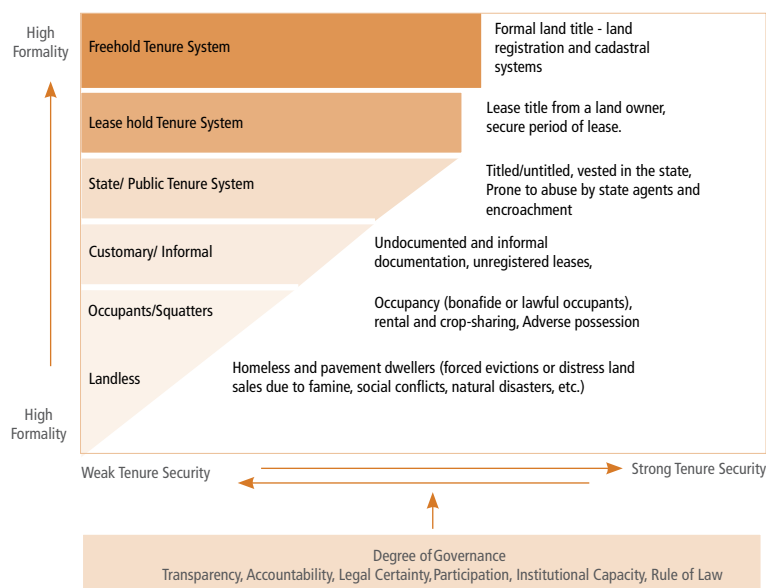
Security of land tenure is a relative concept. It derives from people's perceptions and may be for a short term (e.g. a growing season) or long term, for several years or land owned in perpetuity (e.g. private ownership). Full tenure security is not limited to formal systems by private ownership but extends to some informal market oriented neo-customary systems. Security of tenure is not a preserve of rural or urban land management processes; it is universal and includes many players, such as the government, the local community and civil society, the private sector, and the traditional and religious leaders. What is clear is that tenure security allows land users to benefit from their investments in land and to exercise their rights in line with conditions of access to land and legitimate instruments that restrict land use and development. It may be formal, informal or a synergistic effect of both, since the needed legal, technical, economic and political aspects are not limited to a single player. The government may champion institutional or legal reforms, develop pro-

poor policies or initiate public-private partnerships, but full stakeholder involvement is critical.

Thus, the formality of tenure systems and tenure security are separate; what matters is how secure a tenure system is (Dey *et al.*, 2002). This is, however, a contextual notion. Without a formal system, tenure security alone may not automatically facilitate vibrant land markets, collateral, or even invoke sustainable household investments in land. Formality and the definition of legality of tenure systems in a particular jurisdiction may or may not coincide. Essentially, without good governance tenure security is impossible and land reforms cannot be successful. The land allocation process may be corruptly based on secretive administrative criteria instead of the open market criteria (McAuslan, 2002).

Land titles can be abused while growing land markets and speculation may compel traditional leaders to subordinate cultural norms and values (the social fabric on which customary tenure systems are built) to their interests. This may provoke or aggravate market-

Figure 1: An overview of Tenure Security



Source: Authors

driven evictions and land poverty. Thus, formal land titling is not a silver bullet for ensuring tenure security (Broegaard, 2009) and the effective legal security rests not on the fairness of a judicial system alone but also on the access of the poor and vulnerable to justice. Therefore, tenure security is a continuum of mutually reinforcing factors such as: the state guarantee of title and security of registration, duration of use, land purchasing and inheritance, recognition of land rights from local institutions and neighbours, strong social networks and social stability, legal certainty, rule of law, political will, participation and empowerment.

From Figure 1, it can be seen that while the state of tenure security for any tenure system depends on many factors, the majority of forces lies in the ambit of governance in land management processes. Land title fraud, conspiracy and clientelism, bureaucratic inertia and political patronage etc. in formal and informal land management processes can lead to weak tenure security, irrespective of whether tenure systems are formal or informal.

3. HISTORICAL TRANSFORMATIONS OF LAND TENURE SYSTEMS IN UGANDA

A recap of historical dynamics of land tenure systems is paramount for understanding land ownership and tenure security in Uganda. It is argued that even where a revolutionary change occurs, its rationale lies in the past and the chances of success of the change will be determined partly by the past and the extent to which path-dependent patterns of development can be overcome (McAuslan, 2003). While Uganda's land tenure changes began with the advent of colonialism, diverse forms of customary systems existed before the 1900 Buganda Agreement. Land rights and ownership varied among different ethnic groups and customary rights varied from place to place. However, research indicates that whatever the differences, none of the communities in Uganda recognized individual ownership of land, which was held under a "bundle of

“In pre-colonial Uganda, the individual had the right to use the land as he/she thought best, to rent out a piece of land, to pledge crops on the land but not the land itself, to sell land subject to the approval of the family, to dispose of the land according to the customary laws of inheritance, to dispose of trees growing on the land, to prohibit grazing near his/her homestead and to fence the homestead.”

customary rights”. There was, however, recognition of various individual rights to possess and use land subject to sanction by the user's family, clan or community (Rugadya, 1999).

Knut and Noha (2009) point out that customary rights are not really “legal arrangements”, but encompass various social practices that regulate people's access to land. Hence, most countries have a variety of tenure systems depending on religion, customs, traditions, level of income, etc. This again creates substantial controversies, misunderstandings and disputes over land, which may affect basic living conditions, livelihood opportunities and levels of poverty. Although customary rights were not legal arrangements, Rugadya (1999) argues that in pre-colonial Uganda, the individual had the right to use the land as he/she thought best, to rent out a piece of land, to pledge crops on the land but not the land itself, to sell land subject to the approval of the family, to dispose of the land according to the customary laws of inheritance, to dispose of trees growing on the land, to prohibit grazing near his/her homestead and to fence the homestead.

The clan or family had the power and right to settle land disputes, to exercise the right or option to buy any land offered by its members, to prohibit the sale of clan land to an undesirable person and to declare void any land transaction which had not received its approval. The general community had the right to graze communally but damage to crops had to be made good. Therefore a

system of both individual and communal holding of land in pre-colonial Uganda was highly respected among different ethnic groups as a way of living harmoniously and using land resources sustainably. The land and resources had been bequeathed by the forefathers to the present generation, who in turn would pass it on to the next generation.

3.1 Evolution of Land Tenure Systems in Colonial and Post-Colonial Uganda

Before the arrival of the British in East Africa, land in Uganda was held mainly through customary tenure. Mugambwa (2007) reports that the colonial administration did nothing to change the nature and status of customary land tenure in East Africa until the Second World War. The publication of the East African Royal Commission (EARC) Report in 1955 was the catalyst for the reform of customary land tenure in Britain's east African territories. The EARC reported that customary land tenure was based on the needs of a simple subsistence economy and the social relationships that were associated with land use in such an economy.

Its main argument against customary land tenure was that it was of a communal nature and that consequently there was no incentive for individuals to invest in the land to increase its productivity or to make long-term improvements. Individuals were also discouraged from investing in the land they occupied because the tenure system did not provide individuals with sufficient assurance that their long-term land rights were secure. Moreover, customary landowners could not use their land as collateral for agricultural loans because financial institutions did not recognize customary titles.

The EARC Report was also critical of the fact that under customary land tenure, land was not treated as a commodity that could be sold, leased, mortgaged or otherwise dealt with commercially and therefore it had no commercial value. The British considered customary practices to be an impediment to economic development. Hence, the EARC felt that the only way

Uganda's land tenure systems were legalized when the British colonized Uganda and introduced indirect rule. Uganda was described as a "British Protectorate" that was overseen by a Governor appointed by the Queen of England.

forward was to reform customary land tenure and it accordingly recommended that the administration adopt land policies aimed at the individualization of land ownership and the mobility of land transfer.

The World Bank, which for decades had urged developing nations to reform customary land tenure, in its 2003 report concedes that customary land tenure does not necessarily impede economic development and that it is possible to achieve economic development under customary land tenure. The report, however, does not completely exonerate customary land tenure in this regard (Deininger, 2003).

Nevertheless, EARC urged the administration not to leave customary land tenure to evolve under modern influence;¹¹³ rather, the administration had to be proactive in meeting the requirements of the progressive elements in the society. However, EARC urged the administration to proceed with caution when reforming customary land tenure; reforms had to be introduced gradually, mindful of the local political and economic circumstances. The publication of the EARC Report caused a political stir in Uganda and most districts overwhelmingly rejected its recommendations.

Uganda's land tenure systems were legalized when the British colonized Uganda and introduced indirect rule. Uganda was described as a "British Protectorate" that was overseen by a Governor appointed by the Queen of England.

¹¹³ East African Royal Commission, 1953-1955: Report, Cmd. 9475 (EARC Report).

Although the British gradually introduced reforms to eliminate customary tenure, Mugambwa (2007) asserts that Britain's land tenure policy in its colonies in East Africa was different. The recognition of customary land rights was the exception rather than the rule; for example, in Uganda,¹¹⁴ the British Protectorate administration declared most land in the territory to be Crown Land by virtue of the Protectorate. Customary land tenure was recognized but with limits. Under the Crown Lands Ordinance 1903, indigenous Ugandans had the right to occupy any land (outside the Buganda kingdom and urban areas) that was not granted in freehold or leasehold without prior licence or consent in accordance with their customary law.¹¹⁵ However, the Governor had the power to sell or lease such land to any other person without reference to the customary occupants of the land. Compensation was payable to the displaced occupants at the discretion of the Governor. The only right the customary occupants had was to remain in occupation of the land until arrangements, approved in writing by the Governor, were made to re-locate them to other land.¹¹⁶

Although this presupposes that the British did not introduce any new changes and maintained the existing African institutions, practices and norms, this was not the case. Rugadya (1999) argues that some fundamental changes in relation to the land holding system were introduced and totally altered the way land was held in Uganda. In the Buganda kingdom, about 9,000 square miles (46.1 per cent) of wetlands and uncultivated land was vested in the Queen of England as Crown Land, termed as "wasted lands". The rest of the land in Uganda was declared Crown Land vested in the Queen and all persons on such land became customary tenants on what later became to be known as a public land. For the first time in Uganda three types of land tenure systems were introduced

which had been previously unknown: (a) mailo land, (b) freehold, (c) leasehold.

3.1.1 Mailo Land Tenure System

Mailo tenure was introduced as a result of the 1900 Buganda Agreement, commonly known as the Uganda Agreement, and was peculiar to the Buganda kingdom. Mailo tenure used miles as a unit of measurement, but a corruption of pronunciation in the native Luganda language resulted in the term "mailo". Under Article 15 of this agreement, the total land area of Buganda was assumed to be 19,600 miles² and was divided between the Kabaka (King) of Buganda and other notables in the Protectorate Government. Originally, there were two categories of ownership under the mailo system - private and official mailo. Official mailo land was transformed into public land in 1967. Under the system, land was held in perpetuity and a certificate of title was issued. The principal advantage of this system is that it provided security of tenure, thus allowing long-term investments including those related to conservation.

The royal family of the Buganda kingdom and high-ranking officials received 958 miles² as private mailo or official estate; 1,000 chiefs and private notables each received 8 miles², which added up to 8,000 miles²; 92 miles went to existing governments. The 1,500 miles² of forests, uncultivated land and what was termed wasteland were vested in the Queen of England as Crown Land. Peasant rights in land, which were not recognized in the original mailo arrangement, secured recognition through a Lukiiko (Parliament of Buganda Kingdom) enactment, the Busuulu and Envujjo Law, 1927. This enactment also specified other rights and duties of both the mailo owner and kibanja (tenant) holder respectively.

Until today, the main disadvantages of the mailo land tenure system have included its limited environmental management, the creation of absentee landlordism, and a lack of access by regulatory agencies. Absentee landlordism encourages squatters to move onto mailo

¹¹⁴ Part of what now is now Uganda became a British protectorate in 1894, the rest in 1897.

¹¹⁵ Section 24(4), *Crown Lands Ordinance* 1903 (repealed).

¹¹⁶ *Ibid*, p.33. See also John Mugambwa (2001). *Principles of Land Law in Uganda*, p.4.

land, usually without adequate incentive to sustainably manage a land resource which they do not legally own. To the extent that mailo land was private, resource management regulatory agencies had limited authority over what happened on it. For instance, much of the deforestation occurred in the districts of Buganda was on mailo land. There were no clear mechanisms that allowed the Uganda Forest Department to regulate the private forests on these lands.

3.1.2 Freehold Tenure System

This tenure system was peculiar to the then kingdoms of Toro and Ankole in western Uganda and was set up by agreement between the kingdoms and the British on native freehold. It was also granted as a result of the Toro Agreement of 1900, the Ankole Agreement of 1901 and Bunyoro Agreement of 1933. By these agreements the kingdoms committed themselves to British protection and became part of the Uganda Protectorate. The terms of the tenancy between the tenants on the land and the titleholders were not negotiable and were fixed by law in 1937. Apart from parcels of land under the freehold system being smaller, it had a lot of similarities with mailo tenure and shared the same environmental management problems. In addition, due to heavier population pressures in parts of Uganda where freehold land tenures now exist, land fragmentation is a common occurrence and has contributed to significant environmental degradation, although there is no concrete data on this.

3.1.3 Leasehold Tenure System

A leasehold estate is created in land as a result of a contractual agreement between a lessor (landowner) and a lessee. The lessee enjoys exclusive use of the land for a specified period in return for a cash payment, called rent, being paid by the lessee to the lessor. There are two types of leasehold tenure arrangements: private leases given by individual landlords and official or statutory leases given to individuals and/or corporate groups under public act terms. The advantage of the

leasehold system is that the lessor can attach conditions to the lease and has the right to revoke use rights in case of abuse. The challenge with leases is that they are costly and cumbersome to obtain.

The above three land tenure systems were introduced to Uganda by the British and were the legally recognized land tenure systems in the country until post-independence, when a radical shift in land tenure was made by President Idi Amin through the 1975 Land Reform Decree. Several land reforms have since been introduced and the 1975 Decree was repealed, thereby putting these land tenure systems back at centre stage in Uganda's land sector development agenda.

3.1.4 The 1975 Land Reform Decree

The 1975 Land Reform Decree (LRD) was the most radical move on land tenure in post-colonial Uganda. It was introduced and enacted by President Amin. The LRD, commonly referred to as Amin's Decree, changed the legal basis for land tenure in Uganda and declared all land in Uganda to be public land. The 1975 LRD proposed all land to be administered by the Uganda Land Commission (ULC) according to the 1969 Public Lands Act, and all land in Uganda be vested in the state in trust for the people to facilitate its use for economic and social development. The LRD abolished freehold interests in land except those where this interest was vested in the state through the Uganda Land Commission. As a result, freehold and mailo land tenure were transformed into leaseholds of 99 years for individuals and 199 years for public / religious bodies. The customary tenant was declared a "tenant at sufferance", with rights that were significantly less than those under the Public Lands Act of 1969.

The decree altered the fundamental legal status of tenants by abolishing the Busuulu and Envujjo Law of 1927, the Ankole Land lord and Tenant Law and the Toro Landlord and Tenant Law of 1937. Mailo and freehold

tenants became customary tenants at sufferance¹¹⁷ on public land, and did not have transferable interests in land. Tenants could only transfer the improvements on that land after giving three months' notice to the prescribed authority. Under section 5 of the decree, it was an offence to enter into an agreement purporting to transfer any interest in any public land occupied by customary tenure, except with written permission from the prescribed authority. Section 4 of the LRD provided that any agreement purporting to transfer customary tenure as if it were an actual title was void and constituted a criminal offence punishable by up to two years in prison. The decree was intended to introduce a nationwide system of leaseholds.

The LRD was not fully implemented for various reasons, among them a lack of budgetary provisions and personnel, and resistance by those who were landowners under the previous system. Consequently, both landowners and administrators continued to behave as if they were in the pre-decree period. It was recognized, therefore, that the country had reached a stage where it had to prescribe the type of land tenure that would benefit the country most in terms of environmental sustainability, agricultural productivity and equitable resource sharing. The decree remained the operational land law until the 1995 Constitution and the 1998 Land Act came into law in Uganda.

3.2 Land Tenure Reforms in Uganda since 1995

The process of building strong tenure security began in 1995 and was a pivotal development in Uganda's land reform history. The enactment of the Constitution marked a reversal of the 1975 LRD and enforced citizens' land rights by transferring land ownership from the

the 1995 Constitution guarantees security of tenure to tenants on registered land, commonly referred to as lawful or bona fide occupants. These tenants can acquire a certificate of occupancy on the land they occupy and they can negotiate with the registered owner to be able to acquire a freehold title. .

state to citizens. The instrument legalized the customary tenure system which had been abolished by the LRD along with all other land tenure systems since all land in Uganda was vested in the state as public land. Thus, after prolonged debate by the Constituent Assembly (CA), it was resolved that the four tenure systems that existed before the Land Reform Decree 1975 should be recognized. When the 1995 Constitution was enacted, it provided under Chapter 15, Article 237 that "[...] land belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems namely, customary, freehold, mailo and leasehold" (Government of Uganda, 1995). This provision was further re-enacted in the Land Act 1998(S4). This implies that the state no longer controlled ownership of land in Uganda; in other words, individuals' rights to land were secured by any of the four tenure systems: of mailo, leasehold, freehold and customary tenure.

Rugadya (1999) stresses that the 1995 Constitution guarantees security of tenure to tenants on registered land, commonly referred to as lawful or bona fide occupants. These tenants can acquire a certificate of occupancy on the land they occupy and they can negotiate with the registered owner to be able to acquire a freehold title. These tenants on registered land are to pay the registered owner of land a ground rent¹¹⁸ of not more than UGX 1,000. Failure to do this for two consecutive years may mean the tenant will

¹¹⁷The term "tenant at sufferance" refers to a person who initially entered into possession with the consent of the landowner, and remains in possession after the period for which the consent was given expires, without the consent or dissent of the landowner. See Nygh, P. (1997). *Butterworths Australian Property Law Dictionary*, Butterworths, Sydney.

¹¹⁸ Ground rent is money paid annually by tenants on registered land to the registered owner. It is a nominal fee to be determined by the District Land Board and should not exceed UGX 1,000, approximately 0.40.



Customary tenure is the most prevalent system in rural Uganda © Samuel Mabikke

lose their security if he/she does not have sufficient reason for not paying. The registered owner cannot ask the tenant for anything more (including things in kind) except that the UGX 1,000 provided for the certificate of occupancy can also be mortgaged, pledged or transferred. The tenant also has the right to pass on his tenancy in a will.

This ground rent of UGX 1,000 is a standard fee for all tenants in the country regardless of the size, location and nature of the land. The law states that the ground rent will be reviewed after five years by the minister responsible for lands, but it has never been reviewed since the enactment of the 1995 Constitution. It is believed that this has been one of the causes of increased threats of evictions by landlords. The 2009 Land Amendment Bill, however, prevents the unlawful eviction of any *bona fide* tenant.

3.2.1 The Customary Tenure System

By recognizing the customary tenure system as one of the legitimate land tenure systems in Uganda, the Constitution marked the first important step to improving a long-standing land problem in Uganda's history. The Constitution 1995(237(4)) provides for

security of customary tenure with the possibility for (a) the acquisition of customary certificates of ownership and (b) the conversion of the customary tenure to freehold by registration. This position was re-enacted in the Land Act 1998, which further accorded value to the certificate of customary ownership enabling it to be transferred, mortgaged, or otherwise pledged. This enables holders of a certificate of customary ownership to have access to credit and was a positive change to Uganda's tenure system in which there had been no formal documentary evidence of ownership.

Customary tenure was guided by the rules, norms and traditions that reflected the interests and needs of local communities, which results in customary systems differing from one society to another based on diverse rules and norms. Section 4 of the 1998 Land Act recognized this diversity and the area-specific nature of rules regarding access, ownership, use and any other deals in land under the customary system. However, owners enjoyed and still enjoy land tenure security without a formal land title within a continuum of use, control and transfer rights. With this development, the government guarantees security of land ownership to the majority of Ugandans who hold land under customary tenure.

3.2.2 Freehold Tenure

The ownership of land in perpetuity is typical of the freehold system. Spelt out under the 1995 Constitution, freehold is the most preferable legal tenure system in Uganda. Article 237 (4b, 5) of the Constitution 1995 recommends the conversion of customary and leasehold on public land into freehold. To that effect, the government favours the existence of a single tenure system under which full security can easily be guaranteed through legally enforceable rights. The key aspects of the freehold tenure are spelt out under the Land Act 1998 (S2). Therefore,, a person has “full powers” of ownership of registered land in perpetuity or for a period of time that is less than perpetuity as may be fixed by a condition and can enjoy benefits from the land, use and develop land for any lawful purpose, lease out, sell, mortgage or pledge with the use of the freehold title, alienate by will, sub-divide land or create rights for other people on the land, or create trusts of the land. The landowner must, however, abide by property restrictions as specified by law through land use restrictions.

3.2.3 Leasehold

As provided by the Land Act 1998 (S 3(5)), leasehold is created either by contract or by law. The landlord grants to an individual or group of individuals exclusive rights to possess land, usually for a defined period either directly or indirectly by reference to a specific starting date and a specific date of ending. Leases are granted for a period not exceeding 99 years for non-citizens. The lease arrangement may usually but not necessarily include rent, which may be for a premium (a capital sum) or both rent and premium, perhaps in return for the services or free of any required return.

3.2.4 Mailo Land Tenure System

As already mentioned, this is the predominant type of land tenure, especially in the Buganda region, that came into force with the 1900 Buganda Agreement.

However, the mailo land tenure system draws its legality from the Constitution 1995 and the Land Act 1998. It entitles the owner to the holding of registered land in perpetuity. These instruments separate ownership of land from the ownership of developments on land made by a lawful or a bona fide occupant.

4. THE CONTEXT OF LAND TENURE SECURITY IN UGANDA

History shows that tenure security in Uganda since the advent of colonialism has been weak; subsequent reforms and counter-reforms were largely politically motivated and reforms made by one political regime would be reversed by the succeeding regime. Given that trend, it is not clear as to whether the current land reforms will be sustained through further regime changes. Of importance today is that land in Uganda is vested to the citizens with respect to the customary, freehold, leasehold and mailo tenure systems (GoU 1995, 1998). Furthermore, Article 26 of the Constitution provides for the citizen's right to own property either individually or in association with others, and protects citizens against unlawful eviction except under specific circumstances: “no person shall be compulsorily deprived of property or interest in or right over property of any description...” except in the satisfaction of such conditions where (a) acquisition is necessary for public use, or in the interest of defense, public safety, public morality and public health; and (b) compulsory possession or acquisition of property is (i) preceded with adequate and fair compensation and (ii) a right of access to court by any person with an interest or right over the property (GoU 1995). By providing a framework under which land and property are accessed, owned and used (governed and managed), tenure security is strengthened.

4.1 Formalization of Customary Tenure

Formalization of customary tenure was a significant step in Uganda's land management history. It was abundantly

clear that customary tenure was not a priority for the colonial regime and, in fact, the effect of Crown Land Ordinance 1903 was to make occupants of land under the customary (outside the mailo land) bend to the will of the Crown; the legal position of such people is known to have been extremely precarious (Coldham, 2000). Furthermore, the 1975 Land Reform Decree is viewed as being probably the most radical¹¹⁹ of land reforms in the country, for having declared that all the customary tenants were tenants at “sufferance”. By legalizing customary tenure, the Constitution brought security for all Ugandans because the majority of citizens hold land under the customary tenure system. Citizens were empowered and the state lost full control over land.

4.2 Protection of Bona fide and Lawful Occupants

The protection of the interests for bona fide and lawful occupants on land is a notable pro-poor reform, at least in theory. Article 237(8) of the Constitution provides that “the lawful or bona fide occupants of mailo land; freehold or leasehold land shall enjoy security of occupancy on the land” (GoU, 1995). This was further cemented by the 2007 Land (Amendment) Bill that came into law in 2009. Under the Bill, the lawful and bona fide occupants and the occupants of customary land are protected from eviction except with a court order. It is thus an offence for any person to attempt to evict, to evict, or to participate in eviction of the occupants from a registered land without an order of eviction. The Bill thus provides protection to occupants from “widespread eviction from land without due regard to their rights as conferred by the Constitution and the Land Act”.

The question of secure rights for tenants by occupancy however is still a subject of debate. Experience has

shown that outside established legal frameworks, strong positions and vested interests have hampered efforts to realize mutually negotiated ground between the tenants, landlords, relevant institutions and individual decision makers. Of particular note, in the discussions on land policy which took place during the 1990s, the former mailo owners pressed for the full restoration of their rights, while the customary tenants demanded security of tenure of the lands they occupied (Coldham, 2000). Moreover the effectiveness and sustainability of the 2007 Land (Amendment) Bill is in doubt given the political interests pitted against limited public acceptance behind its enactment. As a result, rampant cases of land grabbing abound with forced evictions without compensation occurring countrywide.

4.3 Recognition of Communal Land Rights

Communal ownership, the traditional character the customary system, is legalized to protect the land rights beyond individuals and groups of individuals. The Land Act 1998 provides that people may, if they so wish, form themselves into a communal land association – an association that may be incorporated. Members of the association may also form a common land management scheme in which they agree to manage the communal land and to set out their rights and duties.

4.4 Third Party Rights: Women, Children and other Vulnerable Groups

By legalizing customary tenure, the Constitution and the Land Act recognize inherent governing rules as binding and authoritative where customary systems apply. In customary communal arrangements, individuals or groups of individuals hold secondary rights that may be lost unless their interests are captured in the registration of the certificate of customary land ownership. Thus, the Land Act 1998 (S39) protects those who hold customary rights that do not amount to full land ownership. To that effect, no transactions

¹¹⁹ The Land Reform 1975 abolished Busuulu and *Envujjo* law of 1927, the Ankole Landlord and tenant law, and Toro Landlord and tenant law of 1937 and all tenants under these laws, customary tenants on public land became tenants at sufferance.

(selling, exchanging, transferring, mortgaging or leasing etc.) on land are permissible in case the person with his or her spouse ordinarily reside on this land and/or derive their sustenance, unless the spouse gives prior written consent. Where the person resides on the land in question with his/her dependent children of majority age, the children must also grant prior written consent. The Act provides for a committee to make written consent where a person wishes to sell the land on which he/she ordinarily resides with his/her dependent children below the age of majority, or orphans below majority age with interest in the inheritance of the land.

4.5 Institutionalization of Land Management and Governance

The administration of land tenure is a duty of institutional structures (formal and informal) in place with specific mandates. The state and citizens of Uganda are empowered by the Constitution 1995 and the Land Act 1998 to carry out defined responsibilities. Hence, in furtherance of social justice, the state may regulate the acquisition, ownership, use and disposition of land and other property in accordance with the Constitution (GoU, 1995). The Uganda Land Commission, District Land Boards and Land Tribunals, and the Parish Land Committees have different mandates under the Constitution and the Land Act. The Uganda Land Commission is charged with the management of the government land. The District Land Boards are independent of the Uganda Lands Commission and are not subject to the control or direction of any person or authority, but must take into account the district and national policies in the performance of their duties. They are mandated to hold and allocate land that is not owned by any person or authority; to facilitate the registration and transfer of interests in land; to take over and exercise the powers of a lessor in respect of leases granted out of former public land; to compile and keep under review compensation rates payable where land is to be compulsorily acquired. They may also acquire land, alter, improve and demolish buildings, and sell, lease or otherwise deal with land held by them.

Mechanisms for land dispute resolution have been instituted through the establishment of the District and Sub County Land Tribunals. Contrary to the Land Act (passed as law on 2 July 1998) provisions, both the Land Commission and Magistrate Courts lost the power to effectively manage new land matters, except the backlog of cases in their custody for a period of two years.

4.6 Establishment of a Land Fund for Secure Tenure

This is an instrument against evictions and landlessness. Article 137(9) (b) of the Constitution provides for the Land Fund to enable the government to purchase and acquire registerable interests. The fund was an attempt to extend loans to land tenants by occupancy (the *bona fide* and lawful occupants) to enable them to acquire registerable interests in land and to resettle people made homeless by the government's action, natural disasters or any other cause, as well as to assist other people to acquire land titles. The Land Act 1998 puts the administration and management of the fund under the Uganda Land Commission. The approach demonstrates a multifaceted approach by the government to provide adequate tenure security to the economically and socially weak.

5. WHY HAS WEAK SECURITY OF TENURE PERSISTED?

Despite the legal and structural reforms taken to revamp the land sector and tenure security, much is still required. Even with the legal instruments meant to protect vulnerable groups (women, children, ethnic minorities and the poor) and smallholder farmers from irresponsible sales, to promote investment and the smooth operation of the market, the adequacy of land tenure policy is questionable (Ssemambo *et al.*, 2006). Land registration and administration systems have not adequately effected proposed reforms,

and bureaucratic inertia and corruption in the land sector have complicated land and property transfer processes, and the cost of doing business. Uganda has 13 procedures that take an average of 77 days to register property; the country ranks 149 out of the 183 countries in the Doing Business Survey 2010 (World Bank, 2010). In this section, we discuss the reasons why land inequality and rampant evictions have persisted despite the land reforms undertaken since 1995.

5.1 Ambiguous and Out-dated Legal Frameworks

Legal certainty is a vital condition for tenure security but land tenure administration in Uganda is still guided by some old legal instruments that cannot adequately address the current situation. They are not in harmony with the 1995 Constitution and the 1998 Land Act. Rugadya (1999) notes that the 1924 Registration of Titles Act is based on the Torrens system of registration, and it sets out lengthy and difficult procedures for acquiring certificates of titles. The Surveyors Registration Act has affected the vibrancy of land surveys, especially through institutional capture where many qualified cadastral surveyors are marginalized in the registration process by a minority who use their positions of influence in the Surveyors Registration Board. Other outdated regulations are: the Land Acquisition Act 1965 (which conflicts with constitutional requirements for compensation for land acquired by government and may impede land acquisition for redistribution to tenants), and the Survey Act, which dates to the 1920s and provides for detailed and high standard cadastral survey – an unnecessarily complicated process for surveying customary land (Rugadya 1999). The current legal environment is not conducive to permit tenure security to all in the country.

The legal definition of the bona fide and lawful occupants means that the provision for tenure security is limited to the tenants who had occupied and used any land unchallenged by the registered owner for

12 years or more; or had been settled on the land by government or its agent including the local authority before the Constitution came into force in 1995. The 12 years are counted backwards from 9th October 1995. This clause means that the majority of occupants in country districts such as Kibaale, Masindi and Kyenjojo etc., areas that are plagued by land conflicts, are not legally protected.

Tenure security for landlords on mailo land has been compromised; formal land titles on mailo land have limited or no economic value. First, tenants were legally required to pay a ground rent of about UGX 1,000 irrespective of the size of landholdings to the landlords. The Land (Amendment) Bill 2007 vests the responsibility for determining the ground rent in the minister but it is not clear what criteria the minister will use to genuinely determine a value that is fair to all parties. Besides, the possibility of landlords mortgaging mailo land with financial institutions is low because failure to repay loans means that tenants on the mortgaged land must be “fairly” compensated prior to eviction. Nevertheless, the ability of tenants to mortgage their holdings on the basis of the customary certificate of occupancy is equally in a precarious state. On closer view, more reforms are urgently needed to improve the land security of land tenure as a prerequisite for sustainable land use, social harmony and economic growth.

5.2 Legitimacy of Legal and Policy Frameworks

Despite the existence of laws regulating access, ownership, use and control of land in Uganda, they are often passed with limited public approval. The Land Act 1998 was no different. From the outset, the Land Bill was received with suspicion, fear, apathy and outright rejection from various quarters. Indeed, many people felt the Bill was rushed through without ample time for public scrutiny and consultation because it was published late on 2 March 1998 with the intention that

it became law by 1 July 1998 (Rugadya 1999). A report of the Parliamentary Session Committee notes:

“From our own experiences during the public consultations we held, it was apparent that people’s indignation with the Bill was because of their ignorance of its contents and what it aims to achieve... it is...important that the government should, before introducing any law, make widespread consultations with the people and get their trust. As one eminent lawyer said, if you don’t trust the messenger why you should trust the message” (Rugadya, 1999).

Besides the indignation from landlords on the mailo tenure with the Land Act (by increasing the status of occupants), women felt the Land Act 198(S40) did not go far enough. They were unhappy because a clause on co-ownership¹²⁰ of land by spouses was missing in the Act. Several non-government organizations such as the Uganda Land Alliance, the International Federation of Women Lawyers (Uganda) and the Uganda Women’s Network lobbied hard but, while the clause was accepted in principle by Parliament, it was later missing from the Act (Rugadya 1999). This clause came to be known as the “lost amendment”¹²¹ (McAuslan, 2003).

The 2007 the Land (Amendment) Bill was rigorously opposed before it passed into law in 2009. It further strengthened the security of tenant at the expense of the landlords’ rights, especially on mailo land, and set difficult conditions for the eviction of occupation tenants. Much opposition came from the traditional institutions, especially the Buganda kingdom (a landlord itself) and some parliamentarians. In fact, the Buganda Kingdom Information Minister had this to say: “President [Idi] Amin introduced the Land Reform Decree in 1975 but

20 years later it was thrown out, People should not lose sleep over this law” (Daily Monitor, 7 January 2010). Whether the law will improve tenure security remains to be seen.

5.3 Gaps in the Policy Frameworks

Land management in Uganda has not been guided by a comprehensive National Land Policy. For a long time, the country has been guided by scattered elements of policy pieced together from the 1995 Constitution, presidential public pronouncements and government statements (Rugadya, 1999). Implicitly, land distribution and allocation have largely been dictated by political interests rather than a consolidated policy built on public inputs. Significant steps have been taken to remedy land tenure contestations and, in 2011, a national policy drafting process reached the final phase but its impact is yet to be seen due to the weak institutional capacity and latent political gridlock over contentious issues including the operationalization of the land fund.

5.4 Weak Institutional Capacity

Capacity (financial, human resource and technical) in land management is completely inadequate and has disillusioned the rural and urban poor who urgently need access to land for survival. Operationalizing the Land Fund enshrined in the Land Act 1998 has become a subject of endless political debates. But, the dramatic mismatch between the theoretical needs of the Land Fund and the actual resources likely to be available have become clear (Nsamba-Gayiiya, 2003). It is not clear who will benefit from the fund and what criteria are to be used. Meanwhile, the landless continue to sink further into abject poverty and food insecurity.

The Directorate of Lands is charged with surveys, supervision of land administration institutions, promotion of good governance in service delivery, and dispute resolution. Despite its well-trained staff, it does not have the required capacity to meet the increasing demand. For some time, there has been a long-standing

120 The amendment was that land acquired by either spouse before marriage remained the property of that spouse; normally in customary law, a married woman would forfeit any land she owned. Land acquired after marriage by either party either as the matrimonial home or as the land for the maintenance of the family would automatically be jointly owned by the spouses.

121 The amendment was later lost when Parliament resolved to include it in the controversial Domestic Relations Bill that has never been passed into law.

The Land Act provides that each district should have five professional staff members in the district land office, namely a land officer, a surveyor, a registrar of titles, a valuer, and a physical planner

seal on civil service staff recruitment due to a budget ceiling imposed by the Ministry of Finance, Planning and Economic Development which reduces the chances of increasing staffing levels. Local governments which are mandated to implement the fundamental reforms, are poorly resourced and lack sufficient technical personnel. The Land Act provides that each district should have five professional staff members in the district land office, namely a land officer, a surveyor, a registrar of titles, a valuer, and a physical planner. By 1999, only 16 out of 45 districts had land offices and only one of them had a physical planner. None had a valuer and only a few had district registrars (Rugadya 1999). Worse, the actual number of districts is not clear; they increased from 45 when the Land Act was enacted to approximately 111 and there could be more in future.

5.5 Professional Associations

In addition to capacity challenges, professional associations whose input is vital in implementing national land reforms are weak and the problem is especially bad with regard to land surveyors.¹²² The Institute of Surveyors of Uganda uses an outdated law to frustrate the registration of new surveyors¹²³ and stringent conditions by the Surveyors Registration Board for the registration of new surveyors do not encourage surveyors. New Vision Uganda (7 August 2009) reported that out of 81 districts in Uganda,

71 do not have a registered surveyor (i.e. 71 out of 111 districts due to recent increase). As members of the Registration Board own private companies, the restrictions are seen as a tool to curb competition in the industry (personal interview with a surveyor). There are about 37 registered surveyors countrywide, of which 28 are based in Kampala, three in Entebbe, and one each in the districts of Kabale, Lira, Masindi, Kabarole and Mukono. The rest of the districts have unregistered surveyors or no surveyors at all.

The Surveyors Registration Board requires that university degree and not diploma holders can register, but very few university graduates have registered because of other conditions.¹²⁴ Since 1994, more than 250 surveyors have graduated from the country's two main universities (Makerere and Kyambogo) but only 12 have been registered¹²⁵ (see New Vision, 13 August 2009). There are allegations that much of the surveying work is carried out by diploma holders, who later get registered surveyors to sign and stamp their documents without inspecting the work done. This has paved the way for unethical practices and quack surveyors. Inaccuracy and errors in surveys have either caused or inflamed land conflicts in many parts of the country. The registrar of the Surveyors Registration Board said that 99 per cent of fraud cases reported by the public are caused by unregistered surveyors (New Vision, 7 August, 2009).

122 In Feb. 2009, about 200 surveyors petitioned Parliament and accused the Board of frustrating efforts. The petition that was copied to the president among others called for the disbandment of the Board.

123 Article 19(3) Subject to this Act, no person shall engage in ... or carry out the practice of surveying by whatever name called, unless he or she is the holder of a valid practicing certificate granted to him or her in that behalf under this Act."

124 Common reasons for failure to register include lack of working experience, no university degree, and negative report from referees (New Vision, Uganda, 7 Friday August 2009).

125 Only one surveyor was registered in 2009. Qualified nationals are denied opportunities but foreigners are registered. There are 81 surveyors in total, inclusive of mining, hydrological, and engineering surveyors

‘ *The land sector is one of the most corrupt sectors in the Uganda. According to Transparency International’s Corruption Perception Index 2009, Uganda scored 2.5, and ranked 130th of the 180 countries surveyed - dropping four positions from 126th in 2008.*

5.6 Limited Transparency and Accountability

The land sector is one of the most corrupt sectors in the Uganda. According to Transparency International’s Corruption Perception Index 2009, Uganda scored 2.5, and ranked 130th of the 180 countries surveyed - dropping four positions from 126th in 2008. The Heritage International’s Economic Freedom Index 2010 reported that dispute-resolution in Uganda can be lengthy and sometimes politicized, while the infrastructure is inadequate. In addition, land acquisition is impeded by a slow registry, complex regulations and restrictions. Some anti-corruption measures have been institutionalized

through the Inspector General of Government, the Directorate of Public Prosecution and legal frameworks such as the Penal Code. Nonetheless, the “will” to fight corruption at the highest levels of government is questioned (Heritage International, 2010). For instance, a minister of local government accused the Inspector General of Government of being drunk while writing a report that implicated him in land scandals (The Global Integrity Report, 2006). Widespread bureaucratic and administrative forms of corruption have increased land title fraud in the land registry and deprived rightful owners of tenure security.

The Uganda National Farmers Federation¹²⁶ observes that lack of transparency, corrupt handouts and inconsistencies in the developing land policy instrument has created distrust about the intentions of the central government. Thus, rural areas regard surveying and certification of land as a cause of corruption that could cause tenure insecurity, and mistrust of the government intentions to use natural resources has increased.

5.7 Opportunities and Constraints to Land Tenure Security in Uganda

Strengths	Opportunities
Existing legal frameworks supporting access, use and ownership of land/property Constitutional recognition of customary rights to land Land fund to provide tenure security to the landlessness Pro-poor reforms to protect bona fide occupants from eviction e.g. the 2009 Land Amendment Bill	Placement of land reforms on priority national agenda International and national pressure lobbying for better land reforms Donor technical assistance in land administration and management Development of a National Land Policy
Weaknesses	Threats
Weak land governance Failure of land registration and administration systems to effect proposed land reforms Corruption and bureaucracy in the land sector agencies Weak institutional capacity Missing gaps in Policy Frameworks Weak and uncoordinated professional associations	Land related conflicts Land title fraud Ambiguous and outdated legal frameworks Limited funding to implement proposed land sector programmes Politicking and sectarianism on land issues
<i>Source: Authors</i>	



Most slum dwellers are prone to forced evictions in Uganda © Samuel Mabikke

6. CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

Uganda's efforts to strengthen tenure security underlie multiple political, economic and social domains. Full tenure security countrywide is still a difficult issue. In some areas, access, use and control of land resources has been a complex mix of ethnic and political orientations. In some districts, such as Kibaale, identification with land by ethnicity precedes the integrity of universal citizenship. Land users/occupants identify themselves along the lines of ethnic background than national citizenship; either as indigenous Banyoro or migrant settlers (*Bafuruki*) due to land tenure conflicts. In post-war zones, such as northern Uganda, land tenure administration for peaceful resettlement of internally displaced people is marred by alleged land grabbing by powerful men (elites and military officers). Worse, government officials with a legal mandate for addressing issues of land access, land rights and conflicts are perceived to be corrupt and unable to solve land conflicts, while traditional institutions have

lost legitimacy (Hetz et al, 2007). Often, the necessary targeted measures are lacking and more is required to effect reforms.

The doctrine of radical titling (the process of issuing out the certificate of land title as ultimate ownership of land) being vested in the state is being questioned. The state is not liable for the damages arising from land registration errors, yet unsuspecting landowners have unwittingly lost ownership or become involved in land disputes arising from title fraud in the registries, fraud and survey errors. Besides, the cost of a land survey in the sporadic land registration system is prohibitively high; this, coupled with unofficial payments to locate a file from disorganized heaps and process it at the land registry(s), as well as inherent bureaucratic inertia, has left formal land titling the preserve of a few. The poor and vulnerable communities in dire need of full tenure security are yet to benefit from the legal and structural reforms. Tenure security is not limited to formal title, and land tenure reform requires more than donor technical assistance for land registration and survey⁵. The recognition of customary tenure systems is a step in

“ *The poor and vulnerable communities in dire need of full tenure security are yet to benefit from the legal and structural reforms. Tenure security is not limited to formal title, and land tenure reform requires more than donor technical assistance for land registration and surveys.*

the right direction. The protection granted to occupants' rights may not significantly yield economic benefits (e.g. mortgaging and land market) to both tenants and landlords and more state intervention is called for. That is, efforts to improve land sector through legal reforms and the decentralization of land management services are not effective enough.

There is an increasing lack of public trust in the government's land management strategies. Proposed and actual land giveaways to foreign investors of public land, and land grabbing by high profile government figures have increased the distrust. Government efforts (such as through the 2007 Land Bill) to further land reforms are often suspected to be planned strategies for the elites to grab more land. There is abundant evidence that the state is not only a poor trustee of public land resources but also a poor manager.

The creation of more administrative units implies high costs of instituting tenure security. There is scepticism that the rise in the number of districts to 114 in 2010 implies an increasing cost in running public administration. This will worsen in the land sector where technical personnel and equipment have been insufficient.

6.2 Recommendations

The possibility of tenure security in Uganda requires a broad spectrum of measures across different parts of the country. The government must reinvent the wheel and proactively upscale land management processes.

This requires building sound land governance structures and restoring public confidence – necessary for the rule of law, through active participatory, accountable and transparent service delivery systems.

Capacity building in technical, human resource and financial skills is a prerequisite to effective land tenure administration. Besides, the recruitment of technical personnel, adequate staffing of the District Land Offices, facilitation with technical equipment and adequate remuneration is one way to enhance performance. Reforms are required to ensure transparent and smooth registration of surveyors to increase the capacity of land surveys in the country.

Land tenure security is possible when national interests supersede individual political interests. Institutional policy aims pursuant of national policies must be given priority to satisfy the already disillusioned land users. Political and administrative accountability is one possible and reliable option.

Despite the legalization of customary tenure, the role of traditional or local leaders is not specified, especially in the adjudication of land rights. Tenure security is ensured only when solutions come from the community with outside facilitation, as opposed to foreign (and often corruptly) imposed statutory approaches. Nevertheless, a negotiated position through both approaches would be the most reliable option.

Land tenure is a political issue. However, land tenure security requires that politics be clean and productive. It is only when the key players in the game and their interests are known and when the roles of other essential actors (technical experts and land users) are recognized and allowed to sustainably coexist that tenure security is strengthened. There is a need to strike a balance between the interests of powerful and the weak, politicians and technocrats, civilians and institutions, if tenure security and sustainable development are to be achieved.

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06

Angola

Zambia

Malawi

Mozambique

Namibia

Zimbabwe

1. INTRODUCTION TO COUNTRY CONTEXT

Land is still a primary resource on which Zambian people depend for their livelihood. From generation to generation, land has been seen as the backbone of wealth in both urban and rural areas. Land is one focal point of economic growth and poverty eradication. As such, tenure security is vital to safeguard the rights of individuals and groups to land. Land tenure security is the individual's rights to a piece of land on a continual basis, free from imposition or interference from outside sources, as well as the ability to reap the benefits of labour or capital invested in land, either in use or upon alienation (Roth and Haase, 1998). Tenure security (1) increases credit use through greater incentives for investment, improved creditworthiness of projects, and enhanced collateral value of land; (2) increases land transactions, facilitating land transfers from less efficient to more efficient users by increasing the certainty of contracts and lowering enforcement costs; (3) reduces the incidence of land disputes through clearer definition and protection of rights; and (4) raises productivity through increased agricultural investment

(Feder and Noronha, 1987; Barrows and Roth, 1990).

This paper provides an overview of the land tenure systems in Zambia, discusses the evolution which has resulted in the current situation, and analyses actual land tenure security. It further analyses the strengths and weaknesses of state and customary land tenure systems as well as opportunities and threats to the current land tenure system.

1.1 Background

Zambia is a landlocked country located near the sub-tropics of the Equator. It is surrounded by eight countries: Angola, Botswana, Democratic Republic of the Congo, Malawi, Mozambique, Tanzania, Zimbabwe and Namibia. According to the Census of Population Report (2010), Zambia has a population of just over 13 million and this is growing at 2.8 per cent per annum. It has 10 provinces and 80 districts. The economic environment is characterized by a heavy dependence on copper mining, which accounts for about 95 per cent of the country's export earnings, contributes 45 per cent of government revenue and is a major



Typical rural community in Zambia ©Anthony Mushingenge

source of formal employment (Central Statistics Office, 2008). Gross Domestic Product is USD 21.93 billion (2011 estimate) and composition by sector consists of agriculture 26 per cent, industry 25 per cent and services 49 per cent (CSO, 2011). With a per capita income of USD 1,600, Zambia is one of the poorest countries in sub-Saharan Africa; poverty levels are 68 per cent in rural areas and 52 per cent in urban areas (CSO, 2008). It is officially a Christian nation and this is provided for in the Constitution. Nonetheless, other religions are also practised.

The two principal land tenure systems in Zambia are customary and statutory tenure. A customary land tenure system is governed by unwritten traditional rules and is administered by traditional leaders. Active occupation or use of a piece of land is the main evidence of ownership or an existing interest in the land. Access to land is also contingent upon ethnic, kin or community membership controlled by the chief or chieftainess

1.3 Overview of Land Tenure System in Zambia

Land tenure is the system of rights and institutions that govern access to and use of land (Adams, 2001). It can be defined further as the terms and conditions under which land is held, used and transacted, and is one of the principle factors determining how resources are managed and used, and how benefits are distributed. The two principal land tenure systems in Zambia are customary and statutory tenure. A customary land tenure system is governed by unwritten traditional rules and is administered by traditional leaders. Active occupation or use of a piece of land is the main evidence of ownership or an existing interest in the land. Access to land is also contingent upon ethnic, kin or community membership controlled by the chief or chieftainess. Community members have rights including exclusive residential rights, seasonally exclusive rights to arable land and shared rights to grazing land and other natural resources. Land is not alienable from the community trust so it cannot be used as collateral for loans. Customary land is occupied by 73 tribes headed by 240 chiefs, 8 senior chiefs and 4 paramount chiefs (Chileshe, 2005).

The statutory land tenure system, on the other hand, is governed by written law, such as a Lands Act, and is administered by the government. Land ownership under the statutory tenure system in Zambia is built on leasehold entitlements to the land. It offers exclusive

rights such as the ability to sell, manage, rent to others, use as collateral for a loan and to exclude trespassers as well as the right to compensation in case of expropriation.

Zambia has a relatively large land surface area totalling 753,000 square kilometres. In 2004, it was estimated that 90 per cent (677,700 kms²) was held as customary land and 10 per cent (75,300 kms²) was statutory land. It is worth mentioning that the customary land area must have shrunk and the area of state land must have increased since then because customary land has been and is still being converted to state land as provided for in the Lands Act of 1995 (Government of Zambia, 1995). However, this can only be confirmed when a land audit is undertaken.

The evolution of the Zambian land tenure system has two phases: the pre-independence (pre-colonial and colonial) and post-independence eras.

2. EVOLUTION OF THE ZAMBIAN LAND TENURE SYSTEM

2.1 Pre-independence era

(i) Pre-colonial land tenure

Prior to the arrival of white settlers in 1890, the indigenous people held land largely through families, jointly or through a chief or chieftainess on behalf of the community in accordance with the community's customary laws. Individuals in the group had the right

to use the land but not to sell it. Nonetheless, they were allowed to transfer rights to land, for consideration or as gifts, subject to the local conditions and customs; interest in land could also be inherited in accordance with the customary laws (Government of Zambia, 2002).

(ii) Colonial land tenure

The tribal tenure systems that existed before 1890 were affected by the arrival of the first European settlers. Colonialism led to the country's land being divided into three categories, namely Crown Land, Reserve Land and Trust Land. The Europeans settled on Crown Land, which was the most fertile and rich in minerals, and they introduced the system of holding land under certificate of title. To this effect, the Lands and Deeds Registry Act – Chapter 185 was enacted in 1944 to provide for:

- the registration of documents;
- the issue of provisional certificates of title and certificates of title;
- the transfer and transmission of registered land and, for incidental matters, to ensure that all interests in the land and other immovable properties were systematically registered.

The registration of Crown Land enabled settlers to use title deeds as collateral to borrow money to develop their land. This made their land more economical than Reserve Land. Before registration, Crown Land was surveyed. This land was administered under English Law, under which leasehold and freehold tenure systems were established and guaranteed. Trust Land was set aside for public purposes and was unregistered.

Reserve Land, on the other hand, was land set aside purely for indigenous people who traced their ancestry to particular areas within the country. Indigenous people were not allowed to own Crown Land except with permission to stay either as licensees in compounds

In Zambia freehold tenure was abolished and substituted with statutory leasehold for a maximum period of 99 years, renewable, commencing 1st July, 1975. All sales of land per se (except improvements on the land) were prohibited. All undeveloped land was acquired by the central or local government, as were most forms of rented property.

or as servants for white settlers. They were always expected to return to their homelands (Reserve Land).

Crown Land comprised 6 per cent (45,180 kms²) of the total land mass. The remaining 94 per cent (707,820 kms²) comprised of Trust and Reserve land.

2.2 Post-independence era

After gaining independence in 1964, Northern Rhodesia became Zambia. The then Zambian Government, formed by the United National Independence Party (UNIP) - which followed a socialist ideology - renamed Crown Land as state land. In addition, Reserve and Trust lands were renamed as customary land. The government made land reforms in 1975 and 1985 respectively. Reforms in the 1990s were made by the Movement for Multiparty Democracy government.

(i) Land reforms of 1975

The cornerstone of the land reforms of 1975 was the "Watershed Speech" made by the then Zambian President, Kenneth Kaunda, to the UNIP National Council in June 1975. Dealing with land reform, he said: "The political rule of UNIP on land is that this is a gift from God and cannot be sold and especially be made the subject of speculation by human exploiters."

This presidential decree on land matters was thus backed by legislation, the Land (Conversion of Titles) Act number 20 of 1975, the then chapter 289 of the laws of Zambia.

The Act introduced a land nationalization programme by vesting all land in Zambia in the president, to be held by him in perpetuity on behalf of the people of Zambia. In Zambia freehold tenure was abolished and substituted with statutory leasehold for a maximum period of 99 years, renewable, commencing 1st July, 1975. All sales of land per se (except improvements on the land) were prohibited. All undeveloped land was acquired by the central or local government, as were most forms of rented property.

The president was empowered to fix the maximum amount received, recovered or secured in any land transaction, provided that no regard was to be taken of the value of the land, only the developments on it. The granting, alienation or transfer of land to non-Zambians was also prohibited.

(ii) Land reforms of 1985

The Land (Conversion of Title) Act of 1975 was amended in 1985. This was done to allow the granting, alienation or transfer of land to non-Zambians. This can be done if (1) a person is approved as an investor in accordance with the law relating to the promotion of investment in Zambia; (2) the interests or rights in land are being inherited upon death or are being transferred under a right of survivorship or by other operation of law; (3) the interests or the rights in question arise out of a lease, sublease or under lease for a period not exceeding five years or a tenancy agreement; (4) it is a non-profit making organization or institution; and (5) the President of Zambia has given his consent in writing under his hand.

(iii) Reforms under multiparty state and liberalized market-economy

In 1991, the country experienced a major change in its political and economic governance. The United National Independence Party's term of office ended and the new government under the Movement

for Multiparty Democracy came into power. Thus, the country changed from a one-party state with a socialist ideology to a multiparty state with a liberalized market economy. These changes were associated with massive privatization of parastatal companies and the privatization of land ownership through a Land Bill of 1993. This Bill was controversial because the government drafted it without consulting the key stakeholders such as chiefs/chieftainesses, the general public or civil society organizations. The privatization of land was seen as a move that would disadvantage the majority of poor people who had no capacity to purchase land or access it through the government's laborious and expensive land delivery system. Traditional leaders, civil society and other key stakeholders rejected the Bill, arguing that once it became law, the Bill would disadvantage poor people and undermine the authority of traditional leaders with regard to administration of customary land.

However, the government went ahead and the Bill became law in 1995. This is still known as "Lands Act, 1995". This Act replaced the Land (Conversion of Titles) Act of 1975 and Land (Conversion of Titles) Amendment Act of 1985. The government pushed ahead with this law in part because it was perceived as giving in to World Bank demands (Machina, 2005).

The Lands Act provides for (1) the continuation of vesting land in the president in perpetuity for and on behalf of the people of Zambia; (2) the recognition of an economic value to land. From 1995, both land and improvements in land could be monetized and sold; (3) the continuation of leasehold and customary tenure; (4) the conversion of customary tenure into statutory tenure, which allows registration of customary land upon the consent of the chief; (5) the establishment of a land development fund for rural development; and (6) the creation of a Lands Tribunal for speedy resolution of disputes. It is a circuit court and can sit anywhere in Zambia where there is a dispute.

3. LAND TENURE IN ZAMBIA TODAY

The Zambian land tenure system features customary and statutory tenure. The two are best looked at separately because of the significant differences between them.

(a) Customary land

Of the total land area of 753,000Km² 90 per cent, 677,700 Km² 2004 estimate) is customary land. This customary tenure only guarantees the protection of use and occupancy rights without the registration of ownership rights. All members of a community have free access to land under traditional tenure. Customary tenure in Zambia recognizes individual ownership, concurrent interests and communal interests (Loenen, 1999). Individual ownership refers to that landowner or occupant who has the strongest rights to the land. The individual owns the land for as long as he or she likes. Conversely, concurrent interests occur where people other than the landowner can occupy land and use it for their own purposes. Finally, communal interests entail the local people using certain tracts of land that are not individually owned.

The chiefs and their headmen control customary areas with the consent of the people. The chief regulates the acquisition and use of land but notable variations emerge within the 73 tribes between the distribution of the “interests of control” and “interests of benefit” (Lungu, 1994). Land acquisition is possible through any of the following ways: the clearing of virgin bush land, as a gift, sale of land, transfer of land in exchange for services, and marriage (Mvunga, 1982). The chief’s permission is needed for an outsider to settle in the area before acquiring a piece of land. Similarly, a chief can stop a person from cultivating in a grazing area (Mulolwa, 1998). However, the president may alienate any land in the customary area if he takes the local customary law on land tenure into consideration and if he consults the chief and the local authority in the area (Government of Zambia, 1995). The president can thus overrule the chief’s decision.

When customary tenure is compared with statutory tenure, it has several limitations. While the rights under both statutory and customary law are, in principle, recognized in law, people holding land under customary law cannot use their land as collateral. In addition, security of tenure under customary law is perceived to be comparatively lower because there is often no proper physical description of boundaries and land is therefore vulnerable to encroachment and disputes, particularly during periods of rising land prices. Customary tenure is also thought to offer little incentive for investing to increase productivity.

As mentioned earlier, the Lands Act of 1995 enables customary land to be converted to leasehold tenure and foreign and domestic investors can acquire land, thereby opening land up to investors. In cases where investors acquire leasehold title from customary authorities, the state becomes the owner and administrator of the land; the title seemingly reverts to the state upon expiry, permanently extinguishing the rights of customary landowners/users (Zambia Land Alliance, 2010). While state or customary land can legally be allocated to investors, the large areas under customary tenure mean that most large-scale investments in practice target customary areas (*ibid*). There is large-scale customary land acquisition by foreign and domestic investors in Zambia. Customary land is acquired mainly for agro-industrial enterprises, and forestry and mineral exploitation, among other uses. According to Zambia Land Alliance (*ibid*), if left unchecked, large-scale land acquisition can lead to a generation of people without ownership or control of land, which in turn will lead to food insecurity, undesirable economic, political, social and environmental consequences for rural communities generally, but specifically for women and future generations.

(b) Statutory tenure

Statutory tenure entails formal registration of land ownership as arranged in the Lands and Deeds Registry

(Amendment) Act of 1994. The Act applies only to land known as state land (administered by the Ministry of Lands in conjunction with other institutions, namely Local Authorities, the Land Resettlement Department, Agriculture Department, Forestry Department, Valuation Department and Water Board). State land covers 10 per cent (75,300 kms², 2004 estimate) of the total area of Zambia. An application for ownership of land is deemed successful once the president (through the commissioner of lands) gives his consent by issuing a certificate of title in respect of a subject parcel of land to the applicant (Mulolwa, 1998). This procedure is provided for under section 4 (1) of the Act as follows: "Every document supporting to grant, convey or transfer land, or any interest in land, or to be a lease or agreement for a lease or permit of occupation for a longer term than one year, or to create any changes upon land, whether by mortgage or otherwise, must be registered" (Government of Zambia, 1994).

There are three types of registers kept in the lands registry, namely: the lands register, a common leasehold register and the miscellaneous register. The lands register contains documents relating to land other than customary land. The common leasehold register records documents relating to common leasehold schemes. Any other documents are entered in the miscellaneous register (Mulolwa, 1998). Anyone applying for a leasehold grant for land is required to have a plan showing the physical boundaries of the area applied for. The plan has to be approved by the municipality, which determines whether the land is still open and unoccupied. Finally, the Minister of Lands gives the land a number and the applicant recruits a licenced surveyor to survey the land. If the Surveyor General approves the survey then the lease for the land is given for 99 years.

Formal land registration is widely recognized to have advantages over customary systems. However, formal land registration in Zambia is difficult because the

Ministry of Lands lacks adequate government funding, amongst others. All the money realized from land registration and valuation goes to the central Treasury but the government in turn needs to allocate more funds to the Ministry of Lands for its operations. The Ministry of Lands is one of the least-funded ministries as illustrated in the following table.

Table 1: Actual and projected budget allocations (USD)

Ministry	Year	Year	Year
	2010(ACTUAL)	2011(PROJECTED)	2012(PROJECTED)
MOL	6,550,000	6,836,000	10,000,000
MOAC	134,000,000	157,300,000	168,200,000
MOFNP	165,000,000	158,000,000	176,000,000
MOD	253,600,000	283,500,000	311,500,000

MOL-Ministry of Lands; MOAC-Ministry of Agriculture and Cooperatives; MOFNP-Ministry of finance and National Planning; MOD-Ministry of Defence. Source: Government of Zambia (2011).

The above table shows that out of the four ministries listed, the Ministry of Defence is the highest funded ministry, followed by the Ministry of Finance and National Development; third is Ministry of Agriculture and Cooperatives. The least funded is the Ministry of Lands.

Other problems with the formal land registration process are shortage of staff (especially licensed land surveyors), inadequate land surveying equipment and inadequate transport. Roth (1995) gives a comprehensive explanation of this: "With the rigorous survey standards required for 99-year leaseholds, the many steps and procedures required by the leasehold process, the different levels of national and local bureaucracy involved, and one central registry to process applications, it is clearly understandable why there are long delays in processing leasehold applications".

4. REGULATORY FRAMEWORKS OF THE CURRENT LAND TENURE SYSTEM

The legal framework for the land tenure system has developed from colonial times over the years in a piecemeal and sporadic way as a response to specific issues or political influence. Zambia's Constitution is the supreme law of the land and any law that contravenes or is inconsistent with it is null and void. The Constitution's Article 16 provides for protection against deprivation of property. There are a number of statutes enacted by the Zambian legislature that deal with specific areas or aspects of land law. In some cases, these laws (for example Lands Act of 1995) that aim to put land on the market conflict with customary laws. For example, the conversion of customary land to state land to enable domestic and foreign investors to undertake large-scale commercial investments tends to displace local people (occupying customary land) and

land conflicts between them and investors. Below is an example of this

Zambian village takes on the sugar barons

April 2006 | Mildred Mpundu

Throughout southern Africa, customary laws governing land management are coming into conflict with modern statutory laws that aim to put land on the market. A tiny village in southern Zambia has become the focal point of a conflict which pits the poor against a corporation backed by a government determined to roll out economic liberalization across the country.

Over 100 families and 17,000 cattle in Kabanje face eviction from their homes and cattle sheds because a private company, Zambia Sugar Plc, is claiming ownership of the land. Zambia Sugar says it has to have the land in Kabanje, known locally as Farm 1343, because it needs to plant more sugarcane. The locals who have lived on this land for decades are refusing to move, claiming the land belongs to them.

"We know no other home than this. Our parents were born here. We were born here and our children were born here. There is no other home we know. Where are we going to move to?" says Brian Nkandela, a smallfarmer.

Source: *Panos London Illuminating Voices (2000)*.

Table 2 below provides brief description of the existing relevant statutes or laws:

ACT	CHAPTER	DESCRIPTION
Lands Act of 1995	184	Provides for the continuation of leaseholds and leasehold tenure, continued vesting of land in the president and alienation of land by the president, statutory recognition and continuation of customary tenure, conversion of customary tenure into leasehold (statutory tenure), establishment of a land development fund and creation of Lands Tribunal.
Lands and Deeds Registry Act of 1994	185	Provides for registration of all transactions involving state land.
Land (Perpetual Succession) Act of 1994	186	Provides for perpetual succession to land.
Agriculture Lands Act of 1994	187	Provides for the establishment of the Agricultural Lands Board; to prescribe the composition and membership thereof; to prescribe its powers and functions; and to provide for tenant farming schemes.
Land Survey Act of 1994	188	Provides for all surveys of land.
Land Acquisition Act of 1994	189	Provides for compensation for real property.
Landlord and Tenant (Business premises) Act of 1994	193	Provides security of tenure for tenants occupying property for business, professional and certain other purposes; to enable such tenants to obtain new tenancies in certain cases.
Housing (Statutory and Improvement Areas) Act of 1994	194	Provides for upgrading and regulation of informal and illegal settlements.
Water Act of 1994	198	Provides for the use of water.
Rent Act of 1994	206	Provides for access by landlord to carry out works, mixed-use premises, obtaining possession by misrepresentation, and statutory tenancy (requirement of occupation).
Valuation Act of 1997	207	Controls the registration of valuers and which property should be considered for the valuation roll.
Common Leasehold Schemes Act of 1994	208	Provides for the use of common property (for instance condominiums).
Town and Country Planning Act of 1994	209	Provides for the development of urban and rural areas.

Source: *Mudenda, (2007) modified by Author.*

5. ANALYSIS OF LAND TENURE SECURITY IN ZAMBIA

Tenure security depends on a host of objective and subjective factors, including the clarity with which rights and obligations are defined; the quality and validity of property rights records and whether or not the state guarantees them; the accuracy with which boundaries are demarcated; the likelihood that rights will be violated; and the ability to obtain redress by an authoritative institution in such cases, along with the assurance that whatever measures that institution decides are deemed appropriate and can be enforced effectively (Deininger, 2003). Deininger explains further that tenure security is important for the following economic reasons:

- Protection against eviction, often equivalent to longer duration of land rights: less resources spent on defence and prevention of conflicts;
- Ability to transfer: increased pay off of investment; and,
- Access to credit.

In a secure system, a landholder's rights are protected. Because his or her rights are understood within the community, he or she may transfer the rights to any other person following certain well-defined procedures (by state or customary law). Access to credit is possible when the rights are used and accepted as collateral by financial institutions.

(a) Customary land tenure security

According to the Lands Act of 1995, customary land can be converted into state land with private leasehold interests. In some cases, these leaseholds have resulted in urgently needed investment in rural areas and they have created opportunities for local employment, contract farming, development of infrastructure and social services, and transfer of know-how (USAID, undated). However, in other cases, the conversion of customary land to large leaseholds has eroded local rights to common-pool resources and enclosed

communal land, causing local people to lose access to water sources, grazing land and forest products, and so has indirectly contributed to rural poverty (*ibid*).

Further, the conversion of customary land to state land has created conflicts in many rural areas. Following the implementation of the Lands Act 1995, the government failed to pass any statutory instruments - the rules and procedures that govern the administration of land at a local level (Adams, 2003). Boundaries between chiefdoms are either unclear, are not yet available or are outdated. Common identifying marks of boundaries on customary land include streams, hills, large trees or even footpaths and these often help to demarcate or identify boundaries between chiefdoms, however they make it easy to encroach on customary land and to ignore customary rules and regulations (Zambia Land Alliance 2005). A good example of this situation is described below:

The transformation of customary rights into leasehold is a lengthy (two years or more), difficult and expensive process requiring a cadastral survey and approval from the chief or chieftainess, the local authorities and the president (through the commissioner of lands). This implies that when one acquires land from a traditional leader, there will be tenure insecurity for two or more years.

MS-Zambia Newsletter July 2008

ZLA tackles chief's land disputes

Land disputes are common in Zambia. Zambia Land Alliance issued a press statement on 18th June 2008, calling on government and traditional leaders to address the many boundary disputes among chiefdoms.

By Justin O'Brien, ZLA

Disputes over land by local chiefs have been a recurring issue in the Zambian press in the past months. Most notably the Zambian Government recently had to intervene in the dispute between Chief Shakumbila and Chieftainess Nkomeshya in Southern Province, who were threatening each other with bloodshed over a land boundary dispute..

(b) State land tenure security

Any recognition of statutory tenure does bring about the registration of ownership rights; only this creates the ability to sale, manage, rent to others, use it as collateral for a loan and to exclude trespassers by the power of law as well as to execute the right to compensation in case of expropriation. However, tenure security is not achieved with statutory tenure. Most of the population in urban areas, for example, lives in informal settlements (state land) (USAID). In areas where these settlements are on primarily public land and the structures meet defined building standards, the government can regularize their rights with 30-year renewable land occupancy licenses. In other informal settlements, residents do not have rights to their land under formal law. Customary law often recognizes the occupancy and user rights of residents, which may protect their interests against other potential occupants, but it offers no protection from eviction.

As a consequence, there are conflicts on state land too due to land administration problems such as undetermined boundaries of landholdings, a lack of proper registration, an inadequate land information system, a lack of transparency and improper land-use planning, among other things. The number of land cases before the High Court (court of first instance for land disputes) far exceeds the courts' ability to resolve them, which leads to delays, high costs and frustration.

To solve these problems, the government established the Lands Tribunal in 1996 to promote more speedy and equitable resolution of land disputes. Despite being established 15 years ago, the Lands Tribunal has failed to quickly resolve the cases submitted to it and only a few are heard or settled within a reasonable time. The rate at which land cases are settled is slower than the rate at which new cases are brought each year due to underfunding by government, inadequate staff and inadequate transport.

(c) Zambia's efforts to improve land tenure security

No regulations were enacted under the 1995 Lands Act. Efforts to pass a coherent land policy since then have been unsuccessful. A draft comprehensive land policy framework was only arrived at in the year 2000 when government began consulting various stakeholders in order to come up with a land policy for the country. To date, consultations are still being made and the land policy is still in draft form. However, civil society organizations such as the Zambia Land Alliance have raised concerns that the proposed land policies fail to provide adequate protection for people who are dependent on rural land and who need access to natural resources (Zambia Land Alliance, 2010). The government has turned its attention to the land provisions in the draft Constitution, which is currently being publicly circulated for comment. The draft Constitution provides for (1) equitable access to land and associated resources; (2) equitable access to and ownership of land by women; (3) land tenure security; (4) sustainable and productive management of land resources; (5) transparent and cost-effective management of land; (6) conservation and protection of ecologically sensitive areas; and (7) cost-effective and efficient settlement of land disputes.

The draft Constitution also provides for the continuation of the customary and statutory (leasehold) tenure systems and calls for revisions to legislation to be enacted to revise existing land laws; prohibit land speculation; address imbalances in land alienation; provide for periodic land audits; provide means for securing customary land tenure; provide equitable access to state land and enable settlement of landless people; and establish minimum and maximum holdings of arable land.

As regards land administration, the Ministry of Lands comprises the departments of surveying, lands, and lands and deeds, which are responsible for all land surveys and issuing title and registration, respectively.

Prior to 1997, state land administration was done in Lusaka (Zambia's capital) only, but the government has since established department offices in nine of the country's ten provinces to provide cadastral survey services. Department of Lands offices have also been established in nine provinces, and a regional office has been set up in Ndola, one of the ten provincial centres, to provide titling and registration services. This implies the latter services are now provided in at least two centres - the Ndola office catering for the northern region and the Lusaka office for the southern region. Zambia is a vast country (753,000 kms²) and distances from the provincial and registration offices are still huge while communication systems are underdeveloped. This implies extra costs for someone applying for land ownership and means that the less affluent sectors of Zambian society will be discriminated against.

6. SWOT ANALYSIS OF ZAMBIA'S LAND TENURE SYSTEM

A SWOT analysis is a management tool used to evaluate an organization's strength, weaknesses, opportunities and threats. This section focuses on a SWOT analysis of the current land tenure system in Zambia.

6.1 Customary land

(a) Strengths

- Although boundaries are not recorded, land may be allocated and used based on communal rights or concurrent interests, so multiple rights may exist over the same piece of land; and,
- Land disputes are resolved quickly and usually in a cost-efficient way because it is done at community level.

(b) Weaknesses

- Tenure under customary lands does not allow for exclusive rights over land. No single person can claim to own land because the whole belongs to the community;

- Customary land does not qualify as collateral and is under-used by the capital market. Rights derived from customary tenure are not registered and difficult to define, thus credit institutions do not recognize such rights as collateral;
- Under customary law, women neither own nor inherit land. Married women have access to land mainly through their husbands. In the event of divorce or widowhood, they may be permitted to continue to use the land, but under customary law they do not inherit control over this land. Most divorced or widowed women return to their birth families and are dependent upon male relatives for access to land (Machina, 2002). Female chiefs do not act differently from their male counterparts in administering land to the disadvantage of women;
- Free access to resources provided by customary tenure has the disadvantage that the individual has no incentive to invest in common resources such as pasture improvement. This encourages overuse and can result in severe degradation of the environment; and,
- The government loses revenue as there is non-payment of rent or rates.

(c) Opportunities

- To collaborate with traditional authorities and other land stakeholders to review, harmonize and streamline customary land practices, uses and legislation governing land holding, land acquisition, use and delivery with a view to harmonising land administration and management;
- To sensitize the public on the advantages of individual ownership of land through leasehold or customary tenure to improve the security of investments by improving land transferability and access to credit;
- To ensure that no chief shall grant land without consulting his/her people;
- To introduce and register simple, affordable, secure "certificates of title" or comparable instruments to be issued by traditional authorities under customary tenure to benefit rural communities. This will

improve security of tenure and access to financial and other resources; and,

- To sensitize the public on the advantages of land title registration as a means to improve tenure security and as a tool to improve investments, transferability and access to credit.

(d) Threats

- Lack of cadastres covering the entire country. Only developing urban centres and fringes are covered. Cadastres are mainly demand driven.
- Disputes relating to boundaries among chiefdoms. Boundary disputes have become common because land is increasingly scarce and more economically valuable. The undefined boundaries of chiefdoms are a seriously emerging problem arising from the non-survey of customary areas. Disputes and threats of bloodshed are heard among traditional leaders.

6.2 State Land

(a) Strengths

- Tenure under statutory lands allows for exclusive rights in land. Land rights in leasehold include the ability to sell, manage, rent to others, use it as collateral for a loan and exclude the trespassers as well as right to compensation in case of expropriation;
- Ability of statutory land to qualify as collateral and therefore adequately participate in the capital market. Rights derived from statutory tenure are registered and defined. Thus, credit institutions do recognize such rights for collateral;
- Restricted access to resources provided by leasehold tenure has the advantage that the individual has a strong incentive to invest in land. This has the effect of encouraging sustainable use of resources; and
- The government receives revenue through ground rent or rates.

(b) Weaknesses

- Centralized issuance of certificate of title makes registration costly. The issuance of title is only done in Lusaka and Ndola, meaning that people from other areas often have to travel long distances to obtain certificates;
- Poor coordination between land-use functions that are spread among different institutions. For instance, the Ministry of Lands and Local Authorities could coordinate better, which would improve the delivery of land titles;
- Lack of systematic planning in the land delivery process. The master plans in Zambia were prepared during the colonial era and have not been updated since then. Better land-use planning could have created more attractive cities and towns; and,
- Weak land administration system is characterized by inadequate consultations, coordination and cooperation among fragmented land sector institutions. The net effect is the overlapping and duplication of functions in their operations. The system has many problems, such as a lack of adequate functional and coordinated geographic information systems and networks; there could also be more transparency in the operations of the institutions.

(c) Opportunities

- To improve regulation of the system of land allocation and further decentralize the functions of the commissioner of lands down to the district level;
- To streamline and simplify the system for allocation of leasehold rights to reduce the number of authorities involved in land alienation and make the system more accessible and affordable to a wide range of eligible applicants;
- To ensure systematic planning in the land delivery process; and,
- To adopt the principles of good land governance in land administration.

(d) Threats

- Lack of cadastres covering the entire country. Only developing urban centres and fringes are covered. Cadastres are mainly demand driven.
- Poor discipline in the land market; encroachments and multiple sales by landowners.

CONCLUSION

Land tenure has numerous implications for rural and urban livelihoods in Zambia. For instance, the lack of registration of customary land leads to disputes over boundaries among chiefdoms and prevents people from raising investment and capital using land as collateral. Land tenure insecurity can be solved by addressing the various land administration challenges in both customary and state land; the inclusion of land provisions in the draft Constitution is a step in the right direction.

There is a need to introduce simple, affordable, secure certificates of title, or comparable instruments, issued by traditional authorities under customary tenure. This will benefit rural communities and will, in turn, improve security of tenure and enable access to financial and other resources. Similarly, the government should ensure that cadastres cover the entire country. This will minimize disputes over boundaries between chiefs. To ensure speedy and equitable resolution of land disputes, the government should improve funding to the Lands Tribunal so that it can operate effectively and efficiently.

There is large-scale customary land acquisition by foreign and domestic investors. Customary land is acquired mainly for agro-industrial enterprises as well as for forest and mineral exploitation, among other uses. As Zambia Land Alliance (2010) points out if left unchecked, large-scale land acquisition can lead to a generation of people without ownership and control of land, food insecurity, undesirable economic, political, social and environmental consequences for

rural communities generally, but specifically for women and future generations. They have added that land is important to every Zambian and it should not be left to the whims of large international and other commercial interests to ignore the land rights of the ordinary Zambian women and men. Hence, there is need to do something about the large-scale transfer of land to local and international investors especially in customary areas.

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07

Bhutan

Nepal

India

Bangladesh



1. INTRODUCTION TO COUNTRY CONTEXT

Land tenure means holding state land or land of a private person on specific terms and conditions. A land tenure system determines the manner in which land is owned, occupied, used and disposed of within a community or state. A properly defined and managed land tenure system is essential to ensure balanced and sustainable development. Until 1950, tenure in Bangladesh was limited to private ownership where, under the regulations of Permanent Settlement Act of 1793, zamindars (lords, tax intermediaries) had the proprietary right to collect rents but not freehold rights in land. Through the Bengal State Acquisition and Tenancy Act (1950), land tenure was formally addressed for the first time and it was a landmark in the history of tenure legislation in Bangladesh. It abolished the zamindari system by acquisition of all types of intermediary rent receiving strata that existed between the government at the top and the tenants cultivating the land at the bottom. The Act brought tenants directly under government control. More remarkable was the provision in mutual rights and obligations between the government and peasants under the new dispensation. However, the tenure systems were redefined, reestablished and strengthened by Land Reform Ordinance of 1984.¹²⁷

Land law in Bangladesh is based on the common law system of freehold and leasehold title and the method of obtaining each of these is different. Usually land titles can be obtained by inheritance, purchase, gift or will, etc.

1.2 Different Tenure arrangements in Bangladesh

Bangladesh land and property rights are protected by a range of statutory and some informal rules and

regulations. Land and property tenure categories that exist in Bangladesh are:

Table 1.1: Different tenure systems

Freehold (individual)	Ownership in perpetuity. The system of full private ownership, free of any obligations to the state other than payment of taxes and observance of land-use controls issued in the public interest
Delayed freehold (individual)	Conditional ownership. Title is granted on the completion of payments or when developments have been completed
Registered leasehold (individual or community)	The right to hold or use property for a fixed period of time at a given price, without transfer of ownership, on the basis of a lease contract. Leasehold is a fixed asset and ownership is for a specified period from a few months to 99 years
Cooperative ownership	Ownership is vested in a co-operative or group of which residents are co-owners
Private rental	Rental of privately owned land or property
Public rental	Rental occupation of publicly owned land or house
Shared equity	Combination of delayed freehold and rental in which residents purchase a stake in their property (often 50 percent) and pay rent on the remainder to the other stakeholder
Community based tenure	This can take several forms of rental by a community of generally private land for an agreed period. At the end of the period, the community may agree to an extension or the community is given notice to leave within an agreed period. Other options include community area permits, community leases, or community ownership
Religious tenure systems (Islamic)	There are four main categories of land tenure within Islamic societies: waqf, mulk, miri, tassaruf usufruct rights is increasingly common, whilst musha/mushtarak, is collective/tribal ownership.

Source: Salma A. Shafi and G. Payne, 2007

Apart from the basic freehold and leasehold tenure categories, a number of other categories exist. These are:

- Khas land (government-owned land).
- Public land under ownership of a municipality/city corporation.
- Public land under ownership of various government agencies, such as Bangladesh Railway, Port, etc.
- Authority owned land (for example Bangladesh Jute Mills Corporation, Bangladesh Textiles Mills Corporation etc.).

¹²⁷ Government of Bangladesh, Ministry of Land. Land Administration Manual (Volume 1 & 2), 1984.

- Trust land (donation from donor for betterment of the disadvantaged people or other purposes) .

Land in each of these categories may also be occupied by residents classified in a number of other tenure sub-categories, including squatting and renting. In the case of private freehold or leasehold, the legal framework for accessing land, protecting titles and setting out the rights and obligations of the parties in any particular transactions is contained in the Transfer of Property Act 1882 and the Registration Act of 1908. Both these acts remain on the statute book, even though the situations which they are required to deal with are very different in the twenty-first century from the tenth century. The most significant law dealing with tenancy is the Non-Agricultural Tenancy Act of 1949.

1.3 Urban Tenure Status

In urban areas, land use is regulated by the Paurashava Ordinance 1977 and the Town Improvement Act 1953. The process of dealing with urban land through Bangladesh's laws is complex, time consuming and

extremely expensive. As such, laws have no meaning or relevance to the urban majority – the urban poor. There are a range of unauthorized alternatives. The total proportion of unauthorized settlements is so large that a number of tenure categories have evolved to cater for different sub-categories of demand. It is important to note that although they may all appear simply as “slums” to uninformed people, these different tenure categories serve different types of demand. Consequently, government action will have different impacts on each social group.

There are 14 types of tenure status in the urban areas of Bangladesh (Salma, Shafi and Payne. 2007).. However, the “tenant bed rental” and the cooperative types of tenure were not present in the surveyed towns. For research purposes, the “tenant bed rental” and cooperative membership category were sampled in Dhaka city. The tenure categories existing in urban centers are briefly described here:



Participatory processes during land demarcation and adjudication minimize disputes, Bangladesh. Photo © UN-Habitat/Washim Akhter.

Table 1.2: Population, land ownership and tenure status in the six city corporations

Slum Population	
2001 Population six city corporations ¹⁴¹	11,210,617
2005 Population six city corporations	15,447,046
2005 Slum population	5,438,165
2005 Slum population as percentage of total population	35.2%
Number of slum clusters	9,048
Number of slum households	1,043,329
Slum land ownership	
Slums on government land	9.2%
Slums on private land	88.6%
Slums on "other" land	2.2%
Slum population by ownership	
Population on government land	27.1%
Population on private land	66.7%
Population on "other" land	6.2%
Tenure	
Households claiming ownership	14.5%
Households paying rent	73.8%
Household living rent free	11.7%

Source: CUS 2000 and UPPR, 2006

1. **Street dwellers:** People or families living on pavements or the side of streets without a roof over his/her head. The length of time can vary from days to months.
2. **Tenant, bed rental (mess housing):** People renting bed space in hostels/dormitories. Not very common, it exists only in major cities, around city centers and close to industrial establishments. This type is commonly known as "mess" type of accommodation.
3. **Tenant room rental:** Renting rooms with shared facilities. Accommodation is temporary by nature. May occur on public or private land and public or private housing.
4. **Squatter tenant:** Tenants in squatter-built houses generally on public land.
5. **Tenant – on unregistered and subdivided land:** Rental accommodation in housing built on land which has been subdivided and purchased but not registered.
6. **Owner – on unregistered and subdivided land:** Legal owners of unregistered land with a building which may be unauthorized; generally known as **illegal subdivision**.
7. **Legal tenant without written contract:** Tenant living in legal housing under verbal agreement.
8. **Legal tenant with contract:** Tenant renting legally developed land/house with legal contract. Usually a yearly contract.
9. **Tied tenant:** Tenant who occupies residential quarters as an employee of government, semi-government and private commercial and industrial

organizations. Tenure security is tied to the employment.

10. **Lease holder:** Possession of land/house under a lease agreement with landowner (public or private).
11. **Co-operative member:** Use land and housing as member of a registered co-operative society.
12. **Communal owner:** Owners who belong to a group and live in one area and benefit from community welfare and mutual support.
13. **Individual owner:** Use land/housing legally and have access to rights of selling/transfer or development of property.

Reliable data on slum and squatter populations and their tenure status for all urban areas of Bangladesh are not available. A study was undertaken in the six city corporations in 2005 by the Centre for Urban Studies, Dhaka, and the University of North Carolina,¹²⁸ which estimated the total slum population and gave an indication of land ownership and tenure status. This study's findings include the following:¹²⁹ From the above table it is evident that about 89 percent of the slums are on privately owned land, more than 88 percent of the slum population lives on private land and more than 73 percent of households pay rent.

1.4 Formal, undocumented tenure types in Bangladesh

In urban areas of Bangladesh, adverse possession, legal protection against forced eviction and use/occupancy rights without certificate are examples of tenure on the land rights continuum that provide some degree of security of tenure. About 3.4 million of Dhaka's population (37 percent) live in informal settlements and there are 4,966 slum communities living in the megacity. The slums and informal settlements (70 percent) are mainly on private land.

In Bangladesh, slum evictions are still practised both on public and private lands, with no adequate rehabilitation schemes in place. In 2008, about 17,650 families were evicted. Although a recent government declaration claimed there will be no more evictions without alternative arrangements, poor settlements are still threatened.

As mentioned above, these groups have a wide range of categories with varying degrees of legality. De facto recognition of occupation (e.g. political patronage, proof of payment of utility bills, oral evidence, informally recognized customary rights, perceived secure tenure, etc.) forms a major part of the tenure types found in slums and informal settlements. They include regularized and un-regularized squatting, unauthorized subdivisions on legally owned land and various forms of unofficial rental arrangements.

1.5 Eviction

Under international law, forced evictions are defined as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to appropriate forms of legal or other protection".¹³⁰ Forced evictions have received a lot of attention in the past from human rights groups, non-government organizations and international organizations such as the United Nations. An alarming phenomenon, however, is that of market-driven evictions.

In the urban areas of Bangladesh, most market-driven evictions are usually the result of speculative activity in real estate by major private investors. They buy the land below market value by threatening poor farmers and poor land owners, then sell it to urban rich people.

128 Technical Annex – 1. Description of Project Components, UPPR Project, 2006

129 Covers Dhaka Metropolitan Area, which is greater than Dhaka City Corporation Area.

130 Sharma, A. et al. 2006.

at a higher price with or without land development. In countries like Bangladesh, the origins of eviction problems lie in the following factors:

- High land scarcity in urban areas for development.
- Constant imbalance between demand and supply of land for housing.
- Uncontrolled land market, very high market value of urban land.
- Increasing commodification of informal land markets.

Eviction is the main threat to tenure security, especially for the urban poor in informal settlements. In Bangladesh, slum evictions are still practised both on public and private lands, with no adequate rehabilitation schemes in place. In 2008, about 17,650 families were evicted. Although a recent government declaration claimed there will be no more evictions without alternative arrangements, poor settlements are still threatened. Korail slum has 120,000 thousand people living on government lands in Dhaka and is under threat. Evictions always take place because:

No organization comes forward with policy advocacy, a campaign or with social a mobilization programme to resist the eviction process. Those organizations which do have funds to address the issue, to organize and mobilize people and demand their housing rights and advocate on the policy level, do nothing at all; there is not even a public media campaign against the evictions.

Some activists and organizations are eager and committed to implement visible programmes and to do something for the urban poor, but they do not have the finances to run the whole process.

Research / studies have been done, but not one was presented to the nation or submitted to the government or policy makers.

1.6 Barriers to secure tenure for the poor in Bangladesh

Major barriers to tenure security for the poor of Bangladesh include a lack of political will that weakens laws established to protect tenure security; legal and regulatory frameworks that fail to provide tenure security; defective laws governing land and housing tenure rights, leaving residents vulnerable to conflicting claims and forced eviction; lack of transparency in land administration, faulty or inadequate administrative systems which lead to tenure insecurity in Bangladesh.

2. REVIEW OF CURRENT STATUS OF LAND TENURE AND ADMINISTRATIVE SYSTEM

2.1 Legal framework and key legislation for land reform/access in Bangladesh¹³¹

In Bangladesh, three major pieces of land reform legislation were adopted in 1950, 1972 and 1984 (Mannan, 2001) as a framework for land management and land tenure. The following is a summary of the main features of the laws and administrative frameworks that have been instituted by successive governments in Bangladesh to address the need for land reform. It must be noted that civil society movements like the Tebhaga, a Left-wing group that pursued a land reform agenda in the 1946 and early 1970s, and civil societies in 1984 played a noteworthy role in formulating ground-breaking laws in 1950, 1972 and 1984. The key elements of the above mentioned laws and legislation are discussed in the following paragraphs.

The East Bengal State Acquisition and Tenancy Act of 1950 was the outcome of the Commission report of Sir Francis Floud (high official and representative from British Empire, 1938-40). This Act changed the position of the peasants to direct tenants of the government. Former tenants (new owners) also got the right to sell,

¹³¹Section 2 is summarized from Barkat, 2004; Roy 2008; CARE, 2003; Toufique and Sinha, 2000; Momen, 1996; Land Watch Asia, 2008.

transfer, inherit and cultivate the land. This legislation introduced limitations on land holdings to 13.3 hectares of cultivable land per family (this limit was raised to 50 hectares per family in 1961). It also asserted the rights of tenants and their successors to land which lost to erosion or submerged under water, but not exceeding 20 years (Sec.86 of State Acquisition and Tenancy Act 1951). There was little success in identification and redistribution of ceiling surplus (more than 13.3 hectares of agriculture land per family ownership) land.

After the liberation war against Pakistan regime in 1971, the Land Reform Policy of 1972 was adopted as a presidential order. The law also restored the ceiling of 13.3 hectares of cultivable land per family. The major feature of this law was the government directive to acquire surplus land and to distribute it among landless peasants. The most significant issues in this policy were the declaration of newly reclaimed land from the river and sea as Khas land to be distributed to the landless poor, and the exemption of land owners who had less than 3.33 hectares from paying land tax. The immediate impact was that the land tax exemption reduced government revenues without helping the poor. Furthermore, there was no directive on the acquisition of ceiling surplus land from large land owners. However, Khas land distribution became the main concern.

A high level committee was formed consisting of senior government officials and leading non-government policy thinkers under the direction of President Hussain Muhammad Ershad in 1982. A Land Reform Ordinance of 1984 was the outcome of that committee's work, which tried to feature most of the components of proper land reform in the context of that time. The salient features of this ordinance were to reduce the ceiling for landholdings from 13.3 to 8 hectares; to prohibit the purchase or transfer of land into the name of another person by hiding the identity of the true landowner; to fix the minimum wage of agricultural labourers at the value of 3 kgs of rice; to forbid the

eviction of peasants from their paternal homestead; and to introduce a three-way sharing of farm produce, of which one third went to the land owner, one third to the sharecropper and the remaining third to be divided proportionately between landowner and sharecropper on the basis of expenses incurred by each one. The impact of the 1984 ordinance was to make regulation of share rent impossible due to the ambiguity of the law. Also, the minimum wage provision was difficult to apply for the interests of vested group (i.e. landed elite groups). The distribution of Khas land had many impediments due to the alliances between the local and national bureaucrats and the elites. The prohibition against eviction from homestead land gave some benefit to the landless.

2.2 Khasland management and distribution policy of 1997 and 1998

There was a surprise initiative from the military government in 1987 due to the control and systematization of the countrywide movement and struggle by the landed poor for Khas land. On the 1 July 1987, the Ministry of Land in Bangladesh issued a circular entitled the Land Reforms Action Programme (LRAP), which effectively converted the specific question of Khas land distribution in accordance to the light of President Ershad's 1984 land reform ordinance.

The **Agricultural Khas Land Management and Settlement Policy (AKLMSP) of 1997** was the revised version of the LRAP of 1987. This is the most recent official policy related to Khas land distribution. This circular retained most of LRAP's clauses related to the process and mechanisms of settlement of agricultural Khas land, but redefined and categorized the priority landless groups. It also reduced the maximum amount of Khas land that could be allotted to landless families from 0.8 to 0.6 ha. The LRAP and AKLMSP both emphasized the urgent need to recover Khasland from

illegal owners and allocate it to the landless.¹³² (Sinha and Toufique, 2000). Another important object of the LRAP and AKLMSP was to grant joint ownership of Khasland to husband and wife.

2.3 Laws related to flooded river areas

Bangladesh is a country with many rivers. Alluvial and diluvial deposits are normal processes due to the special geographical location and conditions of the country and there are some laws and regulations related to this feature. The East Bengal State Acquisition and Tenancy Act of 1950, Sec. 86, guaranteed the land rights of tenants and their successors to land lost to erosion during the period when the land is flooded or under water within the period of 20 years. Presidential Order No. 135 (1972) amended the Act by authorizing the government to claim alluvial and diluvial land when it emerged, and to redistribute it to landless families. The 1994 Act was amended again to give the direction that in the case of land lost to erosion, the right, title and interest of the tenant or his/her successor are retained during the period of loss through erosion, but this right could not exceed 30 years (Barkat, 2008). It must be mentioned that these amendments were essential due to a desperate need and demand from the landed poor, but it was very tricky to implement the ground.

2.4 The structure of contemporary land administration

Land administration in Bangladesh has a long history. The ancient Hindu Rulers of India established all sorts of mechanisms for collecting tax from the tiller. From the literature of Abul Fazal, the advisor of Great Mughol

Emperor Akbar, it was apparent that there was a fastidious and efficient land management system in Bengal, used mostly to collect taxes and to provide some service delivery. During their colonial period, the British introduced the administrative structure of land administration. They also introduced a scientific land survey system and a cadaster system for better administration. Currently, land administration as well as land management is overseen by four authorities under two separate ministries:

The Directorate of Land Records and Surveys (DLRS) in the Ministry of Land is responsible for conducting cadastral surveys and settlement works. They produce the cadastral maps which are popularly known as the mouza or revenue map. Another major activity of that organization is to generate the individual land record certificates.

The Land Reform Board (LRB) in the Ministry of Land is the most significant component of this ministry and it oversees most noteworthy tasks such as implementation and monitoring of land reform activities. Its activities affect the grass root level as much as the union¹³³ level. It directs the distribution of Khas land, supervises vested and abandoned properties, and is responsible for collecting vast amounts of land development taxes. A few years ago it played a vital role in implementing the land reform programmes and was a custodian of tenant's rights.

The Land Appeals Board (LAB) in the Ministry of Land is the highest ranking body to resolve disputes over Khas land. Disputes which cannot be solved at the local and district levels are dealt with by the land appeal board. The LAB has a close association with national and district level revenue officials and with the Assistant Commissioner of Land at a sub-district level.

Finally, the Department of Land Registration in the Ministry of Law, Justice and Parliamentary Affairs, and

132 Landless (definition from Government of Bangladesh, in Roy, 2008.)

Category one:

- (a) Rootless due to river erosion
- (b) Landless family of a dead or disabled freedom fighter
- (c) Landless widow or divorced women having a son to cultivate

Category two:

- (a) Family without agricultural and homestead land
- (b) Family without agricultural land
- (c) Family with home stead and agricultural land but not exceeding 0.5 acre

133 Union is the lowest administrative tier in rural Bangladesh

its associates, are responsible for the transformation of ownership through legal and administrative processes, selling, buying or the other forms of transaction due to transfer of property. This ministry is exclusively responsible for land registration activities.

In addition, the Ministry of Forests, the Department of Fisheries, the Directorate of Housing and Settlement, and the Department of Roads and Railways and other agencies are an insignificant component in the administration of land.

2.5 Resulting property regimes and regulatory frameworks

Land management is a complex task and it involves a large number of ministries, directorates, divisions, agencies and municipalities. The basic functions of current LA are: (1) record keeping, (2) registration and (3) settlement. The key problem is the numerous documents or records of rights that are maintained in different offices under separate, un-coordinated ministries. This system is inefficient, not transparent and ultimately leads to dual ownership. It facilitates fictitious records, disputes and litigations; it acts as a disincentive for production and helps land grabbers. It also enables land-related corruption (Toufique, Sinha, Saurabh, 2000). No single agency is entirely responsible for the execution of any projects of land policy or administration. The private commercial sector's operation in land and housing development is still very small and limited to Metropolitan Dhaka and a few other cities. The individual households (upper, middle and lower middle income groups) have always played the most significant role in land management.

3. LAND TENURE SECURITY IN BANGLADESH

3.1 Recent efforts to improve land tenure security

The importance of security of tenure is recognized to be a key condition for realizing poverty reduction, in particular in urban Bangladesh. A significant number of poor people have little or no security of tenure and rely on informal and unreliable forms of patronage to prevent eviction. Others who are not threatened by eviction still have insufficient security to invest in home improvements. They may not be eligible for some of the entitlements and facilities which are linked to formal tenure.

The working definition of “slum” in Bangladesh suggested by Center for Urban Studies, Dhaka, Bangladesh (2006) includes lack of security of tenure as a component of the definition. Mapping and surveying of slums has quantified in the six largest cities in Bangladesh.

The major proportion of national and donor funding for poverty alleviation in Bangladesh is, however, allocated for rural areas. Most people agree that urban poverty and particularly poor living conditions of the urban poor deserve more attention. However, tenure insecurity in informal settlements in cities and the resulting potential for politicization (in the absence of policy) is seen by many as an obstacle to a stronger allocation of funds for the urban poor. Funding for this group of people has largely focused on social and health issues, which do not depend on tenure security. There are instances of infrastructure improvement in slums by NGOs like CARE Bangladesh and ActionAid Bangladesh with the vision that people will not be evicted for five years. However, such agreements with service providers have not always been honoured by landowners, leading to a loss of investment in addition to the sufferings caused to the dwellers. In any case, such interventions have been small in scale in relation to the problem.

Except in Dhaka, Chittagong and Khulna, there have been few evictions. A change in attitude was experienced with the interim government (2007-2009), when some evictions were carried out on land belonging to government organizations in some smaller towns, leading to policy advocacy by NGOs through the Coalition for Urban Poor. In March 2007, the National Ministry of Home Affairs gave directives to stop evictions being carried out without permission from the Law and Order Advisory Committee. Even so, the perception of insecurity still persists among informal settlers.

Both the Ministry of Local Government, Rural Development and Cooperatives and the Ministry of Lands are responsible for addressing tenure security. Beside the policy support by the Lands Ministry, the Local Government Engineering Department (LGED) has implemented poverty reduction projects from 2000 onwards. The Local Partnerships for Poverty Alleviation Project (LPUPAP) had been implemented with a grant provided by the United Nations Development Programme (UNDP) from 2000 to 2007 in four city corporations (Chittagong, Khulna, Rajshahi and Barisal) and seven municipalities (Mymensingh, Bogra, Sirajganj, Gopalganj, Narayanganj, Hobiganj and Kushtia). The project's goal was to alleviate poverty by empowering communities organized into community development committees. The Poverty Alleviation Project had three main components. A community development fund (CDF) provided grants for the construction of basic services and physical improvements in the communities through a community contract system. A Poverty Alleviation Fund (PAF) provided support for a livelihoods development programme. A third component supported community empowerment and strengthened the capacity of local government to address the needs of the urban poor. Activities were conducted to address tenure security through both the CDF and PAF. The project activity represented a significant empowerment of the community organizations, and began to address the integration of

the urban poor within the local economy".¹³⁴ An expert evaluation specifically mentioned that "...in the face of increasing urbanization, the urban poor communities (under Local Partnerships for Urban Poverty Alleviation Project (LPUPAP) of UNDP Bangladesh 2001-2007) were still facing insecurity of tenure, that local and national governments were failing to develop policy and programmes for pro-poor urban development, and those communities were still vulnerable to eviction and inadequate services".¹³⁵

Urban Partnerships for Poverty Reduction (UPPR) is a seven year Programme funded by the Department for International Development (DFID) and UNDP (partial) which started in November 2007. UPPR has been developed based on LPUPAP and its design draws on experiences from similar DFID-funded programmes implemented in India and Cambodia. The UPPR Programme's goal is to reduce urban poverty in Bangladesh. Its purpose is to improve the livelihoods and living conditions of three million urban poor and extremely poor people, especially women and children. UNDP is the UPPR implementing agency. The Local Government Engineering Department is responsible to government, through the Ministry of Local Government Rural Development and Cooperatives, for Programme implementation. UPPR will work in six city corporations and 24 municipalities throughout the country.

While the UPPR project has placed more emphasis upon extreme poor communities and vulnerable groups, it attempts not only to provide a healthy living environment through community mobilization and partnerships but has also created space within the project for making a secure living environment for the poor by respecting the formal and informal tenure of their households and communities. The importance of a secure living environment for urban poor was further emphasized by DFID when reviewing the overall

¹³⁴ Technical Annex – 1, Description of Project Components, UPPR Project.

¹³⁵ Technical Annex – 1, Description of Project Components, UPPR Project.

logical framework of the UPPR project in April, 2009. This review identified community mobilization and a healthy and secure living environment as two project outputs. Under the proposed output two of the UPPRP, the project needs to make specific and distinguished inputs to secure land tenure for all.

LPUPAP and UPRP are the first large-scale attempts at urban poverty reduction in Bangladesh. LPUPAP had restricted its infrastructure investments only to slums and this had achieved some measure of tenure security or an agreement with landowners not to evict slum dwellers for 10 years. LPUPAP found that the most vulnerable slum dwellers from a tenure point of view were those not included in the project. Some of these are families that lived in rental accommodation and also those that live on land along railway lines, canals, rivers and lakes and on land required for trunk infrastructure improvement or development of commercial and residential areas. Now, UPPRP is expected to pursue a more inclusive approach in which improving tenure security is part of the agenda of reaching all the poor.

3.2 Trends and development of land administration systems to improve security of land tenure

The current land tenure system in Bangladesh is governed by the East Bengal State Acquisition and Tenancy Act of 1951, which discourages tenancy and sets a 33 acre ceiling on individual land holdings. Another piece of legislation, the Land Reform Ordinance (1983), aims to maximize production and to promote better relations between landowners and sharecroppers. To resolve multifaceted land tenure conditions, the Government of Bangladesh is trying to develop legal mechanisms to support the National Urban Sector Policy (2007). As an outcome, the policy is leading for processing proposals for decentralized development and a “hierarchically structured urban system”. More space for urban development is clearly desirable.

The current land tenure system in Bangladesh is governed by the East Bengal State Acquisition and Tenancy Act of 1951, which discourages tenancy and sets a 33 acre ceiling on individual land holdings.

The new policy recognizes the major collective contribution made to the urban and national economy by the poor and the needy; it also recognizes the responsibility of government to enhance this contribution through slum upgrading and services provision. Improving tenure security of “tenable”¹³⁶ slums in ways that stimulate investment in their homes by residents is a key element in such upgrading processes and needs to be done in a way which is within the institutional resources of government agencies and minimizes land and housing markets distortion.

Another positive feature of the National Urban Sector Policy is the proposal to review regulatory constraints to the development of efficient land use in existing urban areas. This can help to reduce the expansion of urban areas into productive agricultural land, reduce unit land and infrastructure costs and to use under-used land more efficiently. This is particularly important in view of the large areas of surplus land already held by government agencies. At the same time, introducing various forms of public-private partnerships and innovative forms of land development, such as land pooling or readjustment, guided land development, land sharing, sites and services, etc., can generate increased incomes for developers, revenues for government and affordable housing for all social groups, including the poor.

¹³⁶ The National Urban Sector Policy states that “an informal settlement or slum may be considered untenable if human habitation in such settlements entails undue risk to the safety or health or life of the residents themselves, or where habitation is considered contrary to the “public interest” as determined by the local authority through a consultation process involving all the stakeholders”. All other slums are considered “tenable” and eligible for in-situ upgrading.

Finally, the Bangladesh Ministry of Home Affairs has given directives to stop evictions without permission from the Law and Order Advisory Committee (17 March 2007). There is a parliamentary Standing Committee on Land which is an advisory body at the highest political level on land matters, providing a strong stance on land tenure security in urban and rural areas.

3.3 SWOT analysis

As a signatory to the UN-Habitat Agenda, Bangladesh is committed to improving the tenure security of urban

inhabitants, especially the poor segments.¹³⁷ The land market in Bangladesh is not efficient but it is very dynamic and complex in nature (especially in big towns) and it is not possible for the government to control or manage the housing and land market. Nevertheless, the government has to play a role in managing and regulating the land market and facilitating guidelines which promote socially and environmentally desirable development. The land tenure systems play a critical role in meeting these objectives and a range of tenure options is essential to meet the varied needs of different social groups.

Table-3.1: SWOT Analysis of Current Land Tenure System of Bangladesh

Tenure type	Strengths	Weakness	Opportunities	Threat
Freehold	<ul style="list-style-type: none"> Ownership in perpetuity. 	<ul style="list-style-type: none"> High costs of access. Collateral value may not be relevant if incomes are low or financial institutions are weak. Property values may be very high, the poor cannot afford them. 	<ul style="list-style-type: none"> Provides a high degree of security. Freedom to dispose or use as collateral for loans. Maximizes commercial value, enabling people to realize substantial increases in property values. 	
Delayed freehold	<ul style="list-style-type: none"> Conditional ownership. Title is granted on completion of payments or when developments have been completed. 	<ul style="list-style-type: none"> Low-income households not eligible for conventional mortgage and only able to borrow from sources not requiring property as collateral. Collateral value not relevant if incomes are low. Property values vary and trap the unwary in properties worth less than they paid for them. Expectations of increased values can divert investments from more productive sectors. 	<ul style="list-style-type: none"> Provides the same high degree of security as freehold, payments are made as required or when developments have been completed. Freedom to dispose, or use as collateral for loans. Maximizes commercial value, enabling people to realize substantial increases in property values. 	<ul style="list-style-type: none"> Failure to maintain payments or undertake developments may result in evictions and loss of funds invested.

¹³⁷ Among the specific actions listed in the United Nations' Global Plan of Action, to which Bangladesh is a signatory, is the proposal that governments "explore innovative arrangements to enhance security of tenure, other than full legalisation which may be too costly and time-consuming in certain situations, including access to credit, as appropriate, in the absence of a conventional title to land".

Tenure type	Strengths	Weakness	Opportunities	Threat
Leasehold	<ul style="list-style-type: none"> Fixed property. Longer ownership- up to 99 years. Right to hold or use property for a fixed period at a given price, without transfer of ownership. 	<ul style="list-style-type: none"> Requirement of legal framework. Costs of access generally high. Requires legal advice in preparing leases; May not facilitate access to formal credit. Land ownership remains with the government. If lease duration is sufficient to attract higher income households to buy into a settlement, it may encourage speculative pressure and 'downward raiding'. 	<ul style="list-style-type: none"> As secure as freehold, but only for the period in question Provides residents with full security for lease duration. Rent or other costs stated within lease contract. Makes minimal demands on administrative system for land management. Discourages tendency for higher income groups to buy houses in the settlement, making it easier for it to be available on a long term basis to low-income households. 	<ul style="list-style-type: none"> Leasehold tenure may discourage acceptance by authorities or local residents. Failure to meet obligations may therefore prejudice the lease.
Private Rental	<ul style="list-style-type: none"> Rental of privately owned land or property. 	<ul style="list-style-type: none"> Only use right. Deterioration may result if maintenance costs are not met. 	<ul style="list-style-type: none"> Legally enforceable contract provide good security. Movement is flexibility to tenants. 	<ul style="list-style-type: none"> Open to abuse by disreputable owners.
Public Rental	<ul style="list-style-type: none"> Rental occupation of publicly owned land or house 	<ul style="list-style-type: none"> Limited supply may restrict access. Deterioration may result if maintenance costs not met. Samuel Mabikke/ UNHABITAT/NBO/ UNO Samuel Mabikke/ UNHABITAT/NBO/UNO Terms may be restrictive. 	<ul style="list-style-type: none"> Provides high degree of security. 	<ul style="list-style-type: none"> Unsuitable due to higher investment. May fail due to poor cost recovery rates.
Shared equity	<ul style="list-style-type: none"> One can invest 50% to purchase property and others pay the rest as rent to the investor. 	<ul style="list-style-type: none"> Requires a legal framework and efficient management as tenure is combination of delayed freehold and rental property. 	<ul style="list-style-type: none"> Combines the security and potential increase in property value of delayed freehold and the flexibility of rentals. Residents can increase their stake over time, ultimately leading to full ownership. 	<ul style="list-style-type: none"> This requires a higher level of institutional management Likely to be applicable in Bangladesh, except for special cases.
Cooperative ownership	Ownership is cooperative basis	<ul style="list-style-type: none"> Requirement of double registration- land and association. Not suitable for low-income groups. 	<ul style="list-style-type: none"> High security. Social unity. Legal framework exists in Bangladesh 	<ul style="list-style-type: none"> Restrictions lead to reduced investment.
Community based tenure	<ul style="list-style-type: none"> Community led rental property option for an agreed period. Community Area Permits, Community Leases, or community ownership 	<ul style="list-style-type: none"> requires trust on behalf of both parties to honour the agreement. All community based tenure systems require a well-established community structure or support system – or at least the potential to create these. 	<ul style="list-style-type: none"> Owners can generate an income from property until it is to be used commercially. Low-income communities can live in areas which would otherwise be unaffordable. Permits increasing security and strengthening communities. 	<ul style="list-style-type: none"> At the end of the contract tenants have to move if contract is not renewed.

Tenure type	Strengths	Weakness	Opportunities	Threat
Religious tenure systems (Islamic)	<ul style="list-style-type: none"> • <i>Waqf, mulk, miri, tassruf</i> etc. provide family/common tenure 	<ul style="list-style-type: none"> • Properties absent in commercial land market • Lands often inefficiently managed 	<ul style="list-style-type: none"> • Good tenure security • Affordable land management procedures 	<ul style="list-style-type: none"> • This is not widely applicable in Bangladesh. • Inheritance disputes can cause land conflicts

Source: Author based on Jayarathe (2009), Shafi and Payne (2007), Islam and Chowdhury (1990)

Apart from the tenure categories in rural Bangladesh, urban areas currently include a large and increasing number of informal tenure categories and sub-categories. Considering the most appropriate tenure options for existing settlements and those that will exist in future, a SWOT (strengths, weakness, opportunities and threats) analysis is presented in Table 3.1 below.

CONCLUSION

In Bangladesh, the status of land tenure for the low-income urban and rural people is insecure. This is due to landlessness or zero access to land and poverty. The government land policy is weak and includes no specific strategies or instruments that address security of land tenure for the poor. Although, Article 42 of the Constitution guarantees property rights to all citizens, initiatives have been too weak to establish this for poor people. This undoubtedly provides the foundation for a pro-poor land policy based on fundamental rights. Alternatively, projects and initiatives that have been tried by various organizations have failed to address this issue due to a lack of pragmatic understanding of urban land tenure for the land less poor. In-depth studies are almost absent and professionals are still too young to cope with the bulk of land tenure issue. Another significant factor is the level of

complexity insecurity of land tenure, especially in the urban settings. Before identifying suitable options to increase the security of land tenure in existing urban poor settlements and urban land administration, it is important to remember that the number of settlements involved is both extremely large and growing, and the institutional, financial and technical resources available are limited. It also has to be remembered that existing land administrative capabilities are limited and urban land registers are not comprehensive, detailed or up to date. Considerations should also be given to the fact that any improvement in settlements or changes to land tenure may have a significant impact on land and property values, even before any improvements are made in low-income settlements. This makes technical and policy reform support essential in Bangladesh.

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08



1. INTRODUCTION TO COUNTRY CONTEXT

Land tenure is the perceived institutional arrangement of rules, principles, procedures and practices, whereby a society or community defines control over, access to, management of, exploitation and use of the means of existence and production. Informally expressed, land tenure is the perceived right to land (rather than the simple fact of having land). Land tenure security thus is the perceived certainty of having rights to land for a certain and well-defined period of time (Dekker, 2005). Therefore, land tenure security emphasises the “rights in hands” rather than the “rights on paper”.

Land tenure security has been a long-term and growing topic for researchers from many different professional backgrounds, which indicate its importance and complexity. It has been the focal point of interdisciplinary studies, such as agricultural production and food security, natural resource protection and sustainable development, human rights and gender issues, as well as studies that focus on tenure security in relation to poverty reduction, economic growth and good governance (FAO, 2007; UNECA, 2004; UN-Habitat, 2008; WB, 2003; Dekker 2003, 2005; Maxwell and Wiebe, 1998; Roth and Bruce, 1994).

China, one of the most ancient agriculture-dominant countries in the world, has developed unique characteristics over the thousands of years in which land tenure systems have evolved. Land tenure security issues have always been the major concern of any political regime in China as well as the Chinese people, and it is not easy to describe the entire history of these issues. However, in reviewing the changes in land policies over time, a fluctuating yet representative pattern can be observed. Before the review of history, however, it is important to introduce some background information about China that could help people to understand the scope of this study.

1.1 Background information on the People's Republic of China

Geographically, China is in East Asia and has a landmass of 9.6 million km² (it is the third ¹³⁸ largest country in the world). From north to south, China stretches 5,500 km, and from east to west it is 5,200 km. With a land border of some 22,800 km, China is adjacent to 14 countries, they are: North Korea, Mongolia, Russia, Kazakhstan, Kyrgyzstan, Tajikistan, Afghanistan, Pakistan, India, Nepal, Bhutan, Myanmar, Laos and Vietnam. Across the sea to the east and southeast are the Republic of Korea, Japan, the Philippines, Brunei, Malaysia and Indonesia (Government of China, 2010).

All five basic topographies exist in China: a vast land of lofty plateau, hilly land, large plains, rolling land and basins surrounded by mountains. Mountainous landscape and rough terrain make up two thirds of Chinese territory (GoC, 2010). This topographical diversity means agricultural operations and land-use patterns vary greatly in different regions, and this has physically forged the complex nature of the Chinese land tenure system.

The Peoples' Republic of China came into existence on 1 October, 1949 - the first socialist regime in Chinese history - and the party in power is the Communist Party of China (CCP). The fundamental political system is the System of People's Congress. Power in the P.R. China belongs to the people and the organs to exercise this power are the National People's Congress (NPC) and local people's congresses at all levels.¹³⁹ The NPC and local people's congresses are established through democratic elections; they are responsible to and supervised by the people. State administrative, judicial and procurator organs are created by, responsible to and supervised by the people's congresses. The Multi-party Cooperation and Political Consultation, under the leadership of the CCP, is the basic political system in China. The CCP is the only party in power; the eight

¹³⁸ Russia: 17.10 million km²; Canada: 9.98 km².

¹³⁹ There are five levels in the governmental structure in China: state, provincial, municipal, district and county/community.

other political parties, which accept the precondition of the leadership of the CCP, participate in the discussion and management of state affairs in cooperation with the CCP. This particular political configuration represents the country's socialist nature; it is also the political foundation for socialist land tenure.

Demographically, China is the most populated country in the world, with 1.34 billion people. The urban population is 669.78 million and rural population is 671.13 million¹⁴⁰ (NBSC, 2011). It is also an ethnically diverse nation; although there are 56 ethnic groups the majority - 91.6 per cent of the population – belongs to the Han ethnic group (GoC, 2010). The total amount of arable land is 121.72 million hectares (NBSC, 2008) about 7 per cent of the global land surface, but it has to sustain about 20 per cent of the world's population (GoC, 2010). Hence, land, especially arable or cultivated land, is a very scarce resource. Though the government repeatedly stresses the importance of arable land protection and food security issues, because China is one of the fastest developing countries with a large-scale urbanization and industrialization agenda, arable land has decreased significantly and at alarming rates in recent years.¹⁴¹

Though the country suffered in the global financial crisis in 2008, the annual GDP growth rate still reached 8.7 per cent in 2009, with total amount of RMB 33,535.3 billion, about USD 4,9 billion (NBSC, 2010). China has achieved significant economic development in the three decades since the country's economic reform in 1978. The average annual GDP growth rate from 1980 to 2009 was 9.87 per cent. Particularly from 2003 to 2007, China maintained a two-digit number for its annual GDP growth rate, which averaged 11.03 per cent (NBSC, 2010). As one of the fastest developing countries in the world, the country is also undergoing rapid urbanization and industrialization, which have

put great pressure on land resources and land tenure systems.

1.2 An introduction to current land tenure systems in China

The current tenure regime is based on socialist public ownership: state and collective ownership of land, which has been gradually established since the republic's foundation in 1949. The dual-ownership also demarcates two tenure systems, in general an urban and a rural system, which have undergone different processes of formation. The urban tenure system (based on state ownership) was formed through a gradual progress of nationalization; the rural tenure system (based on collective ownership) went through a dramatic and abrupt evolution from the 1950s to the 1960s, which was known as rural collectivization. It is difficult to accurately define the impact of collectivization as it not only replaced private ownership with collective ownership of land, but it also restructured the rural economy and society. However, it is enough to say that this duality of land tenure systems is one of the most evident causes of tenure insecurity problems in modern China. Moreover, these problems have been embedded deeply within the country's rural development for decades; they are known as the "Three Rural Problems"¹⁴² or the "san'nong problem", and are a bottleneck for the country's development as well as being a potential threat to social and political stability.

Before a more detailed discussion can be undertaken on tenure insecurity problems in modern China, it is important to have an overview of the evolution of the tenure systems and the status of tenure security. This overview can, on the one hand, establish a clear itinerary for understanding the unique evolutionary process of Chinese tenure systems and, on the other

140 Not including Hong Kong, Macau Special Administrative Districts and Taiwan.

141 A detailed discussion on the arable land loss is in section 3.2.2.

142 "Three Rural Problems" or "san'nong problem" indicates the issues on: agriculture, rural communities and farmers, and is used frequently when describing rural problems in a general way.

hand, it can provide an historic context for analysing problems in the present.

2. HISTORICAL OVERVIEW OF LAND TENURE SECURITY IN CHINA

Historians have debated for decades about the various periods of ancient Chinese history. To avoid any discrepancies, this paper will consider the history before the period of the Democratic Republic (1912 - 1949)¹⁴³ as the Ancient Period; and the period since 1949 as the Socialist Period. See the chronology of China in Annex 1.

All historians agree that private ownership of land was the dominant form of tenure in the ancient land tenure system. The Qin dynasty (221 B.C. - 206 B.C.) was the first unified and centralized feudal regime in China.¹⁴⁴ In 216 B.C., in order to stabilize tax sources and increase government revenue, nationwide land registration was implemented for the first time in history (Yue, 1990). This registration was based on the actual situation of land possession as reported by the occupants. While the state legally recognized private ownership of land, the institutional foundation for landowners (or landlords) was established. Landlords' private ownership became the dominant form in the ancient tenure system thereafter.

The ancient social hierarchy played an essential role in land possession. The politically, socially or economically privileged groups were able to acquire more land through enclosing and annexing the land from the less privileged peasants, usually by force or coercion.

Marxist historians in China attributed such inequality in land possession and the problem of land concentration to the conflicts of interest between different "social classes". Hence, the ancient tenancy-relationship was described as a form of "feudal exploitation" that landowners saddled on tenants. Instead of using the comparatively neutral word "landowners", the term "landlord" (or *dì'zhu* in Chinese) was applied in the CCP's land reforms to imply not only ownership, but also to insinuate his/her political position. Following this, the CCP further categorized landowners into big-, medium- and small-landlords, through which it proved its point about the inequalities in the ancient tenure system. Table 1 shows the distribution of all arable lands nationwide in 1952, immediately before CCP accomplished nationwide land reform to equally reallocate land to all peasants. However, it is a glimpse of the level of land concentration at the end of the ancient tenure system (NBSC, 1989).

Table 1: Status of arable land ownership in 1952

Landlords' Type	% of Pop.	% of Arable Land	Per capita (mu) ¹⁴⁵
Big Landlord	4.75%	38.26%	26.32
Medium Landlord	4.66%	13.66%	9.59
Small Landlord	33.13%	30.94%	3.05
Landless Peasants & Hired Labour	52.37%	14.28%	0.89
Other forms	5.09%	2.86%	1.83

Source: NBSC 1989, Author

In fact, some scholars debated that the situation of land concentration during the first half of the twentieth century was much less acute than the CCP described. The data of a high concentration that is shown in the table was the result from applying arbitrary and ideological standard in categorizing landowners. Moreover, the percentage always changes greatly in different dynasties, especially when factoring in the changes of ruling territories among different dynasties.

¹⁴³Although the Republic of China was founded in 1912 after the overthrow of the Qing dynasty, which marked the end of the monarchy in China, the ancient land tenure system did not collapse. The actual tenure system retained its ancient characteristics and structure until nationwide land reform was completed in 1952. Thus, it can be also regarded as the last phase of the ancient tenure system.

¹⁴⁴Since the appearance of private ownership of land is the critical standard used by historians to define the end of feudal society and as the foundation for theories of historic periodization, as a convenient introduction, this study will only apply one of the most popular theories as the basis of discussion.

¹⁴⁵Mu is a Chinese measurement unit. 1 Mu = 666.67 m², 15 Mu = 1 ha.

2.1 An evolutionary pattern of ancient land tenure systems

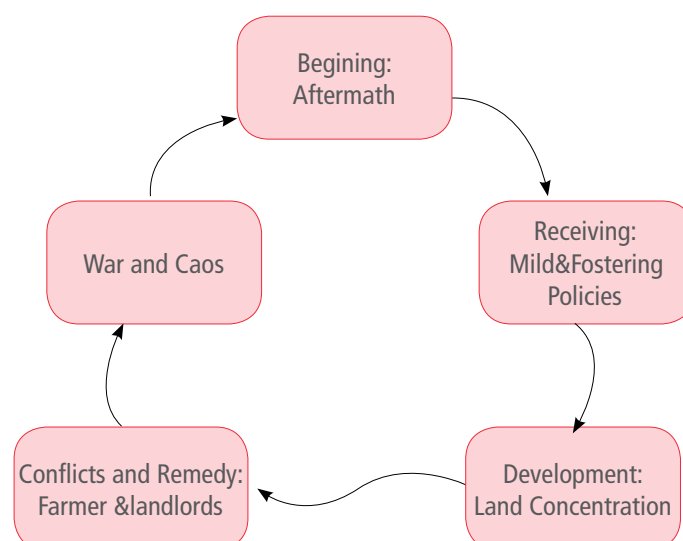
It is not possible to summarize two millennia of evolution of land tenure systems in a short paragraph. However, by focusing on the changes in the status of tenure security, a cyclical pattern can be seen which helps to understand the process. The pattern is a generalization of numerous historic incidents across many dynasties that can be identified as five phases that occurred repeatedly in the ancient period. See Figure 1.

Phase 1: Beginning from an aftermath. The pattern starts either at the beginning of a dynasty or sometimes in the middle, which always indicates the aftermath of years of civil war and social unrest. Several times in Chinese history, a powerful and centralized dynasty has fallen and this is followed by years of separation and wars. Examples are Three Kingdoms (220 A.D. – 280 A.D.) - the period after the downfall of Han (202 B.C. – 220 A.D.); the Sixteen Kingdoms (304 A.D. – 439 A.D.) and the Northern and Southern Dynasties (386 A.D. – 589 A.D.) after Jin (265 A.D. – 420 A.D.); the Five Dynasties and Ten Kingdoms (907 A.D. – 979 A.D.) after Tang (618 A.D. – 907 A.D.), and so on. Besides

these long-term periods of unrest caused by separatist warlords or kings, the other major source of social unrest generally featured farmers' rebellions or civil riots. There are several hundred documented farmers' rebellions in ancient history, and the Qin, Han, Sui, Yuan and Ming dynasties were directly overthrown by large-scale farmers' uprisings (Bai, 1995). Most of the uprisings were the consequence of brutal government by the monarchical regime. Besides heavy taxation and corvée (forced labour), the farmers' loss of land through enclosure and annexation by the privileged class was also a key trigger for rebellions and social unrest.

In this period, large amounts of land were abandoned, left idle or wasted while landowners and farmers fled, were killed or were exiled due to the war; a decreased in the population caused a labour-shortage and a resulting decrease in tax revenue. The huge military expense of the war further aggregated the economic and social situations, which urged the ruler or the emperor to make decisions that could help the empire to recover rapidly and to consolidate his sovereignty. In fact, the decrease of actual private owners gave the emperor (or the state) the chance to control more land resources, which allowed them to have sufficient land reserves for future policy manoeuvres.

Figure 1: Evolutionary pattern of ancient land tenure systems



Source: Author

Phase 2 is the recovering phase. The emperor was urged to promulgate a series of “mild and fostering” land policies for the majority of the population – farmers. Examples of favourable policies were: to equally bestow or lease previously reserved land to landless farmers or farmers who fled; to redistribute or restitute land to its former owner; to restrict land annexation and enclosure by the privileged and aristocratic class; to implement land registration and rebuild a cadastre; to encourage people to develop virgin land or waste land; to lower taxes and labour duties, etc.

At the beginning of the Han, Jin, Northern, Sui, Tang, Ming and Qing dynasties, such favourable land policies for small landowners, farmers, tenants or peasants were issued by the state (Zhao, 1984). In the meantime, relief from taxation and corvée was also given and eased the burden on farmers. These policies not only resettled and stabilized the population and tax sources, but also greatly mitigated social conflicts. Though policies in the recovering phase focused more on the benefits for farmers, the emperor had to consider and balance the interests of aristocrats, bureaucrats, military leaders, regional and local leaders who were usually privileged large landlords with strong political or military influences over the regime. During this phase, the status of land tenure security was improved and people’s rights over land were insured by state policies and institutions.

Phase 3: Development. As the political, social, and economic situations were stabilized, the country would move into a phase of fast development, which also meant that the regime had to reinforce and consolidate its power. Then, policy-making stressed the interests of the large landowners, as they often controlled the economic, political and military power in the country.

As an agriculture-dominant society, land means wealth in China. While landowners motivated by self-interest tried to expand their land, they pressured the emperor to remove restrictions on land concentration. These landowners were also bureaucrats or politically

In ancient China, no matter which emperor finally seized the throne, the structure of the ancient tenure system and social hierarchy still remained, hence the confrontation between farmers and landowners reoccurred. During this chaotic phase, farmers became either soldiers or vagabonds; war casualties also greatly reduced the population and battered the economy.

privileged, and as they were the actual enforcing agents of the state policies they were likely to abuse their power for self-interests. Hence, bureaucracy always followed prosperity in ancient China. As productivity increased and drove the growth of the merchant class, big merchants could easily become big landowners with the assistance of corrupt bureaucrats. Consequently, they would join the privileged classes in annexing and enclosing land by force or by coercion.

The development of the economy led to rapid population growth. Previously abundant land that was reserved by the ruler (in Phase 1) was becoming more and more scarce. As a result, favourable policies (in Phase 2) were no longer practical or feasible during this period. This was a physical reason that caused a shift in the emperor’s policy.

The ancient bureaucratic system also did not allow farmers to claim their land rights and interests through any official procedure. The options for the bankrupted and landless farmers were either to become serfs or tenants of landowners, or to abandon their homes and become drifting farmers. Another factor that may have caused farmers to abandon land was the increasing burden of taxation, corvée or military duties. In times of prosperity, emperors were tempted to expand their reign and increase the army to build extravagant palaces, tombs or monuments, or to enjoy a royal lifestyle, all of which placed a great burden on farmers.

Phase 4: Conflicts and remedies. Land deprivation and heavy burdens escalated conflicts between the

ruling class (normally large landowners) and farmers that often evolved into civil riots and farmers' uprisings. In most cases, the emperor used military force to suppress rebellions and, at the same time, reduce the conflict by promulgating policies that were favourable for farmers and reduced the tension.

However, there were problems with these policies in this phase. Firstly, insufficient land was physically available; secondly, land annexation and enclosure by the big landowners had made this shortage worse; and thirdly, the most crucial problem was that the policy in favour of farmers directly contradicted the vested interests of bureaucrats, aristocrats and large landowners. These problems explain the many failed attempts at land reform in the ancient tenure system. The remediating policy was doomed to fail and more acute conflicts arose, which always indicated the imminent downfall of a dynasty.

Phase 5: War and chaos. As the status of tenure security worsened, social and political stability were at breaking point. Frequently in Chinese history, natural disasters that devastated the agricultural harvest have triggered total chaos. Low agricultural productivity accompanied by heavy taxation was a fatal combination for small farmers along with military duty and corvée; they led to bankruptcy and loss of land. In this phase, farmers' rebellions spread rapidly nationwide. Social unrests sometimes also sparked political instabilities. Civil wars, usurpation, coup d'états or military mutiny frequently occurred in such circumstances and could directly or indirectly lead to the end of a dynasty.

In ancient China, no matter which emperor finally seized the throne, the structure of the ancient tenure system and social hierarchy still remained, hence the confrontation between farmers and landowners reoccurred. During this chaotic phase, farmers became either soldiers or vagabonds; war casualties also greatly reduced the population and battered the economy.

Large tracts of land were abandoned, laid idle or wasted which, again, provided the physical basis for a new dynasty to enforce its recovery policies. The cyclical pattern was completed and restarted.

Considering the development of farmers' property rights over land, the pattern not only appeared to be repeated, but was also evolutionary. From being vulnerable to the actions of privileged landlords, after centuries of struggle the status of tenure security in ancient China gradually improved. For instance, at the end of ancient era, there were rights such as a permanent tenancy, inheritable rights, protection of tenancy and so on that were granted to farmers living during the Qing dynasty. However, the improvement in security did not interrupt the cycle because improvements were small and slow and the main structure of the ancient land tenure system remained static until its end.

2.2 Historical influences on current China

Politically, ancient China was mostly ruled by a highly centralized and autocratic monarchical regime. Though the social classes favoured by land policies may have varied greatly in different situations, the principle aim of policy-making was the stability of the sovereign. This feature is still found in the socialist period. Due to the centralized political structure and a policy-making process that was strongly influenced by a central leadership, the policy-making easily leads to arbitrations and biases. With policy implementation, the unilateral top-down approach, bureaucracy and the local disobedience were regular issues in ancient China and are still apparent in the modern country; they have always led to ineffectiveness and inefficiency in implementation. These problems also hindered feedback from the bottom up. Lack of grass-roots participation was a problem not only in policy-making but also in implementation.

Two millennia of autocratic and monarchical governance greatly subdued and discouraged Chinese people from freedom in expressing their opinions. Changes in dynasties did not fundamentally change the social identity of the people who lived in the lower classes or were at the bottom of society. Eventually, this forged a unique attitude towards the state's policies in Chinese culture: passive acceptance and desperate counterattacks. For centuries, the dictating emperor promulgated policies and implemented them through the untrustworthy bureaucrats who had already lost the trust of the people. Farmers could only passively accept a "policy" that was manipulated by the bureaucrats. As long as their basic survival needs were ensured, there was rarely any opposition. However, when the situation finally threatened people's means of survival, the malfunctioning administrative system gave them no official channel for a fair resolution; they could only rebel against the state machinery by force. Farmers' rebellions were a direct confrontation between the people and the power of the state, a desperate action to show how they felt. Memories of these events still lie in the minds of the Chinese people as well as the ruling party today.

3. THE STATUS OF LAND TENURE SECURITY IN P. R. CHINA

To understand land tenure security in modern China, it is necessary to understand the establishment and development of the socialist land tenure system; then one can assess the current tenure security status.

3.1 The evolution of the socialist land tenure system

The evolution of the socialist land tenure system can be roughly divided into two phases: from 1921 to 1978, and from 1979 until the present day. This division is based on each period's relevance to the current tenure system, which gradually established after the country's economic and structural reforms from 1979.

3.2 Evolution of rural tenure system (1921-1978)

Politically, the first phase can be further divided into the revolutionary period¹⁴⁶ (1921-1952) and the first three decades of the socialist period (1953-1978). In the revolutionary period, the CPP used reforms of the land tenure system as a key instrument to survive and develop. During the first three decades of the socialist period, a socialist land tenure system was gradually established and consolidated.

Land reforms in the revolutionary period (1921-1952)

Since the Chinese Communist Party (CCP) was founded in 1921, land has been regarded as an important tool to achieve the revolutionary goal. Land reforms contributed greatly to the party's survival, development and eventually the successful seizure of power. This contribution began with the organization of the "Peasants' Movement" across the country, in which peasants were organized by CCP members to fight against "landlords' deprivations" in rents and interest rates on loans; the movement continued with the establishment of several "Revolutionary Zones" or "Base Areas" in remote regions. Through the redistribution of landlords' and rich-peasants' land and assets to the landless or land-poor, the CCP quickly strengthened its power. The ideology of "equally redistributing all land to peasants" won the support of the majority of the population; it helped the CCP to assemble troops and win the civil war against the *Kuo'ming'tang's* (the Nationalist Party, KMT) Nan'king government. Finally the CCP established the socialist regime, the Peoples' Republic of China in 1949 (He, Qing, 1993). Many scholars call the path of the CCP's revolution the "Land Revolution".

The success of the CCP shows the importance of secure land tenure and the power it can generate from the

¹⁴⁶ Though the socialist regime was founded in 1949, the CCP's land reform had lasted until 1952 when more than 90 per cent of the country accomplished the goal of reform. In terms of the evolution of the land tenure system, the line is drawn at 1952 instead of 1949.

rural masses. In general, the CCP-led land reforms from 1921-1949 can be thought of as the traditional peasants' movement that was informed by and led by a contemporary ideology from Europe, namely Marxism or communism. The guiding theory applied to peasants' movements then was "class struggle".

First, the peasants were educated about the ideology of "social class", which differentiated people in rural society according to their economic and political status. The CCP believed land ownership to be "feudal land tenure" that created an unequal distribution of wealth, and landowners' income from rent as an "effortless feudal exploitation" of peasants. These were the "old institutions" that the CCP was dedicated to overturning. Since the CCP claimed that most of the rural population was exploited by the economically wealthy and politically privileged rural elite classes – landlords and rich-peasants – the resolution on

middle-peasants, poor-peasants and workers.¹⁴⁷ The basis for this differentiation was not only the amount of land people possessed, but was also based on the so-called "economically exploitative relationships" among different classes.

Land reforms in the revolutionary period became the peasants' struggle against landlords and rich-peasants. There were two main measures applied in the CCP's land reforms: the reductive measure of the "reductions in rent and interest rates" that advocated for the relief of economic burdens; and the redistributive measure of the "confiscation and redistribution of landlords' and rich-peasants' land to poor and landless peasants". The two measures were applied at different phases of the revolution and the shifts of the reform measures were always in accordance with the CCP's political agenda at specific times.

Table 2: Measures and claims of CCP-led land reforms 1921-1952

Periods	Target Enemies of Revolution	Land Reform Measures	Claims on Land Ownership
1921-1927 "The First United Front" of CCP and KMT	Regional warlords and separatists	Reductions on rent and interest rate	Public (1921-1925) Private (1925 -1927)
1927-1936 CCP-KMT Confrontation	KMT's Nanking government	Confiscation and redistribution (by Force)	State (1927-1935) Private (1935 -1936)
1937-1945 "The Second United Front" of CCP and KMT	Japanese invaders	Reductions on rent and Interest rate	Private
1945-1952 Civil War (until 1949) and P.R. China	KMT's Nanking government	Confiscation and redistribution (by multiple measures)	Private

Source: Author modified from Deng, et al. (1996)

rural disparities was to redistribute equally the land and wealth among all rural people. The standard for differentiating between rural classes was initially a blurred concept that was later clarified by Mao Tse-tung's work in 1933 (Mao, 1965). This divided the rural population into five classes: landlords, rich-peasants,

Table 2 is a condensed list of CCP-led land reforms during the revolutionary period. It shows that, in different phases, the CCP's targeted enemies changed and it was the "mutual enemies" of the CCP and the

¹⁴⁷ The same standard is applied at the beginning of the socialist regime. See Table 1.

KMT that facilitated cooperation between the two. Accordingly, the CCP's strategies and measures in land reforms shifted when the targeted enemy changed. Despite these shifts, however, the fundamental purpose of the party always focused on gaining the maximum support from society for the party's survival and development.

One essential element of reform policies was that the claims on granted ownership of land also went through dramatic changes. Ideologically, the CCP always preferred the ownership arrangement as a form of public or state ownership of rural land. Practically, however, the changing situations in the country as well as the peasants' demands in the revolutionary period proved that instead of winning the maximum support from the rural mass, public ownership was not welcomed and was unappealing to the rural people. And the party suffered heavily by losing people's support during its revolution; hence, twice the CCP rectified the policies to support private ownership (Deng et al. 1996).

The redistributive measure was the main dispute between the CCP and the KMT, among many other

ideological differences, because of its drastic nature (confiscation and expropriation). The redistributive measure spontaneously emerged in the peasants' movements between 1923 and 1924, despite the reductive measure being the principle approach. The organized peasants were not satisfied with only economic relief, but wanted ownership of land. The dispute was one of the reasons for the collapse of the bipartisan partnership, known as the "first united front", between the CCP and the KMT. In particular, the extreme brutality towards landlords and the ideology behind the CCP's reform policies were serious concerns for the KMT.

This also explained the reason for the CCP's initiative in 1936, when the party changed its reform measures back to reductive measures, which replaced a drastic policy with a milder and more acceptable one. With the escalating threat of Japanese invasion, domestic disputes between the two parties became comparatively less urgent and unacceptable to the public. Hence the "second united front" to protect the country from invasion was possible (*ibid*).



Urban skyline of Pu'dong district in Shang'hai- China © Rui Ding

However, during the war against Japan, the CCP significantly strengthened its economic and military power and enlarged the occupied territory. The political disagreements with KMT finally led to a civil war and, consequently, land reform again swung back to a redistributive policy. This time, however, the CCP put more consideration in its implementation. Learning from lessons and experiences from the past, the party applied various methods for different social classes in confiscation and redistribution. This was to satisfy the needs of the rural masses without provoking unnecessary resistance from the public. Methodologically, the CCP devised multiple ways for peasants to acquire land from landlords; for instance, through a purchase and a buy off. Forced confiscation only applied to those people who were traitors or so-called “stubborn landlords” who still opposed the CCP’s revolution. The improved redistributive policies won greater support from the public and eventually helped the party to take power. Land reform continued even after the republic’s foundation. In 1952, the CCP government announced that 90 per cent of the land in the country accomplished the goal of land reform (*ibid*), which means all farmers in these territories were bestowed with an equal (factoring in conditions of plot size, soil quality, location, irrigation and so on) and private ownership.

However, every step of the CCP’s land reforms during the revolutionary period was marked by excessive violence toward landlords and rich-peasants. It was tolerated and condoned in at least some cases by CCP leaders and legitimized by the “class struggle”. It is estimated that land reform from 1945 to 1952 involved the execution of between 1 and 2 million landlords (Li, 2004).

By September 1952, about 300 million rural landless or land-poor peasants obtained about 700 million mu of land. China had basically abolished and replaced the ancient tenure system with nationwide and equalized private land ownership for all peasants (Li, 2004).

Establishing and developing a socialist land tenure system (1953-1978)

Despite the drastic and violent actions against millions of landlords and rich-peasants, the equal access to land for most of the rural population indeed consolidated the CCP’s rule in rural society. Meanwhile, the party’s idealistic blueprint for socialist rural and agricultural production was still highly influenced by the Soviet Union (USSR). “The exemplary pattern of rural socialism (for the CCP) is collective farms in the USSR (Gao, 1999).” Hence, land reform in the early stages of the socialist period began with the Rural Cooperation Movement (RCM) or the rural collectivization movement.

Initially, the RCM was part of the greater economic transition scheme called the “Socialist Transformation of the Agricultural Sector”. This was initially designed to encourage farmers to voluntary and spontaneously form agricultural production cooperatives (or APCs), which, in theory, would gradually lead to socialist agricultural production based on the public (collective) ownership of land, as well as other means of production.

However in practice, the progress of the RCM was driven by the central leadership, especially by Mao. Instead of the 15 to 20 years it was originally planned for the RCM to have taken hold, it took less than five years - by December 1956 - for 96.2 per cent of the rural population to enrol in rural cooperatives; many were forced to do so. The movement actually deprived the farmers of private land ownership and established a collective ownership of rural land, which still remains today (Zhang, 2009).

From 1958, The “Great Leap Forward” and the “People’s Commune” further entrenched the collective ownership and, more importantly, restructured rural society and the economy. By October 1958, the movement had forced 99.1 per cent of the country’s rural population into People’s Communes (*ibid*) and the utopian-like experiment had organized 600 million rural people as totally collectivized commune members. The continuation and expansion of the RCM, however,

not only limited agricultural production but it also performed many functions of a local government. A people's commune was generally constructed with three echelons of production units: team, brigade and people's commune. After the people's commune was dismantled in the late 1970s, these three levels were respectively transformed into the basic rural administrative units: natural village, administrative village and township or county (Ho, 2005).

This drastic collectivization seriously reduced agricultural production and was the main cause of three years of nationwide and catastrophic famine from 1959 to 1961 during which tens of millions of people starved to death. The manmade disaster urged some leaders to reconsider their ideals on collective farming and rural collectivization. As a result, from 1962 the central government tried to reduce the restrictions on collective farming to encourage agricultural production by allowing individual farming or some forms of a *production responsibility system (PRS)*.¹⁴⁸ However, these attempts were once again interrupted by a decade-long political frenzy – the “Cultural Revolution” – during which the normal institutions and economic and social orders were discarded and destroyed by overwhelming political movements. Nevertheless, people's painful reflections on and heavy lessons learnt from the rural collectivization and the collective farming as well as radical political movements in the first three decades of the socialist era, in effect, removed people's hesitations and facilitated economic reform in 1979.

The establishment and development of a rural HRC system

After the “Cultural Revolution”, the country urgently needed to correct the mistakes made in the previous two decades. The so-called “Reform and Open-up”

strategy for economic structural reform was decided on, which gradually transformed the country from a planned economy to a market economy.

Reform started with rural land tenure. In 1979, the Household Responsibility Contracting (HRC) system was gradually established across the country. This system dismantled collective farming and granted the freedom of individual farming; accordingly, the use right of arable land was reallocated to rural households. A household then became a working unit that worked on its own HRC plots. It was obliged to give a certain amount of its output to the state and could keep the rest for own consumption or trade it in free markets. The system re-connected farmers' input with actual profit; in other words, it recreated economic incentives for farmers. Technically, only land-use rights were allocated and land ownership remained with the rural collectives.

In January 1982, the central government issued a document that reconfirmed the socialist nature of the HRC system and officially cleared emerging doubts the people had. In December, an amendment was made to the Constitution on the structure of land ownership; it defined collective ownership and re-established the “county, township and village, three-level ownership structure”.¹⁴⁹ From 1982 to 1984 the government issued three documents to ensure the effective implementation of the HRC system. In 1984, the state stressed the importance of prolonging the length of land contracts and pointed out that the HRC should be at least 15 years or more. In 1988, a constitutional amendment was endorsed which allowed the transaction of land-use rights and this provided the legal basis for the exchange of HRC land between

¹⁴⁸ The production responsibility system means a small production unit (one or a few farmer households together) take the responsibility of producing and submitting an agreed amount of products to the collective organization and keeping the rest for their own disposal. Compared to collective farming, it is a form of individual farming and also the prototype of the current household responsibility contracting system.

¹⁴⁹ This is the term that describes three forms of collective ownership; all three forms indicate a specific scenario. It means, depending on the status quo of the collective group (either the production unit in a village, or a township or a county), collective land should be owned by the members of one or several production unit(s) in a village; or by all members of a township or a county. It was derived from the collective structure of the “people's commune”. The difference is based on the previous production units of communes.

farmers. In 1993, the HRC system was added to the Constitution as one of the basic economic systems and, in 1998, the newly issued “Land Administration Law” legally extended the contract period another 30 years. In order to insure farmers’ rights on HRC, in 1999 the state suggested issuing land certificates to all the tillers on HRC plots and in August 2002 the “Law of the People’s Republic of China on Land Contract in Rural Areas” was issued. This was a specific law to regulate the HRC and related activities; it also emphasized the intention to protect long-term and stable land-use rights for farmers (Liu, Cheng, 2007).

The implementation of the HRC system greatly stimulated agricultural productivity and significantly increased farmers’ incomes, especially in its early phases. Today, the HRC system is still the main element of the rural land tenure system. However, the enacting collective tenure based on a collective ownership of land does not specify the rights of individuals (farmer households in a collective organization) who are technically co-owners of a collectively owned property. Their entitled rights as co-owners are not stipulated nor clarified, especially the individual’s right to dispose of land. Even though the 2007 “Property Law of the People’s Republic of China” specifically pointed out that farmers have the right to possess, use and benefit from HRC land, any transaction of HRC land is limited to being among farmers of the same collective organization or village; transactions with outsiders or urban individuals or entities are not allowed. The right of disposing of property is largely restricted.

The evolution of land markets on state-owned land

State-owned land is mainly located in urban China. Before 1979, under the planned economy structure, state land was allocation through administrative approaches. Any demand for land development went through different levels of government sectors; then, after an examination of the necessity and feasibility, the government would allocate land to the applicants,

usually for free, without a fixed period and with a prohibition on any transaction over the land.

Also as a part of its economic reform, the state opened the state land market by leasing land to foreign investors in 1979. In the following years, many local governments experimented with the “compensation use system” on state land, in which land users had to pay a “state land use fee” for a certain period of use. The fees were still fixed by administrative procedures and not by the market. On one hand, the approach effectively attracted foreign investment for low-cost land, but on the other hand land values greatly depreciated. Though local governments issued local regulations to administer such transactions, the constitutional amendments in 1982 and the Land Administration Law of 1986 still clearly forbade any form of land lease. Technically, the state land market at that time did not have sufficient legal support (Zhou, 2009).

As the economic reforms advanced, the demand for land increased significantly and the old methods of managing state land were not able to adapt to new developments. In December 1987, the first auction of state land-use rights was held in Shen’zhen, and land-use rights were a marketable commodity for the first time. This also signaled the beginning of the state land market.

In April 1988, a new constitutional amendment was passed which clearly asserted the legality for the transaction of state land-use rights. In 1990, the state promulgated the specific regulation for the transaction of the state land-use rights and, in 1998, revised the “Land Administration Law”. The legal grounds for the state land market were consolidated and the market grew rapidly.

Compared with the rural tenure system, state land benefited from more tenure security because it had a complete and up to date cadaster system, a functioning market and, more importantly, clearly defined property rights for landholders and users. State land-use rights

were also property rights that could be exchanged, transferred and mortgaged.

3.3 Current Land Tenure Security issues

The current land tenure system in China is based on Socialist Public Ownership. According to the *Constitution of the People's Republic of China*, Article 10:

"Land in the cities is owned by the state. Land in the rural and suburban areas is owned by collectives, except for those portions which belong to the state as prescribed by law; house sites and privately farmed plots of cropland and hilly land are also owned by collectives. The state may, in the public interest, requisition land for its use in accordance with law. No organization or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means..."

Additional regulations are given by the Land Administration Law of the People's Republic of China (LALoPRC), Article 2:

"The People's Republic of China practises socialist public ownership of land, namely, ownership by the whole people and collective ownership by the working people. Ownership by the whole people means that the State Council exercises the right of ownership of state-owned land on behalf of the state."

There is no private ownership of land; the only way to transfer land ownership is through the state's requisition of collectively owned land (CoL). This procedure can turn CoL into state-owned land (SoL). As LALoPRC, Article 2 specifies:

"...The state applies, in accordance with law, a system of compensated use of state-owned land, with the exception of land the right to the

use of which is allocated by the state within the provisions of laws."

Collective land is the creation of the former system of collective farming and individually unspecified collective ownership causes many problems in practice. Now that China is in a period of rapid urbanization and industrialization, the demand for land resources for developmental space puts a lot of pressure on rural collective land. The restricted and unclear property rights to collective land also create problems with tenure security for rural land users. To study current land tenure security issues in China, one should focus on rural collective land and the rural people who are directly affected.

The tenure security issues with rural collective land can be examined from four aspects: the problems with access to land, with land requisition, with people's participation and with land administration.¹⁵⁰

Problems with Access to Land

Because the HRC system is the main component of current rural land tenure systems, it may encourage farmer's individual productivity but it also cause difficulties with access to land.

To implement the HRC system and to make sure that all farmer households have equally distributed plots in terms of soil quality and size, the collective group has to divide a formerly whole land plot into small and fragmented plots. This egalitarian approach may not be the most efficient but it avoids potential conflicts between farmers. Land fragmentation is therefore unavoidable. Another compromise widely used to avoid further disputes is plot readjustment. When there were too many complaints about the allocation of HRC plots, the village usually organizes another full-scale land readjustment among all the farmers. In

¹⁵⁰ The content of sections on people's participation and land administration are partially quoted from the author's Master's thesis: "Multi-Factor Analysis on Land Administrative Corruptions in China: Institutional, economic, social and psychological factors", TUM, Munich, 2008.

some areas, such readjustment is rarely applied once the plots are allocated, but in some areas it happens often. In some extreme cases, the redistribution has happened regularly every five years or sometimes even annually. Frequent land readjustment prevents farmers from extra or long-term investment in the land, and may even intentionally exhaust the soil's fertility.

A recent survey¹⁵¹ of 15 villages in 11 provinces with 361 respondents shows that land fragmentation is very common in rural China. On average, every household has 4.34 HRC plots and 97.4 per cent of respondents reported that their plots are not adjacent; 80.1 per cent feel that nonadjacent plots are inconvenient for cultivation, and 73.7 per cent want to exchange plots with other villagers to address this issue, but only 10.8 per cent of them have actually done this. Land readjustment had been experienced by 48.5 per cent of all respondents; 171 respondents gave the exact number of times there had been readjustment, and the average was 3.03 times since the initial allocation. Only four respondents said that that plot readjustment should be done regularly.

The reason for the low percentage of plot exchanges is mainly the dysfunction of the rural land market. Unlike the state land market, the slow progress in the rural land market has been a long-unresolved problem in China, primarily caused by limited property rights for individual farmers, a lack of effective organization or administrative assistance, and a poor cadastre system.

The dysfunction of the rural land market also limits leasehold activities among farmers. According to the NBSC's statistic report in 2007, until the end of 2008, there were 225.42 million rural migrant workers (31 per cent of the rural population) in China, 97.8 per cent of these still are still holding on their HRC plots at home (NBSC, 2009). Without a functioning land market, most of these migrant workers' land cannot be leased out for fair and steady rent revenue. Meanwhile, those farmers who are proficient in cultivation can neither acquire enough land to grow more crops nor increase their profitability by scaling up.

Land fragmentation and frequent plot readjustments have hampered farmers' willingness to invest in farming. Additionally, a dysfunctional market is unable to allocate enough land for more modernized and mechanical cultivation, or to reap the benefits of large-scale operations. All these problems would result in difficulties for farmers' access to land.

Problems in Land Requisition

Rapid urbanization demands more land from rural areas and the legal procedure for getting land from its collective owners is land requisition. The state first expropriates (using the premise of public interest) the collective land from rural collective organizations or farmers' groups (the legal entity of rural land) with compensation in cash and/or in kind (reallocated plots, resettlement and employment opportunities). Collective ownership is transformed into state ownership and the government is the acting owner of state land who puts it onto the state land market or allocates it directly to users.

151 Land Tenure Security Survey, conducted by the author during January and February 2010 in 15 villages.

Table 3 shows that from 2003 to 2007, the urban built-up area increased by 7,161.65 km². At the same time, 7,049.23 km² collectively-owned rural land was requisitioned by the state through the above procedure, which was on average 1,216.03 km² annually.

Table 3: Urban built-up area and land requisition (2003-2007)

			Unit: km ²
Year	Urban Build-up Area		Land Requisition
	Area	Increment	
2003	28,308.00	2,098.20	1,605.60
2004	30,406.20	2,114.50	1,612.60
2005	32,520.70	1,139.10	1,263.50
2006	33,659.80	1,809.85	1,396.50
2007	35,469.65	--	1,216.03
Sum		7,161.65	7,049.23
Annual Avg.		1,790.41	1,418.85

Source: NBSC 2009, Author

However, the actual figures may be even larger than the official statistics, according to Xi'wen Chen, the Deputy Director of the Development Research Centre of State Council and the Office Director of the Rural Work Leadership Group of the Central Committee of the CCP. According to Chen, about 200,000 ha of rural collective land is requisitioned each year and a large portion of this land is valuable agricultural land, especially arable land (Chen, 2006). From 1997 to 2008, cultivated land in China dropped from 1.95 billion Mu to 1.82 billion Mu; a fall of 125 million Mu. Most of this was due to urbanization and industrialization (Lv, 29 March, 2009). This major reduction in arable land also threatens China's national food security.

In 2004, a study showed that there were approximately 40 million farmers who had been made landless due to nationwide requisitions and the number was growing by about two million annually (Xu and Ning, 2004). A great number of landless farmers are unfairly compensated and can easily become part of the rural or urban poor.

Basically, the compensation for land requisition is based on the average annual output value of requisitioned land; i.e. for three years preceding the requisition. The value is multiplied by a factor of contracting years. According to the Land Administration Law of People's Republic of China (LALoPRC), Article 47:

"Compensation for requisition of cultivated land shall be six to ten times...(and) the standard resettlement subsidies to be divided among members of the agricultural population needing resettlement shall be four to six times the average annual output value of the requisitioned cultivated land for three years preceding such requisition. However, the highest resettlement subsidies for each hectare of the requisitioned cultivated land shall not exceed fifteen times its average annual output value for the three years preceding such requisition. Standards of land compensation and resettlement subsidies for requisition of other types of land shall be prescribed by provinces, autonomous regions and municipalities directly under the central government with reference to the standards of compensation and resettlement subsidies for requisition of cultivated land."

Due to comparatively low prices of agricultural products, the compensation is not sufficient to ensure sustainable livelihoods in the long-term for farmers who have lost their land. On the contrary, once rural collective land is requisitioned and put onto the state market, its use right is "sold" for a competitive market value. Comparing the compensation for a plot with its later market value, land value can greatly multiply overnight. For a local government particularly, the profits from the state land market mainly flow into the local municipal fiscal budget; this is important when local leaders' careers are mainly decided by his/her performance on the growth of the local economy i.e. the GDP. A large budget promises these leaders the fiscal freedom for public investments, which always lead to a significant boost in GDP growth. Consequently, land requisition

creates a strong economic incentive for local leaders to reduce the compensation for rural land on the one hand, and on the other hand to zealously facilitate the appreciation of market prices for land and launch more requisition projects. Through requisition, the collective entities and farmers are excluded from sharing the profits.

In recent years, many serious conflicts have occurred due to requisition procedures across the nation. Some concern is voiced by LALoPRC in Article 47:

“If land compensation and resettlement subsidies paid ... are still insufficient to help the peasants needing resettlement to maintain their original living standards, the resettlement subsidies may be increased upon approval by people’s governments of provinces, autonomous regions and municipalities directly under the central government. However, the total land compensation and resettlement subsidies shall not exceed 30 times...”

It means that farmers whose land was requisitioned can only get compensation that is no more than 30 years of potential gains from cultivation. No regulations that specify their entitlements to market profits as landlords are stipulated in the law. The idea behind this method is that land is simply considered to be a means of agricultural production, not as an estate or property. Although the Chinese Government keeps looking for new ways and policies to improve levels of compensation, land requisition remains one of the most difficult problems of tenure insecurity in China.

The other problem with land requisition is that farmers have almost no disposal right when faced with the state’s demand for land, particularly when the demand is under the pretence of “public interest”. In recent years, the government has made a serious commitment to properly evaluating the nature of developmental projects, has attempted to limit the abusive use of administrative arbitration on “public interests”, and has

organized discussions and trials on fairer compensation. So far, however, no concrete or effective policy or legislation has been made. The only opportunity for farmers to participate and exercise their rights as landlords was during a government-organized public hearing, in which only the compensational standard was negotiable and farmers had no decision-making power on fundamental issues, such as their consent to requisition.

To summarize, current land requisition processes are derived from the socialist ideology that regards land as common property and the government controls the right of disposal. The ambiguous arrangement of property rights to collective land has no clear specifics on ownership for individuals or their rights to enjoy any profits. A farmer’s inability to defend his rights as the owner of the land is an important aspect of tenure insecurity. Moreover, the procedure also reveals that the government (especially a local government) is competing with the economic interests of the farmers by using its administrative and state power as well as its ability to influence market activities. The current land tenure system actually allows such competition and other institutions encourage this behavior.

Problems with people’s participation

Traditionally, the centralized political structure is predominant in China and this has forged its consistent and persistent features of bureaucracy, particularly the “top-down” pattern of decision-making. Current land tenure systems under the socialist regime have already made huge progress compared with the ancient period, but farmers’ actual capacity for effective participation is still insufficient.

1.2.1.1 Bureaucratic and closed decision-making

From the institutional framework, the current land administration system is in accordance with the governmental structure: the state, provincial, municipal, districts and county. The decision-making process in

land administration follows the local bylaws adapted from the “Land Administrative Law”. There are slight differences among different regions but in general they share a similar content and process in decision-making.

The decisions on land-use planning, land-use changes, land requisition projects and land market administration all follow the “joint examination” procedure, that is, a decision will be made jointly with participants from all related departments in the land administration office. At different government levels the land administration offices have different levels of decision-making authority, which means a regional government at a higher level could decide, license and approve a larger size of land than a lower level of government in the hierarchy. For instance, the provincial level is higher than the municipal government and therefore it has the power to dispose of larger tracts of land. If the land size exceeds a certain authority’s level, only a higher office can approve it.

Land requisition can only be approved at provincial level or by the Ministry of Land and Resources. The same “joint examination” meeting is held and, according to certain regulations, approval documents are issued by the land administration offices in the name of the state or provincial government. In other words, the decision is made entirely by the government and its departments.

To compile land-use plans, some experts and professional planners are invited and asked for suggestions, but the event is always organized by local governments and the final decision is controlled by them. It is more likely that the experts and professionals are invited to carry out the governments’ planning requests and not to give their opinions. The opinions of landlords or landholders who are directly affected by the plan are usually excluded or ignored.

1.2.1.2 Poor knowledge on land rights

As rural China’s education systems and public media access is still largely underdeveloped, poor access to information limits rural people’s knowledge about their rights over land. This is another important factor that leads to a lack of participation. According to the Land Tenure Security Survey mentioned earlier, rural people have comparatively little knowledge about laws and policies related to land. Table 4 illustrates farmers’ knowledge of three principle laws related to land.

Only about half of the farmers interviewed know the Land Administration Law and HRC Law, and only 21.60 per cent know about the recently-issued Property Law. The level of comprehension indicates the farmers’ understanding of the content of the laws. According to the data, the majority of the respondents know little or nothing about these laws. Currently, farmers have little knowledge of their land rights and this directly affects their ability to defend and use their rights.

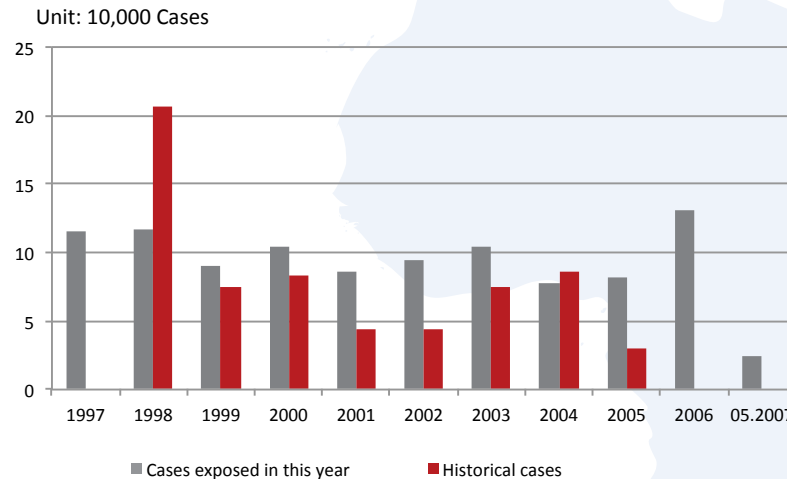
Table 4: Farmers’ knowledge on land related laws

	Land Admin. Law	HRC Law	Property Law
Knowing			
Know	51.50%	56.20%	21.60%
Don’t know	48.50%	43.80%	78.40%
Level of Comprehension			
Well	2.20%	1.70%	1.10%
Medium	26.60%	31.60%	13.00%
Little or Nothing	71.20%	66.80%	85.90%

Source: Field Survey, Author

The closed decision-making process and the lack of knowledge about land rights means farmers are unable to effectively assert their rights; they have to passively accept the administrative orders and are incapable of protecting their tenure.

Chart 1: Land transgression cases from 1997-2007



Source: *The Year Book of Land and Resources, 1999-2005*, data of 2006 and 2007 from the reports of Land and Resources Ministry. Author

Problems with Land Administration

Lack of transparency, bureaucracy and insufficient policy implementation are among the major problems in current land administration systems.

There are still no official statistics on land administration-related corruption. However, we can only examine the problem by using other comparable data, such as the statistics on land transgression cases. These are

are only possible with tolerance, acquiescence or even collaboration by bureaucrats and officials, during which the bureaucrat or official can trade public and administrative power for personal gains. From one perspective, land transgressions can reveal the status of corruptions in land administration. See Chart 1.

On average, more than 100,000 cases of corruption were exposed annually from 1997 to 2006; these numbers fluctuated without a clear tendency to

Table 5: Types of land transgressions 1999-2005¹⁵²

Year		1999	2000	2001	2002	2003	2004	2005
Cases Sum		92,753	95,967	77,030	74,596	71,423	53,926	53,979
Transgression Types	Illegal trade or transactions of land	14,303	11,861	9,099	7,618	8,659	3,876	3,190
	Destroying arable land	3,131	3,084	3,407	3,227	2,592	2,685	2,937
	Unauthorized use	60,798	71,353	57,756	58,142	55,748	45,129	46,321
	Illegal licensing	1,108	1,333	657	508	252	145	49
	Low price lease	158	195	58	23	233	4	1
	Other	13,255	8,141	6,053	5,078	3,939	2,087	1,481

always a hotbed of corruption, for most transgressions

increase or decrease. The types of transgressions are categorized in Table 5.

¹⁵²Land transgression, here, indicates the administrative activity of certain bureaucrats who have violated or transgressed certain regulations or laws related to land administration or management.

Each type of transgression indicates a level of malpractice and the breaching or misuse of administrative power, especially the large number of cases of unauthorized use and illegal trade or transactions of land. These actions are almost impossible to carry out without some help from local authorities.

With weak policy implementation, corruption inevitably leads to ineffectiveness and inefficiency. In this area, there are problems at ground level, that is, with the village leaders.¹⁵³ Technically, village leaders, the chief or the chairman do not belong to the official bureaucratic hierarchy, but they are the most direct link between government and rural people. For ordinary farmers, the village leader is the only person in charge of their affairs and this leader's malpractice, or incompetence in implementing the state's policy fundamentally affects the success or failure of a policy.

According to the field survey, 59.1 per cent of all respondents said that for any important decisions related to land, the village leader is always the decisive person; 13.9 per cent even said that village leaders make decisions about land without any consultation or democratic discussions with village members. Because the legislation on collective land does not specify any land rights for individual farmers, the village leader usually acts as the legal representative of the collective group and as the managerial agent. Although state policies clearly regulate the democratic decision-making process at the village level, in most cases it is the village leaders' preference that becomes the final decision for the collective.

The ancient heritage of a hierarchical differentiation between bureaucrats and the people remains strong in rural China. The problems in land administration at different levels of government, including the village

that land as a personal asset can create; this inhibits investment in land and eventually slows development in the agriculture sector.

There are still serious problems with lack of transparency and inefficiency in land administration as well as the whole government structure. Compared with land tenure security issues, these problems are far more complicated and profound. Dealing with these problems need extensive and sophisticated reform and developments in government as well as in civil society.

4. SWOT ANALYSIS ON THE STATUS OF LAND TENURE SECURITY

After this review of land tenure and tenure security from ancient times to the present, with a look at specific problems in the current land tenure system, this paper now features a SWOT analysis to further evaluate the status of tenure security in China.

4.1 Strength analysis

The long and continuous history of China as an agricultural civilization has fostered a strong connection between land and people, and people are attached to land both emotionally and physically. This bond enables the government and the CCP to use land policy as an instrument to encourage people's support and consolidate its rule, in particular by promising and improving tenure security to the people.

With rapid economic growth, the technology, infrastructure, fiscal budgets and other conditions for a modernized and efficient land management and administration are readily available and applied to support a functioning land administration system.

The government realizes the problems of tenure insecurity and their repercussions for the country's development; it is determined to protect property rights

¹⁵³ The numerical differences between Chart 1 and Table 4 of annual cases are due to different departmental statistic standards. The data from Chart 1.1 is from the Ministry of Land and Resources, and the data of Table 1.1 is from the Ministry of Supervision. Both data are documented in the Year Book of Land and Resources 1999-2005.

over land, especially for rural farmers. This will lead to the effective increase of tenure security.

Urbanization and industrialization drive larger parts of the population into urban areas, which allows these migrants to observe and learn more about the importance of land rights and the potential economic value of their land. This will motivate them to actively study the laws, regulations and policies on land. In the meantime, people can share their knowledge with others. There are already many cases of voluntarily organized farmers protecting their rights to land through legal or administrative channels.

4.2 Weakness analysis

The collective ownership of rural land is still a great obstacle to improving tenure security. The outdated system cannot adapt to the fast-changing society and growing market activities. The individual's property rights over collective land cannot be well demarcated without significant reforms in the current collective ownership; without a proper system of property rights to land, a functioning market cannot be established. People cannot enjoy the income or financial opportunities that land as a personal asset can create; this inhibits investment in land and eventually slows development in the agriculture sector.

The village leaders' role in policy implementation and their influence on the grass-root level of rural society is another problem in China, and negatively affects the electoral system, rural administrative institutions and building democracy in society. As these leaders are the direct connection between the government and the people, they are decisive in determining the role of state policies.

Historical and traditional ideologies and traditions in rural society were formed over centuries, and the passive acceptance of state policy is a Chinese characteristic that has evolved from centralized governance and a hierarchical social system. A lack of education about

democracy makes it almost impossible to establish a voluntarily- and dynamically-functioning mechanism for public participation in the short term.

4.3 Opportunity analysis

The country's political reform has been addressed repeatedly by the central leadership in recent years; governance is moving towards being more transparent, open and democratic. Meanwhile, as the people's awareness about land rights continuously grows, more extensive and active public participation in decision- or policy-making becomes possible.

As the restrictions on public media control have been gradually reduced in the recent past, information channels have become more transparent and effective. The increasing number of internet users has already formed a more open and free environment for debates on state's policy or decision-making processes. Many land transgression cases and the associated bureaucrats have been exposed in the public media; voluntarily and spontaneously organized non-government organizations are becoming an independent monitoring asset that examines every move of the government.

More practical and concrete suggestions have been proposed by delegations to the annual conferences of the National People's Congress. The composition of members of the Congress is more diversified as more representatives come from the grass-roots of society. This is especially so in the case of the rural representatives; their decisions in legislation can be more protective and effective for promoting people's rights on land. The increase in their political power would be an important institutional step to increase tenure security.

4.4 Threats analysis

The difference in living standards between the urban and rural populations is increasing at an alarming rate. Since the rural population still, by far, includes

the majority of people in the country, the seriously imbalanced society is prone to social instability. The problems in the current land tenure system have already caused many conflicts, especially conflicts between the state's administrative organizations (levels of governments) and the people's rights to land. In many cases, the conflicts have escalated into violence and bloodshed. History has already proved that land tenure security is a determining factor for any political regime wanting to retain its power; social instability is the biggest threat to, as well as a potential consequence of, tenure insecurity.

While land is widely recognized as a valuable resource with great potential to appreciate, the slow progress in establishing rural land markets (compared to the soaring markets in urban areas), the discriminatory property rights and a land requisition process influenced by administrative power, all create a land market that is good for speculation and renting. State land markets bring in great revenue for the local governments, and the revenue can be invested in urban development and other projects that may boost the GDP figures that eventually promote the local leaders' political career. As a result, the current land tenure system may suffer from tenure insecurity and defective institutions; however, for some people it is also very lucrative. These people are usually privileged or elites in political or financial positions who favour the current system. They could become huge obstacles to any reform or attempts to improve tenure security.

The improvement in tenure security, especially on rural collective land, requires significant changes in existing arrangements on ownership. But as the ruling party of a socialist regime, the CCP prefers to maintain public ownership of land and to have maximum control over resources. Hence, the party's ideological preference or its fixation on public ownership is unlikely to change in the foreseeable future. Meanwhile, the government has its doubts about rural land reform, partially originating from a fear that farmers' short-sighted behaviour in the land markets would lead to a concentration of

land, which would create more problems in the future. Improvements in tenure security - in other words granting secure property rights to individuals - and the ensuing potential risks of losing control of land resources may undermine any state moves to reform, and hence would hamper the progress of tenure security.

China is a vast and diversified country with a huge variety of characteristics in culture, tradition, ethnics, geography and topography in the various regions. A lesson learned from history is that a specific policy may well be appropriate in one region but is completely unsuitable for another. Under a highly centralized government structure, however, the possibility for policy localization has been rather limited and is still a problem today. Examining the problems of the past, before nationwide reform was implemented, it is evident that the Chinese government always experimented on a small scale and in limited regions. When successful results were achieved, the policy would be scaled up. However, the implementation is mandatory rather than flexible. Land tenure security presents not only an issue of the rights to land, but also of direct access to land; hence, the adaptability and the flexibility of state policies would be problematic if the traditional approaches were still being practiced.

4.5 SWOT Analysis Matrix and Strategies

To combine the analysis of four aspects into one table, policy strategies are suggested. See Table 6. Four aspects of the SWOT model are featured with the Strengths (S) and Weaknesses (W) as columns and the Opportunities (O) and Threats (T) as rows. Previously discussed findings are noted with a short phrase; and then, in cross-sections, are possible strategies for policies which should improve tenure security in China.

First, considering strength-s with opportunities, it is appropriate and practically feasible to:

1. Establish a more extensive participatory platform which should include more social parties, sectors,

Table 6: SWOT analysis matrix

	Strengths	Weaknesses
	<ul style="list-style-type: none"> • People's ties to land • Econ. tech. hardware capacity • State's determination • Effect of urbanization and industrialization 	<ul style="list-style-type: none"> • Out-dated rural land system • Lack of Transparency • Grass-root leadership issue • Historical influences
Opportunities	Strategies	Strategies
<ul style="list-style-type: none"> • Political reform • Open media • Equality in political power 	<ol style="list-style-type: none"> 1 Establish a more extensive participation platform 2 Independent supervision 3 Policy propaganda and education programme 4 New round of land reform 	<ol style="list-style-type: none"> 1 Rural land reform 2 Stressing anti-corruption, public supervision, 3 The construction of civil-community and awareness fostering 4 Introduction of modern political principles and adaptation of traditional virtues
Threats	Strategies	Strategies
<ul style="list-style-type: none"> • Social duality • Problems in land market • State's preferences • Diversity issues 	<ol style="list-style-type: none"> 1 Minimizing rural-urban imbalance through land market, 2 Rural-urban unified or interactive land market 3 Enhance local by-law and regulation 	<ol style="list-style-type: none"> 1 Establish and ensure the property rights on rural land 2 Improvement in rural land administration 3 Decentralization and supervision 4 Diversified factors for policy making and implementation

Source: Author

organizations and individuals into the forming and implementation of land policies;

2. Introduce social organizations, groups and NGOs into the land administration system as independent supervision and monitoring parties;
3. Increase the input of policy publications and education programmes, which allow more people to be able to know, understand and use laws, regulations and other legitimate means to protect their rights on land;
4. Last but not least, a new round and nationwide land reform should be launched that is dedicated to improving tenure security, to foster good social, political and economic environments for reform as well as meeting the demands of the people.

Considering the weaknesses with the opportunities, it shows that:

1. Problems in the rural land tenure system need effective reform to adapt to the rapidly changing situation and demands;
2. Lack of Transparency and administrative inefficiency could be supervised and monitored by the more independent, open and public entities or media;
3. It is essential to construct a community-based civil society and institutionally restrain the possibility of autocratic power at the grass-root level;
4. Political reforms and improvements should provide more democratic and decentralizing concepts and ideologies for the people. In the meantime, proper use of good virtues and traditions forged in history can assist the implementation of modern policies.

When considering the strengths with the threats it shows that:

1. The establishment of functioning land markets is essential for unlocking the economic value of rural

land, which can also improve rural living standards and enhance rural development;

2. The functioning land market must be an urban-rural unified market, or interactive market, which allows for equality and the unbiased entrance of both rural and urban participants. The rights as owners should be respected without bias caused by the difference between the state and the collective ownership;
3. This hugely diversified country requires that the state's policy that should not be too specific and rigid; reasonable flexibility and space for local by-laws or regulations in adapting state policies must be provided.

Finally, considering the weaknesses with the threats, it shows that:

1. To establish and ensure a working property regime for rural land is a key precondition in improving overall status of tenure security in the country;
2. The current, dual systems of land administration in rural and urban China must be changed, and the improvement in rural land administration should institutionally facilitate rural tenure security;
3. The decentralization of political or managerial power would not function well without proper supervision, especially in rural communities;
4. The effectiveness of policy-making and implementation depends largely on the respect for diversity among different regions.

These strategies not only include the making and implementing of land policies, more importantly, they show the extensive affiliations of land policies with other policies, institutions and sectors in the society. Some of the strategies can be seen as working plans, some are only recommendations or preferences for policies, and some are relevant considerations for policymakers. All these strategies suggest the future evolution of the land tenure system and the status of tenure security.

CONCLUSION

From ancient times to the present, land tenure security has played an essential role in Chinese society, where people are emotionally and physically attached to land, the politicians and ruling class regard land policies as fundamental to the regime, and where the historic heritage still affects tenure systems in this rapidly transitioning society.

Land tenure in China evolved over millennia and private ownership of land was the dominant relationship in ancient tenure systems. Landlords were also the political and economic elites who were able to affect state policies and the political choices of rulers or emperors. Though emperors occasionally promulgated policies to balance the conflicts between land-rich and land-poor classes, the autocratic monarchical system restricted these efforts. Hence, the ancient tenure system slowly evolved in a cyclical fashion. The basic structure of land tenure systems remains static. The ancient land tenure system mainly impacts on the modern system in terms of culture and traditions as well as people's perception and attitudes.

Compared to the ancient system, the establishment and development of a socialist land tenure system has a short history, but its evolution is revolutionary and dramatic. The establishment of the socialist tenure system began with the CCP-led revolution and land reforms that overturned a landlord-ownership-dominant ancient tenure system swiftly and violently. In the process, the ancient structure of rural society as well as the traditional hierarchy and social classes were completely restructured. Then, soon after the foundation of socialist regime, the party was driven by its ideology to begin drastic reform with rural collectivization, which eventually abolished any form of private ownership and replaced it with socialist public ownership of land. The consequences of rapid rural collectivization were exacerbated by decades of political frenzy and radical movements that derailed the tenure system from its regular route of evolution. Also, collectivization seriously threatened the country's social and economic

situation, and finally pushed the government to focus on economic reform and development. The introduction of the HRC system in the late 1970s was not only to improve tenure security, but it was also a symbol of nationwide economic reform. However, after a short period of growth in rural production, residual problems from the out-dated property regime and the intrinsic problems of the reform strategies surfaced and escalated. Especially recently, tenure insecurity problems have been concentrated in rural collective land, which have become one of core areas of rural development and the country's development. Specifically, tenure insecurity can be seen as having four problem areas: problems with access to land, problems with land requisition, people's participation and land administration.

An analysis of the evolution of land tenure systems and the status of tenure security using a SWOT model shows that: China's strengths are in the people's active involvements with land, the capacity of modern land administration, the state's attention and the people's initiatives. Its weaknesses are in its collective land property regime, lack of transparency and inefficiency, administrative problems at the grass-root level, and the influences of an ancient tenure legacy. The opportunities are the political reforms and fostering awareness, the improvement of public media, and the advances of people's political and legislative powers. The country is also threatened by social instability, the reluctant and obstructive forces against improvements, the doubts of the government, arbitrary policy-making and implementation without respect for regional diversity.

Compelling findings indicate that one of the most crucial reforms depends fundamentally on changing the government's role and actions in the current land tenure system. Currently, the CCP's main political objectives are to maintain social stability and keep the party in government. However, there are still economic and institutional incentives for the government to maintain the existing structure and its active intervention in the

land market. As a policy, the government's attempts to improve tenure security for farmers may achieve good results in a long run, but, in the short run, it must compromise in its control over land and give up its pursuit of profit in the land market, which means it has to endure loss of interest for a long period of time. To overcome the dilemma, both the central and regional governments and the party's leadership need unwavering resolve and confidence in the future. This could be one of the biggest challenges to improving tenure security in China

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09



Indonesia

A U S T R A L I A

1. INTRODUCTION TO COUNTRY CONTEXT

Land tenure security, particularly in developing countries, is considered one of the basic requirements in a country's development. The ease of development's progress, whether physical, socio-cultural, or economic, depends on the availability of a functioning tenure system. In principle, such a system is able to shape the fundamental human condition in relation to the land; however, a tenure system cannot be easily defined or derived following universal norms but is rather adjusted to local conditions by considering the history, culture, legal aspects, and economic conditions that may influence perceptions and behaviour (Rudiarto, 2006). A general understanding of land tenure is closely related to the personal context and how people, groups or communities are able to occupy and to use the land under an authorized and legal system that is regulated by government acts or local systems.

In Indonesia, where rapid economic transformation is taking place, land tenure issues are developing and land-related problems that may lead to social conflicts and disputes are often found in urban and rural areas. Population growth continues and Indonesia has the world's fourth highest population; the demand for land for various reasons has also increased and this has consequences for the provision and management of land with an acceptable level of tenure security. Security on the land is an obvious concern as it may influence the flexibility of land tenure systems with respect to the land development process. If the land tenure system is considered to be the central focus of a country's development, an understanding of how this system is structured and is applied is necessary. This paper proposes to describe land tenure security in Indonesia and to analyse related aspects by looking at the different perspectives, such as historical development, rural and urban issues, legal institutions and stakeholders, and regulatory frameworks.

1.1 General country information

1.1.1 Geography

Located in Southeast Asia, Indonesia is an archipelago with more than 17,508 small and large islands (United Nations Committee against Torture, 2001). The country stretches 5,300 kilometres from east to west on the Equator and has an area of 9.8 million kms². The country's land area is about 1.9 million kms².

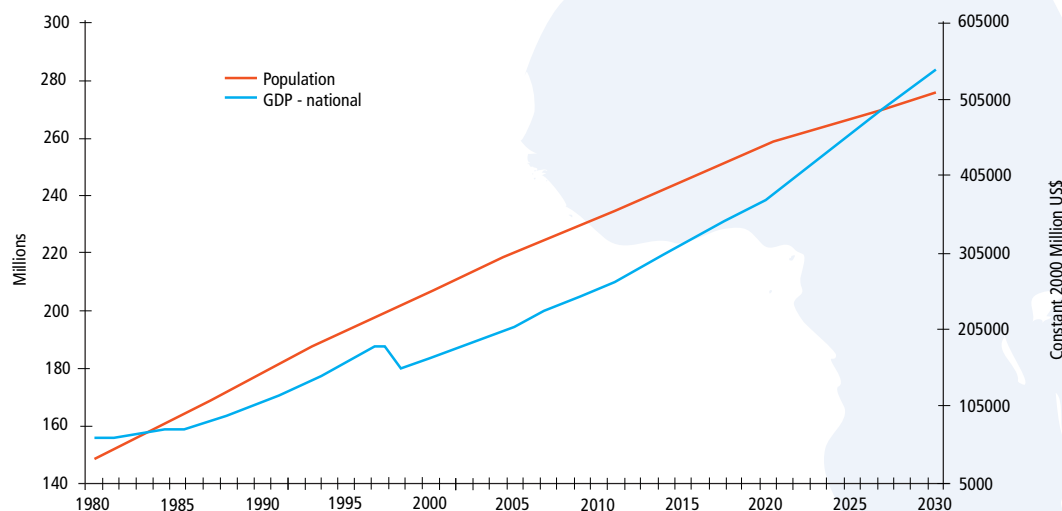
The sea area is 7.9 million kms² (including an Exclusive Economic Zone) and constitutes about 81 per cent of the total area of the country. The five main islands are Sumatra (473,606 km²); Java/Madura (132,107 km²); the most fertile and densely populated island, Kalimantan (539,460 km²); two-thirds of the island of Borneo, Sulawesi (189,216 km²); and Irian Jaya (421,981 km²). There are also many small islands (Ministry of Health, 2009).

1.1.2 Population and religion

According to the population Census of 2000, Indonesia had at that time just over 206 million people, making it the fourth most populous country in the world after China, India, and the United States of America. By 2005, the population had increased to more than 241 million people with 44.5 per cent living in urban areas and 54.5 per cent in rural areas (Energyrecipes.org, 2006). The annual population growth rate was about 1.3 per cent from 1990 to 2000 and with that as a reference Indonesia's population is expected to be more than 270 million by 2030 (International Resources Group, 2007).

Most of the population is concentrated on Java Island. It is only 7 per cent of the total country area but has more than 59 per cent of Indonesia's people, which makes Java Island one of the most densely populated areas in the world with 951 people per km². In comparison, Kalimantan Island has a density of 20 people per km². On Java Island itself, Jakarta is the most densely populated area with 12,700 people per km². East Java has the lowest density with 726 people per km². In general,

Figure 1: Population and GDP projection in Indonesia 1980 - 2030



Source: IRG, 2007

population density at the national level was 109 people per km² in 2000 and 119 people per km² in 2007 (Statistics Indonesia and Macro International, 2008).

Indonesia is a religious country. The Constitution guarantees religious freedom and recognition by the state and Islam is the major religion: more than 88.58 per cent of the population is Muslim making Indonesia the largest Islamic nation in the world. The proportion of people following other religions is: Protestant 5.79 per cent, Roman Catholic 3.07 per cent, Hindu 1.73 per cent, Buddhist 0.61 per cent, and others 0.21 per cent (Badan Pusat Statistik, 2005). Because of the largely Muslim population, Islamic land law has also contributed to land ownership types applied in Indonesia, for instance waqaf land.

Economy

In its transformation to an industrialized country, Indonesia's economy has grown significantly since

the economic crisis in 1997/1998. Different economic sectors contribute to its economic growth, which is indicated by Gross Domestic Product (GDP). According to the strategic data published by the Central Bureau of Statistic/BPS (2009), Indonesia's economic growth was 5.7 per cent in 2005 and decreased to 5.5 per cent in 2006. In 2007, economic growth significantly increased to 6.3 per cent, but slightly decreased to 6.1 per cent in 2008 when the transport and communication sectors were the biggest contributors to this growth.

Indonesia's economy is stable and improved by an average of 0.5 per cent during the period from 2005 to 2008. Based on constant prices in 2000, GDP value in 2005 increased by more than IDR 400 trillion in 2008, or in total IDR 2,082.1 trillion for 2008 (USD 208 billion). This is expected to increase to more than IDR 5,050 trillion or USD 505 billion by 2030, based on the exchange rate of USD 1 equals IDR 10,000 (see Figure 1 and Table 1).

Table 1. Growth and source of GDP by industrial origin 2005 – 2008

No.	Industrial origin	Growth (%)				Source of growth (%)			
		2005	2006	2007	2008	2005	2006	2007	2008
1.	Agriculture, livestock, forestry, fishery	2.7	3.4	3.4	4.8	0.4	0.5	0.5	0.7
2.	Mining and quarrying	3.2	1.7	2.0	0.5	0.3	0.2	0.2	0.0
3.	Manufacturing industry	4.6	4.6	4.7	3.7	1.3	1.3	1.3	1.0
4.	Electricity, gas, water	6.3	5.8	10.3	10.9	0.0	0.0	0.1	0.1
5.	Construction	7.5	8.3	8.6	7.3	0.4	0.5	0.5	0.5
6.	Trade, hotel, restaurant	8.3	6.4	8.4	7.2	1.4	1.1	1.4	1.2
7.	Transportation and communication	12.8	14.2	14.0	16.7	0.8	0.9	1.0	1.2
8.	Finance, real estate, business service	6.7	5.5	8.0	8.2	0.6	0.5	0.7	0.8
9.	Services	5.2	6.2	6.6	6.4	0.5	0.5	0.6	0.6
GDP		5.7	5.5	6.3	6.1	5.7	5.5	6.3	6.1
GDP without oil and gas		6.6	6.1	6.9	6.5	-	-	-	-

Source: BPS, 2009

2. OVERVIEW OF LAND TENURE SYSTEM

2.1 Land tenure structures and arrangements

Indonesia's land tenure system has changed throughout its history as a result of different governments' rules. Beginning with the colonial rule by the Dutch, the land tenure system was considered to be a tool of the colonial governments to extend private interests. At that time, the land tenure system was developed and applied to support agrarian products administered by the Dutch and to protect Dutch assets from other parties that may have been Indonesian or other European colonial powers. After independence, Indonesian land tenure was applied in a dualistic way and differentiated between a Western system, referred to as the Dutch legal system, and a traditional system based on the customs of various Indonesian regions. To end dualism, in 1960 the Indonesian Government introduced the Basic Agrarian Law (BAL) as the national land law.

With the implementation of BAL 1960, the common forms of land tenure were freehold, leasehold and

rental agreements. Freehold is normally manifested through private transfer, the granting of state land, and "improvement" from leasehold of state land.¹⁵⁴ Leasehold can only be obtained from transfer and the granting of state land, while rental agreement is normally settled by involving two parties on private or state land. Leasehold has a limited period and is granted according to the BAL regulations. A rental agreement emphasizes the deal between landowner and lessee and is a written contract. Freehold, leasehold, or rental agreements are associated with the ownership rights attached to the land.

Looking at the current available tenure system, land ownership in Indonesia is generally divided into four major groups (Löffler, 1996):

1. Individual ownership

Under individual ownership, a landowner has complete rights of disposal over his/her land. It may be registered

¹⁵⁴ In some cases, transfer from leasehold to freehold is possible with state land on which the right has been designated to a person or legal entity.



Informal Settlement in Jakarta © Iwan Rudiarto

or not and is recognized by the BAL (adat land for example). Land owners with Right of Ownership (Hak Milik) attached to their land status are able to freely and without any agreement from a third party sell, give, transfer or lease the land.

2. State ownership

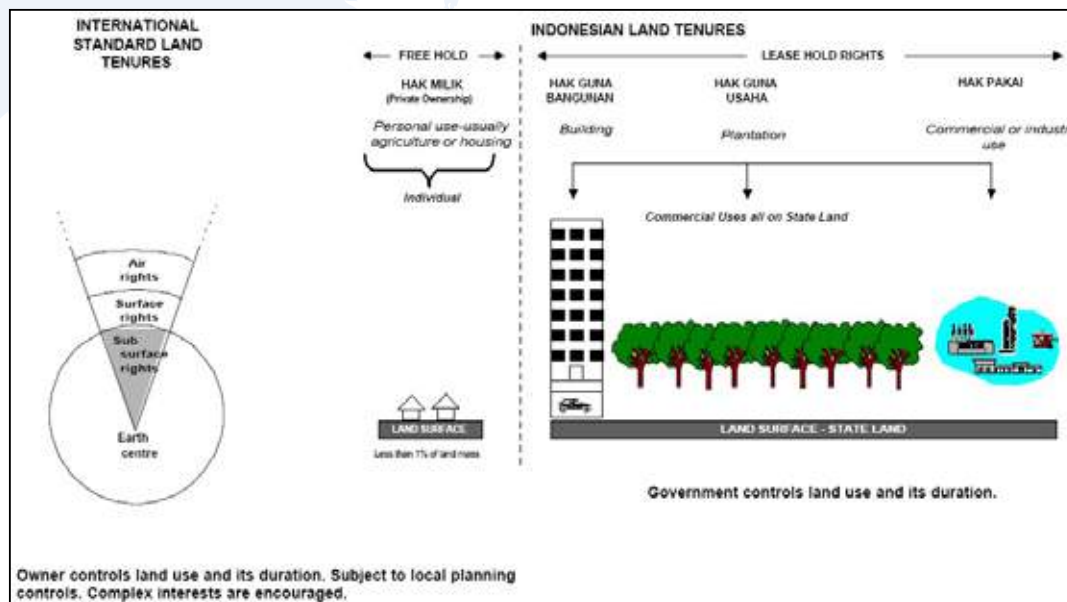
State ownership refers to the land classified as forestland having a specific title on it, for instance: land under Hak Guna Usaha and Hak Pakai are categorized as state land. State ownership is divided into two sub-categories, i.e. state ownership where property rights have been designated to a person or to a specific entity such as a company, and “free state land” with no rights found on it except those of the state. All kind

of land rights can be attached to the first type of state ownership, except Hak Milik, because this right is aimed at individual ownership.

3. Community ownership

Various forms of community ownership exist due to different ethnicities and communities in the different Indonesian regions, particularly within village areas. Under this ownership, structures and arrangements of land tenure do vary greatly from one region to another and very much depend on the local law that is applied in the community. In Indonesia, this type of ownership is categorized as adat land and is legally recognized under the BAL.

Figure 2 shows the differences between Indonesian land tenure and international standards of land tenure.



Source: ILAP - Part C: Topic Cycle 4, 1997

4. Wakaf

Wakaf is the Islamic term for the land that is preserved for religious activity, such as the activities of a mosque. To some extent, wakaf land is also used as additional arable fields to provide maintenance of the mosque and its personnel. Structures and arrangements of land tenure in Indonesia with respect to the state's role are unique. The state has full control over the land for commercial and resource purposes through different sets of land rights. This condition is different from other countries where the control of land use is given to the landowner. Indonesian tenure emphasises primary social and economic policy tools to prevent foreign ownership of land, to limit the amount of land within the hands of an individual, to prevent ownership by groups or companies,¹⁵⁵ and to allow the state to manage the allocation of land (Indonesian Land Administration Project – Part C: Topic Cycle 4, 1997).

¹⁵⁵ To support economic development in commercial and industrial sectors, companies or groups use Hak Guna Bangunan (HGB)/ the right of building as their legal tenure where extension and renewal can be up to 70 or 90 years.

2.2 Land Registration System

Different sets of land registration systems prevail in numerous countries whether it is private conveyancing,¹⁵⁶ registration of deeds, or registration of title (Dale and McLaughlin, 1999). In Indonesia, land is registered only within two systems, i.e. private conveyancing and registrations of deeds (World Bank, 2002). Private conveyancing is not regulated in a formal context but is recognized by the courts as an informal transfer. Legally, a land title is transferred at the time of cash payment, whether registered or not. The passing of agreed documents with the transfer is done in private and normally involves two people as witnesses. On the other hand, registration of deeds is formally adopted where a copy of all agreements that affect the ownership status and possession of the land are registered through a Land Office/BPN. Registering all these agreements may help to simplify the search in the registry for all recent transfer documents as well

¹⁵⁶ Term of conveyancing in this context is to emphasize that transfer of rights can be done directly from land owner to the purchaser.



Improved Municipal Solid Waste Management in Aceh - Indonesia © UN-HABITAT

as giving more confidence to the purchaser that the landowner has the right to sell the land.

Concerning the tenure system, land registration applied in Indonesia follows the negative system in which the registration of deeds is not an independent system. It involves different procedures and other legal institutions, such as court and land deed officials. The intention is to avoid duplicity in the registration process as well as to protect landowners from the risk of mistaken registration. A landowner is able to claim his/her ownership by delivering the claim to the court; once it is confirmed, new ownership is registered. Through this process, evidence of ownership, which should be completed and enclosed by the boundaries map, becomes the most important factor to prove ownership. Therefore, in this system, registers are the primary form of evidence instead of the definitive one.

2.3 Legal Institutions

The institution responsible for land registration and the cadastre in Indonesia is the National Land Agency (Badan Pertanahan Nasional/BPN). BPN was established

in 1988 through the Presidential Decree No. 26/1988; it replaced the Directorate General of Agrarian Affairs under the Ministry of Home Affairs. The central authority is located in Jakarta with branches at the province and city/district levels; so BPN at the provincial and local levels are the extended hands of BPN at the central level. BPN supports the president in land management and administration through the State Minister of Agrarian Affairs. The minister is appointed by the president and is advised by the president in land policy matters. The minister is also simultaneously the head of the National Land Agency. The double function of the minister has put this person in charge of developing and implementing land policy in Indonesia and as the member of cabinet as well as National Development and Planning Agency (Bappenas). The main activities of the BPN are land registration, cadastral measurement, land-use mapping, land certification and land granting. The BPN also issues location permits and land consolidation in cooperation with the local government.

Since its establishment, BPN has been developed and rearranged following the political situation particularly related to the authority and institutional structure.

The most important event regarding authority and institutional changes in BPN was after 1998 when a reformation wave took place in Indonesia. The issue of decentralization was very strong and, as a result, the Indonesian Government at that time introduced a new law on Local Government and Financial Balance between central and local government. Particularly in the agrarian sector, based on the Law No. 32/2004, local government has full authority to manage their administrative area and prepare the relevant local institution, including local land offices. To support local institutions in dealing with land activities, the central government introduced Government Regulation No. 38/2007 on the Division of Government Affairs. This regulation also mentions nine activities of local government on land related activities, some of which were previously controlled by BPN. These activities are: (1) issuing location permits, (2) land acquisition for development, (3) dispute resolution of arable land, (4) land compensation, (5) determination of land redistribution object, (6) determination and resolution of *tanah ulayat* (communal land), (7) utilization and problem resolution of vacant land, (8) issue of land opening permit, and (9) local land use planning. Land registration, cadastre activities and services are still the major responsibility of BPN as stipulated in Government Regulation No. 13/2010 on Type and Tariff on State Non-Tax Revenues in BPN.

3. HISTORICAL REVIEW AND CURRENT STATUS OF LAND TENURE SYSTEM

3.1 Historical development

Indonesia's current land tenure system is related to the history of land tenure development in the country. Many aspects from the past have been used as a reference for further land law development during different periods. However, land legislation in the respective periods was very much determined by the rulers of that time - the colonial powers, in particular the Dutch colonists, throughout various regions. The different periods of

land tenure development can be divided into three eras, i.e. pre-independent period, post-colonial period, and BAL period. According to Sonius (1980), the pre-independent period can be roughly divided into four periods, i.e. the period of Dutch East India Company (*Vereenigde Oost-Indische Compagnie* - VOC), the period of indeterminate state administration and the British interregnum, the period of the Culture System, and the period of liberal colonial administration. The post-colonial period concerns the land tenure system after the occupancy by the Dutch and, finally, the BAL period is discussed as part of the indigenous Indonesian land tenure system.

3.1.1 Pre-independent period

Dutch East India Company (1595 – 1798)

The Dutch East India Company was set up as a trade company that regulated the Southeast Asia region and had mostly commercial interests. To establish more power, the company applied the feudal system¹⁵⁷ by using local sovereign power as their extension to administer the land. The Javanese feudal system was known at that time and assumed that all land, including its people, belonged to the ruler whose sovereignty was defined in terms of the number of households under their authority rather than in territorial terms (Hardjono, 1993).

Ruling with feudal systems gave many benefits to the VOC, one of which was that it did not have to produce its own agriculture products. The VOC had full control over land-related activities, particularly leasing and selling land from indigenous to non-indigenous people, to secure their position. This issue arose due to the flourishing of privately owned estates where selling and leasing the land frequently occurred between landowner, indigenous chiefs and non-indigenous people, mostly Chinese. Since the VOC was the main player in land-related activities, the interests

¹⁵⁷ In administering the land, VOC benefited from the local system applied at that time, which involved the landlord as the land owner and the vassal as the worker.

of indigenous people when it came to land were neglected and even disregarded. Indonesian people could only make a contribution to developing the land tenure system, particularly at a local level. Land seemed to belong to the Indonesians but in practice it was used to accommodate VOC interests.

Indeterminate¹⁵⁸ colonial administration (1798 – 1830)

As the VOC went bankrupt in 1798 all the assets and debts were handed over by the Netherlands Government. The feudal system was not fully maintained but was modified into a more incentive-based policy. Javanese rights on the land were recognized but as a payment people had to contribute their working time freely in the production process, which would have been an incentive for high productivity instead of compulsory deliveries⁶ and forced labour on plantations. When the country was ruled by the British (1811 – 1816) the land tenure system changed and was guided by a more liberal economy. Land rent was based on land occupancy, where an indigenous ruler was the owner of all land, and so the indigenous peasant could only be a tenant who had to pay rent. A land taxation system was adopted to replace the compulsory deliveries system used under the VOC. The introduction of land taxation was a new concept in land tenure in Indonesia in which the land rights of indigenous people were fully recognized. But again, foreign interests had the highest priority of all land occupied in Indonesia.

Culture system (1830 – 1870)

The so called “culture system” is based on the VOC system of compulsory delivery of products with the main purpose being to secure the products at a constant level for the European market at a low price. Excessive demands on farm labourers to work on constructing

roads and canals contributed to a serious famine because there was insufficient cultivation time spent in their own fields. Many lands were broken up into smaller units when farmers were not able to manage larger ones. The lands that could not be worked any more were classified and transferred into communal or village land. This allowed land to be divided among a larger number of people. This first land reform policy was a good opportunity for local people to strengthen their access to land, but due to a lack of evidence of ownership and insufficient people in a region, this policy was not fully applied. Because the culture system resulted in problems for indigenous people and threatened the sustainability of agricultural products, a new government regulation was proclaimed in 1854. This provided for a gradual abolition of the culture system and it was replaced by a voluntary land and labour contract between locals and representatives of privately owned plantations (ILAP–Part C: Topic Cycle 4, 2000).

Liberal colonial administration (1870 – 1942)

The land tenure systems were administered under the Agrarian Law 1870, i.e. Dutch civil law and traditional adat law. Dutch civil law applied to the Europeans in the country while traditional adat law applied to Indonesian people; land was classified either as Indonesian or as European. European land was surveyed, registered and titled based on the Western civil law procedures; Indonesian land under traditional adat laws was neither surveyed nor registered, nor was title given. According to the Agrarian Law 1870, customary rights were indeed recognized but those areas that were not permanently claimed by the Indonesian people had to be converted to government or state land. Europeans were only able to get land for setting up plantations as hereditary leasehold, or as a concession from the Colonial Administration. In the European system, hereditary leasehold land was granted as a rule for 75 years, and concessions for a period of 99 years (Löffler, 1996). By the end of 1924, the “Ethical Policy” with respect to the land tenure system had resulted in unexpected

¹⁵⁸ At that time, there was a “vacuum” dominance as the Dutch were in a political and economic crisis and the Dutch Government was not able to determine a stable course in the colonies.

⁶ Compulsory deliveries refers to the policy applied by the Dutch that obliged farmers to provide a certain amount of their harvest to the government.

economic inequalities in rural areas. The situation for landless workers and peasants with insufficient lands was found to be worsening compared to the previous 10 years, while larger landholders' situation was significantly improving. However, the introduction of the Agrarian Law 1870 had a great impact on the development of Indonesian land law. Even in the Basic Agrarian Law 1960, which is the basic tenure law applied in Indonesia, there are some aspects similar to the Agrarian Law 1870, particularly in its various rights.

3.1.2 Post-colonial developments (1942 – 1960)

The rules of the Dutch colony were still applied in Indonesia with its positive and negative effects for Indonesian people. All the administrative issues as well as the land tenure system during the Japanese invasion remained as they were before. Interference with land rights affected only a small portion of lands. This situation prevailed until 1945 when Indonesia declared its independence on 17 August, 1945. After independence, the Agrarian Law of 1870 still applied. Until the enactment of BAL 1960, it was estimated that not more than five per cent of the country's total area was cadastral surveyed and registered under European procedures. But the land policy remained the same and so a lack of any evidence to prove land ownership was still common.

3.1.3 Basic Agrarian Law/BAL (1960 – Present)

An attempt to build up an indigenous land tenure system was made in 1948 by formulating a new agrarian law to replace the Agrarian Law 1870. In September 1960 a land law, called the Basic Agrarian Law (BAL), was launched. Formally known as BAL No. 5 1960, this law replaced the old Dutch Agrarian Law 1870. BAL was developed based on the characteristics of Indonesian people and their Constitution/*Undang Undang Dasar* 1945 and the Five Ideology Concept/Pancasila (Panca = five and sila = ideology). This ideological concept is reflected in each BAL article as the principle of national land law and the five ideologies are: religion (art.

1), nationalism (art. 1, 2, and 9), democracy (art. 9), socialism, equity and justice (art. 6, 7, 10, 11, and 13). BAL comprises of 67 articles divided into four main chapters and covers the following issues: basic principle and provisions, the rights to land, water, and air space, and land registration, penal provisions, and transitional provisions (Harsono, 1994, and Mac Andrews, 1986).

With the enactment of the BAL, all adat rights⁷ are fully protected and can be registered and titled under the new system. Two important changes to the old land law system are the abolition of the old land regulation system and the introduction of indigenous Indonesian land law with respect to the unique Indonesian situation.⁸ Lands that were registered under the European system can now be converted into the new system or transferred into state land if the converting process fails.⁹ The enactment of a new land law was intended to contribute to the process of national unification and identity. According to the ILAP 1997, there were six characteristics found in BAL 1960 related to its content and development concepts:

1. Formal unification ends dualism.

As mentioned before, BAL formally ended the dualistic colonial land law system and formed a single set of rights. This was to simplify the land law system.

2. Abolition of "domain statement"¹⁰ and introduction of state land/*Tanah Negara*.

The concept of *Tanah Negara* is different from the colonial "state land" principally under the domain statement. In the former colonial system, state land was claimed by the colonial government, but in the BAL, the state "only" controls the land on behalf of the nation.

3. Agrarian based concepts.

The BAL was explicitly designed to incorporate the traditional agrarian concept where adat land was considered the primary focus. It does not anticipate the possibilities of future land development, such as market transfers. This includes non-agrarian commercial

interests, the development of a land sales market, national and international investments, and other related issues.

4. Land has a social function.

A landowner with attached rights is responsible for all processes on his/her land but higher interests must be given to the community and the state. Absentee ownership, utilization as commercial commodity and speculation are to be avoided.

5. Dutch law influence.

Although the BAL was developed from the local situation, the influence of Dutch civil law still remained as land experts who designed the BAL were educated in the Dutch legal tradition. The similarity of the BAL compared to the Dutch civil law is mostly on the rights attached to the land, such as *hakmilik* and *eigendom*, *hak guna bangunan* and *osptal*, *hak usaha* and *erfpacht*.

6. The BAL based on the adat law principles.

The BAL is a hybrid document that attempts to combine explicit adat and implicit Dutch law components. Adat system is obviously different from those mentioned in the Dutch civil law and its development; this term has been created for the unique hybrid system.

3.2 Tenure system and regulatory frameworks

3.2.1 Legal frameworks of Indonesian land law

In general, the BAL (UUPA 5/1960) is the basis for Indonesia's land administration. In Article 5, it is stipulated that Indonesia land laws shall have the Adat (customary) law as the basis for their implementation but this stipulation has never been clearly stated in any subsequent implementing regulations. Due to the influence of Dutch dualism system, the implementation of land regulations still refers to the principle of the Dutch Civil Code. As the legal framework for the Indonesian land tenure system, the existence of the BAL is also accompanied by related laws, which are

Table 2. Principal Land and Related Laws

National Constitution 1945 (Article 33)	
LAND LAWS	RELATED LAWS
BAL No. 5/1960	Forestry Law No. 5/1986
<ul style="list-style-type: none"> • Security Titles Act (Law No. 4/1996) • Land and Building Transfer Tax (Law 20/2000) • Ministerial Regulation: "Delegation On Rights Over State Land" (No 3./1997) • Government Regulation: "Apartments" (No. 4/1988) • Presidential Decree: "Placing Land Title Certification in BPN and 9 Key Activities with Regional and Local Government" (No. 34/2003) 	<ul style="list-style-type: none"> • Basic Mining Law (No. 5/1967) • Foreign Investment Law (No. 1/1967) • Domestic Investment Law (No. 6/1968) • Irrigation Law (No. 11/1974) • Basic Environment Law (No. 4/1982) • Land and Building Tax Law (No. 12/1985) • Fishery Law (No. 9/1985) • Administrative Court Law (No. 5/1986) • Spatial Planning Law (No. 26/2007) • Housing and Settlement Law (No. 4/1992) • Environment Management Law (No. 23/1997) • Water Resource Law (No. 6/1996) • Non-Tax State Revenue Law (No. 20/1997) • Regional Government Law (No. 22/1999) • Forest Law (No. 41/1999)

Source: Author based on Wallace, 2008

classified as complements, instruments of further clarification, or even as technical directions. Table 2 shows some principal and related laws of the current land law system in Indonesia.

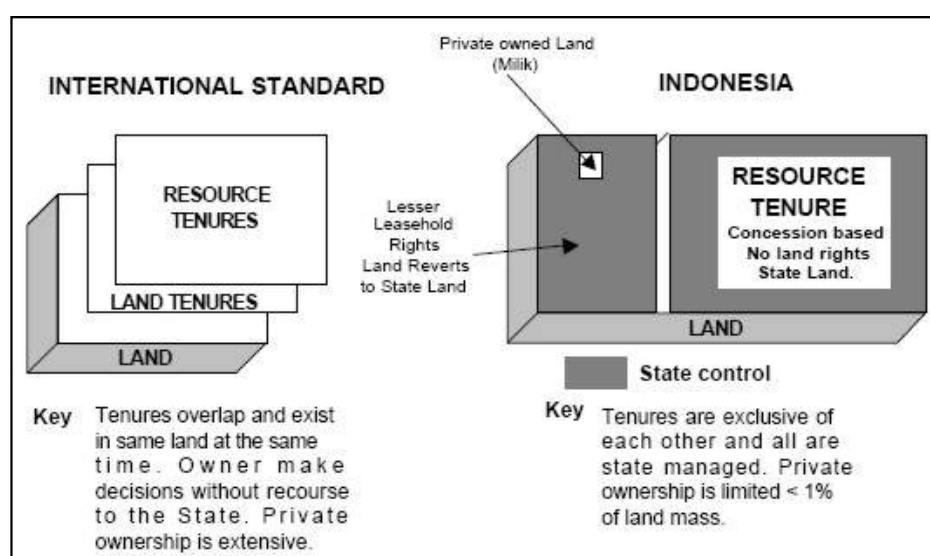
The land related laws and regulations often do not have a detailed clarification on the issues focused on and many detailed subordinate land laws emerge, spawning thousands of separate pieces of subordinate legislation, administrative standards and other announcements which sometimes conflict with each other (Haverfield, 1999). Consequently, this broad legal framework creates opportunities for different interpretations and has become unreliable. The inadequacies of the regulatory systems also fail to provide a sufficiently authoritative description of private land rights to enable owners to withstand the arbitrariness of the state; hence they have failed to create subordinate interests in land capable of supporting a routine supply of essential infrastructures, there are internal inconsistencies, extensive bureaucratic control of commercial interests, and there is a general lack of discipline in statutory interpretation and application (Wallace, 2008).

3.2.2 State's role in managing and controlling land

The state has the stronger interests over all others' interests in the land tenure system. The development of the BAL and related laws were designed to accommodate state interests for the prosperity of Indonesian people. This is clearly mentioned in the Constitution of 1945, Article 33 (3): "land, water, and airspace including natural resources are within the control of the state and to be used for the people's prosperity". The BAL 1960 has reinforced this by placing land under the control of the state, as written in Article 2 (1): "And water and airspace, including the natural resources contained therein, are in the highest instance controlled by the state, being the authoritative organization of all people." Following these statements, all government policies strongly influence the granting and operation of both tenure and titles.

The term "control" in an Indonesian context is different from "owning". It is to declare the position of the state where it should determine any matters related

Figure 3: Tenure model in Indonesia



Source: ILAP - Part C: Topic Cycle 4, 1997

to the land. The law gives power to the government to define and regulate any relationship between individuals, groups or communities and resources, including land. This has made the state the source for personal opportunities to deal with and to use land, including modifying the rights on the land, as well as regulating relationships between individuals and their transactions on land. In another context, the term “control” instead of “ownership” is to clarify the state’s position over land. It implies that the nature of its relationships to the people with respect to the land is less dominant and invasive than the Dutch system. One of the important issues in Indonesian land tenure system is the doctrine of exclusive tenure for the state by restricting the creation of land tenure in forest and mining areas. This doctrine was developed under Basic Forestry Law 5/1967 and Basic Mining Law 11/1967. It allows the state unrestricted access to resources and to establish separate administrative structures for land and resources, as shown in Figure 3. The separation of administrative land, forestry and mining tenures contributed to direct limitation of land available to land tenures.

3.2.3 Current Tenure System

Possession of the land

The most common form of land possession is the existence of rights in adat law, which is used as evidence in the registration process. Prior to registration, some unregistered land is mostly under adat ownership (Sturyk et al, 1990). This land status was formally issued by the local authorities either under Dutch land law or through BAL. Protected by the BAL 1960, uncertified land under adat rights with sufficient evidence can be registered to support *Hak Milik* entitlement by issuing a title evidence of tax receipts. These titles can be further transferred to more secure levels of rights. At the time of first registration, possession for 20 consecutive years is allowed if made in good faith, exercised in a transparent way and not challenged by the adat law community.¹⁰

Another form of land possession in Indonesia is squatting, which is found mostly in urban areas. Rapid development in some large Indonesian big cities have caused more people to live there and squatting is the most common form of settlement for people who do not have legal options and a low ability to acquire land rights. Squatting has been one of the informal forms of possession in Indonesia for three decades. Squatters occupy land owned by third parties with or without an explicit agreement and is distinguished from the process of acquisition of an individual title from adat land by possession, recognition and registration based on permitted use by the government. Squatting in Indonesia is “legal” if the person can obtain a “squatting letter” or surat garap, an official letter of recognition from the local authority to occupy someone else’s land (ILAP - Topic Cycle 4, 1997). This letter gives the squatters authority to maintain and use land under specific circumstances and even to transfer or sell it. A land title is established by approval and is not obtained from adverse possession.¹¹ Adverse possession is not considered to be a legitimate source of title and at times cannot be used to improve the title, even for land that has been squatted on for many years.

It should also be noted that squatting may exist for different purposes in urban and rural areas. In urban areas with a high population density such as in Jakarta, Surabaya, Medan and Bandung, adverse possession is commonly found as a consequence of population concentration. On the other hand, in rural areas where most of the land is used for agricultural purposes, squatting is normally found in plantation areas governed by the state or private companies. Squatting in this area is very much related to the history of the region, where land was formerly occupied under the adat system. Due to a lack of evidence of control over the land, the ownership of these specific areas has been shifted to other parties, such as the National Plantation Company, which may result in land re-claiming.

In relation to state land, squatters may apply for rights on the land, such as *Hak Milik* for a person

who has occupied state land since the early years of independence. Rights on state land can be obtained through three mechanisms, i.e. *pengakuan hak* or recognition of an existing right, *penegasan hak* or confirmation of right, and *pemberian hak* or granting of title. The first and second mechanisms apply to adat land where the owner does not have enough evidential documents, while the third mechanism applies to state land that the squatter has been occupying for a long time and the land has been formally designated as land for housing (World Bank, 2002).

Various land rights according to BAL 1960

As stated in BAL 1960, there are two types of rights to land: primary and secondary rights. Primary rights mean that there is a need to register the land to improve its function and to benefit from land with state involvement through BPN, while secondary rights are related to the agreement between two parties that are involved in land-related activities. The important basic rights that are commonly used in land-related activities are *Hak Milik/HM* (freehold ownership), *Hak Guna Usaha/HGU* (cultivation only), *Hak Guna Bangunan/HGB* (building only), *Hak Pakai/HP* (use only), and *Hak Pengelolaan/HPL* (management only). Tenure can be derived from the state as well as from the customary land through a conversion process. Most of the rights are subject to state purposes as enshrined in the Constitution and the BAL 1960. For individual interests, Indonesian people can only obtain land through the right of ownership or *Hak Milik*. At the same time, land rights are stipulated in BAL 1960 and it also mentions foreign individuals or foreign companies as legal bodies in dealing with land ownership. No individual ownership is granted to them. Foreign legal entities may only be granted a HGB.

Land registration

Land registration in Indonesia is regulated by Government Regulation/*Peraturan Pemerintah* No.

24/1997. First time registration, whether it is sporadic or systematic, is authorized by the National Land Agency/BPN, which issues land certificates. Land registration is required for three purposes: (i) original issuance of the title that includes the titling of previously untitled land, and initial registration, for both adat land and state land; (ii) land transfer and changes in ownership through sale, gift, auction, exchange of parcels or inheritance; and (iii) registration of encumbrances, which includes the use of land as collateral or as security for obtaining credits (Behuria, 1994). However, even if registration is regarded as the highest and best evidence of ownership, the land is not precluded from claims by third parties.

The registration process starts through the Adjudication Committee for systematic registration and through the Land Deed Official/*Pejabat Pembuat Akte Tanah* (PPAT) for sporadic registration. This process is to examine the evidence of title and boundaries and results in an official report that legalizes the physical and legal land data. The report then becomes the basis for an entry in the land book, which includes a note about incomplete data or any pending disputes. A dispute note can be removed if a solution is reached, either through court or if the dispute is not brought before to court within 30 to 90 days. The removal of a dispute note from the report is necessary because a land certificate will not be issued with one there.

Registration procedures differ between adat and state land. Registration for state land has to be done through the Land Office at the city or district level where the land is located and is subject to the HM, HGB, HP, and HPL. HGU registration should be done in a Land Office at the provincial level. There are five steps to be completed in registering land at the city/district level as well as in provincial level, as shown in Table 3. The time taken for the application varies depending on the type of rights

Table 3. Land registration procedures

State lands	Private/adat lands
<ol style="list-style-type: none"> 1 The application is filled and handed in. 2 The applicant pays fees for a letter of measurement and the administrative costs for checking and processing the application. 3 The application is forwarded to a committee called Committee A (Panitia A) for field check; evaluation of the application. Committee A is an ad hoc committee established for this purpose and composed of a representative from the Land Office, the village and individuals from the neighbouring area. This committee also determines if there are any other claims of ownership to the land and makes appropriate recommendations on conflict resolutions. The committee also prepares a report of its findings and submits the report to the head of the Land Office at city/district level. 4 Based on the report, the officials at Land Office prepare a letter of recommendation on the necessity of removing the conflict note or not. 5 This recommendation letter is sent to the Land Office at the provincial level for further action. 	<ol style="list-style-type: none"> 1 Applicant obtains official documents. 2 Application filled for land title and includes; information on the chronological/historical status of land certified by the village head, rough sketch of the land parcel showing boundaries approved by the village head, information on land ownership verified by the sub-district head, and certification of tax payment verified by the sub-district village. 3 Officials of city/district Land Office carry out field check to identify any adverse claims. 4 The land is officially surveyed and mapped. 5 Upon completion, the documents along with the map are sent to the village and sub-district head for 60 days to permit any complains. 6 Land Office prepares a letter of recommendation if no complaints are found. 7 The letter of recommendation is sent to the Land Office at the provincial level for a decision letter (for non-adat land, the letter is forwarded to the National Land Agency in Jakarta). 8 The applicant is informed about the decision and required to pay fees for the completion of the process. 9 The certificate is issued, and a copy is provided to the applicant.

Source: Author based on PP24/1997

Table 4. Registered land in Indonesia from 1989 – 1999

No	Fiscal year	Number of certificates				Total certificates issued			Cumulative total issued
		Project							
		Sporadic	%	Systematic	%	Other	%		
1	to 1989	7,576,058	69.1%		0.0%	3,383,113	30.9%	10,959,171	10,959,171
2	1990/1991	398,921	64.6%		0.0%	218,947	35.4%	617,868	11,577,039
3	1991/1992	566,461	67.7%		0.0%	270,293	32.3%	836,754	12,413,793
4	1992/1993	604,297	69.1%		0.0%	270,457	30.9%	874,754	13,288,547
5	1993/1994	672,209	74.2%		0.0%	233,175	25.8%	905,384	14,193,931
6	1994/1995	819,559	80.4%	1,022	0.1%	198,570	19.5%	1,019,151	15,213,082
7	1995/1996	875,062	76.5%	4,236	0.4%	264,649	23.1%	1,143,947	16,357,029
8	1996/1997	1,015,522	69.2%	224,370	15.3%	228,543	15.6%	1,468,435	17,825,464
9	1997/1998	964,128	57.0%	460,924	27.2%	266,670	15.8%	1,691,722	19,517,186
10	1998/1999	2,342,382	74.2%	635,214	20.1%	179,137	5.7%	3,156,733	22,673,919
	Total	15,834,599	69.8%	1,325,766	5.8%	5,513,554	24.3%	22,673,919	22,673,919

Source: ILAP – Part C: Topic Cycle 10, 1997

that are applied for and are considered as relatively low. The final step, a certificate, is issued to the applicant based on the decision taken on the status of the land. The length of registration time has been a major concern as it depends on the completion of the survey, pending disputes of claimants, and bureaucratic delays. For privately owned or adat land, nine procedures have to be accomplished by the landowner, and they are as equally complex as for state land. Problems may occur through the many and time-consuming steps involved and the documents required. Along the process, there is discouragement, resulting in the high number of smallholders who want to title their land. In spite of the problems during the process, land registration provides many benefits and has a great impact on assurance, social stability, credit, land improvement, productivity, liquidity, labour mobility, property values and taxation, public services and resource management (McLaughlin and Palmer, 1996).

Since land registration generates many benefits, the Indonesian Government has conducted some projects related to the improvement of tenure security through land registration. According to BPN data in 2009, out of 85 to 90 million land parcels in Indonesia, only 34 million have been registered, both through the systematic and sporadic system. (Table 4 shows the development of land registration from 1989 to 1999.) This is a great challenge to the country to improve its ability and capacity to register all land parcels. Nevertheless, this very much depends on the country conditions because it requires much effort with all aspects, such as human resources, technology, financial ability and the availability of supporting infrastructure. Therefore, to some extent, registering land, particularly through a sporadic system with the active involvement of the people, is a major requirement, though it has been thought of as time consuming, complicated and a bureaucratic process that may lead to the “shortcut” of purchasing land certificates and thus facilitating illicit behaviour (Rudiarto, 2005).

Permits and related permits on land

The state has the right to regulate land as clearly stated in the Constitution as well as in BAL 1960. Land regulation is usually applied through a Location *Permit/Izin Lokasi* issuance as a land-use development control in all regions and is stipulated in Agrarian Ministerial Regulation 2/1999 on Location Permit. This permit is directed at all companies that want to acquire parcels of land for development purposes. Prior to *Izin Lokasi*, companies must obtain a Principal *Permit/Izin Prinsip*. Without *Izin Prinsip*, the application for an *Izin Lokasi* cannot be processed. Both *Izin Lokasi* and *Izin Prinsip* are issued by local authorities at a city or district level. The need for *Izin Lokasi* is regarded as a strong development control in most of the urban fringes that comprise of many available small plots and a huge number of owners with various ownership rights. In purchasing *Izin Lokasi*, the developer of a company should be involved into the following formal processes: (ILAP – Part C: Topic Cycle 2, 1997):

- land-use planning where the application should conform to the spatial plan,
- land allocation for different uses where detailed sites for each land use are specified,
- monopoly rights over land where no one else may acquire and develop it,
- extinguishing of underlying land rights upon issue of a master HGB,¹² and
- regulation of varying types of land status within HGB and provision for subdivision and registration of land rights.

Izin Lokasi is given by considering the suitability of a proposed land investment and land-use plans. It is provided for different periods by considering the required land size, i.e. one year for areas up to 25 ha, two years for areas between 25 ha and 50 ha, and three years for more than 50 ha. The authority issuing a land permit is the head of the local authority, the mayor/*Walikota* in the case of a municipality and the regent/Bupati for a district. For specific regions, such as Jakarta, the permit is signed by the governor following

a meeting of related stakeholders. The developer or company who has already been granted *Izin Lokasi* should be able to acquire the intended land within the mentioned period.

Land acquisition is the next issue dealt with by the developer or company. During this process, issues may arise that normally involve different parties either directly or indirectly. These issues are corruption, power control and land market features. Corruption often occurs in the process of obtaining *Izin Lokasi* and may involve the developer or company as the applicant and government officials representing the state authority. As *Izin Lokasi* is a prerequisite in land development activities, its existence is of top priority. On the other hand, the issuance of *Izin Lokasi* means the transfer of power from landowners to the company or developer and might be considered as a strong letter to acquiring the land, since it is issued by the local authority. It is common that the perception of this letter is even stronger where control over the area has been fully transferred to the developer and local officials are encouraged to support the development. Land market issues arise as the consequence of a determination on land as a development area. Once the project becomes

public, land speculators also acquire the land within the area, which may further confuse the situation and may contribute to land price increases in the area.

Building and other permits

Izin Lokasi only allows a developer or company to acquire the land for development purposes but not to erect buildings on the land. In this case, a developer requires a building permit/*Ijin Mendirikan Bangunan* (IMB) from the city or district, which is followed by acquisition, conversion of land certificates and production of a detailed site plan. For specific industrial enterprises that may have a harmful impact on a neighbour (garbage for example), an application for a Nuisance Permit/*Ijin Gangguan* is also required. Also, the application of a planning permit is necessary prior to the IMB and is applied for from the Local Planning Agency/Bappeda at the city or district level.

The regulations and all the formalities and procedures of applying for land and related permits may, however, lead to illicit behaviour, particularly in obtaining *Izin Lokasi*. Because it is a top priority for land development, the process of acquiring *Izin Lokasi* has the potential and incentives for asking for rent or informal fees.



Degraded land in rural upland areas due to tenure insecurity © Iwan Rudiarto

Considering the financial benefits of successfully developing land in the future, a developer or a company would not hesitate to spend more money for “other purposes” to smooth the process of getting the permit.

Land acquisition

Depending on its purpose, land acquisition in Indonesia can be divided into two categories: land acquisition for public purposes carried out by the government and land acquisition for private purposes performed by an individual or a company. Land acquisition for public purposes is regulated in the Law/UU 20/1961 on Rights Dispossession and Related Material on Land, Presidential Decree/Keppres 55/1993 on Land Acquisition for Public Infrastructure Development, and Ministerial Regulation/Permen 1/1994 as the implementation of Keppres 55/1993. Detailed mechanisms on land acquisition are regulated by Ministerial Regulation/Permen 2/1999, which regulates Location Permits. It should be noted that acquiring land either for public or private purposes has to be done through negotiations with the landowner. For government purposes, negotiations are done through a local committee consisting of local government officials, while for private purposes negotiations can be done directly between the two parties involved, the actual landowner and the purchaser.

Land acquisition always involves related issues that need to be addressed. These arise from different aspects, such as regulation, implementation, compensation, authority and dispossession of rights.

1. Regulation: related to a redefinition of “public interest” that may cause different perceptions among the parties who acquire land. In UU 20/1961, the possibility of rights dispossession is also opened to the private sector. Therefore, public interest should necessitate a strong and specific definition in land acquisition process.
2. Implementation: refers to the concept of consensus reaching/*musyawarah* between involved parties, either related to a public or private purpose. Consensus in land acquisition should be based on

a forum for discussion, but should not be seen as a top-down approach.

3. Compensation: this is the most sensitive issue in all land acquisition and is time-consuming. Compensation should not only concern the amount of money to be paid but should also consider other aspects, such as socio-economic impacts and neighbourhood conditions.
4. Authority: procedures and mechanisms of land acquisition should consider UU 22/1999 that regulates Local Governance. It mentions that a local government, i.e. a city or district, has the authority to manage and control all matters related to their territory. But in practice, the procedure and all claims on land acquisition are still referred to the governor.
5. Rights dispossession: officials can potentially mislead people by claiming that they have full authority from the government to expropriate the land from the landowner, sometimes with the threat of force.

4. ANALYSIS OF LAND TENURE SECURITY

4.1 Recent country efforts in improving land tenure security

There have been many efforts to improve land tenure security in Indonesia since the BAL 1960 was introduced. These are related to infrastructural development of the land tenure system, particularly regulations, institutions and implementation. But in recent times, these efforts have shifted to strengthening the established system and efforts may come from the Indonesian Government and from foreign involvement.

4.1.1 Internal efforts

Current internal efforts to improve land tenure security have been carried out by the Indonesian Government through the BPN. These efforts include various aspects, such as reforming national land policy, reforming the organization of BPN and its bureaucracy, developing land administration and services infrastructure,

improving land services and the administration process, as well as land dispute and conflict resolution (Winoto, 2009). The country has also considered efforts to improve tenure security for specific cases such as slum areas.

Land policy reform

With regard to the land policy reform, recent efforts have been aimed at document ratification and to improve land policy. Document ratification is mainly a concern for the improvement of BPN as the legal institution dealing with land related activities. It is clarified in the Presidential Decree/Kepores 10/2006 and made a legal basis of BPN institutional development. Meanwhile, efforts in land policy are being done through the preparation of land-related laws, such as a draft academic manuscript on the Land Law (RUU Pertanahan), a preparation of a draft on the Agrarian Reform Law (*RUU Reforma Agraria*), a draft of the Government Regulation on Idle Land (RPP Tanah Terlarang), and a draft of Government Regulation on Tariff for State Non Tax Revenue (PP 46/2002).

Institutional reform

It is commonly known that BPN is the only legal institution in Indonesia that has the right to issue documents on land-related matters. This “monopoly” may lead to a negative perception by society of this institution. Many critical cases have been reported about the process and services provided by BPN and many of them underestimate its capabilities. At the same time, the position of BPN at a local level overlaps with local institutions since the local autonomy policy under UU 22/1999 was pronounced. Responding to these matters, BPN began bureaucratic reform in 2006, which is regulated in the Presidential Decree/Keppres 10/2006. Some major changes are: merging units and developing two new units (Deputy of Land Survey and Mapping and Deputy of Land Dispute Resolution and Management), implementing a reward and punishment system to enhance staff performance and avoiding corruption, and implementing a new promotion system

as well as recruitment system to be more transparent and accountable.

Infrastructure development

To enhance the tasks of land administration and document service delivery, BPN has carried out activities to improve its software and hardware requirements, develop a detailed base map to support land administration and agrarian reform, digitized 11 million out of 80 million land parcels into vector based maps, provided mobile services for land registration, and developed automatic information services in each Land Office at the local level.

Improvement of Land services and Administration processes

Many studies report that processes of land administration in Indonesia are complicated, time consuming, expensive and involve unofficial payments. To counter this negative image, efforts have been made through two strict approaches; (i) a procedure rearrangement and its simplification, and (ii) opportunities limitation (Winoto, 2009). Procedure rearrangements and simplification is done by the publication of internal and external Standard Operations and Procedures for Land Solution (Standard Operasi dan Prosedur Penyelesaian/SOPP). Through this standard announcement, the public is informed about proper procedures, their duration and the price of land services. Strict regulation on land services as stipulated in the Agrarian Ministerial Regulation/Permen Negara Agraria 6/2008 states that land services provided must not exceed 15 working days for their implementation. Opportunity limitations can be achieved by activities such as setting up mobile land services, implementing mass legalization of private assets through some projects (National Project/Prona, Local Project/Proda, Community Empowerment on Land Management Project/Manajemen Pertanahan Berbasis Masyarakat- MPBM carried out in Central Java Province, Reconstruction of Aceh Land Administration System/RALAS, Adjudication, and mobile land registration/LARASITA), developing Land Information System/LIS, and reducing the direct involvement of

Table 5. Numbers of published land certificates and revenue

	2005	2006	2007	2008	Total
Number of published certificate (parcels)	919319	1345809	2691167	2671551	7627846
State revenue (non-tax) in IDR billion	-	541.12	-	682.80	-

Source: Author based on Winoto, 2009

staff in the land administration process to prevent rent seeking or informal fees.

During its implementation, the number of published land certificates increased by almost three-fold from 2005 to 2008. In 2006, published land certificates increased by 46 per cent compared to 2005, while from 2006 to 2007 the increment was more than 50 per cent. This improvement also directly influenced state revenues within the non-tax category. From 2006 to 2008, state revenue from land services increased by more than IDR 141 billion or about 26 per cent. The target from state revenue from this service was IDR 1,350 billion in 2009 or almost triple what it was in 2006 (see Table 5).

Specific programmes

Specific programmes aim to describe the improvement of tenure security in slum areas and are designed to show that the Indonesian Government has given specific attention to this issue. Slum areas are usually found in large cities such as Jakarta, Surabaya, Medan, Bandung, Yogyakarta, and Semarang. Initially, slum upgrading was initiated by the Jakarta Government in 1972 through the *Kampoeng* Improvement Programme (KIP). This programme was later adopted by the Indonesian Government for several big cities. It covered physical conditions of houses and the environment, such as roads, sanitation and drainage. KIP has upgraded more than 85,000 ha of slum areas and helped more than 36 million people within almost 2,000 locations in several towns and cities in Indonesia (United Nations Sustainable Development, 2004). With the intention of empowering the communities, since 1994 KIP has broadened into an Urban Environmental Upgrading

Programme with more involvement of communities and reduced government intervention. Along with the decentralization process, the responsibility for this programme has shifted completely to the local government.

4.1.2 External efforts

External effort is intended to describe foreign involvement in improving Indonesia land tenure security. In recent years, the Indonesian Government in partnership with the World Bank has conducted two consecutive programmes, namely a Land Administration Project (LAP) as a first stage and the Land Management and Policy Development (LMPD) as a second stage. These programmes were broadly designed to accelerate land titling and to introduce parallel reforms of the land registration system (Heryani and Grant, 2004). A specific programme is also being carried out that is related to the Aceh's post-tsunami programme, called the Reconstruction of Aceh Land Administration System, which was funded by multiple donors.

The Land Administration Project (LAP)

Starting in 1994, this programme was carried out in the middle of major political and economic events that greatly changed the government regime from the new era into the reformation era. The project was designed with three integrated parts. Part A was related to the acceleration of land titling and registration through systematically registering non-forest land parcels. Part B focused on strengthening the role of BPN as the responsible institution for the legalization of land-related matters. Finally, Part C was

to support government efforts to develop a long-term policy for land management by conducting studies and workshops. BPN was the institution responsible for carrying out parts A and B, while Bappenas was in charge of Part C. This project was implemented for seven years and resulted in a number of outcomes that significantly improved some targeted objects. These can be summarized as follows (Heryani and Grant, 2004):

- Improved social economic status of more than 1.8 million households through tenure security of land and property;
- Improved governance through a gradual shift in BPN from a closed, autocratic, self-serving central agency to a more opened, inclusive and service delivery institution. This change focused on a decentralized project management with the Local Land Office as the primary service delivery point and created a transparent systematic registration programme. Increasing recognition for the traditional system of land tenure and the existence of customary communities were also slowly developed.
- The establishment of a cadastral survey industry, supported by the tertiary level training and education, reinforcing the aim of maximizing private sector involvement in building and sustaining the system of land administration in Indonesia.

In relation to Part A, LAP initially started systematic registration in two pilot areas, Depok and Karawang. Depok district is an outer urban area of Jakarta while Karawang is about 50 km from Jakarta city where larger areas of urban/rural land became the priority. To conduct that activity, this project involved 122 systematic teams with 1,950 BPN staff and about 1,200 surveyors (Walijatun and Grant, 1996).

The Land Management and Policy Development Project (LMPDP)

Principally, the LMPDP was set up as the continuation of the previous LAP, which was concerned with land administration reform. It started in 2004 and ended in December 2009. This project was designed to

carry out balanced activities between land policy, institutional development and land titling operation. Its aim was to improve land tenure security and enhance the efficiency, transparency and service delivery of land titling and registration, and enhance the local government capacity to undertake land management functions with greater efficiency and transparency (Wallace, 2008). Five major components were proposed related to its implementation: (1) development of the land policy framework, (2) institutional development and capacity building and training, (3) an accelerated land titling programme, (4) development of a LIS, and (5) capacity building support for local government. Three institutions are involved in carrying out the programme with different responsibilities. Bappenas were responsible for component 1, while components 2, 3, and 4 were conducted by the BPN. The Ministry of Home Affairs was responsible for the implementation of component 5.

Concerning the land titling programme, LMPDP emphasized the implementation of systematic registration; a similar technique was applied in LAP, and it had a target of three million titles. Another new specific issue was the establishment of Land Information System as the main focus in component 4. The development of LIS was a crucial issue to provide spatial information on land for different purposes, such as land valuation, land use planning, management of natural resources, and planning and management of physical infrastructures. On the other hand, component 1 also performed some activities related to the development of land policy framework. These activities were the simplification of land acquisition instruments and the definition of state land; studies on taxes and fees for land services; improvement of spatial and land-use planning for local government, studies on adat land, on land market, on state land distribution, on the sustainability of land registration and programmes on rights regulations, and on conflict assessment of land related laws.

Table 6. Role of donors and their associated programmes

Donors	Programmes
<ul style="list-style-type: none"> World Bank through International Bank for Reconstruction and Development (IBRD) and Australian Agency for International Development (AusAID). 	<ul style="list-style-type: none"> Land Administration Project (LAP) Initiated in 1994 and ended in 2000, this project was designed in three parts, 1. Acceleration of land titling and registration through systematic system for non-forest land parcels; 2. Strengthening the role of the National Land Agency; and 3. Supporting the Indonesia Government's efforts to develop a long-term policy for land management by conducting studies and workshops. Land Management and Policy Development Project (LMPDP) Carried out from 2004 until 2009, this project was designed to carry out balanced activities between land policy, institutional development and land titling operation.
<ul style="list-style-type: none"> Multi-Donor Trust Fund for Aceh and North Sumatra (MDTFANS) 	<ul style="list-style-type: none"> Reconstruction for Aceh Land Administration System (RALAS) This project was started in 2005 and lasted until 2009 with the intention to improve land tenure security in Aceh after the tsunami.
<ul style="list-style-type: none"> German Government through German Technical Cooperation Agency (GTZ/GIZ) 	<ul style="list-style-type: none"> Started in 1993 and ended in 1998, this project provided assistance in land-use management and mapping.
<ul style="list-style-type: none"> British Government through Overseas Development Assistance (ODA). 	<ul style="list-style-type: none"> RePPProT (Regional Physical Planning Program for Transmigration) and RePPMIT (Regional Physical Planning, Map Improvements and Training) projects, which provided support in the surveys for area selection and planning of transmigration project.
<ul style="list-style-type: none"> Japanese Government through Japan International Cooperation Agency (JICA) 	<ul style="list-style-type: none"> Project in technical assistance to the BPN in land consolidation or land readjustment programmes.
<ul style="list-style-type: none"> Asian Development Bank (ADB) 	<ul style="list-style-type: none"> Provincial Irrigated Agriculture Development Project (PIADP) This project was to build tertiary irrigation networks, lay out and construct paddy fields and the certification of land parcels.
<ul style="list-style-type: none"> Spanish Government 	<ul style="list-style-type: none"> Land office computerization The purpose of this project was to computerize land administration process and land records both in text and graphic format.

Source: Compiled from World Bank, 2002, and others

those objectives, the RALAS project was divided into three major components: component A dealt with the reconstruction of property rights and issuance of land titles; component B related to the reconstruction of BPN institution in Aceh, and component C was project management. RALAS was started in mid-2005 and ran until mid-2009.

During its implementation, this project achieved some results on training, land titling, reconstructing institution buildings, and developing land policies related to the disaster issues (Bell, 2009). Within the RALAS project, training was given to the 700 facilitators on community land mapping and driven adjudication process, and

Programme on Reconstruction of Aceh Land Administration System (RALAS)

Earthquake and tsunami disasters in Aceh and surrounding areas have had a major impact on land and property in that region. To cope with this, the Indonesian Government through BPN established a project called RALAS. This was originally funded by several countries that were merged into a Multi Donor Trust Fund for Aceh and North Sumatra (MDTFANS). The main objective of this project was to improve land tenure security in Aceh while its specific objectives were: (1) to recover and to protect land ownership of the people in the affected and surrounding areas, and (2) to rebuild the land administration system. To implement

to 480 BPN staff members on systematic registration. Meanwhile, in the land titling programme, 114,337 land certificates were distributed, 223,105 parcels adjudicated, 211,829 parcels surveyed, and 120,000 parcels mapped. Further, eight BPN office buildings were rehabilitated in several regions and regulation on surveying, the RALAS manual, waiver of taxes, fees, and charges on issuing land certificates, and government regulations were also achieved by this project.

4.2 Role of donors and programmes

Many donors from different countries and sources have been engaged with the development and improvement of land tenure security in Indonesia and contributed different activities through their specific programmes. Donors' contributions to the improvement and development of land tenure security issues in Indonesia are shown in Table 6.

4.3 SWOT analysis on the current tenure system

A **strengths, weaknesses, opportunities and threats (SWOT)** analysis is employed to analyse each related component on land tenure security in Indonesia. In this context, the SWOT assessment will emphasize the components that were previously discussed. This analysis is divided into four major components: legal framework, institutional setting and arrangement, possession and rights on land, and land administration and management issues. Detailed discussions on the SWOT analysis are described in Table 7.

CONCLUSION

Many efforts have been made by the Indonesian Government on current land tenure security issues from the policy, institutional, technical or conceptual perspectives. Through partnerships and cooperative programmes, the Indonesian Government and foreign funding agencies such as the World Bank, GTZ/GIZ, the Japan International Cooperation Agency, the

Asian Development Bank, and others, have improved and developed land administration service delivery into a more acceptable system. This is shown by the number of land certificates issued, the announcement of the Standard Operation and Procedures for Land Solutions to improve delivery services, an improvement and amendment of policies related to the land tenure system, as well as the upgrading of the local staff capacity to be more professional. However, with respect to all related efforts to reduce land administration issues and problems, there are still many points that need improvement, as described in the SWOT analysis. Because land tenure security involves many aspects, therefore, improvement through positive efforts should be considered as part of an integrated, sustainable and pro-society policy.

Indonesia is the biggest archipelago country in the world with a very unique land tenure system. Colonized by the Dutch for more than 300 years, Indonesia's land tenure system cannot be detached from its historical development. During the colonial period, land tenure in Indonesia was mainly to accommodate colonial interests and neglect the local Indonesian system. Even after independence, a dualistic system applied by the Dutch was still used until the introduction of the BAL 5/1960. The enactment of the BAL 1960 did not develop purely from the local indigenous system but was rather an adaption of the previous Dutch system. Due to this background, double identification of land is often found and consequently land claims from different parties lead to land conflicts and disputes in some regions.

In Indonesia, the state is the major player in determining land for different purposes. Because of this, the opportunity for individual responsibility for land has been discouraged. Individual owners are not allowed to benefit through cooperative ownership, which may mean there is less potential for a high value land market. On the other hand, the large numbers of land parcels distributed in Indonesia, the complexity of the land administration process, and the inefficiency

Table 7. SWOT analysis on current Indonesian land tenure system

Components	Strengths	Weakness	Opportunities	Threats
1 Legal framework	<ul style="list-style-type: none"> Land administration has been regulated in various legal-formal frameworks, with BAL 1960 as the basis for land administration. Land related laws in Indonesia are regulated under different hierarchy systems, which influence the level of authority from each regulation. 	<ul style="list-style-type: none"> Above the legal framework related to land, the state still dominates and has a significant role in land administration. Various types of land related laws create disparity in access to land as the result of unnecessary complexity and confusion Individual ownership is restricted only to individuals and prohibits corporate use, while foreign and collective ownership is forbidden in fundamental ownership tenure and tightly controlled in lesser tenures. 	<ul style="list-style-type: none"> Through current legal framework, the opportunity to legalize land is wide open, including for adat land: most of the private land in Indonesia is regulated under this ownership. The laws prohibit absentee ownership on land, which may result in inefficiency of land use. Related to gender issues, there are no prohibitions and limitations to women for land ownership. 	<ul style="list-style-type: none"> State has facilitated control over land, and therefore protection to smallholders is marginalized. Due to dominant role of the state, freehold ownership, which is titled as the highest evidence of ownership, does not secure the owner from land acquisition for public investment by the state. Corporate ownership is restricted and may reduce opportunities for effective cooperation and lead to underdeveloped high-value land markets. The laws do not explicitly limit land size and number for individual holdings, which may result in unlimited land ownership in the country.
2 Institutional setting and arrangement	<ul style="list-style-type: none"> National Land Agency/BPN has been established as the primary legal provider of land administration services and maintains individual ownership in Indonesia. About 300 BPN offices are distributed in cities/districts in Indonesia with more than 25,000 supporting staff. Many Land Offices particularly in cities are well equipped in terms of the physical construction and its supporting tools. 	<ul style="list-style-type: none"> The available staff does not meet the demand for land administration application in Indonesia, particularly in the new administrative area as the result of region enlargement. Inadequate staff skills in dealing with land administration Less effective performance due to the ambiguity and similarity in tasks and responsibilities for some organizational units. 	<ul style="list-style-type: none"> The establishment of BPN as a single institution related to land administration and management process reduces other negative interests that may come from individuals, groups, or other institutions. Coordination and management of staff and sections are easier and more effective. Autonomy policy as stipulated in UU 22/1999 has given full authority to the local Land Office as primary agent in conducting land administration services. 	<ul style="list-style-type: none"> Concentrated powers at numerous points and complex regulatory systems potentially create incentives for informal fees or “rent seeking”. Limited local staff in term of numbers, skill and ability is the reasons for postponement of land services applications and may result in institutional inefficiency. Distrust from the people due to complicated, time consuming, and bureaucratic processes.
3 Possession and land rights:				
- Possession	<ul style="list-style-type: none"> Possession of land is clearly recognized and regulated under the current system. Clearly defined and distinguished between adat, individual, community and state land. 	<ul style="list-style-type: none"> Adverse possession is not considered to be a legitimate source of title and time cannot be used to improve the title even if the land had been squatted on for many years. Squatting on land is mostly considered to be “illegal” possession and often treated accordingly. 	<ul style="list-style-type: none"> Possessions under adat system are fully recognized by the current system, and are able to be formally registered and titled. Granting rights for squatters is made possible either for individual or state land with certain conditions. 	<ul style="list-style-type: none"> In most big cities, no guarantee for squatting and its derived possession may create social unrest in the respective areas. Due to their insecurity, granting rights of possession and squatting on land is not fully guaranteed as it may include other parties to re-claim the land.
- Land rights	<ul style="list-style-type: none"> Ownership and accompanying rights have been established and formed into freehold, leasehold and rental agreements. Separation of ownerships/use rights and distinction of individual use under freehold and state land has been made and clearly clarifies each position. 	<ul style="list-style-type: none"> As the rights to separation and distinction exist, the state's role in managing and controlling the land has widened and reduced the role of individual ownership for commercial and resource purposes. Although freehold with Hak Milik title is admitted as the highest and best evidence, it does not prevent claims from other parties. Upgrading rights from the state (HGB) to individual rights (HM) is considered to be complex and expensive. 	<ul style="list-style-type: none"> Concern by the media for the government to improve and to get benefits from land. Transferring and granting rights from state rights to the individual rights is allowed within prevailing regulations. 	<ul style="list-style-type: none"> No clear rules for closing off decayed land claims and therefore, land disputes have been increasing. Land titles adhering to the commercial and industrial uses are not sufficiently secured to fund commercial lending at international rates due to the uncertainty of regulations. Security titles relate only to the land not to the building, which may result in the double identification as well as inefficiency.

Components	Strengths	Weakness	Opportunities	Threats
4 Land administration and management:				
Land registration	<ul style="list-style-type: none"> Registration procedures and mechanisms have been set up in the PP 24/1997. State encourages people to register their land through both systematic and sporadic system. Many local, national and international projects have been conducted to improve land registration in Indonesia. 	<ul style="list-style-type: none"> In the processing issues, the workload burdened by the Land Office staff has contributed to hampering the progress of the registration process. For less favourable land where land price is considered low, land registration does not contribute. 	<ul style="list-style-type: none"> Registered land is able to give benefits on the assurance, social stability, credit, land improvement, productivity, liquidity, labour mobility, property values, property taxation, public services, and resource management. 	<ul style="list-style-type: none"> The given time for dispute resolution during the registration process sometimes discourages the people from registering their land.
Permits on land	<ul style="list-style-type: none"> Permit for land is formally regulated in Permen Agraria 2/1999 on Location Permit/Izin Lokasi. Izin Lokasi is a way for the state to strongly control the development related to land. 	<ul style="list-style-type: none"> The limitation of field equipment during the cadastre process, which is carried out before official registration, often results in inaccurate measurements. Izin Lokasi is not allowed for the corporate ownership but only to the developer or company which is granted HGB from the state. Complexity and bureaucratic processes are two major concerns that may hamper the process as it involves many institutions. 	<ul style="list-style-type: none"> Through Izin Lokasi, developer or company is able to acquire the land by referring to prevailing regulations. Land market issues arise for the area and its neighbourhood due to the proposed development projects. 	<ul style="list-style-type: none"> Time consuming and complex procedures in land registration process may lead to the "extra cost"; therefore, registration of land becomes unsuccessful, unfavourable and more costly. As the initial prerequisite of land acquisition, procurement on Izin Lokasi sometimes has corruption, collusion, and nepotism issues. Meant as "power transfer" and considered as a powerful letter that is often used to instil fear and threaten people to give up their land for certain development purpose, such as real estate and industrial estates. As land price increase, land speculators also arise and may further confuse the situation.
Land Acquisition	<ul style="list-style-type: none"> Land acquisition in Indonesia is regulated in UU 20/1961, Keppres 55/1993, and Permen 1/1994 as the implementation of Keppres 55/1993, while its mechanism is clarified in Permen Agraria 2/1999. The concept of consensus reaching/musyawarah between involved parties has been considered the most comprehensive and reliable approach during the land acquisition process in Indonesia. 	<ul style="list-style-type: none"> Redefinition of "public interest" that may cause different perceptions is required to avoid rights dispossession by the private sector. Sometimes, this right of dispossession is also misused by the involved government officials who want to seek benefits from the developer and the project. 	<ul style="list-style-type: none"> Land acquisition through the land development project is able to transfer the traditional tenure to the current system governed by the state. In this way, state through its local government, is able to control the spatial development and implementing proposed land-use planning. 	<ul style="list-style-type: none"> In negotiations, disagreement about the compensated money has raised uncertainties in project implementation and this further obstructs the development process. Land acquisition for project development, particularly for public infrastructures, often involves other parties instead of the owner which may result in the high cost.

Source: Author based on literature

of the BPN as the government agent in dealing with land-related issues have become a great challenge for the Indonesian Government. It needs to enhance its ability and capability to administer all land in the country. As this task requires effort in terms of time, financial ability, staff availability and a clear regulatory framework, active participation by society to achieve a better land tenure and administration system is required as well as the contribution of international donors.

Land possession is one of the major concerns in Indonesian land tenure system because most of unregistered land is held under *adat* rights. Under current government regulations, all the possessed land with *adat* rights can be registered and certified. Landowners are able to improve their land status, from informal to formal recognition, and thus get more benefits from the land. However, due to the discouraging bureaucratic system in the local Land Office/BPN and the “costly” procedure, many landowners, particularly in rural areas, would like to keep their original ownership. To overcome this and to reduce informal ownership, the Indonesian Government has introduced a systematic registration programme through some projects in which landowners can register their land for a reduced fee or even for free. More programmes are required in order to cover more registered land possession in Indonesia, which may come from the government itself as well as from international donors.

The issuance of *Izin Prinsip* and *Izin Lokasi*, conducted either by the public or the private sector, has been an effective tool to control land development in Indonesia. Particularly in urban areas where economic activities are concentrated, strong control over land development is necessary to avoid its negative impacts. Local governments should consider appropriate options in developing their cities by accommodating and balancing all interests. To achieve that, a tighter and more selective process has to be carried out to give those permits only to suitable projects and to minimize the illicit behaviour of some staff, because the projects could bring great potential benefits in the future.

Indonesia still has challenging issues for its land tenure system, particularly in rural areas where there is a communal system. Communal land, such as in Kalimantan, Sumatra, Papua and other places throughout Indonesia was not totally and clearly improved by the government, which may create conflict horizontally among the community as well as vertically with the government. Most of communal land is found in remote areas and managed by the community with less infrastructure. Therefore, the involvement of government to this communal land is very limited. On the other hand, global issues concerning forestland management have become crucial because Indonesia has a large forest area. The active role of Indonesia in sustaining its forests has required applicable land policies that accommodate all interests up to community level. Once the community is aware that their central position is an important element of managing and sustaining land and related resources, the sustainability of forest management in rural areas can be achieved with supportive and constructive activities by both local and central government.

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10

Philippines



1. INTRODUCTION

Control and ownership of land continues to be an issue all over the world. In particular, the struggles that developing countries and countries in transition experience over land continue to threaten their countries' peace and economic development.

Poverty in the Philippines is relative rather than absolute. The country's geography, history and pre-Hispanic-, Spanish- and American-influenced cultures have contributed to a very unequal distribution of income and wealth. This distribution is almost synonymous with the skewed ownership of land; the poor are usually those people with the weakest property rights and less secure rights over land.

Land tenure systems are complex and diverse. In most cases, a country's history or political changes have caused the land tenure systems and property regimes to change (as in economies in transition). In the Philippines, land tenure issues somehow dictate the course of history and political changes. The country's land tenure system has evolved from indigenous tenure arrangements (customary/group rights) to individual ownership and it is still evolving.

1.1 The Philippines: Facts and Figures

The Philippines is located in Southeast Asia. Its northern neighbour is the Republic of China (Taiwan or Formosa); to the west is Vietnam; further west is Thailand; to the south is Indonesia and to the southwest are Malaysia and Singapore. The country is separated from its Asian neighbours by the Pacific Ocean on the east, the South China Sea on the north and west, and the Celebes Sea and the coastal waters of Borneo to the south.

The Philippines is a country with a history of foreign colonization. It was colonized by Spain for more than 300 years and was subsequently ruled over by the Americans. There were also cultural influences from neighbouring countries even before and during

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the Spanish regime, through trade with people from Indonesia, Malaysia and China.

Explorer Ferdinand Magellan's claim on the entire Islas de Filipinas as a colony for the Spanish king in 1521 (Douglas, 1970 cited in Malayang, 2001) consolidated the Philippines into a political unit. The present Republic of the Philippines was formed when independence from Spain was declared in 1898.

The country was not able to function freely politically with independence, however, because of the subsequent take-over by the United States through the Treaty of Paris of 1898. The Philippines became an independent and sovereign state in 1946 after the American Government granted it political independence.

The Philippines is an archipelago of 7,107 islands and islets collected into three geographical island groups: Luzon, Visayas and Mindanao. The land area is about 300,000 km² with a rugged topography and long and irregular coastlines. It is organized into 80 provinces (including the National Capital Region) with 136 cities and 1,498 municipalities (National Statistical Coordination Board, 2010). The climate is tropical and there are only two seasons, the dry and rainy seasons.

The form of government in the Philippines is democratic with its executive, legislative and judicial branches all being equal. Since 1992, governance has been substantially decentralized from the national level to the regions, provinces and cities/municipalities and extends to barangay (village) level; a barangay is the smallest political unit. About 80 per cent of Filipinos are Christians; ethnic groups, with their own dialects and distinct cultures, are spread all over the country. Islamic culture is concentrated in the south.

The Philippines is a country of diversity given its multi-linguistic, multi-ethnic and geographically dispersed population. The population reached just over 92.3 million in 2010, with an annual growth rate of 1.90 per cent by the end of 2010 (NSCB 2013). Land resources are: forestland (50 per cent), alienable and disposable (A&D) lands (47 per cent) and unclassified lands (3 per cent).

1.2 Property regimes and land tenure systems: historical evolution

1.2.1 Pre-colonial period

It is believed that early migrations were made by ancestors of *Aeta* and *Agta* tribes or “negritos” around 15,000 to 30,000 BC. Since then, the islands have been inhabited by successive migrations of people moving through the archipelago by boat, principally from the Malay Peninsula and Indonesia, but also from the coasts of Indo-China and from China and Taiwan as well. The last phase of migration was of Muslim traders coming from Indonesia.

Zaide (1994) explains that when the Spanish arrived in the country in the sixteenth century, they were surprised to see that early Filipinos had their own civilization and lived in well-organized, independent villages called *barangays* (from the term “*balangay*”, a Malay word meaning sailboat). Normally, a *barangay* had 30-100 households except in developed areas like Manila, where a *barangay* could have up to about 2,000 households. These were headed by a *datu* or chieftain. The *datu* was the administrative leader of the community (Constantino, 1975) but was not an absolute ruler. First, the scope of his authority was limited by a traditional body of customs and procedures; second, his position was inherited to the eldest son or, if none, the eldest daughter. Chieftainship, unlike ruling a class society, was not an exclusive occupation; although the chieftain exercised executive, judicial and military powers, he was also a farmer.

Concept of property rights

The notion of private ownership of land was irrelevant in the *barangay* social order as it was thought that it did not make sense to claim particular tracts permanently, given there was so much land available (Francia, 2010). William Henry Scott, the first historian to discuss pre-Hispanic land tenure in the Philippines, said that “[...] these lands were held in usufruct, not in fee simple - that is to use but not to own or alienate” (May, 2004).

At the time of Spanish conquest in the sixteenth century, advanced *barangays* were societies in transition and the idea of private property started to emerge in the more advanced communities. In Pampanga, a province near and north of Manila, for example, such private property could be forfeited as punishment for crimes, inherited by one’s children, or used as dowry (Constantino, 1975).

In Muslim communities, the combination of communal ownership with private possession is contained in the Muslim Code of Luwaran, which contains a provision for regulating the lease of cultivated lands but no provision for the acquisition or transfer of lands by private individuals, cession or sale of lands (*ibid*).

For the last 50 years, the accepted wisdom on land tenure in the colonial Philippines derived from a book written by John Leddy Phelan in 1959, in which he claims that it was the Spanish regime that radically transformed the nature of land tenure in the archipelago. This transformation was brought about by substituting the “European” concept of private ownership for the pre-Hispanic arrangement, which had emphasized communal ownership (May, 2004).

1.2.2 Spanish colonization (1521-1898)

Rediscovery of the islands

The rediscovery of the Philippines was in 17 March, 1521, when the Spanish, led by the Portuguese explorer Ferdinand Magellan, landed in Samar (Zaide, 1994). He paved the way for Spanish colonization and for the Christianization of the Philippines. The Philippines was

Spain's only colony in Asia and the Spanish introduced two systems that have greatly influenced the entire socio-economic and political development of the country: the *Encomienda* and *hacienda* systems. These two systems, though different but relatively connected, are the primary reason why the scattered communities of a working society were changed into an integrated country of divided people.

Encomienda system

Encomienda in the Philippines, like its Latin American model, was not a land grant. It was an administrative unit for the purpose of exacting tribute (tax) from the natives as a "gift" from Mother Spain to its loyal soldiers and followers. The responsibilities of the *encomenderos* are to protect the natives from outside force and to maintain peace and order, to help religious missionaries, and to help in the defence of the colony.

The *datus*, or chiefs, now called *cabeza de barangay*, were transformed into "collectors" charged with collecting tributes and forwarding them to the *encomendero* in the *pueblo* (urban area) or capital. However, the *encomenderos* did not own the land inhabited by the natives so most of the recipients considered these gifts (*Encomienda*) as a way to enrich themselves; they saw the tributes as payment for their long voyage and extreme hardships they endured while they were in a land far away from home. Abuses on exactions such as the tribute, forced labour, *bandala* (quota system for agricultural products) and compulsory enlistment in military service were introduced (Constantino, 1975).

Hacienda – landed estates

In the *hacienda*, as opposed to the *Encomienda*, the exploitative relations were based on and grew out of ownership from which the tenants derived their livelihood. The *hacendero* had the right of inheritance and free disposition (*ibid*). However, the *hacendero* disguised his exploitation with the fiction of a partnership with shared risks in production (sharecropping). Hence the term *kasamahan* (partnership) and *kasama* as tenants. There are three ways in which exploitative

activities were carried out in this system: unequal sharing of crops, which mostly favoured the *hacendero*, higher rents for lease arrangements and through mortgaging and lending money, which often had high interest rates and resulted in foreclosures on the peasants' scarce properties (*ibid*).

The friars and their land estates

Church and state were inseparably linked in the Spanish colony. The state assumed administrative responsibility while "conversion" was assigned to friars. At the lower levels of colonial administration, the Spanish built on traditional village organizations by co-opting the traditional *datus* or chiefs, thereby ruling indirectly. In the long run, friars became the "representatives" of the Crown in rural areas as the *encomendero* and Spanish administrators were either in the city or had left for Spain. Friars gradually accumulated vast amounts of land by royal bequest and, later, through purchase, donation, trickery, foreclosure on mortgages and outright usurpation (Canlas et al, 1988).

The rise of principalia

Between the traditional authority and the political privileges granted by the Spaniards, were the *principalia*, leadership with economic power. The *principales* were intermediaries between the Spanish colonialists and the people who consolidated their economic power to take advantage of opportunities to own private land (Constantino, 1975). The trend toward individual ownership with legal title accelerated during the seventeenth century when more and more chieftains appropriated the lands cultivated by their dependents and the workers were institutionalized as tenants (*ibid*). By 1800, the provincial hierarchy, heavily dependent on agriculture, was made up of the estate-owning friar orders, the land-owning *principalia*, and the tenant farmers and agricultural labourers (Francia, 2010).

Impacts on traditional land tenure

The introduction of the regalian doctrine, whereby all land belongs to the Spanish king except for land granted or disposed of by him, provided the impetus

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for the colonial masters and an elite few to accumulate land at the expense of the majority of the people. Many Filipinos were forced to leave the lowlands and opted to live in the mountains away from the abuses of Spanish administration. The introduction of Spanish Mortgage Law of 1889 provided some semblance of legality for vast ownership by the landed few, even if the land was acquired illegally.

With the adoption of a private property regime, the concept of land as a commodity also emerged and one important instrument of land accumulation was credit. Credit was primarily given in exchange for mortgaging land as security. The so-called pacto de retroventa or pacto de retro was a contract in which the borrower conveyed his land to the lender with the proviso that he could repurchase it for the same amount of money that he had received. However, the borrower, who had become the tenant or lessee of the land, could seldom accumulate the necessary money to repurchase. This system greatly favoured the landlord, because the money loaned in the pacto de retro was only between one-third and one-half of the true value of the land (Constantino, 1975). One of the major land issues during this time was land grabbing. The Royal Decree of 13 February 1894, known as the Maura Law, gave landholders only one year in which to secure title to their lands; after the deadline, untitled lands were forfeited. This decree was not even known to small landholders in the provinces, which allowed their land to be included in the titles of big landowners and left small farmers with no alternative but to accept tenant status (ibid). Landlordism in the Philippines had begun.

Forest management and tenure

During Spanish colonization, royal decrees were promulgated which placed land and the natural resources in the Philippines under state control. The introduction of the Regalian Doctrine undermined traditional rights to land as well as prior claims by indigenous communities to forest resources. Furthermore, rights to forest use were granted to a few “privileged” individuals, which led to the conversion of forestland into agricultural crop plantations. Spanish land laws weakened customary Filipino systems of land tenure, depriving indigenous peoples of their rights to their land. Instead, the colonial government and the local elite claimed the land for themselves (Pulhin and Dizon, 2003).

1.2.3 Revolution, war and United States control (1898-1945)

Friar landowners were absentee landlords who left the management and supervision of their estates to administrators whose efficiency was measured by their ability to extract more profit. The importance of the land question and the depth of the grievance against the friars are evident from the fact that the first provinces to revolt were those in which there were extensive friar estates (Constantino, 1975). In 1896, revolution spread throughout the major islands and in 1898, the Spanish-American War started which the Americans won. This subsequently led to a revolt against American rule. (Zaide, 1994).

American influence

The American colonizers introduced the Torrens System of Registration (based on Massachusetts law) into the Philippines in 1902 under which land was to be surveyed and property rights were registered. The American colonial government also introduced the Friar Lands Act of 1903, which prescribed the conditions for the sale and lease of the friar estates (an estimated 166,000 hectares of friar land held by the Catholic Church) with preference to be given to some 60,000 tenants who worked the land. Despite this, over half of the area

acquired passed directly, by sale or lease, to American and Filipino elites. In addition, the requirement that the full acquisition price, plus interest, be repaid by the tenant beneficiaries put the land beyond their financial reach. Homesteading was also introduced in 1903 (as in the American West), wherein a Filipino peasant could occupy public land and, with proof of cultivation, ownership of the land could be given to him. Only very few applied for this because of three main factors: “vacant” land was too far and lacked infrastructure, there was a lack of government assistance, and very few people understood the law (Constantino, 1975).

During this time, tenants were either *inquilinos* (cash tenants) or *kasamas* (share tenants). By the 1930s, most *inquilinos* had become sharecroppers mainly because they could not pay their fixed rents and were short of capital (*ibid*). The Rice Tenancy Act of 1933 provided for a 50-50 sharing arrangement between the tenant and the landowner; a ceiling of 10 per cent interest per annum on tenants’ loans; and the prohibition of arbitrary dismissal of tenants. In 1936, a Public Land Law was also enacted under which public land could be accessed through homestead, free patent (by prescription), sale or lease. This law legalized the monopolistic structure of landholdings and even facilitated their expansion.

Forest management and tenure

The colonial government asserted ownership over forests and forestland through the 1902 Organic Act and the 1935 Constitution. These laws perpetuated the spirit of the Regalian Doctrine that assumed all forestland in the entire archipelago belonged to the state. With the arrival of American logging companies in the country, the forest industries in the Philippines flourished and were encouraged during the American colonial period (Pulhin and Dizon, 2003). However, the boom also prompted a steady loss of forests throughout the same period and severe deforestation continued until the Second World War due to heavy exploitation of forests for war purposes (*ibid*).

“The introduction of the regalian doctrine, whereby all land belongs to the Spanish king except for land granted or disposed of by him, provided the impetus for the colonial masters and an elite few to accumulate land at the expense of the majority of the people.”

Impacts to Land Tenure

American policy favoured rich landowners and foreign corporations, especially those with American interests. Although the Friar Lands Act of 1904 offered more land for Filipino citizens, the terms of sale benefited rich landowners more than the small farmers. The American procedure for the acquisition of land with Torrens Titles to the property displaced and discouraged small farmers who were too poor or ignorant to register their property. Finally, the homestead programme of enabling Filipinos to acquire 24 hectares of public land proved to be a failure. Without government assistance, poor farmers could not take advantage of the homestead offer (Zaide, 1994).

The Americans had a two-fold interest in strengthening the Filipino landed elite. Economically, it was the land of the elite that provided the raw materials that the Americans required. Thus, the *hacienda* system introduced during the Spanish occupation was strengthened under American rule. Tenancy problems worsened during this period (Constantino, 1975). The Share Tenancy Act of 1933, which was supposed to regulate tenancy contracts for the protection of the peasantry, was problematic because of a provision that the law could only be invoked upon petition of the majority of municipal councils in a province (*ibid*).

1.2.4 Post-Second World War (1946-1965)

War reconstruction and rehabilitation

The Philippines finally became an independent country on 4 July 1946, and the post-war administration was faced with staggering problems. The country’s

infrastructure, culture, finances and its economy were in ruins. To help with rehabilitation, the United States established preferential trade relations through the U.S.-Philippine Treaty of General Relations (Zaide, 1994). With this, the Philippines was forced to agree to give U.S. investors equal economic rights with Filipinos, including the right to exploit the country's natural resources. In addition to its economic problems, the Philippines also faced growing tensions between landowners and the rural poor.

Attempts to improve the land tenure situation

Reacting to the peasant dismay expressed in the *Hukbalahap* rebellion, Ramon Magsaysay campaigned for the presidency in 1953 by stressing the land issue with the slogan “land for the landless” and promising to rid the land tenure system of “injustice and oppression” (Constantino and Constantino, 1978). After his victory, he introduced two pieces of reform legislation, the Agricultural Tenancy Act of 1954 and the Land Reform Act of 1955. The Agricultural Tenancy Act was supposed to undercut landlords’ power by allowing tenants to shift from share tenancy to leasehold, by reducing land rents, and by prohibiting the ejection of tenants as prescribed by the Court of Agrarian Relations. The Land Reform Act of 1955 called for the negotiated purchase or expropriation of private land for subdivision and resale to tenants at cost, but exempted land of less than 144 hectares. Congress chose to limit the scope of the reform to land in excess of 300 contiguous hectares in the case of private rice farms, 600 hectares for corporations, and 1,204 hectares for private farms with crops other than rice.

The final law, although noteworthy for embracing the concept of compulsory expropriation, contained several critical flaws. The high retention limits meant that less than 2 per cent of the nation’s agricultural land was even potentially subject to redistribution. In the event of expropriation, little guidance was provided to determine the land value. Faced with these various restrictions, the government acquired less than 20,000 hectares – less than 1 per cent of the nation’s then total farm area

– in the first six years of the programme (Riedinger, 1995). The two acts became ineffective as the landlord-dominated Congress restricted their enforcement by providing only meagre sums to the programmes, while watering down the provisions by raising retention limits and inserting additional requirements (Vargas, 2003).

In 1963, an Agricultural Land Reform Code (Republic Act 3844) that abolished share tenancy was enacted during President Diosdado Macapagal’s administration. It was intended to emancipate the tenants, shift tenancy arrangements to leasehold, provide for the expropriation of private agricultural lands and reduce the retention limit from 300 hectares to 75 hectares. However, Congress only allotted PHP 1 million to implement a programme that was estimated to cost at least PHP 200 million within a year of its start. But even if finance had been provided, the Reform Code would still have benefited only 10 per cent of Filipino tenants because of provisions favouring large landowners (Constantino and Constantino, 1978).

Forest management and tenure

After gaining its independence, subsequent Philippine constitutions, for example those of 1973 and 1987, stipulated that all public lands, meaning all the classified forestland, belonged to the state, thus reinforcing the Regalian Doctrine. As a result, the power to allocate, classify, regulate and manage the forests and timberland remained with the central government. Forest exploitation increased, even during the post-war period when large-scale logging expanded to meet the increasing market demands for timber in Japan and the United States. This generated more revenue, which the government could use to help accelerate national rehabilitation and development. However, many politicians and well-connected individuals also amassed wealth from the exploitation of natural resources (Pulhin and Dizon, 2003).

Impacts on land tenure

Attempts to improve the land tenure system in the Philippines within the period proved to be short-

sighted and political commitment was lacking. Despite the good intentions of a few people in government, radical improvements were not achieved because the influence of the landed class was widespread in the political arena, particularly in Congress. As pointed out by Huntington (1968), there was a basic incompatibility between parliament and land reform. Also, it is clear that intentions to improve the plight of the peasants through redistributive reform were more of a counter-insurgency strategy than a serious and practical intervention, which made it vulnerable to attacks of the landed class and a failure from the outset.

The abolition of share tenancy arrangements and the adoption of a leasehold system seemed to be a political gimmick intended to strike a balance between the peasants and the landed class. Such a move, in some cases, reversed the objectives of the whole land reform process because landlords moved to hire farm labourers instead.

1.2.5 Marcos Regime (1965-1985)

The rise of a dictator

The 1965 elections gave the presidency to Ferdinand Marcos and he was easily re-elected in 1969. However, lacklustre economic growth ensued and criticism increased over the U.S.'s dominant economic position in the Philippines. By the early 1970s, two separate forces were waging guerrilla war on the government. Citing the need for national security, Marcos declared Martial Law on 21 September 1972. Congress was dissolved, opposition leaders were arrested and strict censorship was imposed. Marcos became a dictator.

The 1972 Operation Land Transfer Programme

Although Operation Land Transfer dates to the 1963 Agricultural Land Reform Code (Republic Act 3844), it was only with the adoption of Presidential Decree 27 (PD 27) that the programme had some effect. Pursuant to PD 27, tenants of rice and corn land whose landlords had more than seven hectares were permitted to purchase the parcels they tilled. By executive fiat, eligible

tenants were deemed "owners" of "family-size farms", which the decree set at three hectares of irrigated lands or five hectares of non-irrigated lands. However, receipt of the Certificate of Land Transfer did not signal the termination of beneficiary rent obligations. Land valuation and landowner compensation had to be completed before beneficiaries could begin amortization payments. Only on the completion of these payments would beneficiaries receive final title, an Emancipation Patent (EP).

Impacts on land tenure

Zaide (1994) considered land reform to be Marcos's greatest achievement under Martial Law, citing the fact that in 1981, 532,153 tenant farmers became owners of rice and corn land in 45 provinces. This led to self-sufficiency in rice production and rice exports to other countries and was consistent with Marcos's emphasis on increased rice production through the so-called Green Revolution. However, Francia (2010) believes that Marcos's land reform failed because no sustained attempt was made to implement it. A mere 1,500 tenants, only 0.5 per cent of the supposed beneficiaries, had titles by 1979, which was 0.3 per cent of the land reform area. Moreover, coverage did not include such sectors as landless rural workers and tenant farmers working crops other than rice or corn. Vargas (2003) writes that Marcos's land reform programme succeeded in breaking up many of the large haciendas in Central Luzon, a traditional centre of agrarian unrest, where landed elite and Marcos's allies were not as numerous as in other parts of the country. In the Philippines as a whole, however, the programme was generally considered to be failure.

Forest management and tenure

Deforestation continued to rise during the Marcos regime as the number of logging concessionaires grew. Timber Lease Agreements (TLAs) accorded wealthy private individuals the rights to vast forest concessions and were used as a tool to cement political patronage (Pulhin and Dizon, 2003).

In July 1982, a Letter of Instruction 1260 was issued providing for the Integrated Social Forestry Programme (ISFP). The ISFP granted stewardship agreements to qualified individuals and communities that allowed for the continued occupation and cultivation of upland areas, which, in return for, they were required to protect and reforest. The programme provided tenure for a period of 25 years, renewable for another 25 years, through a Certificate of Stewardship (CS) or a Certificate of Community Forest Stewardship (CCFS).

Impact analysis

Several decades of forest exploitation brought about its inevitable negative impacts. These programmes, while seen as the forerunners of the present community-based forest management programme of the government, did not really provide land tenure security to forest occupants. Rather, the occupants were still treated as squatters and were tapped by the government merely as source of cheap labour to rehabilitate what had been destroyed and to protect the remaining forest resources.

Also, the emergence of social/community forestry as a development strategy in the Philippines should be understood within its broader political context during the 1970s and 1980s. Social forestry emerged not only in response to the worsening poverty and forest degradation in the Philippine uplands, but also as a state strategy to control and stabilize the intense political unrest in the countryside. It was part of the overall rural development counter-insurgency strategy during this period of the Marcos administration (Bello *et al.* 1982).

Urban land reform

In the urban sector, particularly in Metro Manila with its growing population and increasing informal settlements, access to land has been addressed through an urban land reform and housing program that has provided opportunities for informal settlers to own land they occupy. The Urban Land Reform Act (Presidential Decree 1517) was enacted in 1978 to protect long-time residents or tenants on urban land and to prevent an unreasonable increase in the price of urban land. The



Baseco informal settlement in Manila, the Philippines @UN- Habitat/ Gerald M. Nicolas

National Housing Authority (NHA), through its various programmes - such as zonal improvement program, slum upgrading, community mortgage program - and special projects developed most sites. Other sites were developed by the local government units or were purchased by a concerned community organization in the area.

However, the ever increasing rural to urban migration and the existing legal framework (squatting was still a crime at the time!) did not move the whole program to the level where informal settlements had secure tenure.

1.2.6 People Power Era (1986-present)

People Power Movement and democratic transitions

The assassination of opposition leader Benigno “Ninoy” Aquino, Jr. was the beginning of the collapse of a dictatorial regime. In 1986, Aquino’s widow, Corazon, became president after a people’s revolution in February 1986. President Corazon Aquino’s government faced mounting problems, including coup attempts, significant economic difficulties, calamities and pressure to rid the Philippines of the U.S. military presence. The failure of the Marcos land reform programme was a major theme in Aquino’s 1986 presidential campaign and she gave land reform top priority: “Land-to-the-tiller must become a reality, instead of an empty slogan” (Vargas, 2003). She laid out the democratic transition and, in particular, introduced the Comprehensive Agrarian Reform Law of 1988, but this was not until 13 peasants had been gunned down by government troops in a pro-agrarian reform rally, now commonly called the Mendiola Massacre.

In 1992, Aquino was succeeded by President Fidel Ramos. He immediately launched an economic revitalization plan premised on three policies: government deregulation, increased private investment and political solutions for the continuing insurgencies in the country. His political programme was somewhat successful, forging a peaceful agreement with the

Marxist and Muslim guerrillas. During his tenure, the Indigenous Peoples Rights Act (1997), the Urban Development and Housing Act (1992) and Local Government Code (1992) were promulgated.

Joseph Estrada, a former film actor, was elected president in 1998 but he was stripped of the presidency in 2001 amid mounting corruption charges. Vice-President Gloria Macapagal-Arroyo was sworn in as his successor and was then elected in her own right in May, 2004.

2. ANALYSIS OF LAND TENURE SECURITY

2.1 Agricultural land

Agrarian Reform Republic Act No. 6657, otherwise known as the Comprehensive Agrarian Reform Law (CARL), was enacted on 10 June 1988, and it instituted the Comprehensive Agrarian Reform Programme (CARP). On 23 February, 1998, President Fidel Ramos signed Republic Act No. 8532 extending CARP for another 10 years and injected another PHP 50 billion into the programme. CARP covered all agricultural land regardless of tenure and crop, which was approximately 8 million hectares. Previous programmes were concerned only with tenanted rice and corn land. Apart from land distribution, CARP — unlike past programmes on land reform - included the provision of support services to both farmer-beneficiaries and affected landowners. These included irrigation facilities, credit, infrastructure, training, marketing and management assistance, and support for cooperatives and farmers’ organizations. Separate courts were also established that focused solely on agrarian-related disputes.

Table 1 gives details of the CARP land distribution, although these figures are contested by some civil society organizations. In addition, CARP was able to reduce the retention limit from 144 hectares in the 1950s to 5 hectares. Under the program, access to land by poor farmers and farm workers could be achieved through distribution (if land was public land) and redistribution

(where land was expropriated by government for landless farmers). Leasehold arrangements were institutionalized and provided clear-cut guidelines on the contract arrangements. However, this was not a priority in the CARP implementation. The formation of cooperatives among the small farmers were encouraged and assisted. Later on, the establishment of ARCs was institutionalized where “convergence” of government resources and assistance was afforded with the assistance of local government units and non-government organizations.

Table 1. CARP Status of Land Distribution, 1987- December 2012

Land Type	Accomplishment		
	RA 6657 (1987-June 2009)	RA 9700 (July 2009-Dec. 31, 2012)	TOTAL
DAR			
Private Agricultural Lands (hectares)	2,321,064	196,055	2,517,119
Non-Private Agricultural Lands (hectares)	1,727,954	209,151	1,937,105
TOTAL (hectares)	4,049,018	405,187	4,454,205
ARBs	2,396,857	210,586	2,607,443

Source: DAR 2013

CARL lapsed in December 2008 and was extended until June 2009. In August 2009, the land reform law was extended for five more years thru Republic Act No. 9700 or the Comprehensive Agrarian Reform Program Extension with Reforms, taking effect on July 1, 2009, of which land acquisition and distribution (LAD) is expected to be completed by June 30, 2014. RA No. 9700 allocates PHP 150 billion for the programme of which 60 per cent of the fund will be for LAD, while the rest will be for support services.

Under RA 6657 or the Comprehensive Agrarian Reform Program (from 1987 to June 2009), the Department of Agrarian Reform (DAR) covered 2,321,064 hectares of private agricultural lands and 1, 727, 054 hectares

of non-private agricultural lands, covering a total of 4, 049, 018 hectares This is equivalent to 2, 396, 857 ARBs installed.

Congruently, under RA 9700 (July 2009 – December 2012), 196,055 hectares private agricultural lands and 209,151 hectares of non-private agricultural lands were distributed. This total to 405,187 hectares, equivalent to 210,586 ARBs installed.

2.2 Forest land

The restoration of the Philippine democratic government beginning in 1986 put the issue of social equity at the center of the country's forest policy agenda (DENR Policy Advisory Group, 1987). To guard against the inequities of the past monopolistic allocation, the new Constitution contained mandates for equitable access and distribution of benefits from the country's natural resources. Policy reforms were initiated that envisioned the dismantling of the quasi-monopolistic forestry industry controlled by a select few, and the installation of a community-based forest management system that provided tenure security to upland communities.

In 1987, the National Forestation Programme under the Aquino administration promulgated a new reforestation policy offering market incentives and involving communities, families, NGOs and corporations in management initiatives. After about three years of implementation, the program paved the way for the Forest Lease Management Agreement (FLMA), a 25-year tenure arrangement that entitled its holders to develop the project site and use the products.

Department Administrative Order (DAO) No. 123 in 1989 by the DENR established the Community Forestry Programme (CFP). This aimed to provide the upland farmers with legal access to forest resources and the financial benefits derived from them. Under the program, tenure is given to qualified community organizations through the Community Forest

Management Agreement (CFMA) for a period of 25 years, renewable for another 25 years.

Community forestry continued to expand in the 1990s with the implementation of other people-oriented forestry programmes throughout the country. Its development has been facilitated by numerous agencies and non-government organizations providing financial as well as technical support. The Aquino administration established a system of protected areas and also recognized the rights of cultural communities through two policy instruments; these were the Republic Act No. 7586, otherwise known as the National Integrated Protected Areas System Act of 1992, and the issuance of a Certificate of Ancestral Land Claims (CALC). The NIPAS Act encouraged community participation in the delimitation of land boundaries and in the management of protected areas, while the CALC reasserted the rights of indigenous peoples to their ancestral land. These two important policy instruments underlined the role of public and community involvement in resource management.

In 1995, President Fidel V. Ramos issued Executive Order 263, which institutionalized the Community-Based Forest Management (CBFM) program. Declared as the national strategy to attain sustainable forest management and social equity, the program integrated all people-oriented programmes that espoused public participation in local forest management. To operationalize social equity and public participation in forest resources management, a National Strategic Plan earmarked 9 million hectares of the country's total classified forestland of 15.8 million hectares for community management by 2008. This represented a major departure from the previous forest management approach, which placed 8-10 million hectares of forest land (one-third of the country's total land area) under the control of the powerful elite, particularly the timber logging corporations (Pulhin and Dizon, 2003). As of 2001, CBFM covered about 5.7 million hectares of forest land and involved approximately 496,000 households.

Of these, 4.4 million hectares were tenured area (DENR, 2001).

Sustainable forest management

Since the 1990s, the DENR has worked on the approval of the Sustainable Forest Management Act bill. The Bill, which has not been approved yet by Congress, mandates the development and adoption of a sustainable forest management strategy based on rational allocation of forestland uses. It also mandates the promotion of land-use practices that increase productivity and conserve soil, water and other forestland resources, the protection of existing forest resources and the conservation of biodiversity, rehabilitation or development of denuded areas to expand the forest resource base and promote food production activities. The proposed new forestry law includes important policy reforms on modes of access to forest resources, devolution of the management function of some forest areas to local government units, the NIPAS and IPRA laws and the CBFM.

2.3 Ancestral Land

In 1997, the Philippine Congress enacted the Indigenous People's Right Act of 1997 (otherwise known as IPRA Law). Through IPRA, ancestral domain was finally recognized with legislation as private, discrediting the more than century-old notion of state ownership over all classified forestland. Under this law, indigenous peoples (IPs) can apply for a Certificate of Ancestral Domain Title (CADT) or Certificate of Ancestral Land Title (CALT) to certify their ownership of the land. The IPRA, however, prohibits the sale of these lands despite the fact that they are private. Nonetheless, traditional rights and practices may be used in determining the IP's bundle of rights in recognition of the cultural diversity of the different IP groups.

Some issues are emerging in the implementation of the IPRA with regard to some conflicts with the Regalian Doctrine, the Torrens System of registration and boundary issues, among others.

2.4 Urban Land

The practice of identifying urban land reform sites was discontinued from 1989 due to opposition from landowners and the regressive effect of the law on land markets. Instead, government scaled up community-based housing programmes to provide a mechanism with which informal settlers could gain access and secure tenure on urban lands. These programmes provided low cost financing to organize household communities for land acquisition and development.

The first of these programmes was the Community Mortgage Programme (CMP) implemented in 1988 by the National Home Mortgage Finance Corporation (NHMF). The other programmes were the Group Land Acquisition and Development (GLAD) Programme implemented by the Home Development and Mutual Fund (HDMF) and the Land Tenure Acquisition Programme (LTAP) of NHA. Of all these, the CMP

remains the most availed of by the informal settlers, particularly in Metro Manila and nearby regions 3 and 4 where informal settlers congregate in search of better opportunities. This explains the relative emphasis in these areas in respect of CMP implementation.

CMP has some successes and yet, there were several problems and shortcomings too. First, the CMP was complex. Many poor communities could not cope with its administrative processes or understand the programme's complex procedures. Second, organizing communities was difficult. Third, the CMP scope was limited; it was designed mainly to help squatters on private land but did not offer much help to low-income renters. Fourth, the main benefit from CMP was access to land, but it provided little in terms of solving the problems of slum upgrading and providing basic services or infrastructure (Llanto and Ballesteros, 2002).



Poor land use planning increases the effects of flooding in the Philippines © UN-Habitat/ Gerald M. Nicolas

With the passage of a comprehensive law, RA No. 7279, otherwise known as the Urban Development and Housing (UDHA) Act of 1992, some of the limitations of the former programmes were remedied. With this law, three distinct contributions to security of tenure were provided, namely: the decriminalization of squatting, except for reasons of safety; the relocation of informal settlements was prohibited unless the resettlement area was acceptable to the community; and the provision of socialized housing to at least 20 per cent of the area that is subject to housing development. The administration of the process was also addressed through the establishment of the HUDCC, through which all efforts including housing, slum improvement, land acquisition, and financing mechanisms were coordinated.

Land proclamations

Inspired by Hernando de Soto's book *The Mystery of Capital*, and as a political strategy to win the support of the urban poor, President Arroyo began to proclaim idle government land in urban areas as socialized housing sites. Government land which was already occupied by informal settlements was reserved for the "squatters" to own with the assistance of government agencies for financial help and the provision of basic services and infrastructures. As noted by UN-Habitat (2004), the policy did not cover informal settlements on private land but nonetheless, it was a positive and pragmatic response that encouraged poor households to improve their homes and neighbourhoods.

Once the land was proclaimed, the national government, working with local government, issued a Certificate of Entitlement to Lot Allotment (CELA) prior to the

issuance of individual titles. By 2009, the HUDCC had issued 111 proclamations providing security of tenure to 255,600 homeless families and involving 27,300 hectares of land (Arroyo, 2009).

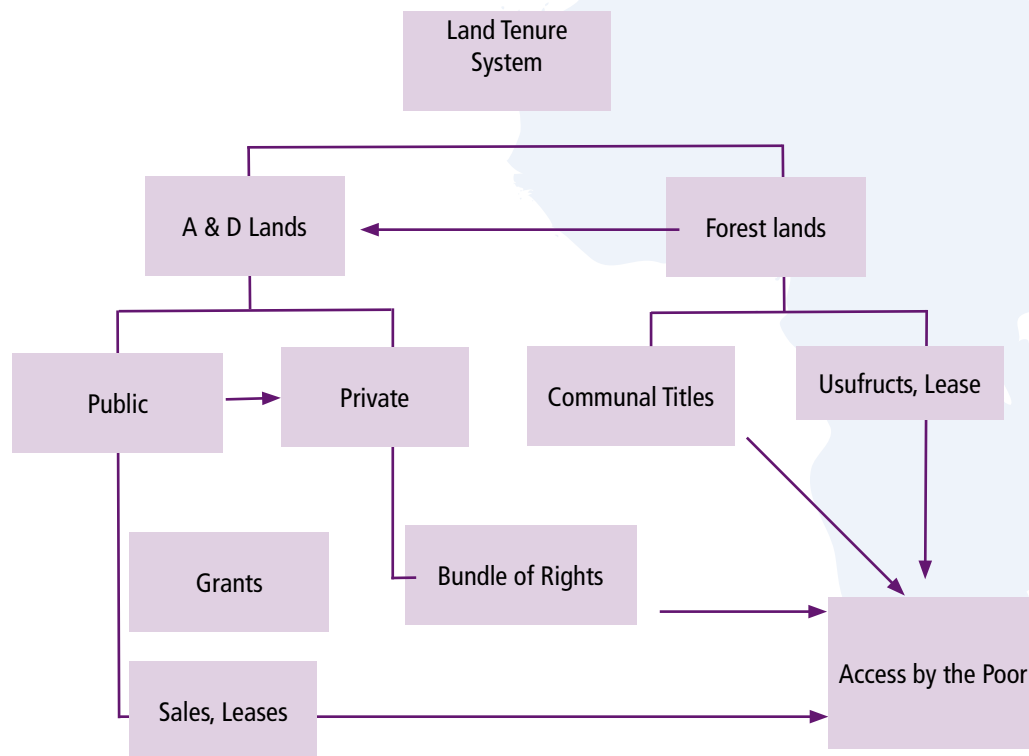
Antonio (2007) further highlighted that beneficiaries of land proclamations gained security of tenure and tends to improve their housing, livelihoods and communities in general.

Karaos, et al (2012) provided the comprehensive description and details on urban tenure programmes in the Philippines which also highlighted the CMP programme, the land proclamations and usufruct arrangements with some case studies.

Condominiums

Due to lack of space in urban centres in the Philippines, condominiums continue to gain popularity with a mix of middle-class and upper-class people. The Condominium Act (RA 4726) allows foreigners to buy condominium units and shares in condominium corporations of not more than 40 per cent of the capital stock of a Filipino-owned or controlled corporation. Condominiums are often located in the economic centres of cities, where land and space is relatively expensive. With the growing urban population and inefficient traffic system and transportation network, the proliferation of condominiums is seen as an immediate solution for those who want easy access to basic services and economic activities in the urban areas. A Condominium Certificate of Title (CCT) is the instrument conveyed to a condominium unit owner.

The present land tenure system in the Philippines is described in Figure 1.



Source: Antonio, 2006

3. SWOT ANALYSIS OF THE CURRENT LAND TENURE SYSTEM

Table 7. SWOT Analysis

Themes	Opportunities	Threats
Land governance	<ul style="list-style-type: none"> Decentralized functions to local government units and de-concentration of functions of government agencies at the field level Presence of active civil society and private sector organizations in the land sector in both urban and rural areas Availability of sector-wide assessments capturing the key challenges of the land sector and possible way forward Presence of land programmes/projects tackling land issues at a macro level, e.g. LAMP Presence of initiatives to make the land administration more efficient and responsive 	<ul style="list-style-type: none"> Power, politics and corruption are still the driving force in the land sector No integrated mechanism and political commitment (and possibly no realization yet) to address land issues in an integrated and holistic manner Very few land champions Lack of vision Very difficult to pass legislation No clear guidance or regulations on addressing land issues during disaster situations, or any pro-active measures
Institutional arrangements	<ul style="list-style-type: none"> Presence of ad hoc committees to discuss land issues at different levels (e.g. national, regional, city/municipality) 	<ul style="list-style-type: none"> Too many institutions administering land Priorities are limited to their individual mandates and functions Cooperation and coordination among agencies are only voluntary No mechanism to resolve conflicts and overlap among agencies
Records management and information	<ul style="list-style-type: none"> Presence of technology and available skills Exposures of both government and private sector towards good land records management and information system, i.e. training, etc. Efforts to computerise land records are increasing 	<ul style="list-style-type: none"> Sharing of land information is voluntary No uniform standards and protocols, e.g. computerization, records validation, etc. Limited resources for the improvement of records and information management Limited skill and enthusiasm in the public sector for computerization
Land conflict management	<ul style="list-style-type: none"> Laws and regulations are in place Institutional responsibilities are clear Alternative conflict management are increasingly recognized 	<ul style="list-style-type: none"> Very inefficient, lengthy and costly Corruption exists, e.g. courts Forum shopping is possible Alternative approaches are not yet institutionalized Affordability (and knowledge) issues for the poor
Capacity building and education	<ul style="list-style-type: none"> Advanced learning from both public and private sector is increasing, e.g. post graduate courses, training, etc. Presence of technology and skills Increasing recognition of the need to upgrade university curriculums, etc. Continuing professional education for all professionals is in place 	<ul style="list-style-type: none"> Appointments to government positions are more politically motivated than competency based. Development in the education sector is slow Skilled human resources tend to go to private practice or abroad Professional bodies need strengthening
Issuance of various and alternative land tenure instruments	<ul style="list-style-type: none"> Most land laws and regulations are in place Agency responsibilities are somewhat clear Various rights to land can generally be recognized through the issuance of appropriate land tenure instruments 	<ul style="list-style-type: none"> Titling is still a preferred option for the government and citizens Some alternative approaches are not yet institutionalized Politics and corruption still persist in this area Lack of resources Lack of a unified vision

Themes	Opportunities	Threats
Land reforms	Increasing number of initiatives to institute reforms in the land sector, e.g. land valuation, agrarian reform, urban issues	Vested interests might delay reforms or even stop reform measures Lack of vision and leadership might delay reforms or may water down intended reform measures
Land Policy Development	Increasing number of good laws pending in Congress Increasing awareness on the need to address land issues	Vested interests might delay reforms, water down legislative measures or even stop reform initiatives Lack of leadership tends to delay the passage of good legislation
Improving Security of Tenure	Increasing recognition of alternative tenure arrangements particularly in the urban areas Increasing knowledge and exposure to other alternative and innovative approaches to improving security of tenure Increasing demand from both urban and rural areas on security of tenure Increasing recognition from the professional and private sectors of their role in assisting the poor to improve their tenure security	"Culture" tends to stay with freehold titles as the absolute instrument for secure tenure Legal and technical bottlenecks tends to block efforts to institutionalize other tenure approaches Lack of vision and awareness about providing secure tenure on a large scale and the cost and time it takes Most land professionals tend to recommend state-of-the-art technology and expensive solutions

Source: Authors, 2010

4. TRENDS IN LAND ADMINISTRATION SYSTEM

International agreements and conventions that the Philippines has signed have provided the impetus for prioritizing reforms in the land administration system. One international agreement, for example, is on the Millennium Development Goals, of which the proportion of households with access to secure tenure is an indicator of Goal 7 (ensure environmental sustainability), target 3 (achieve a significant improvement in the lives of at least 100 million slum dwellers by 2020).

The rapid development in information technology has provided an incentive for the public and private sectors to use technology for service delivery and efficiency. There are many initiatives in the land sector, including the use of state-of-the art technology in mapping and the computerization of land records and surveying. A very active private sector also contributes to this trend. However, efforts are aimed at greater efficiency and faster delivery service rather than changing the norms and making lasting reforms.

Strong civil society and grassroots organizations in both urban and rural areas tend to improve the land administration system with regard to sharing of information, demanding a higher standard of public service and exposing irregularities in land allocation and corrupt practices. In most cases, the government tends to involve civil society in its policy formulation and development, including during implementation at the local level. However, "trust" issues between the government and civil society organizations and the government and the private sector serve as a "barrier" to a more harmonious working relationship.

4.1 Philippine Development Plan (PDP) 2011-2016

The Philippine Development Plan 2011-2016 was formulated in accordance with the constitutional provision of Section 9, Article VII, directing the government's economic and planning agency to "implement continuing integrated and coordinated programmes and policies for national development".

PDP focuses on the following cross-cutting key strategies: (a) boosting competitiveness to generate employment; (b) improving access to financing; (c) investing massively in physical infrastructure; (d) promoting transparent and responsive governance; and (e) developing human resources through improved social services.

Chapter 10 of the PDP is on the Conservation, Protection and Rehabilitation of the Environment and Natural Resources, whereby in order to improve the conservation, protection and rehabilitation of the country's natural resources, the sector shall pursue sustainable use and integrated management. This strategy is also intended to improve land administration and management:

- a. Fast track the cadastral survey to delineate boundaries of all municipalities/cities, provide economic data for land-based development studies and projects and facilitate land disposition and titling;
- b. Accelerate the titling of agricultural and residential lands and ancestral lands in partnership with DAR, NCIP, LRA and LGUs to improve the socio-economic condition of beneficiaries and provide security of land tenure;
- c. Rationalize land policies and laws for harmonized and effective land administration laws;
- d. Incorporate environmental safeguards in the issuance of foreshore leases, taking into account the likely effect of climate change;
- e. Intensify a more vigorous nationwide campaign against the proliferation of fake or fraudulently-issued certificates of land title;
- f. Strengthen the management of land resources information and cadastral information through computerization and in partnership with other land-related agencies, local governments and the private sector for improved land administration services and revenue collection;
- g. Enhance the capacity and competence of professionals, practitioners and workers in the land

sector, supporting them with modern technology and land-resources information made available at national and local levels and in the private sector; and

- h. Develop a national country programme to combat land degradation and poverty in marginal areas and rural communities, and mainstream issues of sustainable land management (SLM) and desertification, land degradation and drought in agriculture and environment planning and policy formulation.

4.2 Land Administration and Management (LAM) Programme

To date, seemingly there is only one comprehensive multi-agency programme that is trying to address the complex issues surrounding the land administration - the Land Administration and Management Programme.

The LAM Programme is a long-term commitment by the government to increase land tenure security and improve the efficiency and effectiveness of the land administration system. The overall goal of the programme is to alleviate poverty and enhance economic growth by improving land tenure security and fostering the development of efficient land markets in rural and urban areas. It does this through the development of an efficient system of land titling and administration based on clear, transparent, coherent and consistent policies and laws and supported by an appropriate institutional structure. The programme is now in its second phase (and being extended), and the outputs include completion of land registration in three provinces with the target of distributing 101,626 titles in rural and urban areas and to expand the work on building the land information and record systems. Other activities include streamlining of titling procedures through reforms in surveying, mapping and adjudication of rights, capacity building, policy development and improved service delivery through One-Stop-Shops. Through LAMP, several pieces of legislation have been proposed and some have been passed that have improved tenure security and land

Table 3. Proposed and Passed Bills Under LAMP

Proposed	Passed
<p>The Land Administration Reform Act (LARA)</p> <p><i>The LARA Bill aims to integrate land administration agencies (LRA/RoD, NAMRIA, and LMB) into a single entity called the Land Administration Authority (LAA). The proposed LAA aims to enable reforms in the land administration system geared towards sustainable management of resources and records; standardization of the titling process; fully decentralized service through One Stop Shops; and the development of increased transparency and accountability across the whole administration process.</i></p>	<p>The Valuation Professionalization Bill (Real Estate Service Act) – approved as Republic Act No. 9646</p> <p><i>The Bill provides for the creation of a board that will regulate and supervise real estate practitioners through education, examination and periodic evaluation. Expected benefits include the professionalization of real estate service practitioners to strengthen their accountability and protect public interests.</i></p>
<p>The Valuation Reform Act</p> <p><i>The Bill proposes the creation of the National Appraisal Authority (NAA). The NAA aims to regulate and oversee the development and maintenance of a just, equitable, independent and nationally consistent real property valuation system, the development of a single valuation base and the separation of the valuation and assessment function from tax setting and political influence.</i></p>	<p>Amendments to the Free Patent Provisions of the Public Land Act – approved as Republic Act No. 10023 or an Act Authorizing the Issuance of Free Patent to Residential Lands</p> <p><i>The Bill provides for a shortened required occupation period from 30 years to 10 years, and the extension of free patents to residential lands. Expected benefits include security of tenure; streamlined procedures and requirements due to the shorter time required for occupation; increased economic activity and a wider tax base.</i></p>

Source: LAMP 2009

administration system. Table 3 shows a list of these bills.

President Benigno S. Aquino III, as Chairperson of the National Economic and Development Authority (NEDA) Board approved in September 2012 the Additional Financing for the World Bank-assisted Land Administration and Management Project (LAMP 2) which costs PhP2.68 billion. This will provide additional funding for the LAMP 2 in establishing a land information system and improving land tenure security in the country. It will develop an efficient system of land titling and administration that will foster the development of efficient land markets in rural and urban areas. Activities in this project include scanning of maps (e.g., cadastral maps, projection maps, survey plans, and land classification maps) and documents (e.g., lot data computations, public land applications, survey returns), geo-referencing, and encoding, among others.

4.3 Republic Act (RA) No. 10023

Prior to RA No. 10023, administrative titling over residential lands could only be done through sales,

either through direct sales under Republic Act No. 730 or through bidding under CA 141 or the Public Land Act. This process was difficult and cumbersome due to the strict document requirements and the prohibitive price of the parcel to be paid to the government and assessed at the current price, thereby resulting in an average 3,000 patents issued per year.

With the passing of the law, titling of residential lands has been fast-tracked. Altogether 58,486 patents were issued in the first year of the law's implementation in 2011. One of the strategies to facilitate titling is the partnership between the DENR and the local government units (LGUs) on public land titling as contained in DENR Administrative Order No. 6, series of 2011. This prescribes the guidelines for the implementation of public land titling in partnership with LGUs.

4.4 Land Administration and Management Systems (LAMS)

The Land Administration and Management Systems (LAMS) is a system-enhanced land record management facility that ensures integrity of and access to land information, such as cadastral maps, isolated survey

plans, public land applications, patents and titles. It also assists the fast processing of land transactions and updating of land records as well as the tracking of applications undergoing processing. This is supported by a digital cadastral database that provides a spatial reference. LAMS involves not only the setting-up of databases but also the installation of required hardware infrastructures. Specifically, the project requires the computerization of land records but also the scanning and encoding of maps, survey plans and public land applications.

The DENR adopted this system, which is a product under the second phase of the Land Administration and Management Project (LAMP2), to improve the management of land information through DENR Administrative Order No. 18, series of 2010. It is now being implemented in the regional offices of the DENR.

4.5 Comprehensive Land Use Act

With the Agenda 21 of the Philippine Council for Sustainable Development (PCSD), the need to legislate a Land Use Act was endorsed by civil society groups as early as 1996. The proposed bill, which is continuously being revised by the National Land Use Committee, was also resubmitted to the 15th Congress and is currently being deliberated by the concerned committees in both the House of Representatives and the Senate. The proposed bill, the National Land Use Act of the Philippines, seeks to institutionalize a national land-use policy to ensure the rational, holistic and just allocation, use, management and development of the country's land resources.

One of the critical issues today is the conversion of agrarian reform land to non-agricultural use land, which also has an impact on the current agrarian reform programme. There is also a need for a national policy on land-use to harmonize different laws, such as the Forestry Code of 1975, IPRA of 1997, the Agricultural and Fisheries Modernization Act of 1997 and the extended CARP Law.

4.6 Land Sector Development Framework (LSDF)

One effort to sustain the gains made from the efforts with reforms on land administration and management of the country is the adoption of the Land Sector Development Framework (LSDF), which is the 2030 vision of the land sector in the country. The LSDF is a framework that prioritizes the development and implementation of policy, legislation and regulations to improve the management of government lands. A comprehensive policy framework for the following thematic areas has been created: 1) Land Administration; 2) Land Information Management; 3) Public Land Management; 4) Property Valuation and Taxation, and 5) Institutional Development and Capacity Building. An overarching policy environment shown in the figure below was conceived for the long-term development plan to set out a clear vision and core principles, which will guide policies and respective strategies:

The LSDF envisages a world class, efficient land administration and management system geared towards sustainable and equitable socio-economic growth of the Filipino people. The mission of the sector is to:

- Provide tenure security by accelerating formal recognition of all rights and provide effective and efficient LAM services;
- Provide effective management of public and government-owned land for the benefit of present and future Filipinos and promote optimal use and sustainable management of land and natural resources;
- Establish an effective and transparent property valuation and taxation system to stimulate the real property market and maximize property revenue; and
- Develop an integrated Land Information System harnessing modern ICT in support of LAM functions and e-government services

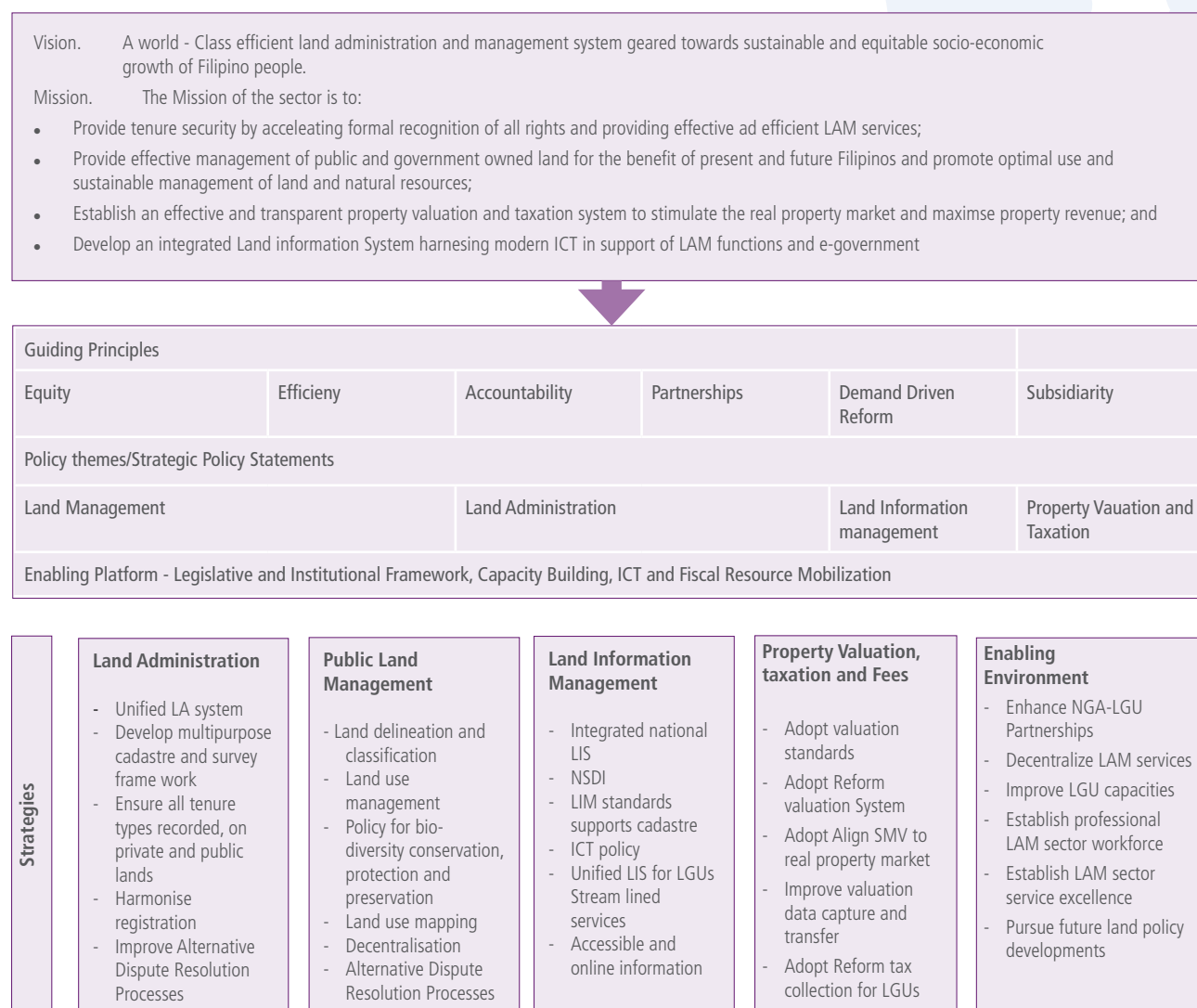
4.7 Land tenure instruments in the Philippines

Land tenure instruments are certificates, documents, written documents, etc., which recognize the relationship between the land and the entity (either individual or group) that owns, occupies, possesses, utilizes or uses the land for different purposes and describes the inherent rights attached to the land including some responsibilities and restrictions. These tenure instruments can be categorized into three groups: 1) freehold titles/patents; 2) certificates/permits and 3) lease agreements. Patents are being issued by DENR while titles are being issued by the Lands Registration

Authority (LRA). Patents are administratively prepared by DENR with some restrictions (i.e. homestead patent) and continue to become freehold titles after complying with requirements, conditions and time, and when registered in LRA.

The figure below shows the different land tenure instruments being used in forestland, national parks, ancestral lands/domain, other public land, alienable and disposable (A & D) land, agricultural land and mineral land:

Figure 2: LSDF Policy Framework



Source: PA-LAMP, 2010

Table 4: List of Land tenure instruments in the Philippines

Tenure Instruments	Description
FOREST LANDS	
Community-Based Forest Management Agreement (CBFMA)	A production sharing agreement between the Department of Environment Natural Resources and the participating people's organization (POs) for a period of 25 years renewable for another 25 years, and shall provide tenurial security and incentives to develop, use and manage specific portions of forest lands.
Integrated Forest Management Agreement (IFMA)	A production sharing contract entered into by and between the DENR and a qualified applicant, in which the DENR grants to the latter the exclusive right to develop, manage, protect and use a specified area of forestland and its forest resources for a period of 25 years renewable for another 25-year period, consistent with the principle of sustainable development and in accordance with an approved Comprehensive Development and Management Plan (CDMP), and under which both parties share in its produce.
Forest Land Grazing Management Agreement (FLGMA)	A production sharing agreement between a qualified person, association and/or corporation and the government to develop, manage and use grazing land.
Socialized Industrial Forest Management Agreement (SIFMA)	An agreement entered into by and between a natural or juridical person and the DENR in which the latter grants to the former the right to develop, use and manage a small tract of forestland consistent with the principle of sustainable development.
Tree Farm Lease (TFL)	A privilege granted by the state to a person to occupy and possess, in consideration of specified rental, on any small forest land or tract of land purposely planted with tree crops
Agroforestry Farm Lease (AFL)	A privilege granted by the state to a person to occupy and possess, a sustainable management for land which increases overall production, combines agriculture crops, tree crops and forest plants and/or animals simultaneously or sequentially, and applies management practices which are compatible with the cultural patterns of the local population.
Industrial Tree Plantation Lease Agreement (ITPLA)	A privilege granted by the state to a person to occupy and possess an ITP for 25 years renewable for another 25 years in consideration of a specified rental.
Private Forest Development Agreement (PFDA)	An agreement entered into by and between the DENR and a private landowner or his duly authorized representative for the establishment and development of forest plantation within his or her private property.
Timber Licence Agreement (TLA)	A privilege granted by the state to a person to use forest resources within a forestland with the right of possession and occupation thereof to the exclusion of others except the government, but with the corresponding obligation to develop, protect and rehabilitate the same in accordance with the terms and conditions set forth in the said agreement.
Special Land Use Permit/ Agreement (SLUP/SLUA)	A privilege granted by the state to a person to occupy, possess and manage in consideration of specified return, any public forest land for a specific use or purpose.
Private Land Timber Permit (PLTP)	A permit issued to a landowner for the cutting, gathering and utilization of naturally grown trees on private land.
Special Private Land Timber Permit (SPLTP)	A permit issued to a landowner specifically for the cutting, gathering and utilization of premium hardwood species including Benguet pine, both planted and naturally-grown trees.
Rattan Cutting Contract (RCC)	A contract entered into the Secretary of Environment and Natural Resources and another party to cut, gather and transport rattan.
Resource Use Permit (RUP)	A resource-use right to be issued to holders of tenure instruments under CBFM programme of DENR who intend to harvest/ use naturally grown and/or planted forest resources within the production forest for commercial use, provided that they have affirmed CRMF, AWP and RUP by the concerned CENRO and the Environmental Certificate Compliance from RED through the EMB.
Wood Processing Plant Permit (WPPP)	An operating permit to sawmill, mini-sawmill, re-saw permit, plywood/veneer plants, blockboards /fibreboard/ particle board and other wood-based panel plants and wood treating plants. It is issued to the holders of existing timber license agreements or permits, and those non-timber holders with approved Equity Participation Agreement may be granted a permit not exceeding two years. Permits that may be issued to operators other than the above shall have a duration of not more than one year. (MAO 50, series of 1986 as amended by DENR Administrative Order No. 2003-41)
Certificate of Stewardship (CS)	Awarded to individuals or families actually occupying or tilling portions of forest land pursuant to LOI 1260 for a period of 25 years renewable for another 25 years. It is only issued within established CBFM projects with CBFMA, subject to the decision and recommendation of the PO. (DENR Administrative Order No. 96-29)
Certificate of Registration as Log/ Lumber Dealer (CRLD)	A certificate/document issued to a dealer of lumber, logs, poles or piles upon registration with the DENR. (Republic Act No. 1239, series of 1955 and FAO 26, series of 1956)
Ordinary Minor Forest Products Permit (OMFPP)	Permit issued for the collection of all products of the forest other than timber. Among the most important are firewood, charcoal, palm products, cutch and tanbarks, fibres, resins, gums, oils, rubber and gutta-percha, beeswax, and medicinal plants
ANCESTRAL DOMAIN LANDS	
Certificate of Ancestral Land Title (CALT)	Refers to a title formally recognizing the rights of ICCs/IPs over their ancestral lands.
Certificate of Ancestral Domain Title (CADT)	Refers to a title formally recognizing the rights of possession and ownership of ICCs/IPs over their ancestral domains.

Certificate of Ancestral Land Claim (CALC)	A certificate issued by the DENR to indigenous individuals, families or clans who are members of the indigenous cultural communities, declaring, identifying, and recognizing their claim to a particular area they have traditionally possessed, occupied and used themselves or through their predecessors-in-interest since time immemorial.
Certificate of Ancestral Domain Claim (CADC)	Issued by the DENR declaring and certifying the claim of an indigenous cultural community or indigenous people over a corresponding territory, which they have possessed and occupied, communally or individually, in accordance with their customs and traditions since time immemorial.
AGRARIAN LANDS	
Emancipation Patent (EP)	A title to the land issued to the tenant upon fulfilment of all the requirements required by the government. It is the symbol of the tiller's full emancipation from the bondage of tenancy.
Certificate of Land Ownership Award (CLOA)	A title to the land issued to the agrarian reform beneficiary upon fulfilment of all the requirements under RA 6657 (CARL) and of other pertinent government laws and issuances.
CARP Beneficiaries Certificate (CBC)	An instrument issued to an indigenous tribe and sub-tribes, as a whole, or to individual indigenous farmers over their cultivated agricultural lands within the identified CADC/CALC areas or those to be issued with CADT/CALT.
Agricultural Leasehold Contracts (ALC)	A contract entered between a person and the owner of land, in which the person cultivates another's land for a specified period of time and for a fixed rent. Agricultural leasehold is instituted to improve the tenure and economic status of a tenant-tiller within the retained areas or in areas not yet covered by the land transfer component of the CARP.
AGRICULTURAL LANDS (E.G., ALIENABLE AND DISPOSABLE LANDS)	
Free Patent	A mode of acquiring a parcel of Alienable and Disposable public land which is suitable for agricultural and residential (newly passed law) purposes, through the administrative confirmation of imperfect or incomplete title.
Homestead Patent	A mode of acquiring alienable and disposable land of the public domain for agricultural purposes conditioned upon actual cultivation and residence.
Miscellaneous Sales Agreement	Another mode of acquiring land in the public domain for residential purposes as provided under Republic Act 730.
Certificate of Entitlement for Lot Allocations (CELA)	An award given to intended beneficiaries who are occupying portion(s) of the proclaimed area subject to final subdivision survey based on a subdivision/reblocking scheme that may be promulgated. It is an evidence of the intended beneficiaries' entitlement to acquire the said portion of the proclaimed area.
Condominium Certificate of Title (CCT)	Certificate of title issued to a condominium unit owner of a portion of a condominium project.
OTHER PUBLIC LANDS (I.E. RECLAIMED LANDS, FORESHORE LANDS, SCHOOLS, INSTITUTIONS)	
Special Patents	A public instrument issued by the government confirming the grant by the state of a parcel of public land in favour of the grantee.
Foreshore Lease Agreement	An agreement executed by and between the DENR and the applicant to occupy, develop, use and manage the foreshore land. It may also cover marshy land, or land covered with water bordering the shores or banks of navigable lakes or rivers.
NATIONAL PARKS	
Protected Area Community-Based Resource Management Agreement (PACBRMA)	An agreement entered into by and between the DENR and the organized tenured migrant communities or interested indigenous peoples in protected areas and buffer zones.
MINERAL LANDS	
Mineral Agreements (i.e. Mineral Production Sharing Agreement (MPSA), Co-Production Agreement (CPA), Joint Venture Agreement (JVA))	An agreement between a contractor and the government wherein the government grants to the contractor the exclusive right to conduct mining operations within, but not title over, the contract area. Mining operations that are allowed under Mineral Agreements include exploration, development and use of mineral resources.
Financial or Technical Assistance Agreement (FTAA)	An agreement for the large-scale exploration, development and use of minerals.
Mineral Processing Permit	The permit granted to a qualified person for mineral processing. Mineral processing means the milling, beneficiation, leaching, smelting, cyanidation, calcination or upgrading of ores, minerals, rocks, mill tailings, mine waste and/or other metallurgical by-products or by similar means to convert the same into marketable products.
Exploration Permit	Allows a qualified person to undertake exploration activities for mineral resources in certain areas open to mining. The EP has a term of two (2) years, renewable for like periods but not to exceed a total term of four (4) years for the exploration of non-metallic minerals or six (6) years for the exploration of metallic minerals.

Source: As compiled by the authors, 2010

Table 5: Patents issued under different administrations (1910-2005)

Administration	Year	Patents Issued	
		No.	Area (hectares)
Pre-Martial Law	1910-1972	784,875	3,914,727
Martial Law	1973-1980	854,725	1,941,630
After Martial Law	1981-1985	409,000	918,062
Aquino Adm.	1986-June '92	357,060	744,654
Ramos Adm.	July '92-June '98	550,783	489,069
Estrada Adm.	July '98-2000	139,698	113,383
Arroyo Adm.	2001-2005	395,038	459,315
Grand Total		3,491,179	8,580,840

Source: LMB, 2005

4.8 Cadastral land surveys in the Philippines

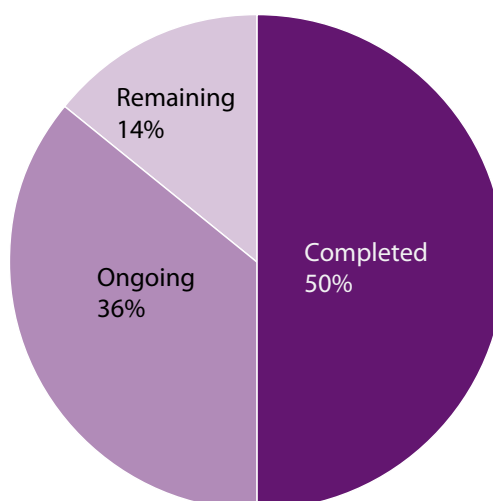
Cadastral land survey is an integral part of the land administration system of the country to facilitate land-use planning, infrastructure and land tenure improvement. The conduct of cadastral survey comprises the following phases of work: survey control establishment to determine the horizontal and vertical positions of points; political boundary survey to determine the metes and bounds of the entire municipality or city and the extent of barangays for comprehensive land-use planning and computation of

the IRA; and lot survey to determine the metes and bounds of every parcel of land in the city or municipality for titling purposes. Figure 5 shows the status of cadastral survey as of August 2013.

The completion of the cadastral survey until 2016 of the remaining municipalities in the country is a priority for the present administration.

Given the data above, the number of patents issued through the administrative process of titling is 3,491,179

Figure 3: Status of cadastral survey projects as of August 2013



Source: LMB, 2013

covering an area of 8.6 hectares (61 per cent of the total A&D lands). The table below shows the distribution of patents issued in different administrations:

4.9 Status of Land Titling in the Philippines

Given the data below, the number of patents issued through the administrative process of titling is 3,491,179 covering an area of 8.6 hectares (61 per cent of the total A&D lands). The table below shows the distribution of patents issued in different administrations:

The Land Tenure Study (2004) of PA-LAMP estimated that there are a total of 24 million parcels in the country. Of these parcels, 46 per cent or 11 million parcels are still untitled, while the rest (54 per cent) have already been titled (13 million parcels). The Land Tenure Study (2004) of PA-LAMP estimated that there are a total of 24 million parcels in the country. Of these parcels, 46 per cent or 11 million parcels are still untitled, while the rest (54 per cent) have already been titled (13 million parcels). Figure 6 shows the percentage of titled parcel at the provincial level, while Figure 7 shows the percentage of untitled parcels at the provincial level.

Figure 4. Titled parcels at provincial level

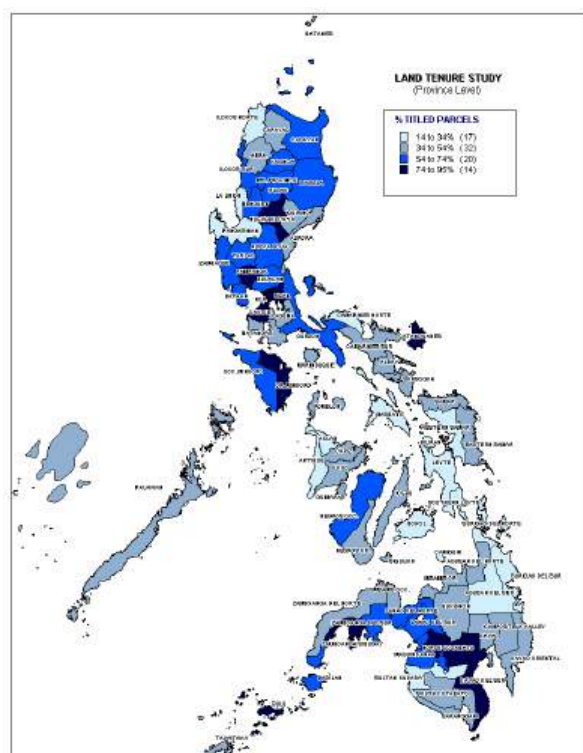
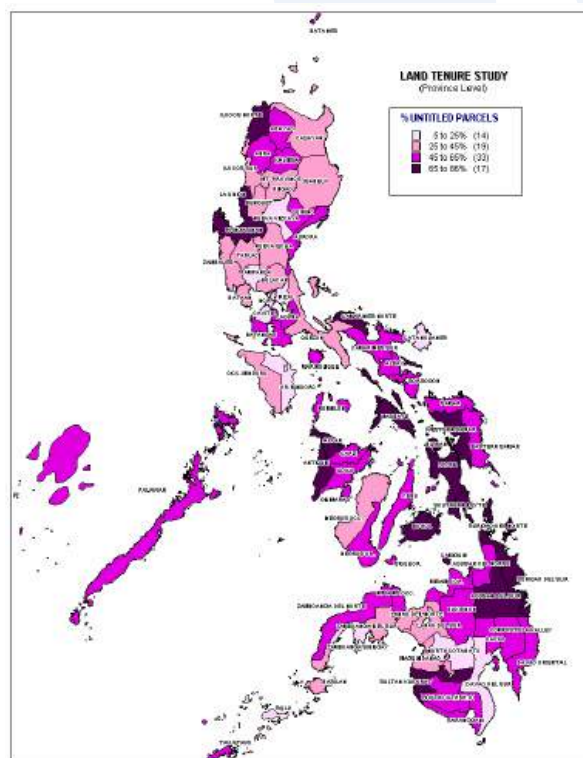


Figure 5. Untitled parcels at provincial level



Source: PA-LAMP, 2004

SUMMARY AND CONCLUSION

This paper traces the evolution of land tenure systems and policies in the Philippines from the pre-colonial period up to the present. It highlights the transformation of property regimes from customary, community-oriented to a market-based and individual land tenure approach. It outlines the trend from highly regulatory and centrally-controlled land policies to a more decentralized, participatory and people-oriented approach. The analysis focuses on the tenure reform and struggle at the point of political transitions and their impacts on addressing the problems of social inequity and political stability.

The concept of land as a community resource in the early years of Philippine history was redefined as wealth as well as commodity. Such a notion, which happened in such early years during the Spanish regime, led to the disintegration of Filipino society and huge wealth disparities.

We can now see that changes in land tenure systems and property regimes are not always the result of a transition in history and politics, and that this could also work the other way around. Also, as is reinforced by experience, genuine land reforms are difficult to implement when members of Congress are themselves landlords and/or “protectors” of the landed class.

As the Philippine experience also demonstrates, tenure reform initiated by the government is necessary but is not enough to get sustainability and effectiveness. Greater participation by ordinary people, the dissemination of enough information and awareness of the current political and economic situation are prerequisites to at least articulate the peoples’ actual needs, provide a stronger position for negotiation and to help political “reformists” to neutralize the interests of the elite few. The new trends in providing land tenure approaches, while still very much linked to market-oriented objectives, are promising because they are based on incremental, people-oriented and participatory approaches, such as those in urban areas

where people have organized themselves and seek various options to improve their tenure security.

Perhaps the bibingka strategy, as discussed by Borras (1999), could make sense here as a means to consolidate reform energies from the ground up and from “believers” from the top down. With a combined synergy, the chances of winning that struggle, or at least incrementally moving the reforms forward, will be improved.

The historical and political evolution of land tenure systems in the country is of a century-long struggle by the people to correct the mistakes brought about by the colonial past. And the struggle continues because skewed land ownership patterns in the Philippines still exist and contribute to a continuing pattern of poverty, landlessness and social unrest.

People Power, as twice demonstrated by Filipinos and which has inspired various countries around the world, is a legitimate force for changing politics and directions. A system in which the opinions of different members of the society are heard and considered encourages participation and responsible actions. It balances the interests of different stakeholders on important issues on land tenure. A cursory look at recent policies suggests that there are substantial changes in the tenure rights of traditionally marginalized groups, such as peasants, the urban poor and indigenous peoples. Filipinos should capitalize on this and use it as a rallying point for reducing social, economic and political inequities.

Moreover, continuous challenges with land administration and land management will haunt the country as its population steadily grows and its land resources become scarcer. Rapid urbanization and climate change will also add to the complexities. Land reforms are needed to untangle the “chaos” brought about by imported systems and administered by culturally-corrupt government agencies. Land management, particularly that of land use and resource management, will be a challenge as a growing

population, increasing urbanization and competing demands continue to put pressure on the environment.

“Land is the essence of life” and for most Filipino people, the right to land will continue to be a never-ending struggle for survival and will always be a part of their life’s journey.

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1. THAI LAND TENURE SYSTEM AND TENURE SECURITY: ACTUAL CHALLENGES

The Food and Agriculture Organization says that “land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land (“land” is used here to include other natural resources such as water and trees). Land tenure is an institution, i.e. rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions” (FAO, 2002). Therefore, land tenure is crucial for the people who occupy, use, own or transfer land; land tenure security is also vital for and connected to social, economic and environment aspects.

In Thailand, land tenure security issues do exist. Currently, the Thai population is growing and demand for land is increasing. Land tenure problems contribute to food insecurity, poverty, limited livelihood opportunities (ibid), housing insecurity and degradation of natural resources. The actual land tenure problems in Thailand include a lack of measurement to limit the amount of land one can hold and so an inequitable distribution of land occurs. A minority of the Thai population owns a large amount of land, while the majority of the people own only small amounts. With insufficient employment opportunities that are independent of land access and use, this matters for the overall social and economic relations in Thai society. According to the Land Reform Network of Thailand (2011), there are 1.3 million landless families and it is estimated that around 90 per cent of the population owns less than 0.16 hectares of land per person, whereas 10 per cent have more than 16 hectares per person. In addition, in 2001 the Thai Land Institute Foundation said that 70 per cent

of legally titled land had been abandoned and that land was kept for speculative purposes. Other issues include difficulties with accessing and securing access to land for the poor (in urban and rural areas) and for indigenous people. These issues contribute to poverty, evictions, illegal encroachment and encroachment into vulnerable areas, leading to disasters, inefficient use of land, landlessness and homelessness. Those are the challenges the country has to cope with.

1.1 Thailand's Background

Thailand is in the center of Southeast Asia. It is bordered to the north by Myanmar and Laos, to the south by the Gulf of Thailand and Malaysia, to the east by Laos and Cambodia, and to the west by the Andaman Sea and the southern-most part of Myanmar. It is located 15 degrees north of the equator and it has a tropical climate. A unified Thai Kingdom was first established in the mid-fourteenth century. Known as Siam until 1939, Thailand is the only Southeast Asian country that has never been conquered by a European power. It has been a constitutional monarchy since 1932.

Thailand covers an area of 513,210 km², of which 510,890 km² are land and 2,230 km² are water. The country is divided into 77 provinces. The majority of the people are Buddhist (93.6 per cent), while 5.4 per cent are Muslim and 0.9 per cent are Christian (National Statistical Office, 2011).

In 2011, Thailand had a population of around 64.07 million of which 31.5 million are male and 32.5 million female (Department of Provincial Administration, 2012); the population growth rate is 0.5 per cent per annum (2010-2015) (United Nations Population Fund, 2011). In 2011, the urban population was 34.1 per cent (United Nations, 2012). The GDP of Thailand is USD 361.8 billion (estimated in 2011), the GDP growth rate is between 3.5 and 4.5 per cent and the GDP per capita is USD 5,351.6 (Department of International Economic Affairs, 2011). According to the United Nations Development Programme (2011),

Thailand's Human Development Index (HDI) value for 2011 is 0.682, which puts it in the medium category and placed 103rd out of 187 countries. The Gender Inequality Index (GII) has a value of 0.382, ranking it 69th out of 146 countries in the 2011 index. According to the United Nations Children's Fund (UNICEF),¹⁵⁹ in 2005-2010, it estimated the literacy rate of male and female youth (15-24 years) at 98 per cent.

1.2 Outline of the Paper

This paper is organized into four sections. Section 1 describes actual challenges for the Thai land tenure system and to land tenure security. Section 2 provides an overview of historical and current land tenure systems in Thailand during different historical

periods. The overview covers the period of an absolute monarchy from the Sukhothai era of 1257 until the political reform in 1932, main types of land tenure, resulting property regimes and regulatory frameworks after the political reform in 1932 until today, and finally access to land (for Thai citizens, foreigners and indigenous people) are included in this section. Section 3 focuses on the efforts of the Thai Government since 1975 to improve land tenure security through the Agricultural Land Reform Programme (1975), the Thai Land Titling Project (1984) and the Baan Mankong Collective Housing Programme (2003), and looks at the current trends and development projects of the land administration in the country. This section also includes an analysis of land tenure security and a SWOT analysis (strengths, weaknesses, opportunities and threats) of the current land tenure system. Section 4 provides the conclusion and a recommendation.

¹⁵⁹ UNICEF 2005-2010, Data refer to the most recent year available during the period specified in 2005-2010). Thailand: Statistics.



Rapid Urbanization in Thailand © UN-Habitat/Danilo Antonio

2. HISTORICAL AND CURRENT LAND TENURE SYSTEMS IN THAILAND

2.1 Different Historical Periods of Land Rights and Land Tenure Systems

Prior to 1932, Thailand was an absolute monarchy from the Sukhothai period (1257-1377), through the Ayutthaya period (1350-1767), the Thonburi period (1767–1782) and the beginning of the Rattanakosin (current era) period from 1782 to the political reform in 1932. The significant historical periods in regards to land rights and land tenure systems during the absolute monarchy period are:

2.1.2 Sukhothai era

During the Sukhothai era, King Ramkhamhaeng promulgated through a national policy to promote agriculture; under his reign people had the freedom to choose their occupation either in trade, handicraft or agriculture, and to occupy and use land without having to pay taxes (Office of Natural Resources and Environmental Policy and Planning, 2008). Cultivated land could be handed down to descendants. At that time, land resources were still abundant and there is no evidence that land belonged to the king (Department of Lands, 2011a).

2.1.3 Ayutthaya Era

During the Ayutthaya era, the land tenure system changed. It was stated in miscellaneous laws that all land inside and outside of Ayutthaya city belonged to the king. At the beginning of this period people could only have possession¹⁶⁰ rights over land; however, they had no ownership or permanent transfer rights

to that land (ibid: p.37). Government officials were awarded by the state if they encouraged people to bring land under agricultural cultivation or to use it for other purposes. However, no one could own or use land without permission from the local government (Tongpradub, 1999). If land was illegally occupied, the occupant was punished and the land was reclaimed by the state.

The current Office of Natural Resources and Environmental Policy and Planning (2008) summarizes three main rules regarding land tenure in the Ayutthaya Kingdom: “(i) all lands belonged to the king; (ii) citizens were not allowed to trade land among each other; and (iii) the landowners’ rights would be terminated once they had abandoned their lands and someone else overtook the land”. By the end of the Ayutthaya period, the land laws had changed and the land tenure system was more flexible than when people had no ownership rights on land. Therefore, at the end of the Ayutthaya period people could now be exchanged or transferred. After the end of the Ayutthaya era, the Thonburi era was established. This was the shortest period of Thai history and very little changed in the land tenure system during this era.

2.1.4 The Rattanakosin Era from 1782 until 1932

In the beginning of the Rattanakosin era, the king allowed the people to claim and to legitimize ownership of land. Land certificates were issued as guaranteed documents. In addition, during the reign of King Rama IV (1850-1868), the Bowring Treaty (of friendship and commerce between the British Empire and the Kingdom of Siam) was signed in 1855. The treaty significantly affected¹⁶¹ the financial situation of Thailand and during the reign of King Rama V (1868-

¹⁶⁰ Possession rights are those that accrue, in everyday language, from physically occupying a land parcel. A legal owner does not have to possess the land to be the owner; the person possessing it may have a legal claim or none at all. Legal recognition of possessory rights vary around the world; in some cases, possession can give rise to ownership claims through adverse possession. Available at <http://www.fao.org/docrep/005/Y4307E/y4307e09.htm> Accessed 20 Feb 2013

¹⁶¹ The Bowring Treaty is now credited with having led to the economic development of Bangkok, as it created a framework in which multilateral trade could operate freely in Southeast Asia, notably between China, Singapore and Siam. “Ode to Friendship, Celebrating Singapore - Thailand Relations: Introduction”. National Archives of Singapore. 2004. Retrieved 2007-04-24.- Available at wikipedia.com Accessed 20 Feb 2013

1910), the government changed the tax collecting system. To facilitate this, land possession documents which were based on land-use purposes, were issued (Department of Lands 2011a).

Under the reign of King Rama V, the land tenure system and land administration changed greatly. In 1872, King Rama V initiated procedures to recognize private ownership rights. According to the Department of Lands (2011a), he acknowledged that the price of land and land conflicts increased because of the unclear regulations on land ownership, and by 1901, still the significant regulations related to the land tenure system and to the land administration were:

- The Land Act *Monthon Ayuthia* May 3rd R.S. 120 (Kitbamrung, 2009) was enacted to solve land issues, based on fairness and international standards. The first cadastral survey was conducted. A titling registration system, based on and modified from the Torrens System, was also introduced to Thailand.
- The Department of Lands was established in 1901.
- The first *Chanod* was issued in 1901.

The *Chanod* is the strongest land title (see Appendix 1) but needs time and some legal procedures to attain. For instance, there were interim land certificates that were issued while waiting for a *Chanod*. First the people gained the Sor Kor 1 (Possessory Certificate / Claim Certificate), then the landholder could claim for a "Utilization Certificate" ("*Nor Sor 3 Kor*"), and eventually a landowner could claim for the *Chanod*.

Interestingly during that time, foreigners introduced a land administration and a cadastral system in Thailand and the first director of the Department of Lands (1901 - 1903) was W. A. Graham, an English national (Department of Lands, 2008a). In addition, R.W. Giblin, a licensed surveyor from New South Wales, who was Director of the Survey Department (1901-1910), and Phraya Prachacheepborriban were largely responsible for establishing the new land title registration system (Kitbamrung, 2009). Nonetheless, from the era of King Rama V to the political reform in 1932 the land tenure system and land rights had not changed much.

2.2 Main Types of Land Tenure

The land tenure system in Thailand recognizes public and private land.

Public Land

Public land refers to all lands that belong to the state and are used in the public interest. According to the Civil and Commercial Code, public land includes wasteland, vacant land and lands that are reclaimed by the state, property for public uses such as foreshores, waterways, highways and lakes, and property with special use to the state (e.g. a fortress or other military buildings, public offices, warships, arms and ammunition) and land in national reserved forest territory. According to the Department of Lands (2008b), public land has two purposes: 1. for the general public or reserved for communal purposes, e.g. ponds, lakes, pasture lands, cemeteries. The Ministry of Interior is responsible for issuance of this type of land title; 2. for state purposes, e.g. land which is used for the government,

Types of Land Titles	Parcels	Hectares
Chanod (Nor Sor. 4)	26,973,420	15,989,275.36
Nor Sor. 3 Kor	3,506,018	2,838,676.8
Nor Sor. 3	1,105,914	1,607,106.88
Nor Sor. 2 or Bai Chong	144,146	213,182.88

Source: Department of Lands (2011b)

prohibited land, land which is purchased by the state, land which is donated to the state. The Ministry of Finance is responsible for issuance of these land titles. It is estimated that 129,350 parcels, around 1.2 million hectares or 83.53 per cent of public lands, were issued as Nor Sor Lor titles (as reported by the Department of Lands in January 2010).¹⁶²

Private Land

Private ownership of land has been recognized since the King Rama V era and this land has a title in both rural and urban areas. There are two distinctly separate rights to land: the right of possession and the right of ownership. People can have the right of use/cultivation although the land does not belong to them. There are several private land documents issued for different purposes and by different institutions (see Appendix 1). Each type of document has some strengths, weaknesses and limitations for the tenure and ownership of land, which lead to complexities in the land registration system and create confusion for the people. There is a need for an integrated measure to reduce the complexity of land registration.

From 1904 to 2009, a number of land titles for private holders were issued across the country:

2.3 Resulting Property Regimes and Regulatory Frameworks

According to Dekker (2003), "land tenure security cannot be guaranteed by putting in place a certain system or a set of regulations and establishing appropriate institutions. Each country will have its specific land tenure concepts and historical and cultural values that determine the current property regime" (*ibid*). The land tenure system in Thailand developed out of the country's historical and cultural values and the Thai Constitution, the Land Code Act and other laws or regulations of each regime.

The current era is the Rattanakosin period (1782 – present) under King Bhumibol Adulyadej, or King Rama IX, who has reigned since 1946. After the political reform in 1932, Thailand became a constitutional monarchy. Under the reign of King Rama IX the resulting property regimes and the regulatory framework for the land tenure system under different political regimes are as follows:

Land Code Act, 1954: Limitation on the amount of occupied land and issuance of *Sor Kor*. 1

In 1954, the Land Code was created. Although the Civil and Commercial Code (enacted in 1923) provided a strong legal basis for property rights, all the existing land law was combined in the Land Code (Brits et al., 2002). The Land Code constitutes an enactment pertaining to ownership and use of land. It distinguishes between *de facto* occupancy and legal recognition of rights of property. It finally made the distinction between private land and public land. After the change of the political system, the land tenure system was also changed. The government set up a policy to limit the amount of land held in order to distribute sufficient land to people, and it also provided some infrastructure.

Limitation on amount of land occupation: Under Field Marshal Plaek Phibunsongkhram's government (1938-1944 and 1948-1957), the land tenure policy was changed in 1954 from one in which people had complete freedom to access or possess land to one that required formalized government assistance. Also, a policy on the limitation of land holding was set. According to the Land Code Act 1954 Chapter 3, Section 34, the measure for limitation on the amount of land occupation is as follows:

- Land for agriculture - not to exceed 8 hectares
- Land for industry - not to exceed 1.6 hectares
- Land for business (entrepreneurship) - not to exceed 0.8 hectares
- Land for residence - not to exceed 0.8 hectares

¹⁶² Department of Lands, Thailand. Available: <http://www.dol.go.th> as accessed on 20 May 2012.

Issuance of *Sor Kor. 1*: Following the Land Code of 1954 Section 5, a person who possesses or uses land, should inform the local government in order to obtain *Sor Kor. 1* (Possessory Certificate / Claim Certificate). The Possessory Certificate includes information such as the land's location, plot size, way of access, kind of use and information on ownership. At the time, issuance of the Possessory Certificate (*Sor Kor. 1*) was a crucial initial step for land registration in Thailand. Anyone who holds the Possessory Certificate (*Sor Kor. 1*), can qualify for a Utilization Certificate or *Chanod*.

Delimitation on the amount of land occupation regulation in 1959

In 1957, after a coup d'état led by Field Marshal Sarit Thanarat he then became the 11th Prime Minister of Thailand. During his period of government (from 1959 to 1963), some paragraphs in the Land Code of 1954 were annulled. In 1959, the Land Code Act, 1954 Chapter 3 Section 34, mentioned earlier, was dropped by the revolutionary committee because, they said, this regulation had limited the rights of the people to occupy land and it also affected agriculture, industry, business and the economy of the country (Announcement of the Revolutionary Council No. 49 on January 13th, 1959, Office of the Council of State, 2008).

Since then this specific provision has not been renewed and therefore currently there is no limit on the amount of land one can occupy. In addition, during Sarit Thanarat's government, the National Economic and Social Development Board and the first National Economic and Social Development Plan were established. In this plan (1961-1966) a policy statement protected forest areas which comprised 50 per cent of the country's area (25.68 million hectares) which mean that, as in earlier periods, it was not as easy for people to clear forestland for agriculture. With a growing population, the demand on land resources and land dramatically increased and which became more scarce, particularly for poor rural people.

Allocation of Land for Livelihood Act, 1968

During Field Marshal Thanom Kittikachorn's government from January 1958 to October 1958, and again from December 1963 to October 1973 (The Secretariat of the Cabinet, 2011), the Allocation of Land for Livelihood Act, 1968, was enacted. The government provided land for landless people or those who had insufficient land for their livelihoods; it aimed to allocate land for settlement and livelihood purposes, and it set up a self-reliance community in those areas. Each household could access land not exceeding 8 hectares, and after using it for five years would be given a land title or a claim certificate (Kodmhai, 2010).

The Utilization Certificate (*Nor Sor 3 Kor.*) was introduced in 1972. Due to the cancellation of some provisions of the Land Code Act 1954 by the revolutionary committee, the government (Department of Lands) attempted to accelerate the issuing of land certificates to secure land tenure for the people. Aerial photography was introduced to identify land boundaries and this information was used to issue a different "Utilization Certificate", called *Nor Sor 3 Kor.* Once a person holds a *Nor Sor 3 Kor.*, they may qualify for the *Chanod*.

Agricultural Land Reform Act, 1975

During Sanya Dharmasakti's period (1973 - 1975), the Agricultural Land Reform Act of 1975 was enacted and in the same year the Agricultural Land Reform Office was established. The reform aimed to improve rights and tenure on agricultural land, and the government allocated land for farmers who were landless or who had insufficient land to live off. Land for the agricultural land reform was acquired from public land such as vacant land, from deteriorated forest reserves as determined by the cabinet for land reform, from public land for the use of the government or from "prohibited" and private land such as donated royal land, from donated land, from purchased land, and other lands (Agricultural Land Reform Office, 2005).

Land Tenure in the Constitution of the Kingdom of Thailand 2007

The Constitution was amended in 2007 during General (retired) Surayud Chulanont's government (2006 - 2008). The equitable land distribution and the ownership on land are dealt with in the current Constitution as follows:

"Section 85: The state shall pursue directive principles of state policies in relation to land, natural resources and the environment, as follows:

- (1) to prescribe rules on land use which cover areas throughout the country, having regard to the consistency with natural surroundings, whether land areas, water surfaces, ways of life of local residents, and the efficient preservation of natural resources, and prescribe standards for sustainable land use, provided that residents in areas affected by such rules on land use shall also have due participation in the decision-making;
- (2) to distribute land in a fair manner, enable farmers to have ownership or rights in land for farming purposes thoroughly through land reform or otherwise, and provide water resources for sufficient use of water by farmers in a manner suitable for farming (...)" (The Constitution, part 8, section 85 (The Secretariat of the House of Representatives, 2007).

It can be seen that the government is aware of problems related to land and has made efforts to address tenure issues legally through the Thai Constitution.

Regulation on Community Land Title, 2010

Under the Prime Minister Abhisit Vejjajiva's government (December 2008 – August 2011), a law was introduced on the issuing of community land titles and was put before the Cabinet in May 2010 (Erni, 2010). The government set a land policy in an attempt to push for land distribution and to resolve the issue of land rights for the poor. In addition, in the same year, a new office, which is located in the Office of the Permanent Secretary of the Prime Minister's Office, was established to handle

the issuance of community land titles (The Government Public Relations Department, 2010). According to the Prime Minister's Office (2012), a community is allowed to occupy, to manage cooperatively and to use public land under the "Community Land title". Security of their settlement and use of communal land are the objectives of this law.

Current Government

The current government is led by the first woman prime minister, Yingluck Shinawatra (5 August 2011-present). On 23 August 2011, Prime Minister Yingluck announced her government's policies on land, natural resources and the environment. The government aims to ensure fairness and to reduce inequality in the use of land and natural resources by:

- reforming land management with just and sustainable distribution of land rights through taxation measures;
- establishing a land bank for low-income people and small scale farmers;
- considering to make unused state land available for productive use by the people;
- protecting public lands and grazing lands;
- pushing forward laws that acknowledge the rights of local communities in the management of resources, land, water, forests and the sea;
- reforming the judicial process on natural resources and the environment;
- resolving pending environmental cases against low-income people (Thailand Today, 2011).

The 11th National Economic and Social Development Plan (2012-2016)¹⁶³ highlights land tenure issues, meaning that the government shall support farmers (small farms) to get rights or ownership of land. The government shall also accelerate the purchase of private land for agricultural land reform, and the establishment

163 The 11th National Economic and Social Development Plan (2012 -2016). Office of the National Economic and Social Development Board. Available: <http://www.nesdb.go.th/> Accessed: 24 April 2012.

of a land management system as a mechanism for equal land distribution. The government shall set up tax policies to increase the efficiency of land use and to encourage land holdings so they are equitably distributed. Laws and regulations should also be amended to make resources available and accessible to local communities. However, at the time of writing, the government had been established for about a year, and there was still a long way for it to go to fulfil its policies and promises.

2.4 Access to Land

Access to Land for Thai Citizens

With the current Constitution, male and female citizens have equal rights to access land through land markets. The Ministry of Social Development and Human Security and Thammasat University (2009) point out that there has been gender equality in Thailand since the 1932 political reform, in both the Constitution of 1996 and in the current Constitution, where it is reflected as follows:

“All persons are equal before the law and shall enjoy equal protection under the law. Men and women shall enjoy equal rights. Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious belief, education or Constitutional political view, shall not be permitted. Measures determined by the state in order to eliminate obstacles to or to promote persons’ ability to exercise their rights and liberties in the same manner as other persons shall not be deemed as unjust discrimination(…)” (The Secretariat of the House of Representatives, 2007).

Leasing of Immovable Property for Commercial and Industrial Purposes:

According to the Leasing of Immovable Property for Commercial and Industrial Purposes Act, 1999, immovable properties such as land can be leased for more than 30 years but not for more than 50 years, the

lease agreement can be renewed for not more than 50 years (Department of Lands, 2008c).

Leasing for agricultural purposes:

The minimum duration of a lease contract should be at least six years according to the Agricultural Land Tenancy Act, 1981 (Office of the Council of State, undated).¹⁶⁴ Currently, farmers have difficulties in accessing land for agricultural use through leasing because of the high price (Ministry of Agriculture and Cooperatives, 2010) and because of restrictions for tenants and complexities in the current leasing law.

Land can also be acquired as follows:

- Share cropping: 30:70, 35:65, 40:60 per cent (it depends on the agreement negotiated between two parties);¹⁶⁵
- Gaining land through government programmes for land allocation or land reform.

Access to Land for Foreigners

Foreigners are prohibited from purchasing land by law, with some exceptions, as follows:

- Investment: an investment of more than USD 1.3 million and maintaining this investment for not less than three years (The Land Code Amendment Act (No.8) 1999) (Department of Lands (2008d);
- Tenancy: The same laws as applied to Thai citizens after the Leasing of Immovable Property for Commercial and Industrial Purposes Act, 1999;
- Ownership by a company (any company can buy and own land): natural or legal foreigners can own up to 49 per cent of a Thai company.

¹⁶⁴ Office of the Council of State (undated): Land Lease for Agriculture Act, 1981. Available: <http://www.lawreform.go.th> Accessed: 26 April 2012.

¹⁶⁵ The figures about the share-cropping result from personal interviews by the author in Thailand in 2012. They show the real situation as experienced by farmers.

Access to land for indigenous peoples in Thailand is problematic because a number of indigenous peoples still have no citizenship.

Access to Land for Indigenous People

Access to land for indigenous peoples in Thailand is problematic because a number of indigenous peoples still have no citizenship. Lasimban points out that “[...] the possession of citizenship documents is essential to access any facilities or services, and to prove rights over land and natural resources” (2006). Because they lack citizenship, a number of indigenous peoples still have no access to land or security of land tenure. The Forest Resource Protected Project in the upper part of the Mae Sa Watershed Area has shown that “[i]n case of the land for living and agriculture, most Hmong¹⁶⁶ could not access the certificate of ownership for land” (Mungkung, 2012). The Asian Indigenous & Tribal Peoples Network also points out (2006) that there is no recognition of the term “indigenous peoples”, an absolute silence on citizenship rights, a lack of specific protection of indigenous peoples’ land rights, and other aspects, which are missing in the current Thai Constitution.

3. ANALYSIS OF LAND TENURE SECURITY

3.1 Recent Thai Efforts to Improve Land Tenure Security

Thailand has been putting much effort into improving land tenure security. The country has attempted to improve tenure security under different governments, and there are several projects that were initiated to solve tenure insecurity problems. In this paper three projects will be addressed in both rural and urban areas:

The Agricultural Land Reform Programme

Improving land tenure security in poor rural areas had been addressed under the Agricultural Land Reform Act, which was promulgated in 1975. Lands have been allocated and developed for farmers in land reform areas. The tenants and landless farmers have received land for agriculture, and a Sor Por Kor. 4-01 or ALRO 4-01 title was issued by the Agricultural Land Reform Office (ALRO). Land was transferred to the landless for agricultural purposes up to a certain amount in order to reduce poverty, etc. Since 1975, the Agricultural Land Reform Office has allocated Sor Por Kor. 4-01 land titles for 2.4 million people (5.44 million hectares) (Agricultural Land Reform Office, 2012).

In 2004, there were 889,022 landless farmers, 517,263 farmers had land that was inadequate for cultivation, and more than 811,000 farmers occupied plots without land title (Bangkok Post, 2011). According to the 10th Plan (2007-2011),¹⁶⁷ and its “Strategies for Development of Biodiversity and Conservation of the Environment and Natural Resources”, it aimed to create “*demesnes*” (title deeds) for 1.6 million hectares, and to allocate land to at least 700,000 people who had no land ownership.

Significantly, the Agricultural Land Reform Office has followed the 10th National Economic and Social Development Plan (2007 - 2011) in its policy of equity of gender. Females are included in the Agricultural Land Reform Project by providing opportunities for women to be part of the development. It has focused on female leadership and self-reliance to create additional careers, to access marketing opportunities, to increase income and improve the quality of life (Agriculture Land Reform Office (2005a). Furthermore, the office provides services to farmers such as checking the status of Sor Por Kor.

166 Hmong is one of the hill tribes in Thailand.

167 The 10th National Economic and Social Development Plan (2007 -2011), Office of the National Economic and Social Development Board, Thailand. Available: <http://www.nesdb.go.th/> Accessed: 2 May 2012.

Thailand has been putting much effort into improving land tenure security. The country has attempted to improve tenure security under different governments, and there are several projects that were initiated to solve tenure insecurity problems.

4-01 or ALRO 4-01 title, mobile learning, providing a call centre, etc.

The Agricultural Land Reform Programme has benefited a number of landless farmers. Nonetheless, there has been a perceived corruption within the programme (Business Report Thailand, 2012) which has allegedly benefited many wealthy families and businesses but not poor farmers and the landless. Also, land under the programme is being used to build, for example, resort businesses instead of agriculture, and it is sold/transferred to people who are not the heirs,

which is forbidden by the Agricultural Land Reform Act (Agricultural Land Reform Office, 2005b).

The Thai Land Titling Project

In 1984, the government acknowledged the economic benefits of land titling and it sought loans and technical assistance from the World Bank and from AusAID (Australian Agency for International Development). The Thai Land Titling Project (TLTP) attempted to facilitate and improve several aspects of land management in both rural and urban areas. According to Bowman (2004), it is worth emphasizing that the TLTP has had four central objectives:

- To accelerate the issuance of the title deeds to eligible landholders throughout Thailand;
- To produce cadastral maps in rural and urban areas, using a uniform mapping system showing all land parcels;
- To improve the effectiveness of land administration at both central and provincial levels;



Poor farmers in Thailand still face difficulties in access to land © FAO

■ *An appraisal of the project, which was conducted in four provinces of Thailand, indicated that security of ownership or titled land gained significant advantages over untitled land, namely obtaining institutional credit and larger amounts of credit, higher value, greater productivity and lower cost of inputs*

- To strengthen the Central Valuation Authority to provide an effective property valuation service at the national level.

The TLTP was designed as a four phase project and ran over 20 years. When it finished in 2004, approximately 13 million titles were delivered to Thai landowners, and approximately 40 per cent of the total area of the country (20.48 million hectares) was classified as private land. Landholders have benefited positively from the Land Titling Project because it increased the values of land and it improved tenure security (Brits et al. 2002 and Dekker 2003). An appraisal of the project, which was conducted in four provinces of Thailand, indicated that security of ownership or titled land gained significant advantages over untitled land, namely obtaining institutional credit and larger amounts of credit, higher value, greater productivity and lower cost of inputs (Feder, et al., 1988). In addition, land transactions for titled land and cultivated areas were increased by the project (Burns, 2004). Significantly, the programme received the World Bank Award for Excellence in 1997 (Bowman 2004). But, as the project was restricted by law to non-forest land areas, there were a number of people who were and still are excluded, for instance hill tribes and communities who live on forest land (Burns, 2004).

Baan Mankong Collective Housing Programme

The lack of security of tenure is a recurring problem that the people in irregular and informal urban settlements are confronted with (UN-Habitat, 2003). In Thailand,

urban poor populations face the same problems, such as lack of secure land tenure and evictions. These problems affect the poor, who have no access to land and no security of tenure. The Thai Government is aware of these issues and in January 2003 it announced a housing programme policy to solve the problems of housing, land insecurity and basic services for urban poor people (Community Organizations Development Institute, undated).¹⁶⁸

The CODI under the Ministry of Social Development and Human Security implemented the Baan Mankong Programme. Negotiations with landowners in order to obtain and secure land for collective use were undertaken through the programme (ESCAP, ADB and UNEP (2012)) and it is based on a participatory and bottom-up approach. It is driven by the people in community and collective management of their environment and resources. There are five strategies taken under the Baan Mankong Programme: upgrading, re-blocking, land sharing, re-construction and re-location. Land tenure security is one of the significant areas of the programme. In the programme, public land is simply used while private and unused land is either bought or leased by the government.

According to CODI (2011), Baan Mankong has included 1,546 communities with 90,813 households in 73 provinces. The status of land tenure under the programme in 2011 was as follows:

- Cooperative ownership (with title) -
32,153 households (34.78%)
- Long-term lease -
40,292 households (43.58%)
- Short-term lease (more than 5 years) -
7,594 households (8.21%)
- Permission to use land -
12,419 households (13.43%)

¹⁶⁸ CODI (undated): What is Baan Mankong? Available: <http://www.codi.or.th> Accessed: 30 April 2012.

According to Sophon (2006), the evaluation research conducted in 2003 by the Faculty of Environment and Resource Studies at Mahidol University, and in 2005 by the Faculty of Social Administration at Thammasat University, showed that the land and housing insecurity problem could be solved under the Baan Mankong Programme. The obstacles at the programme's implementation include issues on land titling processes and legal regulations, namely the Building Code and the Municipalities Act (National News Bureau of Thailand, 2005).

3.2 Trends and Development of a Land Administration System in Thailand

As mentioned above, land registration in Thailand is based on the Torrens System. Under the Land Code of 1954, the Department of Lands is responsible for maintaining the land registration, for issuing land title documents, for all cadastral surveys, for the implementation of the Land Code, and for the registration of rights to non-forest land under the Land Code; it also performs the central valuation function. A title deed or a Utilization Certificate is issued in a duplicate form for each parcel; one is held in the land office as the register, another one is held by the landowner. However, the registration system also includes some elements for the registration of deeds. A parcel file (or dealings file) is created and maintained for each parcel, either with a *Chanod* or with utilization certificate (*Nor Sor. 3, Nor Sor 3 Kor, Nor Sor 3 Khor*). The first form kept in this file is the adjudicative form. Afterwards, the documents, which relate to all land dealings, will be annexed permanently to the dealings file (Kitbamrung, 2009). In addition, Kitbamrung states that "[...] the land transaction process in Thailand is unique, as most of the dealings do not involve legal professionals. The land officers perform their duties as officials and conveyancers at the same time. Normally, the whole process takes about 2-3 hours" (*ibid*).

The land administration system is decentralized in the country; there are 866 land offices covering 76 provincial

land offices (16 branches in Metropolitan Bangkok), 431 district land offices, 322 branch land offices and other sub-branch land offices. Title registration is maintained at the provincial level, and includes a range of related information: survey plans, cadastral maps, valuation maps/-data, office copies of the titles, parcel dealings files, and cross-indices including an owner's index. The certificates of utilization and pre-emptive certificates are maintained at district level, which then supports the provincial office (Burns, 2002).

Thailand has been judged by the World Bank as having one of the most efficient registration systems in the world. "The registry there is still manual. But there is a direct link between the registry and cadastral maps; land records storage is continually improving, decentralized registration is possible and there is a nationwide system for personal identification." (World Bank, 2005). Furthermore, the World Bank ranks Thailand as the sixth easiest country in terms of land titling with regard to procedures, time and the cost of registering a property. Thailand has only two procedures (fewest) and it takes only two days to register property (fastest) (World Bank, 2009). Kitbamrung (2009) remarks that land registration alone (land valuation, land tax, transaction fee) may be done in less than four hours with the one stop service at the Land Office.

3.3 Recent Trends, New Developments and Challenges in the Land Administration System

The land administration system in Thailand has been improved and developed on both national and local levels in accordance with the laws, traditions and values of the country. The administration system follows the global trends such as "Cadaster 2014" (which is the result of a working group of FIG-Commission 7 looking at trends and developments in the field of cadaster),¹⁶⁹ and the Department of Lands (DOL) has been putting its efforts into achieving its goals.

¹⁶⁹ <http://www.fig.net/cadastre2014/>

However, the road to Cadaster 2014 has not yet been completed and there are still some obstacles, such as the integration of records for both private and public restrictions, rights, and other data (Utesnan, 2010). Nevertheless, the DOL has successfully fulfilled many requirements already. In the course of the Thai Land Titling Project (TLTP) between 1984 and 2004, the new technological system with cadastral base maps, UTM (Universal Transverse Mercator) projection, Spatial Data Infrastructure, and other new technologies were introduced and implemented everywhere. Now, officers and licensed surveyors are able to work and cooperate via internet technology. DOLSURVEY online software provides computer mapping and a Digital Cadastral Database, full cost recovery, value added services, rationalization and transfer of land ownership, government restructuring and an integration of survey and land title processes (ibid).

The area of the entire country is 51,311,520 million hectares, of which 89.81 per cent, or 46,082,880 million hectares (as of November 2008), have been surveyed and mapped with reference to UTM coordinates (Department of Lands, 2008b). The DOL has been improving and developing its cadastral map continually to facilitate land administration and registration.

Between 1901 and 2010, the DOL issued land certificates for 30 million parcels (20 million hectares), of which 24 million parcels are Chanod. The numbers of issued land certificates and land information has continuously increased. The DOL recognizes the necessity and importance of land administration management and acknowledges the integration of the three elements: Land Registration System, Cadastral Survey and Mapping System, and Parcel Based Land Information System. Since the Thai Land Titling Project was completed, many systems in land management have been improved further:

- In 1990, the land registration system was computerized. Starting that year, the DOL developed a GIS project, which operates with Google Maps, to

provide land location and land parcel information services. This project operates in 46 land offices (23 provinces), and covers 6 million land parcels (Department of Lands 2011c).

- In 2005, the Land Information System for Managing Land System Development (Initial Project) and Integrating Computer System with the Land Office (Comprehensive Project)¹⁷⁰ were established (Department of Lands 2011a). The development of land information system phase I took place between 2009 and 2012; the Initial Project and the Comprehensive Project were to be integrated and applied to four provinces in 25 land offices. The 25 land offices were to be established as land information centers to provide services and to improve land registration and other systems in the DOL to prepare for the changes in the country. In this phase, land registration would be done online from the different land offices. An e-payment service would be offered as a convenience.
- In 2007, the “National Land Information and Mapping Centre Project” or “National Land Parcels Base Project” (Department of Lands 2011a) was organized by the DOL. The objectives were:
- To integrate land information and maps into GIS, to form a standard for the preparation of land use boundaries, to support local governments in collecting taxes, and to be used for both government and private organizations;
- To be an integrated center for sharing land information and maps between the Department of Lands and organizations concerned.

The National Land Parcels Base Project aims to support the policies of the government and of the Ministry of Interior to mitigate land tenure insecurity problems in Thai society. This will be done by securing land ownership according to the land-use purposes and clearly identifying land boundaries.

¹⁷⁰ Author's translation.

In 2011, the DOL received the budget to implement the first pilot project in seven provinces of the central region: Bangkok, Pathum Thani, Nonthaburi, Chachoengsao, Samut Sakhon, Samut Songkhram and Samut Prakan. It will take three years (2011 - 2013) and has a budget of USD 175.96 million. The information obtained by GIS will consist of map layers as follows: Land Map, Public Land Map, Land Evaluation Map, Building Map, Index Map, Fundamental Geographic Data Set-GEDS Map, Land Use Map, and Land Classification Map. Significantly, land information and maps will be integrated for the National Land Information and Mapping Centre Project / National Land Parcels Base Project. The documentary data of both private and public land titles and spatial data will be digitized. data will be formed with some basic GIS data and relevant data from other organizations. Finally, they will be kept in the GIS system to become the centre of land information for the country.

When this project has been completed, land information from the whole country will be shared and it can be used by all organizations. New technologies have been introduced in some land offices; for instance in the Nonthaburi Province the Land Office (Pak Kret Branch) has provided and facilitated people with surveying

schedules (surveying data), people participate in land area calculation (transparency) by reporting surveying processes weekly by text messages on cell phones, and by using the land office's website. The DOL has been improving effective cadastral and surveying services to facilitate land registration in the country.

3.4 SWOT Analysis of the Current Land Tenure System

The land tenure system in Thailand controls both private and public land. To identify positive and negative implications and to explore possible solutions to land tenure system issues in Thailand, a SWOT analysis is undertaken:

Strengths

- Legalization of land titles for both private and public land

Legally, land tenure security for both private and public lands is guaranteed. Private and public lands are identified and issued separately in order to reduce land conflicts.

Strengths <ul style="list-style-type: none"> • Legalization of land titles for both private and public land • Regulation of community land titles • Decentralized land administration - services-oriented • Improving land tenure security through government programmes 	Weaknesses <ul style="list-style-type: none"> • Several kinds of private land certificates • No limitation on the amount of land occupation • Weak governance • Difficulty of access to land for poor people • Difficulty of access to land for indigenous people
Opportunities <ul style="list-style-type: none"> • Modern cadastral system and land administration • Awareness of natural resources and environment aspects • Governance: Targeting to increase the corruption perception index 	Threats <ul style="list-style-type: none"> • Opened land market for the rich (Thai and non-Thai investors)

- Regulation of community land titles

Issuance of community land title secures land tenure for the community. Thus, the community is legally allowed to occupy, to cooperatively manage and use public land.

- Decentralized land administration - services-oriented

The land administration system is decentralized into 76 provinces, and a total of 866 land offices are spread around the country. The decentralized land administration has improved access to services with a 24 hour Land Clinic¹ that is open every day to answer queries and give advice about land registration (Nabangchang and Srisawalak, 2008). The “DOL cadastral system, both survey and registration, is fully cost recovered, mainly through statutory fees levied on transactions. The digital cadastral system is regarded as a strategic government base map for any applications purposes” (Utesnan, 2010). Generally, decentralization facilitates the land administration for people but the Department of Lands has some inconsistencies in controlling this process at provincial/district level (Petcha-em, 2008).

- Improving land tenure security through government programmes

The Thai Government has recognized land tenure security for urban, rural and indigenous people. There are government programmes that contribute to land tenure security, for instance the Thai Land Titling Project, the Agricultural Land Reform, the Baan Mankong Collective Housing Programme, the National Land Information and Mapping Centre Project and others.

Weaknesses

- Several kinds of private land certificates

As mentioned earlier, there are several types of land title certificates that are issued by different institutions and consequently there is complexity and ambiguity in

the land registration system. For instance, there are a number of private land certificates, so there is a need for a combination of either private land titles or the issuing of only one standard private land document.

- No limitation on the amount of land occupation

Land concentration and unequal land distribution occurs due to the lack of measurement for a limitation on the amount of land occupation. There is a big gap in land holding between the rich and the poor. A minority of Thai people owns large amounts of land, while the majority owns only small amounts of land. A large portion of land is unused while there are still a number of landless people in the country. Laws for limiting the amount of land held and a progressive land tax are absent in Thailand (Land Reform Network of Thailand, 2011) but this issue is addressed in the government's policies and in the 11th plan as mentioned above.

- Weak governance

Although there are many government programmes which directly benefit many landless and poor people, a number of wealthy people have also benefited from these programmes. Weak governance within these programmes generates corruption issues. For instance, under the Agricultural Land Reform project, rural people can get a piece of land from the government with a title. It is then forbidden to buy or sell this land, and it can only be transferred to the descendants of the owners. But many poor people still illegally sell or transfer this land to wealthier people when they need money, or when they need a loan. Distributing land with a title alone cannot solve the problems of insecurity on land or poverty. Good governance is vital and complements titling and can be an instrument to secure land for people in need. Hence, providing land with a secured title, funding and good governance - namely the rule of law, transparency and accountability - should improve land security and reduce poverty in a sustainable way.

There are a large number of poor people in rural areas who are still landless and who cannot afford land through the market. Poor farmers have also difficulties with accessing land by leasing. .

- Difficulties for poor people to access land

In Thailand, land is tradable. There is no limit to the amount of land holding so it is openly possible for wealthy people to access land. In contrasting, poor people have difficulties accessing land through a land market. Although Thailand has a well-established land administration system, and the land rights are clearly recorded, accessing land is still a problem for them. The problems of accessing land for the poor are grouped as follows:

Poor people in urban areas: Poor urban communities in Thailand face problems of eviction, homelessness, squatting and insecure land tenure. They cannot afford housing on the markets and the public systems. However, upgrading urban poor communities, development of low-income housing, provision of communal land titles and the establishment of the Baan Mankong Collective Housing Programme are efforts to reduce these land issues.

Poor people in rural areas: There are a large number of poor people in rural areas who are still landless and who cannot afford land through the market. Poor farmers have also difficulties with accessing land by leasing. The government is aware of this issue and the agricultural land tenancy law is an attempt to improve farmers' access. The government has also allocated land for rural people through many projects, for instance the Agricultural Land Reform Programme, or the Allocation of Land for Livelihood Programme. In addition, it has tried to accelerate the purchase of private land for agricultural land reform.

- Difficulties for indigenous people to access land

Thai citizens, both men and women have equal rights to access land through land markets, lease, inheritance, etc., but this does not apply to indigenous people. Citizenship and land rights are still a complicated issue (Luithui and Lasimbang, 2007). Without citizenship, minority groups cannot access land (Minority Rights Group International, 2009) although some organizations have attempted to get Thai citizenship for indigenous people so that they could have equal rights with Thai nationals. This still an unsettled issue; indigenous peoples are still demanding legal recognition by traditional land tenure and resource management systems (Erni, 2010). However, government institutions, NGOs and others are concerned about natural resource management, which includes land for the indigenous people in Thailand. In addition, Luithui and Lasimbang (2007) say that natural resource management for indigenous people/local communities is addressed by a number of organizations such as the Inter Mountain Peoples Education and Culture in Thailand Association (IMPECT), the Highland Nature Conservation Club (HNCC), the Northern Farmers' Network, and the Assembly of Indigenous and Tribal Peoples. There are also projects that have addressed these issues, for example the Joint Management of Protected Areas Project (JoMPA), or the Participatory Land Use Planning Project by the Royal Forest Department (RFD) and the University of Chiang Mai.

Opportunities

- Modern cadastral system and land registration

Since the Thai Land Titling Project (TLTP), a new tenure system with cadastral base maps, UTM projection, Spatial Data Infrastructure (SDI), GPS, GIS and new technologies have been introduced and implemented. The land administration system in Thailand follows global trends and the DOL has put its efforts in to achieve the Cadastre 2014's goals (Utesnan, 2010).

Quality of governance is vital for land tenure security. Many land tenure problems derive from weak governance and it affects social, environmental and economic aspects i

Furthermore, several other projects have started to improve the land registration system. This could in future lead to an efficient and secure land tenure system in Thailand.

- Awareness of natural resources and environment aspects

The government is aware of natural resources and environment issues and its Policy on Land, Natural Resources and the Environment is currently one of the government's long-term policies. To ensure fairness and to reduce inequality in the use of land and natural resources the government is focusing on use. The current Constitution also addresses equitable land distribution, ownership of land with guarantees about the efficient preservation of natural resources, and sustainable land use. The government is aware of the importance of natural resources and environmental management and land tenure security shall be one of the crucial aspects. The Food and Agriculture Organization (FAO, 2012) says that ensuring the sustainable use of the environment depends on gaining and controlling access to land and to other natural resources. Thus land tenure security affects natural resources and environment management.

- Governance: Targeting to increase the corruption perception index

Quality of governance is vital for land tenure security. Many land tenure problems derive from weak governance and it affects social, environmental and economic aspects (ibid). As mentioned earlier, there is perceived corruption in the land reform programme in Thailand because of weak governance. In 2011,

Thailand had 3.4 points on the Corruption Perception Index¹⁷¹ and it ranked 80th among 183 countries (MCOT, 2011), which indicates that corruption in the country is relatively high. In the 11th National Economic and Social Development Plan (2012 -2016) the target is to achieve a score not lower than 5 on the Index and to take good governance aspects seriously. The government is aware of the governance issue; therefore, it will have a positive overall benefit for land administration and land tenure security.

Threats

- Opened land market for the rich (Thai and non-Thai Investors)

Private land with title deeds is secure and its value is higher than land without a title. Private landholders have full rights over their land, which can be sold, rented, leased and transferred. Hence land can be put onto the market for business purposes. In addition, in Thailand there are no laws to control the amount of private land and it is believed that "most of the land in Thailand is owned by a small number of wealthy land owners while smaller plots belong to a large number of poorer land owners" (Office of Natural Resources and Environmental Policy and Planning, 2008). As indicated earlier, 10 per cent of the population in Thailand owns 90 per cent of the private land. Rich people and investors are able to access land more easily than poor people can due to information imbalances and lack of access to credit.

According to the Bangkok Post (2012a), Industrial Estates of Thailand (IEAT) was ranked as the 12th-best economic zone in the world by the Foreign Direct Investment magazine of the Financial Times. Land sales between October 2011 and February 2012 totalled over 272 hectares, a 40.84 per cent increase on the year before. The IEAT wants to work with foreign investors and expected land sales in 2012 to reach 480 hectares.

¹⁷¹ Corruption Perception Index scale of 0 (highly corrupt) to 10 (very clean). See <http://cpi.transparency.org>

Significantly, Foreign Direct Investment classified by business in September 2011 were real estate activities around USD 74.51 million and manufacturing USD 745.62 million USD from a total investment of USD 893.23 million (Bank of Thailand, 2012). The Foreign Direct Investment in real estate and land is minor; however, foreign investors access land in Thailand mainly through Thai nominees. It has been reported that about 90 per cent of the beach land in the Phuket province is controlled by foreigners (Bangkok Post, 2009) and it is claimed that a third of land in Thailand, or about 100 million Rai (16 million hectares) is owned by foreigners through proxy ownership made possible by legal loopholes and corruption (Bangkok Post, 2012b). The Department of Lands proposed to the Ministry of the Interior that there be an amendment to the Leasing of Immovable Property for Commercial and Industrial Purposes Act, 1999, for aliens. The Department plans to extend the leasing period from 50 years to 70 years and it added a new option to lease land for agriculture for 50 years for aliens. It is believed that this amendment will persuade foreign investors to invest legally in Thailand and reduce illegal access of land by foreigners through Thai nominees (Thansettakij, 2012).

Also, the government is aware of the inequity of land holding for Thai people of different backgrounds (urban and rural people) by addressing that the government-owned lands shall be productively used by farmers and communities. Issuing land titles for the landless will also be accelerated. The issue is recognized in the 11th National Economic and Social Development Plan (2012-2016). However, this is a long-term plan by the current government with no guarantee on its effectiveness for the future.

CONCLUSIONS

Thailand has attempted to improve land tenure security for many decades and through several regimes. Numerous programmes have been implemented to improve land tenure security in both rural and urban areas. Land administration, land registration and cadastral systems are facilitating each other and

substantially contributing to land tenure security. Fortunately, land administration in Thailand is decentralized. Modern technologies have been used to improve and support the land administration system and the cadastral system. Several types of titles have been issued by the DOL and other institutions.

Both private and public lands have formal titles, which are official documents of land tenure, and a land title is provided for communities. Access to land is equal for both Thai male and female citizens but poor people and indigenous people still have difficulties in accessing land. Equitable land contribution and ineffective land use affect the social, economic and natural resources of the country.

Finally, improving land tenure security is crucial for landholders, for the economy, for society and for natural resources. Good governance is indispensable for improving land tenure security. Also, efforts to improve land tenure security in Thailand should not neglect social and environmental issues.

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Brazil

Peru

Bolivia

Paraguay

1. INTRODUCTION TO COUNTRY CONTEXT

Bolivia is one of the poorest countries in Latin America. It experienced a disastrous economic crisis in the early 1980s but is rich in natural resources, having the second largest reservoir of gas in Latin America and the world's biggest in-situ lithium reservoir (27 per cent of the world's total) (Gruber et al., 2011). It also has many other natural resources, such as tin, petroleum, zinc, tungsten, antimony, silver, iron, lead, gold, timber, hydropower (Central Intelligence Agency, 2011; United States State Department, 2011).

In August 2010, the World Bank no longer classified Bolivia as a low-income country, which means the Bolivian Government has access to financial sources, investment guarantees and contingency loans for

emergencies or economic crises. It is also important to mention that between 2008 and 2011 Bolivia enjoyed a surplus in its budget (World Bank, 2011). Nevertheless, inequity is still evident with regard to wealth distribution in the country.

Bolivia is situated in the central zone of South America and has an area of 1,098,581 km². Of this, 25 per cent is part of the Highland Plateau and the Andean region; 15 per cent is the Inter-Andean Valleys and 60 per cent is lowland (most of it is part of the Amazon Basin). It is a landlocked country surrounded by five other countries: Brazil, Argentina, Peru, Paraguay and Chile (CIA, 2011; CRID, 2011).

The climate varies with altitude; from humid and tropical to cold and semiarid. Its terrain is made up of

Map showing Location of Bolivia



Source: World Bank, 2011

the rugged Andes Mountains with a highland plateau, hills, and lowlands plains of the Amazon Basin. This country has extreme differences in elevations; the lowest point is the Rio Paraguay at 90 metres above sea level and the highest point is the Sajama Mountain at 6,542 metres (CIA, 2011).

Bolivia's administration is based on nine departments (Beni, Chuquisaca, Cochabamba, La Paz, Oruro, Pando, Potosi, Santa Cruz and Tarija), 112 provinces and 339 municipalities (La Razon, 2011). The department of Santa Cruz is the largest with an area of 370,621 km²; the smallest department is Tarija with 37,623 km². Each department is ruled by a governor who is elected by popular vote. The country has road, rail, air and water transport systems with internal and external integration. The national road system has two parts: the East and West systems. The main internal road system connects the cities of Santa Cruz, Cochabamba and La Paz and the country is connected with Chile, Peru and Argentina by the West Road System; the East Road System connects Bolivia with Brazil, Argentina and Paraguay. The international airports are Viru Viru in Santa Cruz, El Alto in La Paz and Jorge Wilstermann in Cochabamba (Salamanca, 2008).

Bolivia has a population of just over 10.4 million and the ethnic groups are Quechuas 30 per cent, Mestizo (mixed white and Amerindian ancestry) 30 per cent, Aymara 25 per cent, white 14 per cent and 1 per cent made up of more than 30 other indigenous groups. The Constitution of 2009 recognizes Spanish and native languages, and official languages spoken by percentages of the population are: Spanish (nearly 100 per cent of the population), Quechua 21 per cent, Aymara 14.6 per cent, foreign languages 2.4 per cent, other native languages 1.2 per cent (CIA, 2011; INE, 2010 (1)).

The Bolivians have a strong Christian tradition and 81 per cent of the population is Roman Catholic, 14 per cent is protestant, 3.3 per cent agnostic, 0.4 per cent follow minority religions such as Islam, Bahai, Judaism,

Buddhism and Hinduism (Diaz-Dominguez, 2009). The age ranges are: 34 per cent between 0 and 14 years, 60.7 per cent from 15 to 64 years, 4.6 per cent 65 years and older (2011 estimation) (CIA, 2011). The median age of the population is 21.9 years; for men it is 21.36 years and for women it is 22.46 years (INE, 2010 (1)).

The rate of urbanization has changed a lot in the past ten years. Currently, 67 per cent of the population lives in urban areas and the annual rate of urbanization is 2.2 per cent. The most populated cities are Santa Cruz with 1,651,436 million people, La Paz with 840,206, Cochabamba with 618,386 and Sucre with 281,000 (INE, 2010(2); CIA, 2011). A census took place at the end of 2012 to update all this data.

Bolivia recorded the highest economic growth rate in South America in 2009. In 2010, an increase in world commodity prices resulted in the biggest trade surplus in history. However, a lack of foreign investment in the key sectors of mining and hydrocarbons as well as higher food prices posed challenges for the Bolivian economy (CIA, 2011). The estimated Gross Domestic Product (GDP) for 2010 was USD 19.78 billion, the annual growth rate is 4.1 per cent and the GDP per capita estimated for the year 2010 was USD 1,849 (U.S. State Department, 2011). With a supportive external environment, real GDP growth is projected at 4.5 per cent in the second quarter of 2011 driven by the hydrocarbon sector and tax revenues, and the external current account would remain in fiscal surplus (International Monetary Fund, 2011).

The 2010 GDP estimate for Bolivia is based on the exportation of hydrocarbons, minerals and commodities. Natural resources such as hydrocarbons (natural gas, petroleum) are the biggest source of income for the Bolivia (42 per cent of the GDP); minerals make up 14.1 per cent of the GDP (zinc, silver, lead, gold and iron), agriculture contributes 11 per cent (major products are soybeans, cotton, potatoes, corn, sugarcane, rice, wheat, coffee, beef, barley and quinoa). Manufacturing contributes 11.3 per cent to

GDP, transport and communication together 9 per cent and public administration services 11.9 per cent (CIA, 2011; U.S. State Department, 2011). Bolivia has a Gini index of 0.57, which is an assessment of income distribution in a country (World Bank, 2011).

1.1 Overview of the land tenure system

The land tenure system in Bolivia is based on the recognition of different kinds of property in urban and rural areas; these are private, state, communal and indigenous land. The main difference between communal and indigenous land is that communal land can be granted and owned by indigenous groups and farmers indistinctly. This does not apply to indigenous lands. The 2009 Constitution recognizes indigenous autonomy, therefore indigenous people can use the land under their customary system.

The land tenure system in Bolivia is based on the recognition of different kinds of property in urban and rural areas; these are private, state, communal and indigenous land. The main difference between communal and indigenous land is that communal land can be granted and owned by indigenous groups and farmers indistinctly. This does not apply to indigenous lands.

The state has been trying to implement, standardize and unify the cadaster for the urban and rural areas since 2006 but has still not succeeded. There have been many improvements in this regard; the idea of a unified cadaster is that the system should work for urban as well as for rural areas and is administered by each municipality. There are urban cadastre units in every municipality but all of them have been developing their



Indigenous people in Carabuco Municipality in Bolivia © UNDP

own system and there is no standardized procedure. These units, which have been active for the past 40 years, do not include the rural areas in their cadastres, they only focus on urban areas. The rural cadastre is under the National Institute of Agrarian Reform (INRA).

The highlands and lowlands indigenous groups have different customary systems of usage or tenure because they have completely different cultures. While the densely populated highlands have had a tradition of farming for centuries, the ethnic groups in the Amazon lowlands and the dry lands of the Chaco subsist primarily from hunting, gathering, shifting cultivation and cattle raising. Huge extensions of land have also been used in farming and most of these lands are private. After the division of the arable land in the Agrarian Reform in 1953 between the farm workers' unions, many highland communities still have mixed private and collective cultivation tenure forms, rather than purely private (Mertins & Popp, 1996).

The social and political structure of the Highland Indians, Quechuas and Aymaras ethnic groups is the Ayllu with its communal land tenure, land usage and cultivation methods. Ayllus were within the Spanish hacienda system, but many areas still use the customary Ayllu organization (Mertins & Popp, 1996). Nowadays, the Ayllu system still exists in many regions in the Department of Oruro and Potosí, which is based on the Incagentele organization; this system brings together agricultural, urban, military and marriage interests. The group of Ayllus form a Marka, which is divided into small groups called *Churi-ayllu* or *Ayllus-menores*, meaning "Ayllu's son" (Amazonia, 2011). It is important to mention that both the Ayllus and Markas' councils, the National Council of Ayllus and Markas of Collasuyu (CONAMQ), support Evo Morales's government (ABI(1), 2011).

Around 220,000 indigenous people live in the lowland area of Bolivia and there are 34 distinct tribes. The majority lives in the Department of Santa Cruz, followed

by Beni and Pando. Four groups can be differentiated according to customary land use: (Weber, 1994; cited in Mertins & Popp, 1996):

- Partly nomadic indigenous groups of the evergreen tropical rain forest.
- Indigenous groups of the wetlands.
- Indigenous groups of the damp-dry transitional zone.
- Indigenous groups of the dry forest and thorn steppe.

The government has been trying to increase land tenure security through the implementation of land titling projects and the distribution of land to the landlessness. The historical overview presented in the following section starts with Bolivia's agrarian reform and is divided into two periods: from 1945 to 1995, and from 1996 to 2011. Also, an overview of the Bolivian Constitution of 2009 mentions the articles that are related to the land administration and the land tenure system.

2. HISTORICAL REVIEW AND CURRENT STATUS OF LAND TENURE SYSTEM

2.1 Between 1945 and 1995

The first Indigenous Congress in Bolivia was held between March and May of 1945. President Gualberto Villarroel opened the congress by saying: "The Indigenous people are equal to us and they are also children of this flag, and as children of the state they should be protected by the government. They will be protected, will have access to schools, legal guarantees and they are also obliged to work, fulfilling their duties and obligations like any other Bolivian. Today the work of government that looks after you as a father that cares for his children will begin. No more abuse...!" (INRA, 2010).

As result of the congress, four decrees were passed:

1. Forced work must be abolished; work had to be done for payment or as volunteer work.
2. The abolition of *Pongaje* and *Mitaje* and any other free services in the field imposed by administrative, judicial, and ecclesiastical authorities, etc.
3. Within 60 days the haciendas, mining companies and industries had to open a school at their own cost, applying the Supreme Decree of August 19, 1936.
4. A commission that would draft the code of the Agrarian Worker was to be created. (Censed, 1985, cited in INRA, 2010).

Unfortunately, President Villarroel was killed in 1946 and this signalled the end of his policies; just a few of the fourth decrees and other initiatives were fulfilled. At that time, inequities in the distribution of and access to land and wealth increased, and only a small percentage of the population had access to an arable plot. As stated by Beltran and Fernandez (INRA, 2010), 4.5 per cent of the population owned 70 per cent of the agrarian land in 1950 under the hacienda system.

By 1950, the total amount of land under the hacienda system was 12.7 million hectares and these were controlled by 8,137 haciendas. The departments with the largest areas under this system were Chuquisaca, La Paz and Cochabamba (3.04 million, 3.31 million and 2.89 million hectares respectively) all of them in the Andean region. The departments in the Amazon region had the lowest populations at that time and only 13 per cent of the haciendas were settled there (see Table 1) (Soruco, et al., 2008).

Bolivia had a popular and agrarian revolution in 1952 due to the unequal access to land. The trigger event was the non-recognition of the incoming president Mamerto Urriolagoitia who won the presidential elections in May 1951 for the Nationalist Revolutionary Movement (MNR). This created a favorable atmosphere for a revolution, so the MNR and indigenous groups demanded the recognition of its legal government; agrarian reform to give everyone the right to possess a piece of land; educational reform; the nationalization of the tin mines; and the right to universal suffrage because at that time illiterate people and women did not have the right to vote (Jemio-Ergueta, 1973).

Table 8: Properties and areas under the hacienda system by department in 1950.

Department	Number of Haciendas (N°)	% of Total N°	Total Area	Cultivated Area (Ha.)
Chuquisaca	1,791	22	3,044,450	49,028
La Paz	1,958	24	3,311,167	96,032
Cochabamba	2,357	29	2,891,407	75,004
Oruro	126	2	400,399	10,320
Potosi	748	9	628,906	33,851
Tarija	118	1	166,878	576
Santa Cruz	907	11	1,625,954	23,153
Beni	132	2	631,915	2,201
Pando	0	0	0	0
Total	8,137	100	12,701,076	290,165

Source: Extracted from Soruco et al., 2008 Adapted by Author

This revolution swept through the valleys and the Andean region but its impact was weak in the lowlands. The agrarian reform eliminated and abolished the *latifundio* (large piece of land) and the *hacienda* system and ended up with the feudal system that was imposed by the Spanish in their colonies (INRA, 2010).

Property was occupied by indigenous groups and the owners were not compensated, even if they possessed legal titles. Also, the revolution nationalized without compensation the tin mines that had been in hands of three families known as the Tin Barons: Simon I. Patiño, Victor Aramayo and Mauricio Hostchild (INRA, 2010).

The revolution in the rural areas was violent and there were many fatalities, most of them indigenous people who were fighting to recover their rights over the land that their ancestors worked on and that they owned under customary rights. The customary rights system was based on individual and communal rights of use over the land (Urioste, 2011).

The agrarian reform was passed by the Decree N° 3464 in August 1953 and was elevated to Law in October 1956, which was known as the Agrarian Reform Law. The main objectives of the agrarian reform were:

- To grant arable land to peasants who do not have any land, or they have an insufficient amount, expropriating it from landowners who hold the land and have other source of income that does not come from working or investing additional capital in the arable land.

- To proscribe personal and all kind of free servitude character, instituting a wage regime as the only form of payment to farm labourers for their work.
- To reclaim the land for indigenous communities that was dispossessed by fraud, administrative extortion or and political influence, and to turn those lands into production cooperatives.
- To ensure the rational and intensive cultivation of arable land to achieve food self-sufficiency in the country, providing easy and affordable credit to farmers and implementing a plan to mechanize agricultural work (Jemio-Ergueta, 1973).

The agrarian reform of 1952 (called by some authors the First Agrarian Reform) created favourable conditions for a huge internal migration from the Andean region and the valleys to the lowlands (Bolivian Amazon). In 1960, the Instituto Nacional de Colonización (National Colonization Institute – INC)) granted a plot of land between 20 and 50 hectares per family under the category of individual private property, which was not transferable and was indivisible. Years later, however, farmers divided and sold those plots of lands.

Granting land through the INC to the poor and landlessness, in 1960 the MNR government championed the transition from the semi-feudal hacienda system to what they called a family business capitalist farmer type (Urioste, 2011). The resulting types and characteristics of land under the agrarian reform are described in Table 2.

Table 9: Types and characteristics of ownership of rural land property in Bolivia under the Agrarian Reform Decree of 1953

Types of Property	Description	Characteristics
Solar Campesino (Lot Farm)	The land where the farmer and his family lives.	It is forbidden to divide and seize (not possible to use as a collateral guaranty for a loan).
Small Farm Property. Up to 350 ha in the Plateau and 80 ha in the Chaco region.	The farmer and his family works the land, it should satisfy their food needs.	It is not allowed to divide or use as collateral guarantee for a loan.
Medium Property. Up to 350 ha in the plateau and up to 500 and 600 ha in the lowlands and the Chaco region respectively.	It is worked by hand labour or by mechanized farming. The production is for the market.	It is allowed to be sold and mortgaged.
Agricultural Company. Between 400 and 2,000 ha.	Land where a huge amount of money is invested. Paid labour force is used. The production is for the market.	Its recognition is a condition of land availability and the capital invested. It can be granted, sold or mortgaged.
Indigenous Community.	Land titled collectively in favour of an indigenous group. The production is for subsistence.	It is forbidden to sell, to divide or to seize.
Cooperative	Land granted to a farmer's association.	It is not allowed to be sold and mortgaged.
Illegal settlements (squatters)	All plots or lands that are occupied by settlers with no legal right over it. No title, without authorization of the owner.	It is not possible to use it as collateral guarantee for a loan. It is not allowed to be sold or seized.

Source: Extracted from INRA (2010).

INRA (2010) published official data about the distribution of land between 1953 and 1993 and this data shows that the agrarian reform did not have the expected impact on the distribution of the land for small farmers in the lowlands (Table 3). Of 110 million hectares, 57.3 million were granted to small, medium, communal and company properties, with a total of 759,346 beneficiaries, between individual and collective properties. Table 8 shows the distribution per beneficiary of the rural land divided per five-year period, from 1953 until 1993. There are differences in the total amount of land distributed and the data published by the Environment Development Ministry (cited in Soruco et al., 2008) and INRA (2010) but the trend and tendencies are still the same.

The area distributed from 1953 to 1993 represents 52 per cent of the 110 million of hectares Bolivia's land area. In the departmental analysis, most land was distributed or granted in the Mining Department of Oruro - 76 per cent of its territory – with this department being located in the Andean region. Pando was the department with the lowest rate of land granted, at 14 per cent of its territory (INRA, 2010).

In Santa Cruz and Beni, which are located in the Chaco and the Amazon regions, 58.3 per cent was distributed out of 57 million of hectares granted to 16.43 per cent of the beneficiaries and 26.46 per cent from 1953 to 1993. In the departments of La Paz, Cochabamba and Potosi 26.46 per cent of the total land was distributed to 71.32 per cent of the beneficiaries (INRA, 2010).

In 1953 an institution called Servicio Nacional de Reforma Agraria (Bolivian Service of Agrarian Reform - SNRA) was created. Its main objective was to distribute land to people who did not have any land or insufficient land only. The SNRA was formed by the president and the National Council of Agrarian Reform (CNRA) and integrated nine members: the agrarian judges, the Rural Board of Agrarian Reform and the Rural Supervisors (INRA, 2010).

The state granted land through the CNRA and the National Institute of Colonization (INC) from 1965 until 1992. The INC was created to distribute land in parcels of between 10 and 50 hectares. This distribution was to be free of charge and would be done within the colonized areas (most of it in the Amazon area). The

Table 10: Distribution of land per beneficiary based on five-year periods from 1953 – 1993

Five-year Period	Files amount	Beneficiaries (B)	% (B)	Area (A) in Ha.	% (A)	Average
1953-1958	403	13.777	1.87	607,356.46	1.06	44,08
1959-1963	3,280	72.147	9.50	3,315,581.47	5.79	45,96
1964-1968	2,624	34.196	4.50	3,122,358.25	5.45	91,31
1969-1973	7,464	111.384	14.67	9,086,532.20	15.86	81,58
1974-1978	11,596	198.239	26.10	17,449,864.10	30.45	88,02
1979-1983	4,133	75.334	9.92	4,912,977.42	8.57	65,22
1984-1988	5,049	83.794	11.03	4,252,377.43	7.42	50,75
1989-1993	13,540	162.621	21.41	13,612,221.73	23.75	83,71
Unknown period	371	7.944	1.05	946,053.69	1.65	119,09
Total	48,460	759.436	100	57,305,322.75	100	75,46

Source: INRA, 2010.

CNRA existed between 1953 and 1992 and it was in charge of granting land over 50 ha, whereas INC was in charge of granting land under 50 ha (INRA, 2010).

Through the CNRA, 55.1 million of hectares were distributed until 1992, which represented 96.24 per cent of the distributed land within that period. These lands were granted to 704,100 citizens who represented 92.71 per cent of the total beneficiaries. Through the INC, 2.1 million of hectares were distributed, which represented 4 per cent of the land distributed to 54,988 beneficiaries. The beneficiaries needed an average of 12 years to get the title from the CNRA and 7 from the INC (INRA, 2010).

The distribution of land through the CNRA and the INC by types of properties for 40 years (1953-1993) was 57,305,322.8 hectares in total, which were distributed within different types of property: 40.16 per cent of the total area (23,011,055.2 ha.) was granted to 2.24 per cent of the beneficiaries under the category of Agrarian Company; 28.32 per cent (16,231,728.9 ha.) was granted to 16.27 per cent of the beneficiaries within the category of Medium Plot size; and the 21.45 per cent of the area (12,289,511.1 ha.) was given to 43.90 per cent of the beneficiaries (see Table 4). Of the rest, 9.99 per cent was distributed in the categories of Lot Farm, Small Farm and No Classification (INRA, 2010).

Table 11: Total area distributed by beneficiary in the period 1953-1993

Types of properties	Files amount	Beneficiaries (B)	% (B)	Area (A) in Ha.	% (A)	Average
Lot farm	548	3,999	0.53	23,866.10	0.04	5.91
Small	26,639	269,179	35.44	4,850,838.80	8.46	18.02
Medium	13,555	123,567	16.27	16,231,728.90	28.32	131.36
Agrarian company	4,147	17,005	2.24	23,011,055.20	40.16	1,353.19
Communal property	2,990	333,403	43.90	12,289,511.10	21.45	36.86
No classification	581	12,283	1.62	898,322.60	1.57	73.14
Total	48,460	759,436	100	57,305,322.80	100	75.46

Source: Extracted from INRA (2010)

In 1989, former president Victor Paz Estenssoro signed an agreement with the United States of America to support specifically the agribusiness sector. In the same year, the World Bank financed a project in the department of Santa Cruz, called "Lowlands". The land included in this project was divided into two areas: B1 (Pailón-Los Troncos-Tres Cruces) and B2 (San José de Chiquitos). This project's main goal was to populate the lowlands and support the expansion of the agricultural frontier for commerce and for the exportation of commodity products (Soruco et al., 2008).

From 1960 to 1994, 12 years after democracy was restored in Bolivia, the responsibility of colonizing the Amazon region in order to decrease the demographic pressure in the Andean region, was given to the Corporación Boliviana de Fomento (Bolivian Chamber of Development - CFB) and later to the INC. Through these institutions 3.6 per cent of the area was granted to 7.2 per cent of the beneficiaries, the planned colonies of Japanese and Mennonites were among them (INRA, 2010).

In 1942, the Bolivian Agrarian Bank was created to finance investments for farming in rural areas. This bank was closed in 1990. A total of just over BOB 370 million (approximately USD 259 million in 1985), was financed by the Agrarian Bank from 1955 to 1984 (Soruco et al., 2008).

The CNRA and the INC were closed due to the absence of the State's presence in many areas, corruption within the institutions, non-recognition by the government of the customary uses of land, and lack of respect for indigenous people as equal citizens. The land was granted through influence and not for proven necessity (INRA, 2010). In 1992, the government intervened in the CNRA and the INC and in 1996 a new institution was created, the Instituto Nacional de Reforma Agraria (National Institute of Agrarian Reform - INRA).

2.1.1 Between 1996 and 2011

When the INRA was established, the government prescribed a 10-year period in which all the rural areas in Bolivia should have been titled - from 1996 to 2006. The INRA has a legal framework for its titling activities through law N° 1715.

When this period ended in 2006, parliament approved some modifications to the INRA law. This amendment law was named Law N° 3545 *Reconducción Comunitaria de la Reforma Agraria* (Communitarian Renewal of the Agrarian Reform Law). This new law allowed for an extra eight years, from 2007 until 2013, to finish the titling process. Under this law the government was obliged to prioritize the titling and solve all conflicts over indigenous, private and communal lands (Law N° 3545, 2007; Urioste, 2011).

Under Law 1715 (also called INRA law), the state could get land back under the reversion and expropriation processes frameworks:

Reversion: all land that did not fulfil a social-economic function, e.g. abandoned land, when the land taxes were not paid, would be returned to the state without compensation. Reversion was possible only for those lands under the category of a medium-size property or an agricultural company (Article 52. of the law N° 1715).

Expropriation: this process was applied to contribute to public goods (regrouping or land consolidation and distribution of land, natural protected areas and for the construction of public infrastructure). The compensation would be based on the market price, with the exception that the compensation for the expropriation of communal and indigenous land would be defined by the agrarian superintendent (Article 59, 60 and 61 of the Law N° 1715) (INRA, 2010).

A problem that many farmers have in the Plateau and Valley regions is that after some years the land is too fragmented and the areas are no longer useful for farming purposes. This is because families have been dividing up their lands between members, generation after generation, and in many cases each family member owns less than 300 m².

During the titling process the INRA addressed many internal and external challenges to work efficiently and finish all the titling processes, and especially deal with corruption. The INRA has also been solving problems such as border conflicts or the double issuance of a title to two different beneficiaries. These problems were created before the institution existed.

The titling process is done in 20 steps grouped into three phases (see Annex 1). First, a collection and analysis of titles and previous documents issued is done; information on the titling process for the beneficiaries is given, along with an identification of conflicts. Second is fieldwork and data collection. Third,

In their search to promote equal access to land, the public institutions of Bolivia have increased the issuance of properties titled to women, amongst other initiatives, because they want to reduce gender inequalities. In the period from 1996 to 2009, 26,403 land titles were issued under women's names and 43,035 under the name of couples (women and men).

a cabinet process is carried out, which ends with the issuance of title property (see Annex 1). An area of 106,751,723 hectares is to be titled in Bolivia. The total area titled by the INRA within the 1996 – 2011 period was 60,333,000 hectares that represents 56 per cent of the total. By 2013, 100 per cent of the land under the titling programme was to have been completed, according to the INRA executives (ABI, 2011).

The INRA law recognizes the legal tenure of the land in all the categories that were established by the Agrarian Reform in 1953. These categories are described in



Improving the quality of urban housing in Sao Paulo © Conjunto Pretes

Table 7. It also recognizes the category of the *Tierra Comunitaria de Origen* (TCO); this is the recognition of the legal tenure of community land where indigenous people settled many generations ago. The land under this new category cannot be taxed, sold or mortgaged as is the case with land in the categories of Lot Farm, Small Farm Property, and Communal Land.

In their search to promote equal access to land, the public institutions of Bolivia have increased the issuance of properties titled to women, amongst other initiatives, because they want to reduce gender inequalities. In the period from 1996 to 2009, 26,403 land titles were issued under women's names and 43,035 under the name of couples (women and men). In the same period, 49,039 land titles were issued under the name of men only. It is surprising that from 1996 – 2005, 4,125 land titles were issued for women and in the 2006 - 2009 period 22,278 woman were granted a title. Despite this growth, there is still much to do to resolve these inequities (INRA, 2010).

Granting land is an initiative that every Bolivian government has worked on. The current government of Evo Morales is no an exception. It also has a programme for the distribution of state land. The difference now is that Morales can also expropriate agricultural land for it to be granted to indigenous and farmers, most of them former miners who migrated from the Andean Region as colonizers. The area that was distributed in the 1996-2009 period was 115455 ha to 151 communities (indigenous and Mestizos) that represents 6,026 families. The time needed to issue a land title is generally between three and nine months with an average cost of USD 2.95 / ha in the period 1996 - 2009. The titling programme was financed by many organizations through bilateral or multilateral agreements but most of the budget was financed by the World Bank from 1996 – 2005. Eighty-four per cent of the funds came from international cooperation agencies and 16 per cent from the Bolivian Government. Just over USD 85 million was paid out in the same period (INRA, 2010).

In the 2006 – 2009 period, USD 35.6 million was financed by international cooperation agencies and the Bolivian Government. The dependency on foreign investments in land titling has been changing within the last years. In 2009, 51 per cent was financed by the international community and 49 per cent by the government through agreements with municipalities and from land taxes collected. Within the next few years, the government aims to be financing 75 per cent of the costs with 25 per cent from international donors (INRA, 2010).

Eight processes of land reversion were initiated by the government between 2006 and 2009, with the justification that those lands were not fulfilling their economic and social functions. Until April 2011, an area of 5,795 ha was affected by these processes. In the same year, more processes were initiated and the land affected was around 160,000 ha (Eldeber, 2011).

The Forestry Law was issued in 1996 (Law N° 1700) to regulate the forestry sector. Before this law came into effect 22 million hectares were under the control of 20 logging companies; this was not environmentally sustainable and all those companies had leasing contracts. The only obligation in their contract was the payment of taxes based on the amount of wood and log extracted from the forest. Many of them did not pay these taxes because the system was too corrupt.

At the beginning of 2007 there were dramatic changes in the area as well as in the number of forest concessions. Only 5.8 million hectares remained under the administration of 87 forest concessions, and the rest were given back to the state. These new contracts were valid for 40 years, with the possibility of an extension after being audited. The audit procedure could be done every five years (Urioste, 2011).

The Forestry Law (Law N° 1700) also improved access to the land for indigenous people and farmers, under the *Category of Tierra Comunitaria de Origen* (TCO), and for the indigenous and *Agrupaciones Sociales del Lugar*

(ASL - Farmers' Association). This allowed these groups to carry out logging on their lands in the case of the TCO, and to request land under a leasing contract in the case of the ASL, avoiding the dependency on a forest company. Also in 1996, the Forestry Superintendence was created through the forestry law, and in April 2009 this institution was replaced by the Bolivian Administrative Authority for Land and Forestry (ABT).

Today, 4.5 million hectares are under logging leasing contracts; 3.5 million are under the administration of forest concessions and 1 million hectares are under the administration of TCOs. In the 1997 - 2008 period, 2 million hectares were granted an international forest certificate to allow the export of certified forest products produced under environmentally-friendly logging management.

There were also some private companies that extracted timber and non-timber products, for example Brazilian or Amazonas nuts and natural rubber. Of these, some were foreign companies that acquired large pieces of land in Bolivia before the 1960s mainly for agricultural purposes, natural rubber extraction and the collection of natural products, for example to produce quinine. Amongst these were German, Austrian and Swiss companies (Soruco et al., 2008).

Foreigners have always been involved in land in Bolivia but in the last 10 years their number has increased exponentially because of the high demand of land and the increase in food prices in the international market. Since the 1960s, the Mennonites and the Japanese have been amongst the biggest group of foreigners that owned agricultural land. Brazilians, Argentinians and Colombians have also been involved in land acquisition in the past 10 years (Urioste, 2011).



Researchers measuring tree diameter, a key metric used in computing ground-based estimates of forest carbon storage in Bolivia © Wayne S. Walker.

2.1.2 Resulting property regimes and regulatory frameworks

It is legal to possess and own land under three categories: private, state, or communal. The only condition is the fulfilment of the economic and social function, and the accreditation for this is done by the government through the National Institute of Agrarian Reform (INRA).

The ABT (Forestry and Land Authority) was created in 2009 as result of a merger between two institutions: the former Forest Superintendence and Land Superintendence. The ABT is the state bureau in charge of the administration of land, forest and the agricultural sector, this authority was given by Article 4th of the Supreme Decree 071.

Foreigners can own land but under the Constitution the Bolivian Government has created a restriction for the next few years, meaning that the state is not able to grant land to foreigners. This restriction will apply when the government has finished the titling project, in 2013. Squatters and unofficial settlements have increased tensions between the settlers and the owners.

3. ANALYSIS OF LAND TENURE SECURITY

3.1 Recent country efforts to improve land tenure security

The Constitution of 2009 created a new framework for land tenure security in Bolivia. Nevertheless, there are some legal loopholes between the Constitution of 2009 and the laws that are used to manage the land. These contradictions and inconsistencies should be solved with forthcoming laws.

Some laws, for instance the Autonomy Law, were promulgated when the Constitution was approved; others like the Mother Earth Law (Ley de la Madre Tierra) were issued in December 2010. This particular law recognizes the land as a dynamic and living system that is made up of an integrated community of interrelated and interdependent living beings that share a common

destiny. The government's vision is that Earth must also be respected and treated as a living organism.

A Rural Cadaster Law was also suggested by the government but this is not even written in the draft version. However, there is an initiative to solve the cadastre problems with the National Law, and standardized processes and criteria should be included in this law in order to solve all the inconsistencies in the rural and urban cadastre, and also between the cadastres of different municipalities. Currently, each municipality administers the urban cadastre and the central government is in charge of the rural cadastre through the INRA.

3.2 Legal framework at the constitutional level

The new Constitution was written from August 2006 to October 2008. There were some delays because of disagreements within the Constituent Assembly but in January 2009 the Constitution was approved.

Parts of the Constitution refer to legal framework that concerns land issues and natural resource management. Notice was given that some laws, such as the forestry, water and land law, and the territorial management law amongst others, would be issued in 2012,.

- The Constitution recognizes the customary land uses by indigenous farmers or ethnic groups, and it gives them the power to rule over their land under their traditions and customs (Article 4; 30/17; 290).
- The Constitution recognizes 36 ethnic groups (Article 290) as well as the ethnic autonomy together with the departmental (Article 277) and municipal autonomies (Article 283). The indigenous languages are also recognized as official languages together with Spanish (Article 5). The Constitution has a framework for the Bolivian state to grant land to these ethnic groups – peasant, indigenous people (the ancestral land they have always occupied) (Article 290).

- There is no logical hierarchy between the different autonomous units (departmental, municipal and ethnic) (Article 276). This is because they have the same power and they are regulated by the Autonomy Law (Article 271). This creates a contradiction for land-use planning because it is not clear who should approve land-use plans. It needs to be resolved with a land use or territorial law, e.g. currently, the legal approval for land-use planning at the municipal level is from the city council (municipal assembly); the municipality must then send the plans to the departmental government for approval by the departmental assembly.

The autonomy and decentralization law states that territorial or land-use planning should be done in coordination with all different autonomous levels, the departmental, municipal and indigenous-farmers-ethnic (Article 22 and 23 Art. III). However, again it is not clear how this coordination should work. In the field this may lead the autonomous unit to develop their own plans without any coordination because the law does not state how, when, why and where this coordination should be done.

- There is confusion because the Constitution recognizes the autonomy at the departmental level (Article 277). It also states regional autonomy is allowed in case it is required, and that this regional autonomy can be formed by associations of municipalities and provinces (Article 273 / 280). This can generate controversies if it is not clarified in a land-use law.
- Private and collective land ownership are recognized by the new Constitution (Article 311, 315), but it also states that one cannot accumulate more wealth than the state allows you to have, as this wealth can endanger the economic sovereignty of the country (Article 312). Who will determine how wealthy a person or company can be before they jeopardize the state? This is a debate in part because there is some suspicion that the state will be able to control who has economic power

In Bolivia, the vision for rural land is too agrarian; it does not recognize the ownership of a forest as reason enough that private land is properly used. It is recognized that only a small part of the property can be preserved as a forest under the category of Private Reserve of Natural Heritage

and who does not. This is why it is important to define parameters to determine the level of wealth of a company or person that could endanger the economic sovereignty of the country.

- Oligopolies and monopolies are forbidden (Article 314). This gives the power to the state to control all the services and reinforce, for example, the notion that every service should be provided by companies approved by the state.
- There is a plot-size-ceiling. No individual can own more than 5,000 hectares (Article 315; Paragraph II). This article was discussed because there was no agreement on this by the Constituent Assembly; they discussed whether to allow 10,000 or 5,000 hectares as the plot size limit. That is why it asked in a referendum what should the maximum number of hectares be and the population decided it should be 5,000 hectares. That was tricky because the population was never asked if they wanted an upper limit on the number of hectares per owner. This plot-size-ceiling will be reinforced at the end of the titling project that the government is implementing and that is to end in 2013, according to the INRA Departmental Director (expert interview). Currently, a property bigger than 5,000 ha can be granted with a land title if the owner or owners can prove that they fulfil what is called the Social and Economic Function (Función Económica Social - FES). This means the property must be used for agricultural purposes and does not have an unfair impact on the neighboring native communities, among other criteria and parameters.

In Bolivia, the vision for rural land is too agrarian; it does not recognize the ownership of a forest as reason enough that private land is properly used. It is recognized that only a small part of the property can be preserved as a forest under the category of Private Reserve of Natural Heritage (Forestry Law 1700, Article 13). It is only possible to lease a forest, get permission for logging purposes or to keep it as a forest concession. This vision or approach leads to farmers cutting off the forests if they want to preserve their lands under the “property” category, otherwise the state can expropriate it without compensation because they are not fulfilling the FES.

- The state must own 51 per cent of each oil company operating in Bolivia (Article 363, Paragraph II). This gives the state control over every oil company and the responsibility to invest and develop projects to increase and develop oil production. No foreign intervention or international arbitration solving oil business conflicts is recognized. (Article 366).
- The land given under a mining leasing contract is not allowed to be transferred or given as an inheritance (Art. 371).
- It is not possible to privatize any water resources or have them as a concession because those resources belong to the Bolivian state. Their use will be regulated under a specific law (Art. 373, 374).
- The state recognizes the rights of use that communities and private companies have over the forests (Art 386 of the Constitution and Forestry law 1700 Article 16 and 27).
- The indigenous and ethnic groups that have lived in a specific forest will have the right to have title over that land (Art. 388).
- The state recognizes and protects the individual, communitarian and collective ownership of land (Art. 393).
- Collective owners of land do not have to pay land taxes (Art.394, Paragraph III); agricultural land under 50 hectares and livestock farms less than 500 hectares are exempted from taxes to the central government. The Communitarian Renewal Law made the same mistake as the INRA Law because it forces the titling of land under the category of communal land, and if this is the case, every farmer who has worked and used the land for many generations will lose the right to own it individually (Urioste, 2007).
- Women have the right to possess land (Art.395, 402 Par. 2). The Community Renewal Law states that the land title should be in the name of the couple (wife and husband) and the name of the wife should be written first under the gender equity principle. The eighth disposal of the Community Renewal Law (Gender) ensures and prioritizes the participation of women in the titling processes and land distribution. In cases of free marriage and conjugal union, the property title will be issued in favour of both spouses or to partners who work the land, stating the name of the woman first. The same will be done in cases of women and men co-owners who work the land, regardless of their marital status.
- It is not permitted to rent out agricultural land (Art. 395, Paragraph III). According to the government this paragraph is to avoid land speculation and to try to solve the problem of land grabbing. The land should be used and the owner should work on it.
- There is a plot-size-ceiling as well as a minimum plot size for agricultural land (Art 396). The agricultural land should not be divided into pieces smaller than 50 hectares (Article 27 from the Reconduccion Comunitaria Law (Community Renewal Law) which changes some articles in the INRA Law. The 27th Article of the Community Renewal Law replaces Article 48 of the INRA law as follows: “The ownership of land under any title may be divided into smaller areas to those established as small property category.” The heritage succession will remain undivided under forced regime. With the exception of Solar Campesino (Lot Farm) land ownership may not be titled in areas less than the maximum for the small property, unless it is as a result of the titling process.

- Foreigners cannot purchase land from the state (Art. 396, Paragraph II). This constitutional Article will be reinforced at the end of the titling project, planned to be completed by the end of 2013. Currently, a foreigner will have the title of the land if he or she fulfils social and economic functions.
- Foreigners are not allowed to own or possess land within 50 km of the borders of Bolivia (Article 262).
- The indigenous (ethnic) communities have the right to use and extract the natural resources on their lands (Art. 403), for example timber and non-timber resources (Forestry Law 1700, Article 29).

Currently there are many new laws that are under review, e.g. the Forestry Law and the Land Law, because they need to be adapted to the Constitution. It was also envisaged by the government that these new laws should be finished in 2012 and a land-use planning project law that the Autonomous Department of Santa Cruz is being developed to solve some gaps and inconsistencies in planning.

3.3 Land conflict within the Isiboru Secure National Park

Land conflicts developed during the construction of a highway that connects the city of Trinidad with the city of Cochabamba. Intended to integrate the Amazon region with the central highway system, the plan developed critical issues when the state decided to build a highway through the Isiboru Secure National park in the Amazon region. The project was approved at the end of 2010 by the Morales government. The construction of the highway will affect many indigenous groups that have been living in this national

park, namely the Moxos, Chimanos and Yuracares (El País, 2011).

This road will split the national park into two polygons and will generate ecological, economic and social conflicts. The natives are worried about the environmental impact this new access to the park will have because of the possibility that the highway will facilitate the settlement of non-native people, who are part of the so-called colonization movements. This road will also be used by timber smugglers and cocaine producers (mafia), because it is near a region where the mafia has been cropping coca and processing the cocaine. People believe it will generate insecurity within the park.

Under the Constitution, indigenous peoples' autonomy is recognized, meaning that the customary use of land is also recognized. However, the Bolivian Government has not complied with this and indigenous people living within the park were not consulted about the construction of the road within their territories.

On the economic aspect, the government of Evo Morales does not have all the money needed to finance the project; the Brazilian Government will finance most of it with USD 300 million. This generates conflict between the Bolivian Government, the Brazilian Government and the Indigenous Territory and National Park Isiboro-Secure (TIPNIS), its national representation the Confederation of Indigenous Peoples of Bolivia (CIDOB) and the municipality of Trinidad because the road will give this city easier access to the national highway system (BBC News, 2011).

3.4 SWOT analysis (strengths, weaknesses, opportunities and threats) of the current land tenure system.

Strengths	Opportunities	Weaknesses	Threats
<p>There is the will of the Bolivian Government to regulate all the areas that do not have a title.</p> <p>From 1996 until now, the Bolivian Government has made efforts to solve the lack of titling in Bolivia.</p> <p>Some areas have a long history of customary use of land, and have created the recognition of ancestral boundaries within the communal land by the inhabitants.</p> <p>Recognition of private, state, communal - indigenous land.</p> <p>Recognition of customary uses of land under the Constitution.</p> <p>Land is granted only by the central government.</p>	<p>Availability of land. (20% of the total territory is public land, but 4.5 million hectares can be granted out of this 20%).</p> <p>In some areas there is still a demarcation of boundaries for recognition of rights based on deeds.</p> <p>New technologies can help to develop the titling process faster, cheaper and in a more accurate way.</p> <p>Low populated country (9.2 inhabitants/km²). There are still some areas remaining which can be colonized under distribution programmes.</p>	<p>About 30% of the Bolivian territory does not have titles yet.</p> <p>Many tenure conflicts are present in urban and rural areas due to lack of titles.</p> <p>There are many limit conflicts between parcels, overlapping rights. There are overlapping rights within communal and indigenous lands.</p> <p>Lack of proper demarcation. Some rural areas still using demarcation based on non-accurate methods, for example trees, wood or other non-permanent markers.</p> <p>The cadaster system is not updated or, in some cases, there is no data at all.</p> <p>There is no rural cadaster. The cadaster only exists in urban areas. In many cases it is not updated.</p> <p>Some titles issued by the government are not recorded in an electronic database; this creates conflicts in the recognition of titles or documents.</p> <p>There are conflicts between private parties and communities due to a lack of well-marked boundaries or the overlapping of rights.</p> <p>Governmental institutions are too weak to enforce the law, e.g. forestry, water, land laws.</p> <p>No transparent procedure in the determination of the fulfilment of the FES, which determines if a specific plot of land should or should not be expropriated or reverted by the government.</p> <p>Landlessness and squatters are settled on private or state land, and many private owners are forced to sell it to them, because legal owners cannot recover this land due to the lack of an institution that would solve conflicts.</p> <p>The tenure of a specific plot of land can be proved only if there are deeds. Many private people were clearing the forest in order to prove their rights over their plots.</p>	<ul style="list-style-type: none"> Land conflicts that can lead to physical confrontation between communities. Lack of reinforcement of uses of land, e.g. land that should be used as a forest is used as arable land. Different interests in uses of land. There are areas where the land should be protected, but there is pressure by other farmer groups or private companies to change land cover, even if the areas are legally protected areas. Political interests. Granting land is a way to run the campaign for the presidential election, without analyzing if there is arable land available or not in a specific area. Illegal settlements are spread over the urban and rural land. Coca farmers are demanding the allocation of land to increase their production. President Evo Morales is the president of the six associations of coca croppers).

3.5 Conclusions

Since 1996, the Bolivian Government has made a lot of effort to increase tenure security through the titling project; nevertheless, there are still many issues to be resolved. There are influences by the landlessness movements (colonos) who reclaim rights over some areas of land. The bigger issue is that the farmers from the Andean region want to have more access to land in the lowlands region, and if this issue is not well managed it could cause future conflicts around land tenure security. Also, the indigenous people from the lowlands have claimed the allocation of land in areas that were used by their ancestors or areas near to that.

In Bolivia the tenure systems recognized by the Constitution of 2009 are state, private, and communal land. However, there are a lot of conflicts to be resolved regarding land tenure security; some owners would feel more secure if they get the title but that they would need more security regarding government policies and corruption. The titling process is bureaucratic and too long, and some farmers fear that they will not get the title if they do not support the current government.

The departmental, municipal and indigenous autonomies are recognized by the Constitution, but there are a lot of legal loopholes regarding the implementation of the autonomy itself and the authorisation that each administrative unit should have on this issue. This creates land tenure insecurity. In some cases the interests of the government and the indigenous people are not the same over specific pieces of land and there is insecurity about who will make the decision on the best use of specific land.

The governmental institutions should do more to improve tenure security within urban and rural areas, address the lack of law reinforcement and the low budget allocated to governmental institutions; the lack of good and democratic governance has created many conflicts not only within government but also in Bolivian society. There are some titling conflicts, because if a specific plot of land is classified as a Medium

Property of less than 500 ha the title process has fewer observations and obstacles than other categories.

There is the will by the international community to fund projects to improve land tenure security, for example through titling projects. Most titling projects are currently financed by international donors. The government aims to reduce Bolivia's dependency on international financing and it is trying to increase the budget financed by the General National Treasury in the next few years.

There is no integrated rural and urban cadastre because each municipality administers the urban cadastre and the rural cadastre is administered by the central government. Government wants to draw up a cadastre law to overcome these legal loopholes and inconsistencies. Since 2011, it has created a Departmental Rural Cadastre Office in an effort to decentralize and reinforce the idea of rural cadastre administration offices.

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1. GENERAL INFORMATION ABOUT BRAZIL

Brazil has 8.51 million km² of land, which is equivalent to 47 per cent of the whole of South America. It is the only Portuguese-speaking country of the Americas and is one of the most multi-cultural nations of the world, a result of immigration from a variety of countries. Most of the population is Roman Catholic, a religion which has had a major influence on the historical development of the country even though the country currently has a combination of different belief systems. Brazil was a Portuguese colony from 1500 to 1815, when it became a Kingdom united with Portugal. In 1822 it passed to be independent from Portugal establishing the Brazilian Empire. In 1889 the country proclaimed the Republic.

According to the Brazilian Institute for Geography and Statistic (IBGE) 2011, Brazil has currently 192 million inhabitants. The Brazilian census of 2000 proved that the Brazilian population has experienced successive increase of its contingent. Although the geometric average index of annual grown of 1.63% from 1991-2000 was the lowest already observed which reflect the decrease of the birth rate during 90's years. Brazil is progressively reaching the stabilization rate.

According to the Demographic Census of 2000 the urban population is 4.3 times higher than the rural population, confirming in the whole Brazil a tendency initiated during the 1960's years, when the percentage of urban population had exceeded the rural one. This reduction of rural population was caused by the attraction of urban areas and migration in every Brazilian region.

1.1 Social aspects

Socioeconomic transformation took place rapidly after the Second World War. Brazil had two of the world's largest metropolitan centres – São Paulo and Rio de Janeiro - that had high economic growth but also attracted the rural poor.- Urban growth and structural change have not altered the extremely unequal

distribution of wealth, income and opportunity and urban areas have inherited all the problems of rural areas: discrimination, informal settlements, violence and criminality.

According to the Getulio Vargas Foundation¹⁷², in June of 2006 the poverty rate was 19,18 per cent of the population. In 2007 the poverty rate witnesses a fall of 18,11 per cent. The poverty rate is partially attributed to the economic inequality of the country which, according the Gini-Coefficient,¹⁷³ is improving but it is still one of the highest in the world at 0,553 (in 2007); this is despite the Human Development Index for Brazil being high at 0.813.¹⁷⁴

The poorest region of Brazil is the northeast, which has large areas with high indices of poverty and undernourishment. It has a fragile socio-economic structure characterized by a high level of social inequality that is occasionally intensified by periodic drought in the region. These conditions have been used for electoral and opportunistic purposes to manipulate voters' choices.

In general, poverty is very common in Brazilian in its big cities, suburbs, slums and poor communities. The cities have developed in a disorderly fashion and the government has failed to establish an urban plan for the growing cities and deliver the necessary infrastructure.

172 Getúlio Vargas Foundation (FGV): is a private, non-profit Foundation, founded in 1944, dedicated to teaching and research in social sciences and economics.

173 The Gini Coefficient is used to measure inequalities. The index is from 0 to 1; the closer it is to 1, the better is the level of equality.

174 United Nations Development Programme (2009). Human Development Index (HDI). <http://hdr.undp.org/en/data/trends>

1.2 Economic aspects

In 1993 Brazil stabilized its economy with the so-called “Plano Real”.¹⁷⁵ With this measure almost three decades of high inflation were extinguished. A strong currency the Real has substituted the old Cruzeiro and created a favourable economic environment.

The Brazilian economy (recently classified as at a promising investment level) is diversified and comprises of agriculture, industry and many services; the country has been successful and influential in regional and global markets in the development of its economy. The economic power that Brazil has demonstrated is due in part to the global boom of commodity prices and its export products.

Brazil trades regularly with more than 100 countries in the world with 74 per cent of the export goods being manufactured or semi-manufactured. Its biggest regional partners are the European Union (26 per cent), Mercosul¹⁷⁶ and Latin America countries (25 per cent), Asia (17 per cent) and the United States (15 per cent). The most dynamic sector is the agro-business sector, which has kept Brazil’s rural productivity high for more than two decades.

Brazil is the biggest economy in Latin America and the tenth biggest economy in the world. Its Gross Domestic

Product per capita is USD 10,296, putting Brazil in seventieth position.

The main export products include soya, meat, coffee, orange, steel, iron, planes, electrical equipment, cars, alcohol, textile, shoes, etc.

Brazil is part of several economic groups, for example: Mercosul, G-22, *Grupo de Cairns* and the BRIC Group, which is made up of the four emergent economies Brazil, Russia, India and China.

Sustainable economic development is closely connected with the issue of land distribution. The unequal land distribution in Brazil reflects in the conservative nature of the development process in Brazil.

Brazil has an archaic system of property (i.e. land) rights that supports one of the world’s most iniquitous, unequal and inefficient land distribution systems.

The land tenure system in Brazil is characterized by:

- High level of tenure insecurity
- Large numbers of informal property holders in rural and urban areas
- Insecure property rights
- Complicated and obsolete land administration systems
- Disorderly data on property and lack of adequate sources of information on land tenure for risk assessment, resource management and good governance
- Decentralized authority which does not work well
- Absence of mechanisms to access credit using land as collateral
- Conflicts over land and lack of adequate land dispute resolution mechanisms
- Resistance by political and economic interest groups.

The current land tenure system is intrinsically related with the use and politics of land in the past. In the next

¹⁷⁵ The Real Plan (Plano Real) was an economic stabilization plan created by Itamar Franco’s government and developed by the Treasury Ministry under the management of Fernando Henrique Cardoso, who subsequently was elected Brazilian President in 1994. The objective of the Real Plan was to control hyperinflation, a cyclical problem in Brazil. Political, historical and economic conditions were combined to permit the Brazilian Government to launch the plan at the end of 1993, the basis of a long-term programme. Established in phases, the plan ended almost three decades of high inflation and the substitution of the old currency for Real. See: http://pt.wikipedia.org/wiki/Plano_Real

¹⁷⁶ MERCOSUR/MERCOSUL is a common market (Southern Common Market: Mercado Común del Sur / Mercado Comum do Sul) established based on the Treaty of Asunción signed by the four countries of Argentina, Brazil, Paraguay, and Uruguay on March 26, 1991. It aims at promoting free trade of goods, services, and production inputs. Source: <http://www.mercosur.jp/english/about/index.ht>

section, this paper will present historical reasons why the land tenure system in Brazil is so unequal.

2. ASPECTS OF LAND IN BRAZIL

2.1 Land relations in the past

After the Portuguese discovered Brazil in 1500, they feared a foreign invasion of this land – a real threat because British, French and Dutch pirates often plundered the wealth of new land. Portugal was desperate to start establish a colony and administrate it in an efficient way.

For this reason, between 1534 and 1536 the Portuguese King Dom Joao III decided to split the land of the discovered territory in strips that started at coast and stretched to the imaginary line assigned in the “Tordesilhas Treaty”.¹⁷⁷ These huge strips of land were known as *Capitanias Hereditárias* (see Figure 1), big plots of land, and were Brazil's first *latifundios*.

These lands were donated to the king's nobles and trusted lords. The landowners were called *donatários* and it was their responsibility to administrate, colonize, protect and develop the region. The landowners also had to combat the Indians who tried to resist land occupation. Besides the land, landowners had permission from the king to explore for minerals and vegetation resources in the region. Ownership of these lands followed a hereditary system, which meant that they had to pass from father to son. Many *Capitanias Hereditárias* failed because the landowners were not capable of administrating or investing in such big plots of land.

From 1500 until its independence in 1822, Brazil's economy has been characterized by an agrarian monoculture, slave labour, export and big properties

From 1500 until its independence in 1822, Brazil's economy has been characterized by an agrarian monoculture, slave labour, export and big properties called latifundios. Three centuries in which land was controlled by one small group of landowners has defined the land tenure system of Brazil until today

called *latifundios*. Three centuries in which land was controlled by one small group of landowners has defined the land tenure system of Brazil until today (Prado Junior, 1970).

After independence, there was a period of 28 years in which freemen occupied *terras devolutas*¹⁷⁸ and these occupations did not lead to big changes to the land tenure system. In 1850, Law 601 of the empire was approved, called the Land Law (*Lei das Terras*) which favoured the consolidation of *latifundios* and focused on exportation. The law allowed for land acquisition through purchase, but with high prices .

During the nineteenth century some politicians and powerful people of the period were concerned to extend land access to the citizens, for example José Bonifácio de Andrada e Silva. Their objective was to stimulate the economy and social growth (Dolhnikoff, 2005).

The period, known as the Old Republic (*República Velha*) (1898-1930), was dominated by coffee landowners (*Oligarquia do Café*) with paid labour mainly provided by European and Japanese immigrants. In this period,

¹⁷⁷ In June 1494, the Spanish kings of Castile and Aragon, Isabel and Fernando, and the Portuguese King Juan II signed the Tordesilha Treaty which divided the lands of the new world between the two kingdoms though an imaginary line located 370 miles from west of Cabo Verde.

¹⁷⁸ *Terras Devolutas* at that time was synonymous with open access. Today in Brazil's Constitution “*terras devolutas*” are public lands without a defined public land use, it means land which still do not have passed though assignment process. The Brazilian Federal Constitution of 1988 disposes in Article 20, II, that *terras devolutas* is Federal Land, since it is indispensable for boundaries protection, or area reserved for fortress and military areas, for federal highways and area reserved for environmental protection. Article 26, IV. of the Federal Constitution of 1988 disposes that in other cases the public land belongs to the state.



Large land holdings called *latifundios* are common in Brazil © Juca Varella / Folhapress

the number of properties and landowners increased but with slight changes in the land tenure system.

The power of coffee landowners group was reduced as a result of the 1930 revolution, which among other changes, drove the industrialization process and the establishment of work legislation. Those changes have not the land tenure structure in Brazil.

2.2 Property regimes

Before the Portuguese colonized Brazil in 1500, Brazil had three different systems to acquire property: *sesmarial*, *senhorial* and modern property (Benatti, 2003).

The *sesmarial* system was established in 1504 and lasted until 1822. This type of property resulted from a confirmation by the Portuguese king of a concession for a land plot to someone who would cultivate and demarcate it. The beneficiaries were generally nobles

and friends of the king and the plots were big in size. The kingdom recognized the rights of individual property belonged to those who possessed the original title of concession and confirmation of the donation by the Portuguese kingdom. Access to property was regulated by the *sesmarial* system, by ordinations and sparse legislation emanating from Portugal. After the king's confirmation, the plot acquired the status close to that which today is conferred for absolute private property (freehold).

Senhorial property derives from primary occupations of the land and not from official transfer of the public wealth to private patrimony as in the "*sesmarial*" system. It was through local customs and judicial conception in this era that such occupations gained recognition as rural private property. Afterwards, the nation recognized and legitimized because of pressure from *senhorial* owners. In fact, a lot of private appropriation occurred in open areas. The legitimization of the rights to own a land plot was based on cultivation of the land and the

legalization occurred through prescriptive acquisition, buying and selling negotiations and testaments which were put into private documents and officialised by public notaries and testament judges. The fact that the senhorial property had its legitimacy in occupations does not mean that it was an illegal property; it was a property that had its fundamentals in the jurisprudence of the seventeenth and eighteenth centuries. The pressure to turn these occupations into legal private property gained political and judicial power of the landowners *senhores de terra*.

An important point is that the senhorial property was exclusively related to large plots of land, which also meant that those who did not have power in that period, such as *quilombolas*,¹⁷⁹ “caboclos”,¹⁸⁰ the river populations and Indians, were a part of the land acquisition process. The senhorial property became illegal at the beginning of twentieth century with the modern conception of property.

While the *sesmarial* and senhorial property developed between the fifteenth and nineteenth centuries, modern property was established only at the end of nineteenth century, but only gained hegemony between 1930 and 1960, depending on the Brazilian region.

The *sesmarial* and senhorial property have one aspect in common: in colonial times they were the centre of economic and political decisions, absorbing all the life in the surroundings. For this reason few or almost no space was given to the development of small and middle-sized rural properties.

Another characteristic of this time was the wasteful use of land; there was no soil protection, forests were overused, etc. There was no concern about the necessity to preserve the environment through a rational land use policy.

Table 1: Summary of property regimes in Brazil

Type of Property	How to acquire	Proof of Acquisition	Landowner power	Land use and management of natural resources
Sesmarial	Concession / Possession and Concession	Letter of sesmaria concession / Letter of confirmation	Absolute and exclusive	Predatory and wasteful
Senhorial	Possession	Land improvements and political and economic power.	Absolute and exclusive	Predatory and wasteful
Modern	Official public title	Land title	Absolute and exclusive	Predatory and wasteful

Source: Benatti, 2003.

3. CURRENT RURAL LAND TENURE SYSTEM IN BRAZIL

With an historical analysis it is easy to understand why land inequality in Brazil is so pronounced. Since 1930, the government has reformed land laws to make access and use clear and fair for Brazilians, but it has featured important decisions that have changed the old established rural relationships and privileges of many important landowners and politicians in Brazil. The rural lobby is powerful and has many representatives

“Land tenure patterns throughout Brazil show that most of the desirable land is controlled either by the national government or by the economic elite and is concentrated into large holdings known as *latifundio*. Land is left idle or reserved for plantations, while poor rural farmers are pushed into subsistence farming or share cropping on *minifundio*, small holdings often with marginal soils.

179 Quilombolas are the descendants of slaves who escaped from slave plantations that existed in Brazil until abolition in 1888. See <http://en.wikipedia.org/wiki/Quilombola>. It was mainly in the Federal Constitution of 1988 that the Quilombola issues were treated as a public policy, as a result of the Black Movement. Article 68 of Ato das Disposicoes Transitórias (ADCT) says: “The reminiscent of Quilombolas Communities which still occupy their lands recognized the definitive land property. The state shall provide the respective title”. See: http://www.cpis.org.br/comunidades/html/i_oque.html

180 Caboclo (or caboco, from Tupi kaa’boc, “who came from forest”) is a Brazilian term describing a person of mixed Brazilian Amerindian and European descent. In Brazil, a caboclo is a specific type of mestiço.

Figure 1: Brazilian Capitánias Hereditárias



Map by Luís Teixeira (c. 1574). Source: Biblioteca da Ajuda (Lisboa).

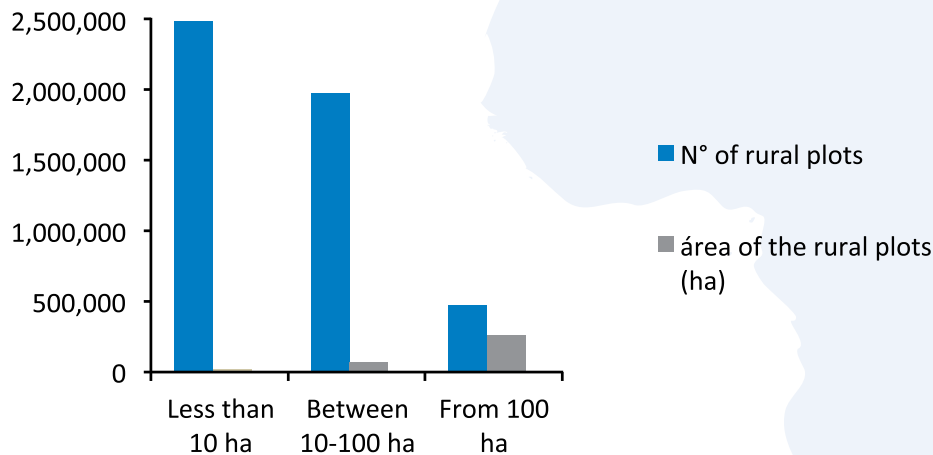
in local, state and federal government but who avoid radical changes. The current scenario of land exclusion and unclear land data can be useful for many of them. Making changes in the current system can be dangerous and for this reason the land sector in Brazil has only featured slight changes; it has improved a little but the heart of the problem still exists. There is an unfair distribution of land and poor land reform policy, which oversees the distribution of land in remote areas with weak mechanisms for delivering basic infrastructure and providing access to credit for new landowners.

Other major problems are the inefficiency of land institutions which maintain old procedures and lack human, technical and financial resources. Land information is also unreliable and unclear, affecting the

security of tenure. Difficult land management prevents optimal land use and generates conflicts in rural and urban areas. Brazil also has a weak mechanism of conflict resolution. The justice system is expensive and slow.

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Table 2: Distribution of land plots in Brazil (2006) versus area



Source: Agricultural Census IBGE (2006)

The table below shows the distribution of land plots in Brazil with the respective areas in hectares.

According to Table 2, it is possible to see that the number of small rural plots is 50 per cent of the total, but they make up only 2.3 per cent of agricultural land. On the other hand the big rural plots account for only 9.5 per cent of the agrarian properties but they take up an area of 78 per cent of agrarian land.

Land distribution in Brazil continues to be extremely unequal. It can be correlated with the Gini coefficient, which has remained very stable ranging from 0,855 in 1975 to 0,856 in 2006.

According to the Pastoral Land Commission (CPT) less than 3 per cent of landowners have more than half of the agricultural lands, and, more than four million rural families do not have access to land and live in extreme poverty.¹⁸¹

4. PROBLEM ANALYSIS AND RECENT COUNTRY EFFORTS IN IMPROVING LAND TENURE SECURITY IN RURAL AREAS

Until 2007, the Brazilian presidency saw the necessity of accelerating and strengthening efforts to regularize land and improve the cadaster, and issuing environmental licenses, especially in the Amazon region where the rights to land have been completely unclear until now. There is a favorable wave of change to improve security of tenure in many Brazilian states.

4.1 Government initiatives to acknowledge rural tenure and regularize land

The sustainable and peaceful development of the rural areas in Brazil depends on a clear definition of who has use and property rights over its lands. Even though there has been a great deal of effort by the National Institute for Settlement and Land Reform (INCRA), respective federal land institute, since 1999, to re-record the rural plots through cadastre campaigns, there is still a serious lack of information, especially about the Amazon

181 www.cptnac.com.br 18/11/2003 Campanha Global pela Reforma Agrária no Brasil.

region where many rights over land are confusing or unknown.

Three re-cadaster campaigns were carried out by INCRA to clarify the land tenure system of Brazil: the first one in 1999 dealt with the records of bigger properties, particularly those greater than 10,000 ha. The second one was carried out in 2001 and included properties between 5,000 and 9,990 hectares in some selected Brazilian municipalities and in 2008 in municipalities with highest level of deforestation in the Amazon region. The results of the re-cadastre campaign were partly satisfactory. The 1999 initiative for rural plots (of $\geq 10,000$ ha) included approximately 3,579 rural plots, equivalent to about 120 million hectares of Brazil (14 per cent of Brazil's land area). The campaign in 2001 (5,000 ha - 9,999 ha) included 743 rural plots covering an area of just over 5 million hectares. The third campaign is still in progress.

The main effects of these campaigns were:

- The cancellation of the records of around 20 million irregular areas of land which were conservation areas;
- The legitimization of the documentation of 20 million hectares with 663 land plots;
- The prohibition of INCRA to emit declarations of land possession which had been a common practice in the past and, in reality, was precarious because the documents always gave the occupant an expectation of having the land plot regularized by law. This sort of declaration also allowed the access to credit for small- and middle-sized landowners (≤ 450 ha) as well informal public land transactions.
- The cancellation of the records in INCRA rural cadastre Certificado de cadastro de imóveis rurais (CCIR) of approximately 66,000 possessions, which hinders the informal commercialization of public lands.
- The launching by the federal government of a programme to establish a unique national rural

cadastre: Cadastro Nacional de imóveis rurais (CNIR) in order to organize current data in a logical and practical way and increase the security of the cadastre system.

According to the publication *Quem é o dono da Amazônia?* (Barreto, 2008), the cadastre campaigns were important to acknowledge the Brazilian land tenure system, but they also left many pending cases unresolved because of an insufficient budget, inconsistencies in the legislation to define the rights of the occupants or how to cancel illegal records acknowledged by the state, or how to regularize the possessions.

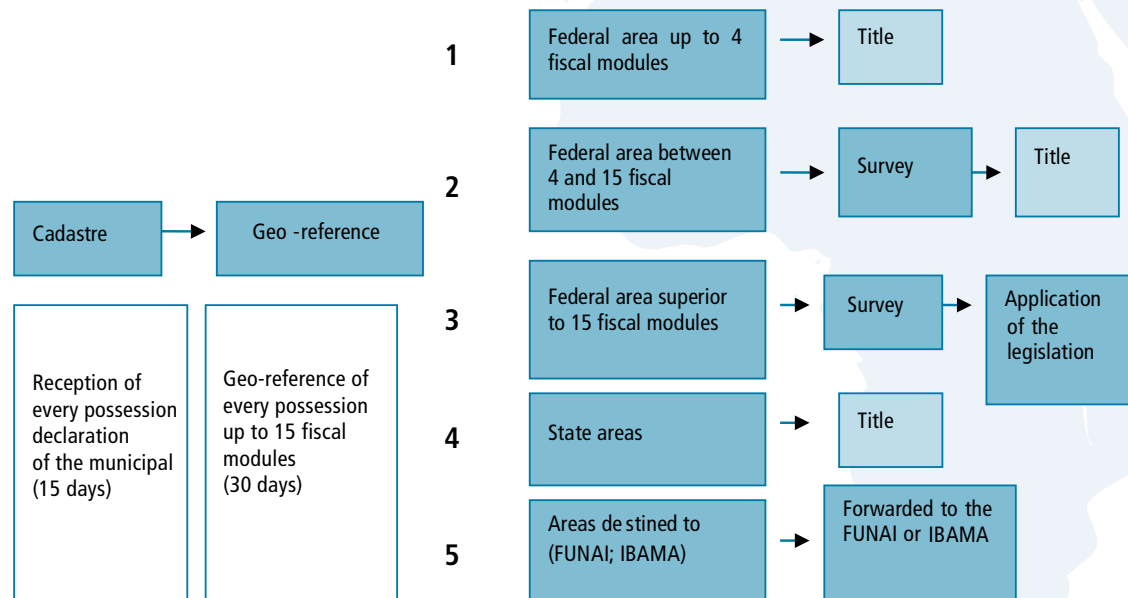
Evidence of these deficiencies is reported by Imazon. Seven years after the first campaign (1999), 56 million hectares of land continued to exist as land plots with documentation in process or without information; three years after the start of the campaign, more than 40 million hectares of occupations continued to be irregular.

Therefore, there is still no transparency or ability to deal with land tenure issues. The land regularization campaigns will only be successful if these issues and some procedures can be clearly defined and the actions quickly implemented.

4.2 Land regularization project in Amazon region: Legal Land Project (Projeto Terra Legal)

From 2003 to 2008, 81 million hectares of land, equivalent to 10 per cent of the Amazon region, was designated for settlement projects, conservation areas, Indian areas and state lands. There are still 67.4 million hectares of public land without designation in the Amazon region, meaning that 13.42 per cent of the total area of the region is favourable to start a policy of land regularization. Under the control of the state's government, there are more than 100 million hectares of land ready to be regularized.

Figure 3: Rural areas: Steps of regularization process



Source: INCRA: "MDA vai regularizar 67,4 milhoes de hectares na Amazonia legal", 23/01/2009.

In January 2009, the Ministry of Agrarian Development (MDA) launched the Legal Land (Terra Legal) programme, which aims to regularize 67.4 million hectares of land in Legal Amazon.¹⁸²

The programme intends to give land titles to people who have land plots of up to 15 fiscal modules¹⁸³ (maximum 1,500 ha) occupied since before December 2004. The project will be guided by the Ministry of Agrarian Development (MDA) with the partnership of states and municipalities of the Amazon region. The strategy is to set up joint work groups between the

land institutes at federal, state and municipal levels to record geo-reference measurements of the land plots in the cadastre system.

To gain efficiency, the regularization process will be simplified, especially the legislation and procedures to get a land title. Under normal rules the whole process would take five years.

The intention of the project is to regularize land in the following way:

- For plots up to one fiscal module (average area of 76 ha) the title process will be free of charge and will take between 60 and 120 days up the land record of the occupation in the cadastre system.
- Plots between 1 and 4 fiscal modules will be sold with prices below the market value with 20 years for payment with three years of amortization. The procedure to get a title is the same as the one designed for plots up to 1 fiscal module.

¹⁸² The legal Amazon comprise the north estates of Brazil (Acre, Amazonas, Amapá, Pará, Rondonia, Roraima, Tocantins, Mato Grosso and part of Maranhao (44° longitude west) and a small portion of Goiás (up to 13° latitude south). The concept of Brazilian Legal Amazon was determined in Jan 1953 by Law 1.806. At that time only the north part of the Mato Grosso Estate was included (16° latitude). The Mato Grosso Estate was part of the Legal Amazon in its integrity by the law n° 31 in October 1977. (Lentini et al. (2005): Amazon Forest Facts 2005, Imazon, Belém-PA.

¹⁸³ A Fiscal Module is a unit of measure established for each Brazilian region. In Amazon region one fiscal module is equivalent to 76 hectares land.

- Plots between 4 and 15 fiscal modules will be sold according to market prices discounting improvements to the property. The title procedures will be preceded by survey analyses to identify the improvements, age of the property and deficiencies of the plot. The procedure of payment will follow the similar rules set up in the case of plots ($1 \leq x \leq 4$) fiscal modules.
- Plots bigger than 15 fiscal modules (up to 2,500 ha) have to follow the normal legislation.
- Plots bigger than 2,500 ha have to get authorization from the Federal Government to be sold.

The procedure for regularization follows the schedule shown below:

In all cases an alignment is required with the environmental legislation, which in the Amazon region is that 80 per cent of the land plots should be covered with native vegetation.

Another rule is that the plots in the process of getting land titles cannot be sold for 10 years, but they can be used as for a mortgage with financial institutions.

In general, there is a lack of structure and routine in the Ministry of Agrarian Development (MDA) to meet the demands of the Legal Land programme. INCRA, the federal land institution, is a mainstay of the MDA for the land regularization issues and has allocated employees to work in Legal Land Programme or through its technical departments as support. The absence of criteria on land regularization is attributed to the lack of a preliminary inspection in loco before the cadastral stage by the municipalities. Many areas have been registered without complying with environmental laws, in areas registered as permanent preservation areas (APP) or even in overlapping areas. Due to a lack of criteria during the cadastral phase, much opportunism occurred which led the subsequent stages being more complex and lengthy.

4.3 Combat land forgery (Grilagem de Terras) in the Amazon region

Throughout history, the expression grilo or grilagem has been commonly used in Brazil to describe lands that are illegally occupied and recorded; it originated from the artifice of giving documents an old appearance. Forgers put the document in a metal or wooden box with a lot of crickets and closed it for some weeks. Eventually, the document becomes light yellow-dull-rust colour as a result of the excrement of the insects. This was done to make the documents look old.

It was a trick in the past that has been overtaken by sophisticated technological artifices. But the history of grilagem serves as an example of how old the practice of faking land title documents in Brazil is. Land forgery has colonial roots. Since the nineteenth century, through different ways and frequently with the participation of public power, people forged land titles with the cooperation of land institutes and real estate offices. They also used violence to expel rural and Indian communities

Forgery was tolerated by government institutions that were bribed to allow permits and forged land titles in public areas to powerful people, sometimes behind the names of non-existent people. After having succeeded the forgery in Real State, the forgers applied the same procedures in the state land institutions, such as the Federal Land Institute and the Federal Patrimony. The objective was to link the records in order to give the forgery an appearance of legality.

The forgery of land titles is the most powerful mechanism of land concentration in rural Brazil. In the entire country the total area under suspicion of land forgery is around 100 million hectares; that is four times the area of Sao Paulo State or the size of Central America plus Mexico.

These fakes were facilitated by institutional lapses due to the lack of a common cadastre. The data of the federal and state cadastres had not been joined up; the federal cadastre is merely declaratory. The supervision over the real state is poor.

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In the northern region of Brazil, the situation is critical: from the total area of Amazonas State of 157 million hectares, 55 million are suspected to be forgery, this area is equivalent to three times the size of Paraná State. In Pará State for example, a non-existent person sold approximately nine million hectares of public land to 10 other people. Many of the Real State Offices, not only in Amazonas State but also in Pará, Acre, Goiás, Paraná, Amapá and Roraima States, show mistakes and weaknesses with the registration process.

The Ministry of Land Policy and Agrarian Development (MDA) plus the National Institute for Settlement and Land Reform (INCRA) are currently trying to revert for public patrimony ten million hectares of land that is irregularly occupied by private individuals. The first step of this operation consists of the cancelation of the registry of big properties, all of them previously analysed. The government's objective is the cancellation by state and federal justice of the registry of such illegal properties. With this action the government intends to revert to public the forged private areas and to support policies of land reform, environmental conservation and others. With this measure the government aims to combat the social exclusion of rural Brazil.

5. DEVELOPMENT OF RURAL LAND ADMINISTRATION: ESTABLISHING A UNIQUE RURAL CADASTRE SYSTEM

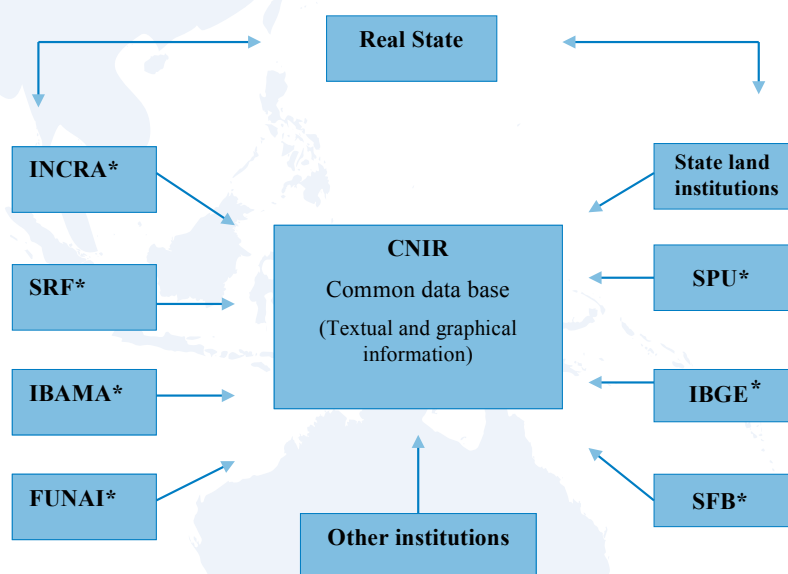
The fragility of the rural cadastre system has been acknowledged since at least since 1992 when the Federal Treasury Secretary (SRF) launched a cadastre separated from the National Institute for Settlement and Land Reform (INCRA). This federal rural cadastre was specifically to collect the rural duty (ITR). From then on, the idea of establishing a unique registry and cadastre system arose. In 1998 an audit executed by Union Count Tribunal (TCU) emphasized again the necessity of establishing such a unit, but only Law n° 10.267 of 2001 has legally consolidated the proposal to create a national unique geo-referenced rural cadastre.

The current National Rural Cadastre (CNIR) aims to bring together and facilitate access to land-related rural data, to improve the reliability of the data to fiscal, environmental, rural development and land-reform purposes, and to increase the efficiency of human and financial resources.

According to the legislation, the structure of the national rural cadastre (CNIR) should be as the follows:

- The database will consist of a common land information system conjoined by INCRA and SRF, produced and shared with a range of federal and state land-related institutions which will be able to provide data and use the database.
- The common database will adopt a unique code to be established by INCRA and STR to allow the identification and sharing of data with other public land-related institutions.
- Integration of the national rural cadastre (CNIR) with databases produced by each institution, participants can be shared between them, respecting the rules of each institution.

Figure 4: Land information system of the national rural cadastre (CNIR)



Source Barreto, Paulo: *Quem é o dono da Amazônia?*, Belém 2008, p.51..

INCRA = National institute for Settlements and Land Reform, SRF = Federal Treasure Secretary, IBAMA = Brazilian Institute for Environment and Renewable Natural Resources, FUNAI = National Indian Foundation, SPU = National Patrimony Secretary, IBGE = Brazilian Institute for Geography and Statistics, SFB = Brazilian Forest Secretary.

The total cost of the national rural cadastre system was estimated to be around USD 260 million to be covered initially by the federal government (USD 104 million), state government (USD 26 million) and a loan from the Inter-American Development Bank (IDB). The federal government will cover the 50 per cent remaining costs.

The projected land cadastre and land regularization in Brazil that is responsible for the launching of the national rural cadastre is expected to have the following results: the geo-referenced cadastre of one million rural plots, land regularization of 1.3 million occupations, complete land regularization and geo-referenced cadastre of every rural plot within nine years. But this project had a

delayed start because of the many negotiations about the IDB loan, the definition of the geographical focus, the definition of the framework for land regularization and the definition of the leadership to implement the project. Therefore the project only started in 2007 to establish the cadastre pilot phase covering only one state – Maranhão-MA. This project aims to reach 140,000 properties in five selected states (Bahia, São Paulo, Minas Gerais, Ceará e Maranhão) with a cost of USD 120 dollars by property.

6. TENURE IN URBAN BRAZIL

Less than a century ago, Brazilian cities were inhabited by 10 per cent of the total national population. Today 82 per cent of the country's citizens live in cities. This change took place together with a process of social exclusion which further aggravated existing social inequalities. Past policies aimed at correcting the situation proved to be ineffective, either because of a lack of focus on the population segments that suffered most from the effects of disorganized urbanization or a lack of continuity, a problem that worsened during the peak of the nationwide economic crisis in 80's.

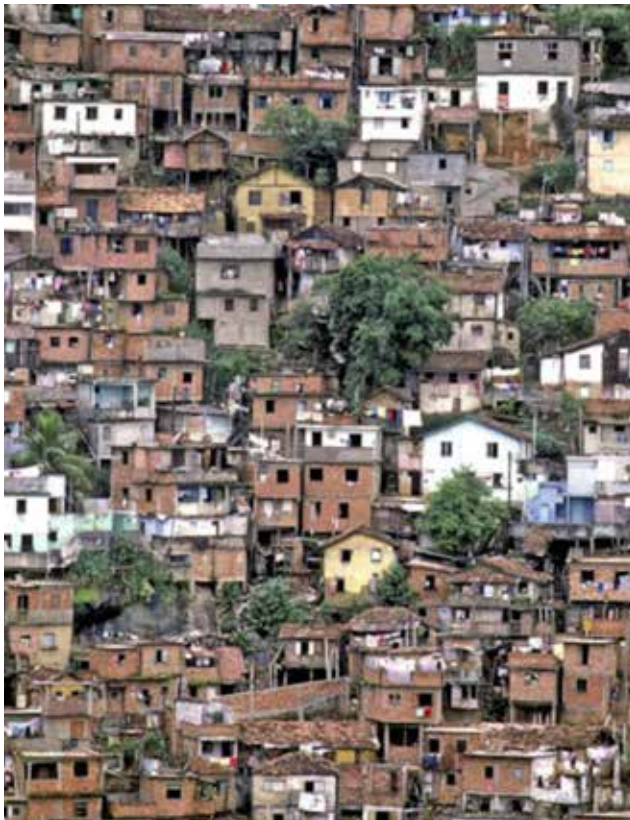
Brazil suffers from a variety of urban problems: lack of water and sanitation, chaotic and noisy transit in big cities, poor delivery of public transport services in terms of regularity and quality for its citizens, lack of houses for all. The urbanization models used in Brazil in recent decades have created cities that suffer from

fragmentation, scarcity and social exclusion as well as rampant and disorganized growth of city suburbs. The most significant indicators of urban problems are the increase in the number of urban slum dwellers, which is much higher than the national average; the continued proliferation of informal and illegal settlements; and the degradation of environmentally protected areas.

On March 2010, Rio de Janeiro staged the 5th World Urban Forum where a variety of urban topics were discussed. The Brazilian Government impressed by presenting the results of the Growth Acceleration Programme (PAC), a strategic four-year investment plan for building infrastructure in different fields of development in the whole of Brazil.

According to the most recent financial statement, from June 2009, the financial resources allocated for sanitation and slum urbanizations were BRL 56.34 billion for the housing sector, BRL 20.8 billion for sanitation sector. Forty one per cent of the contracted housing projects were under way and 31 per cent of sanitation projects were initiated. (Ministry of Cities, 2008).

Three weeks after the 5th World Urban Forum, Rio de Janeiro suffered the biggest storm in its history. This caused floods and landslides in 105 localities of the state which resulted in more than 220 deaths and urban chaos. The victims of the natural catastrophe were mainly the urban poor. Many informal settlements in slum areas on slopes were washed away. In Niteroi, the community of Bumba was completely destroyed. Bumba was a hill of garbage that had been inoperative since 1981 when the area was completely settled by the urban poor. Some experts had warned about the danger of settling on a garbage hill because of the unstable soil, the contaminated water, the toxic elements of the area such as methane gas with explosive components, but the warnings had no effect. The community continued to grow and the Prefecture of Rio started to invest in urban infrastructure for the area. A road was constructed until the top of the hill to facilitate



A slum in Rio de Janeiro, Brazil © UN Photo/Claudio Edinger

access to the area. This measure increased occupations in a vulnerable area. As a result of the rains and public negligence, the slope slid away. Catastrophes such as this reveal the poor building conceptions and lack of good sense of the decision makers. How could they invest in urban planning in a settlement over a garbage hill?

6.1 Recent country efforts to improve urban areas

Measures to reverse these types of trends have been characterized by some historical landmarks such as the 1988 Federal Constitution, which includes provisions on urban policies, the social function of property and the right to housing (arts. 182 and 183); and the institution of the City Statutes (Federal Law 10.257/2001 and Temporary Order 2.220/2001).

The Ministry of Cities has been a part of this historical context together with social organizations. The ministry was created in 2003 and its main objective was the formulation of a National Urban Development Policy to combat social exclusion and segregation within Brazilian cities integrating regional housing, and providing sanitation and transport policies.

The Brazilian Government also has set alliances to improve the expertise on urban issues and has made many adjustments in the legal framework to better define and implement measures in different areas of urban planning. Brazil is the first developing nation to join Cities Alliance, an organization that counts amongst its members the G7 countries and other international organizations. This organization provides financing for urbanization programmes directed at precarious settlements in developing countries and also provides and defines strategies for urban policies.

The regulatory code for sanitation has been approved and the regulatory code for the urban transportation and mobility sector has been forwarded to the National Congress. Law 11.445 of 05/01/2007, which sets the

national directives for basic sanitation and for federal sanitation policies, was sanctioned. In the housing sector, referential works for the National Housing Policy (PNH) in 2004 were created, followed by the creation through Law 11.124 of 16 June 2005, of the National System and the National Fund for Social Interest Housing (SNHIS/FNHIS) and its Managing Council; the creation of the National Habitat Plan (PlanHab); and actions for the housing sector in the Growth Acceleration Programme (PAC). Every state of the Brazilian Federation and more than 5,000 municipalities joined the National Social Interest Housing System (SNHIS). The system has become one of the most valuable instruments to re-start planning and to create an environment with new institutional conditions and the capacity to influence the executive branch on federal, state and municipal levels.

The results of Growth Acceleration Programme (PAC)

The Brazilian programme, PAC - Slum urbanization was praised by William Cobbett, a coordinator of the City Alliance Programme, which globally acts to improve urban planning in order to diminish poverty. According to Cobbett, Brazil is currently well-known as an international leader in slum urbanization. Although many things still have to be done, Brazil has the political will to change the way of life for the inhabitants of slums. The country made some changes in the City Statute to regularize access to land, and made progress when it established the Cities Ministry to manage urban planning issues. This initiative exists in only a few countries. The Indian Jockin Arputhan, president of the International Association of Slum Settlers, also supports the Brazilian initiative, saying: "This is a good model to be adopted everywhere in the world" (Ministério das Cidades, 2010).¹⁸⁴

184 Ministério das Cidades: "PAC Urbanizacao de Favelas obtém reconhecimento internacional no FUM 5". At: <http://www.cidades.gov.br/> Accessed: 26/03/2010.

In fact, the Brazilian Government is investing in a series of infrastructure projects to improve urban areas with special focus on the urban poor.

The results of the first Growth Acceleration Programme (PAC), a strategic four-year investment plan for building infrastructure in different fields of development over the whole of Brazil, has had the following results: BRL 56.34 billion was designated for the housing sector, BRL 20.8 billion for the sanitation sector; 41 per cent of the contracted housing projects were under way, 50 per cent were in the bidding stage and 9 per cent were in the preparatory stage. The figures for sanitation projects show that 31 per cent were initiated, 63 per cent were in the bidding state and 6 per cent were in the preparatory stage (Ministério das Cidades, 2008).

In order to continue with the previous plan, the Brazilian Government has launched the PAC 2 with an estimated investment of BRL 1.59 trillion to be divided between six new focus areas and which cover infra-structure projects for the whole of Brazil: PAC Better cities, PAC citizen community, PAC My home, my life, PAC Water and Light for all, PAC Transport and PAC Energy.

6.2 Trends and development of land administration system

The responsibility for the establishment and administration of cadastre system in Brazil is divided between INCRA in rural areas and municipalities in urban areas. In urban areas, while the federal state is responsible for recording immobile transactions according to the registered number of the property, city hall has the responsibility for approving land parcels, conceding building licences, charging for taxes and securing land rights for property owners.

In Brazil there is no unified, multifunctional, modern public cadastre system related to immobile properties' data and which comprises the registry of technical, legal and graphical data related to terrain and

edification (Souza, 2001; Philips, 1996). One of the main problems with the Brazilian urban cadastre is related to a too narrow use of this tool. Generally, the municipal administration uses the urban cadastre mainly for taxation purposes, to charge the Imposto sobre propriedades territoriais urbanas (IPTU), urban taxes and services on a smaller scale for urban planning. To transform the cadastre into a multifunctional tool is a necessity in the modern world.

The Ministry of Cities is promoting a seminar in all Brazils regions to present and discuss a regulatory code to define content, institutions and updating of a multifunctional technical cadastre which will be adopted by Brazilian municipalities.

The cadastre is a fundamental tool to support the municipal actions because it consolidates and integrates a range of information: physical, social, economic, judicial and environmental on the land. It is essential to support urban planning, urban management and to execute urban policy as well the to fulfil the social function of property, to charge tax for urban property (IPTU), to execute land regularization; to mediate urban transactions, to concede and charge for a licence to build, to charge for the use of a public place (urban infrastructure network).

7. SWOT ANALYSIS OF THE CURRENT LAND TENURE SYSTEM IN RURAL AND URBAN AREAS OF BRAZIL

Every urban and rural institution recognizes the need to change the old-fashioned paper based system to a computer-based one with GIS technology. This is to be the administration system for the whole of Brazil. Seminars, discussions and adjustments to the legislation have been made to build a place for a new and modern system. To understand the status of the current land tenure system in Brazil in rural and urban areas, a SWOT (strengths, weaknesses, opportunities, threats) analysis was carried out and is presented below:

Table 3: SWOT analysis of land tenure system in rural Brazil

RURAL	Positive	Negative
Internal Factors	Strengths	Weaknesses
	Existence of financial resources to be bound for institutional improvement, land regularization, technology acquisition and capacity building.	Confusing legal framework which creates space for delays and impunity.
	The federal, state and municipal rural land institutions have been working closer in a previously agreed priority policy.	Slowness of judiciary to sentence a case.
	A modern multifunctional cadastre with geo-referenced information system is in progress. The system will comprise land information from the government land related institutions.	Absence of governance in remote areas, for example some areas in the Amazon region, where the law is made by and for powerful agents. As a result land conflicts and environmental degradations are high.
	Efforts to combat land documents forgery have been made.	Resistance of rural lobby to clarify the rural system.
External Factors	Opportunities	Threats
	Pressure of international market for clear tenure and clean production.	Elections: discontinuity of actions.
	Pressure by the landless movement to access land.	Corruption

Source: author

Table 4: SWOT Analysis of land tenure system in urban Brazil

URBAN	Positive	Negative
Internal Factors	Strengths	Weaknesses
	Existence of financial resources to be converted into urban benefits.	Poor land information system. The urban cadastre is not geo-referenced or multifunctional.
	Existence of a ministry especially to deal with urban issues; the Cities Ministry which, in partnership with states and municipalities, are defining policies and projects to improve urban areas.	It is necessary to focus on the quality in creating urban infrastructure not only the quantity.
		The articulation between federal, state and municipal levels is still weak.
		It is necessary to invest in human capacity building at the municipal level.
		Absence of technology and human capacity to prevent natural catastrophes.
External Factors	Opportunities	Threats
	Fifth World Urban Forum in Rio de Janeiro emphasized the importance of guaranteeing equal, universal, fair and democratic distribution of urban resources to give opportunities to all.	Natural catastrophes which affect Brazilian cities, such as storms and landslides.
	After the strong damage caused by natural catastrophes, urban planners and policy makers are more aware of the quality of the building constructions and are bound to invest in technology to monitor the weather changes.	Corruption of funds designed to build urban infrastructure Elections: discontinuity of actions.

Source: author

CONCLUSIONS

Brazil, a giant country, has grown economically. Strong investments have been made to improve infrastructure, integrate the country, combat social inequality and support sustainable development in urban and rural areas. Financial resources have been allocated for a

variety of development purposes in rural and urban areas, such as: land regularization, rural settlements, a rural cadastre system, capacity building, institutional improvement, sanitation, transportation, urbanization of slums, habitation projects, etc. Even though with reasonable financial resources and the will to change,

the development policies have met with great difficulty because of the unclear tenure system, slow procedures and decisions of judiciary and public administration. To break with the archaic roots of the system is not an easy task and needs time and commitment to change.

Resources exist, but successive governments have not shown commitment because such long-term projects do not bring immediate results and so many projects remain uncompleted. From a rural perspective, the government is adjusting land policies for rural areas to make them clear and fair for Brazilian society. Maybe a renewal of the rural structure will make it more attractive for the population that lives and works there and, urban problems would be reduced, but it involves important decisions to break with the old rural relationships and the privileges of many important landowners and politicians in Brazil. The rural lobby is powerful and has many representatives in local, state and federal level of government who avoid radical changes in rural structures. From an urban perspective, cities have also inherited social inequality and have grown in a disorderly manner; many areas are completely without urban planning and building laws. The urban poor struggle to live in the city; they have settled on steep slopes and in vulnerable areas. Urban policies to offer the urban poor access to home and infrastructure have been weak and delayed. However, Brazil recognizes its strengths and weaknesses. The government is trying to change its archaic system to support the growth of a modern country and reduce the contrast between rich and poor in rural and urban areas.

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14



1. INTRODUCTION TO COUNTRY CONTEXT

Chile has an area of approximately 750,000 kms². According to estimates by the National Institute of Statistics, the current population is nearly 17 million, of which only 4.6 per cent belongs to an indigenous ethnic group (Instituto Nacional de Estadísticas, 2008). The rest of the population is mainly composed of *criollos* (European/Spanish-American) and *mestizos* (mixed race ancestry). According to the institute, the population is mostly urban with 86.8 per cent living in urban areas.

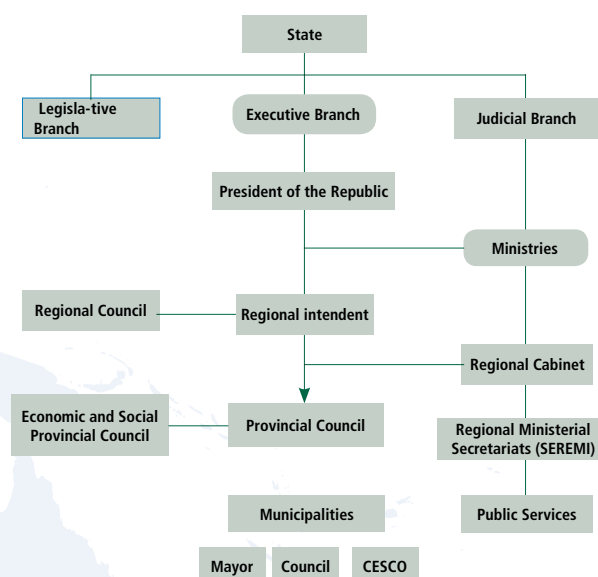
Chile is a unitary republic with a presidential and democratic multi-party political system. The state is composed of three independent branches, namely the Executive, headed by the president, the judicial system, with the Supreme Court as the highest authority, and the legislative branch with its deputies' chamber and the senate (see Figure 3). The presidential period is four years without the possibility of re-election.

According to the Organisation for Economic and Cooperative Development (2009), of which Chile has been a member since 2010, the quality of institutions and the stability of Chile's regulatory framework are comparable to those of other OECD countries. As a result, Chile has been one of the most successful countries worldwide in reducing poverty levels. In 1990, 38.6 per cent of Chileans lived in poverty; in 2008 this figure was down to 13.7 per cent. In 1990, 13 per cent of the population lived in extreme poverty; by 2008 this number had fallen to 3.2 per cent (Government of Chile, 2008).

Before Spanish colonization in the sixteenth century, Chile had numerous ethnic groups. Some of them had developed agricultural systems and some had not. Thus nomadic, semi-nomadic and settled groups were present across the territory.

Since then, the country has gone through several political, economic, social and environmental changes. Some of these were temporary stages or transitory

Figure 3. Organization Chart of the Chilean State



Source: (Government of Chile, 2007)

phases, but some of them had consequences that can still be observed, particularly in relation to land tenure and land laws, and these are the focus of this paper.

According to estimates of the Agricultural Census of 2007 (National Institute of Statistics, 2007), there are over 69,000 cases of informal (untitled) property in Chile's rural areas. From 1993, the state carried out a programme to regularize at least 30,000 properties by the year 2010. As indicated by the progress report in 2009, the scale of the problem certainly justified the existence and continuity of the regularization programme. Lack of security of tenure in Chile still

Lack of security of tenure in Chile still persists and there is a need to quantify it because there is currently no accurate information about the total number of irregular properties in the country. There is also currently no information about the number of untitled properties in urban areas and it is not possible to extrapolate figures on the basis of the Agricultural Census..

persists and there is a need to quantify it because there is currently no accurate information about the total number of irregular properties in the country. There is also currently no information about the number of untitled properties in urban areas and it is not possible to extrapolate figures on the basis of the Agricultural Census.

The following chapters provide an overview of the evolution of Chile's land tenure system and will analyse the current status of land tenure security.

2. EVOLUTION OF THE LAND TENURE SYSTEM IN CHILE

As mentioned previously, before Spanish colonization Chile was inhabited by numerous ethnic groups that had different relationships with land. When the Spaniards arrived, there were more than ten different indigenous groups. Some of them lived in settlements and had developed agriculture on their land, while the rest lived as nomads or semi-nomads. At that time,

there were no formal tenure systems although people's rights over land were based on customary systems (Eyzaguirre, 1982).

This section will focus on the evolution of the land tenure systems in Chile from the Columbian period until the present.

2.1 Merced titles (16th century)

With the discovery of the American continent, numerous Spanish adventurers crossed the Atlantic Ocean to the "New World", motivated mainly by economic factors, devoted service to their king and Christian evangelization. Although the geography of the continent posed serious challenges to these objectives, the Spanish managed to conquer a vast territory.

As described by Borde and Góngora (1956), the Spaniards initially settled in cities and concentrated



A rural village located in the Atacama Desert in the north of the Chile © Jorge Espinoza

on gold mining. Agricultural production to supply the cities with food was carried out on farms in suburban areas and the Spaniards also needed pastures for horses (essential for warfare) and cattle. During this period there was a concentration of land under the Spanish Crown as a consequence of the new territories being conquered, which led to the so-called “War of Arauco” in southern Chile between the Spanish and the indigenous people.

As Gallardo (2002) points out, after the Spaniards won this contest, the Títulos de Merced (similar to leasehold) were the only mechanism that provided access to land, while the Encomienda, on the other hand, was the main mechanism to access the available labour force among the indigenous population. According to Borde and Góngora (1956), the merced title was introduced by the Spanish in 1495-1497 when the need to develop a wealthy class became apparent; nevertheless the relevance of the merced title was modest compared to the Encomienda in the sixteenth century.

Borde and Góngora (1956) also outline diverse types of Merced titles distributed by the crown, namely:

- Those related to land within the limits of the city solares) or located near this (*chácaras*)
- Arable farms (*mercedes de labranza*) and cattle farms (*estancias* or *estancias de ganado*)
- Small sites for building mills (*trapiches*) for processing metals near mining areas.

Of these three types of *Merced* Titles, the last two are the most important with regard to land ownership and only the *mercedes de labranza* provided the title holder with ownership of the land, while the *estancias* provided a right to grazing. For the latter, the king explicitly refused ownership rights since the sites were of a public nature.

“Initially, the local councils (*cabildo*) were responsible for the administration of the *Merced* titles, but later the royal legislation, which aimed to save indigenous

property and avoid an abusive concentration of land by powerful inhabitants, delegated the responsibility of distributing titles to the representatives of the king, namely viceroys (*virreyes*), courts of justice (*audiencias*), and governors (*gobernadores*) according to the respective types of province. The local councils retained only the urban and sub-urban *Merced* titles. This measure was implemented from 1575...” (Borde & Gongora, 1956)

The distribution of Merced titles in Chile was liberal and widespread. This had consequences for land policy making at the time and later, particularly for the indigenous population, which had clearly unequal opportunities with regard to their access to land.

2.2 The colonial period (17th – 18th centuries)

This period is characterized by the development of a mixed-race population (indigenous-Spanish) and the consolidation of a mainly agricultural society. There was also an escalation of land conflicts in the southern regions of the country, particularly with the Mapuche people (Eyzaguirre, 1982). North of the Bio Bio River, the situation was different; cities were developed and consolidated, numerous agricultural activities gained importance and the first exports were made. Society, of course, became more and more diverse and complex (Eyzaguirre, 1982).

During the seventeenth century the hacienda or *latifundio*¹⁸⁵ gained importance as an economic unit, which generated great economic benefits for the landlords and began to replace mining activities. At the

¹⁸⁵ Latifundio: Large estate normally under extensive agricultural land use, characterized by inefficient use of available resources (low technological level), poor working conditions and quality of life for the workers. In Latin America, a *latifundio* can easily be bigger than 10,000 ha. They are traditionally associated with absentee landlords, social instability and a large number of landless farmers.

same time the *Encomienda* lost relevance as a labour structure and social institution.

In this respect, Gallardo (2002) notes that the institution of the *Encomienda* had come to an end in some parts of South America by the first decades of the seventeenth century and in others, such as Chile, towards the end of the same century. The reason for this was mainly a decrease in the indigenous population due to the introduction of diseases from Europe, poor living conditions and the development of other labour structures that came along with the economic development. In fact, the seventeenth century became the “century of wheat” because of the increase in exports to Peru. The socio-political power given by the colonial authorities to the big landlords (*hacendados*) was substantial and lasted for decades.

2.3 Independence

During the nineteenth century, the French military leader Napoleon Bonaparte invaded Spain, imprisoned King Fernando VII and he appointed his own brother Joseph Bonaparte to rule Spain and the Indies. The absence of the king led to civil unrest in the colonies and the establishment of local government units or assemblies. This is why in September 1810 the first government assembly was held in Chile; Mateo de Toro Zambrano was elected president of the assembly and thus took the first step towards independence (Eyzaguirre, 1982).

The Spanish king was, however, released from prison in 1813 and, after a series of battles between the Spanish army and the “Patriots”, the Spanish crown recovered power over the colony in Chile. In the following years, the local population opposed Spanish rule and in 1818 independence was finally achieved and was followed by the “anarchy period”, a time of disordered and chaotic socio-political change in the country.

2.4 The beginning of the republic, liberalism and national expansion

In the period following independence, 80 per cent of the population lived in rural areas and Chile; this period was characterized by economic activities such as mining and the exportation of wheat exportation, as well as the colonization of unoccupied territories, particularly by European immigrants. The Constitution of 1833 was enacted and it contained elements on land ownership; for example, that only literate people had the right to vote and to own land. At the time, Chile enjoyed substantial commercial expansion; copper, silver and wheat enriched the upper class and enabled the country to steadily develop (Collier & Sater, 2004).

In 1843, a census was carried out to acquire data about population, ownership of property, and market and industrial activities, which would be the basis for policies guiding the development of the country. In 1844, for example, the administrative structure of the country was established and was composed of provinces, departments and further hierarchical subdivisions. This structure was valid until 1885.

From 1861 to 1891, the colonization by European immigrants in the south of the country became stable. Meanwhile military occupation was carried out in lands that were originally indigenous (Mapuche). These lands were auctioned and sold to private investors in a process that often had serious irregularities, and the latifundios retained their importance as an economic structure.

In 1866, the most important law of this period with regard to indigenous people was enacted. It was known as the Law of 4th of December 1866, also called “the law about establishment of settlements in indigenous territory and conveyance of indigenous property”. This law recognized indigenous property rights and established the norms for boundary demarcation and registration of indigenous lands (Toledo, 2001), thus stopping land transactions that often occurred between indigenous (Mapuche) and non-indigenous people (Bengoa, 2000).

In 1869, Chile's army raided Mapuche territory burning houses and farms, killing people and stealing more than two million cows. The Mapuche economy was not able to withstand this for a long period and in 1881 the Mapuche were finally defeated by the Chilean army. The Mapuche people became foreigners in their own land; most of their wealth was taken away and they were forced to become a society of small farmers (Pérez & Navarrete, 2003).

The law of 1866, modified through decrees in 1874 and 1883, set the basis for the Mapuche land tenure system during the entire twentieth century. These decrees specified that the Mapuche lands could not be sold or purchased for a period of ten years from the time of enactment. This restriction was extended periodically for over half a century (Toledo, 2001). However, this requirement was not enforced in several cases due to severe irregularities; transactions took place, lands were auctioned, lease rights were given to non-indigenous citizens and, in many cases, the indigenous people only received the land remaining after all these events (Toledo, 2001).

The so-called "process of settlement" (*asentamiento*), the implementation of the Law of 1866, was very slow and ended up completely fragmenting the Mapuche society and creating permanent land tenure insecurity.

A particular reason for this was the occupation of these lands by colonizers who, when the "Settlement Commission" came to regularize the legal situation, could demonstrate "effective occupancy"; for that reason they were entitled to property rights over the Mapuche lands (Pérez & Navarrete, 2003). This was based on a procedure similar to the law of usucapión (prescription), which allowed for the occupant to acquire ownership if no objections were filed against it.

Due to these irregularities and inefficiencies, several thousand Mapuche people could not regularize their lands. In the following years, the state had to give them property titles in accordance with the actual purpose of the law of 1866, through *Títulos de Merced*, in order to deal with the pressure that these families generated (Pérez and Navarrete, 2003).

As Pérez and Navarrete (2003) pointed out, the property titles in the form of *Títulos de Merced* were theoretically given to the head of the family, who was supposed to settle with his relatives on the given land. But in many cases the Settlement Commission gathered together families of different origin under the same *Título de Merced* thus creating a large number of conflicts. The state recognized this problem and in 1912 dealt with it by slowly replacing the collective titles with family titles. The amount of land given through this procedure can be seen in Table 12.

Table 12: Land allocated through *Título de Merced*

	Títulos de Merced	Area (ha)	People
Arauco	66	7,116	1.92
Bío Bío	6	659	112
Malleco	350	83,512	11.52
Cautín	2.102	317,112	56.98
Valdivia y Osorno	552	66,711	7.26
Llanquihue	2	84	16
TOTAL	3.078	475,194	77.75

Source: (Pérez & Navarrete, 2003)

The data indicate that the land given to them was not more than 6.1 hectares per person on average and, if we consider that at that time around 150,000 Mapuche people lived in this part of the country, this means that half of the Mapuche population was left without *Titulos de Merced*. In order to solve the problem, the state continued giving land through different mechanisms, such as “free land property titles”, to families that had lived in those places for centuries, transference of fiscal lands and some others. In conclusion, around 15 per cent of the IX Region of Chile was given to the Mapuche (average 6.1 hectares/person), while more than five million hectares were given to non-indigenous Chileans (average 40 hectares/person) and foreign colonizers (average 400 hectares/person) (Pérez & Navarrete, 2003).

2.5. Social crisis, industrial development and expansion of democracy (1891 – 1958).

2.5.1 Rural – urban migration

Between the years 1891 and 1958 there were major changes in the state's development strategies. The industrialization model replaced the agro-exporter model; in other words the central economic axis moved towards urban industry. There was a gradual abandonment of the agricultural sector and rural areas due to migration of the rural population to the cities, mainly Santiago. This occurred mainly between 1930 and 1960, a period in which the rural population lived in deplorable conditions (illiteracy, unhealthy environment, etc.). Once in the cities, people usually settled in marginal areas where conditions were no better than those they had left behind (Armijo & Caviedez, 1997).

As Armijo and Caviedez (1997) point out, the process of rural-urban migration had the following characteristics:

- Migrants were predominantly women (65 per cent)
- The main motivation was access to higher income

- It was a step by step process; people moved first to the nearest village, then they moved to a city of regional importance and then to a bigger city (Valparaíso, Concepción and especially Santiago)
- It did not solve any socio-economic problems; on the contrary, it generated socio-spatial conflicts (informal settlements and employment, lack of basic social infrastructure, etc.).

2.5.2 Subdivision of large properties

With relation to the subdivision of large properties (*Haciendas, Latifundios*) Garrido, Guerrero and Valdes (1988) mentioned that:

“...the rural property is too big to be properly cultivated...only 10% of the people who work in the countryside are the owners of the land, the biggest part of them are tenants, workers, temporary workers or homeless people, who cannot have any interest in improving the property that does not belong to them... The subdivision of the rural property implies a problem both in economic and social matters, and is of the highest interest...”

As mentioned by Garrido et al (1988), in 1927 Carlos Ibañez del Campo was elected as president and a reformist plan was initiated with respect to social matters. His main objectives were to:

- Carry out a vast colonization programme on state land.
- Develop agricultural cooperatives.
- Establish a system of credit for small landowners in rural areas.
- Subdivide the *latifundios* in Chile's central region in order to establish new colonies.
- Regularize property titles in the southern part of the country.
- Regularize property titles of indigenous land.

These objectives, while not mentioning the concept of agrarian reform, were certainly similar to the targets of such a process. Even though the actual agrarian reforms started much later in history, it is correct that this was the first time that a process of reform related to land was applied.

To achieve the above-mentioned objectives, in 1928 President Ibañez passed a law that created the Agrarian Colonization Fund; this played a crucial role since it controlled the state's activities related to land tenure until 1962. The Fund's main objectives were to promote better distribution through colonization, by Chilean or foreign farmers, of lands that were not being used productively, and through the division of large properties that were not cultivated at that time. But the world economic crisis of the 1930s prevented the Colonization Fund from functioning as it was supposed to due to a substantial lack of capital (Garrido, Guerrero, & Valdes, 1988).

The year 1938 marks the beginning of a new political period called "Radical Governments" that lasted until 1958. During this time, the Colonization Fund lost its financial means and the situation changed the way of acquiring lands through purchase to expropriation due to the difficulties of agreeing on prices. During this period, the first pro-Agrarian Reform movements started to arise.

During its lifetime (1929-1962), the Agrarian Colonization Fund acquired 105 parcels from private owners covering roughly 382,000 ha, and 37 state land plots totalling around 1.2 million hectares. It is thus quite evident that the priority was to privatize state lands and not to acquire private land (Garrido, Guerrero, & Valdes, 1988).

With this acquired land, the Fund created 121 colonies until 1962, using around a million hectares of the lands affected by the process of purchase or expropriation, in which it assigned 1,050 parcels, about 63,9 per cent, of the total acquired lands (Garrido, Guerrero, & Valdes).

This process generated considerable land fragmentation and large areas of land were transferred to private investors because of economic or political pressures, legal ignorance or deceit. As a result, poverty among the Mapuche¹⁸⁶ people increased significantly and, at the beginning of the Agrarian Reforms (1960s), 25 per cent of the lands given to the Mapuche had been transferred to private owners (around 130,000ha) (Muñoz, 1999).

2.5.3 Changing political context

As Armijo and Caviedez (1997) have argued, in 1959 the Cuban revolution gained strength and, fearing that this situation could spread, the Alliance for Progress Conference (Punta del Este, Uruguay, 1962) recommended that Latin American countries apply modernizing strategies in the agrarian sector. This started a process of intervention in this productive sector that after a few decades led to changes in rural areas that were intended to strengthen farming through Agrarian Reforms.

During this decade, the crisis in the Chilean industrialization model became evident and the social and productive crisis of the Chilean countryside and in the rest of Latin America worsened. The agrarian structure during this period was still the latifundio-minifundio complex; in other words, there was a large concentration of land in the hands of a few and, at the same time, a large number of small property owners or tenants (minifundistas) and landless farmers. As a result, the agrarian sector was no longer capable of producing enough food for the population explosion; the population growth in 1960 was 2.56 per cent, but the Agrarian production growth was only 1.8 per cent (Armijo & Caviedez, 1997). This led to an increase in the importation of food when there was not enough foreign exchange to support an import-based economy. As a result, rural areas were characterized by a lack of the basic conditions for a reasonable quality of life.

¹⁸⁶ Currently the largest indigenous group in the country.

Poverty increased not only in Chile but also across Latin America (*ibid*).

This crisis set the context for a transformation of the land tenure system in Chile, socially, economically and politically.

2.6 Agrarian reforms

In 1961, the Charter of the Organization of American States (OAS) agreed to establish an Alliance for Progress for a better life for all people on the continent. The primary objective, in accordance with recommendations of the Alliance for Progress, was to generate a major transformation of the agrarian structures, with the objective of guaranteeing a more balanced distribution of the ownership of land and achieving an increase in agrarian productivity to meet the national demand for food. This is clearly expressed in the OAS programme of action (Organization of American States, 1961):

Title I. Objective of the Alliance for Progress

"6. To encourage, in accordance with the characteristics of each country, programmes of comprehensive agrarian reform leading to the effective transformation, where required, of unjust structures and systems of land tenure and use, with a view to replacing latifundia and dwarf [small] holdings by an equitable system of land tenure so that, with the help of timely and adequate credit, technical assistance and facilities for the marketing and distribution of products, land will become for the man who works it the basis of his economic stability, the foundation of his increasing welfare, and the guarantee of his freedom and dignity".

Title II. Economic and Social Development, Chapter II. National Development Programmes

"2. National development programmes should incorporate self-help efforts directed to:



Typical Rural housing South of Chile- most rural areas lack basic infrastructure © Jorge Espinoza

c. The strengthening of the agricultural base, progressively, extending the benefits of the land to those who work it, and ensuring in countries with Indian populations the integration of these populations into the economic, social, and cultural processes of modern life. To carry out these aims, measures should be adopted, among others, to establish or improve, as the case may be, the following services: extension, credit, technical assistance, agricultural research and mechanization; health and education; storage and distribution; cooperatives and farmers' associations; and community development".

In addition, the Concilium Vatican II (*Gaudium et Spes – On the Church in the Modern World*, 1962-1965) also made similar important declarations with respect to land, society at large, and the role of the Catholic Church in this respect around the world. Because Latin America is highly Christianized continent, the declarations made by the Concilium were taken seriously by governments and the local branches of the Catholic Church, many of which were the biggest landlords in the region. Some of the most relevant passages of this document explicitly refer to the benefits of private ownership and fair access to private property by individuals and communities. It also refers to the importance of secure property rights; the state's responsibility to guarantee them will prevent anyone from abusing private property to the detriment of the common good. In other words, owning property implies both rights and responsibilities.¹⁸⁷

The implementation of agrarian reforms in Latin America often had disappointing results (Thiesenhusen, 1996). Worse, in many cases the process failed to achieve the primary objectives and instead generated civil unrest and serious land conflicts that sometimes escalated into civil war. The following sections will focus on the agrarian reforms carried out in Chile and will illustrate this outcome.

2.6.1 The agrarian reform of Jorge Alessandri Rodriguez

The first Chilean Agrarian Reform (AR) law, the N° 15.020 of 1962 that created the Corporation of Agrarian Reform (CORA), was enacted during the government of Jorge Alessandri Rodriguez. The CORA was supposed to oversee the entire process of AR, including planning and implementation. This process was top-down and did not lead to major changes in land distribution; very little land was expropriated for farmers (Armijo & Caviedez, 1997).

During this period, the Catholic Church transferred a significant part of its rural land to farmer communities, following the recommendations of the Concilium Vatican II for social equality, particularly for people with a poor quality of life.

During Alessandri's agrarian reform, the national context was characterized by a conservative government in opposition to a strong and well-organized socialist movement. The international context was characterized by the Cold War (Armijo & Caviedez, 1997).

2.6.2 The agrarian reform of Eduardo Frei Montalva

The second agrarian reform was carried out by the government of Eduardo Frei Montalva. The objective was the expropriation of land and its re-distribution to farmers and a new law of agrarian reform was passed in 1967 (N° 16.640), the same that would be used by the government of Salvador Allende (1970 – 1973). The main criteria for the expropriation of land were the size of the property, abandonment or misuse. The law was applied to all properties bigger than 80

¹⁸⁷ See Concilium Vatican II, *Gaudium et Spes – On the Church in the Modern World*, 1962-1965, Certain Principles Governing Socio-Economic Life as a Whole.

BIH (basic irrigated hectares¹⁸⁸). The law specified that expropriated lands would be for transitory settlements, called *asentamientos*, which were supposed to exist for two to five years. People settled could only be farmers living on the expropriated farm, who were head of the family and who were older than 18 years of age (Armijo & Caviedez, 1997).

During the *asentamiento* period, the land was to be managed jointly by local CORA administrators and committees elected by the peasants themselves. "Although this period was to last only three years, it could be extended by two years with authorization from the president. When the period ended, the peasants themselves would have the option of requesting collective, individual or mixed properties. Whichever they chose, CORA was to retain considerable jurisdiction over the rights to transfer, withdrawal from cooperatives and collectives, and the credit and marketing procedures to be employed" (Kaufman 1972 and Garrido et.al 1988).

By the end of 1969, about 15 per cent of irrigated land had been expropriated (1,094 latifundia, 246,000 ha of irrigated lands and 2.4 million ha of non-irrigated lands) (Armijo & Caviedez, 1997). Although owners of expropriated land were entitled to compensation, there were many conflicts, particularly over compensation payment procedures (Garrido, Guerrero, & Valdes, 1988).

This government also supported the creation of farmer syndicates as a social right, which generated an increase in the number of farmer organization members. In 1969, 76,356 farmers were members of one of these syndicates. Altogether 28,000 families benefited from

the process of agrarian reform during this period although the objective was to benefit 100,000 families and only a 13 per cent of the total agricultural area was affected. One of the main problems was that the strategy did not include economic reforms or support measures that could assist the development process at the local level (Armijo & Caviedez, 1997).

In conclusion, the process of agrarian reform of Eduardo Frei Montalva, similar to that of Alessandri, was closer to land reform than to agrarian reform. The presence of other support measures alongside the redistribution of land is a key issue that defines the process of agrarian reform and should not be overlooked in its implementation.

2.6.3 The agrarian reform of Salvador Allende Gossen

In 1970, Salvador Allende Gossen was elected president. The government of Popular Unity (Unidad Popular (UP) intended to lead the country to socialism, even though the Cold War was being conducted in other parts of the world. Consequently, the agrarian reform was not an isolated process; on the contrary, it occurred in a context of global change (Armijo & Caviedez, 1997).

The UP believed that a farmers' organization should take control of the agrarian reform and this was the cause of great conflicts between the *terratenientes* (major landlords) who were against the reform process and the farmers who wanted this process to be accelerated. Due to these conflicts a number of illegal land occupations were carried out by Mapuche farmers, temporary workers and small proprietors (see Table 13) (*ibid.*).

188 Basic Irrigated Hectare (BIH) is the area needed for the potential production of an irrigated hectare, Class I of Capacity of Use, in the Valley of the Maipo River. The law provides a conversion table (República de Chile, Law N°18.910. *Ley Orgánica del Instituto de Desarrollo Agropecuario* (Organic Law of the Agricultural Development Institute), INDAP 1990). The objective of the BIH is to provide a legal system to compare areas of land in terms of potential production.

Table 13: Illegal Occupations of lands (1967 – 1971)

Year	Number of illegal occupations
1967	9
1968	26
1969	148
1970	456
1971	1.28

Source: Kay 1975 quoted by Armijo and Caviedez 1997.

The number of syndicates continued to grow as did the members. According to the Employment Authority (Dirección del Trabajo) in 1971 there were 632 syndicates representing around 127,000 farmers (Garrido, Guerrero, & Valdes, 1988).

As Armijo (1997) points out, the process was then accelerated and farmers were pressured for the expropriation of properties smaller than 80 BIH. From the beginning of 1971 to July 1972, 3,282 farms were expropriated (371,299 ha of irrigated land and 4,045,974 ha of non-irrigated lands), or 21 per cent of the country's productive land. The result was a period of major changes in the land tenure system in which the latifundio were eliminated. But the agricultural production did not improve as it was expected to and an increase in imports was necessary. Because of a lack of agreement between the political parties, it was impossible to establish a clear structure for the reformed sector. All this, added to the international context already mentioned, created instability in Chile's economy and set the scene for widespread political changes.

2.6.4 The last modernization of the agrarian sector

In 1973, Augusto Pinochet Ugarte took over the government and put an end to the process of reform carried out by the former administration. In 1975, a new process of neo-liberal restructuring began which led to a reverse process called "counter agrarian reform".

The key elements of the policies related to land tenure in this period are (Armijo & Caviedez, 1997):

- Access of the national economy to international markets, based mainly on agricultural production.
- Transformation of the role of the state (high intervention).
- Liberalization of land ownership, which formed part of a land market.
- Liberalization of prices of agricultural products, they were determined by traditional economic dynamics of demand and supply.
- Creation and application of a new labour plan that provided security to investors and which operated against the syndicates' organization of farmers.

The government achieved the following through the counter reform process (ibid):

- Returned the expropriated lands to their former owners in a complete or partial way.
- Other lands were leased to private investors or commercial companies.
- Further lands were given to the farmers with an average of approximately 8 BIH per farm. The new owners, without the support of any institutional mechanism in terms of capital or technical assistance, started selling their parcels, mainly to companies.

The neo-liberal model generated productive specialization and a further differentiation of rich and poor regions across the country. The rich regions were those that specialized in the production of fruit, forest, livestock, fisheries, and mining. The poor ones were those that lacked capital and modern technology; there was extensive use of land with family-based labour and production was mainly for self-consumption or for the internal market only (Armijo & Caviedez, 1997).

The resulting situation in terms land tenure by the year 1985 is illustrated in the following Table.

Table 14: Land Tenure Structure in Chile 1985.

Social Category	Size	Number of Proprietors	% of Tenure	% of Total	Average size (BIH)
Minifundium peasant	< 5	330,000	16	77,1	1,4
Middle size and rich peasants	5-10	55,000	12	12,8	6,5
Commercial proprietors	10-20	25,000	16	5,8	16,1
Commercial middle size properties	20-80	12,000	30	2,8	65,0
Large estates proprietors	> 80	6,000	26	1,4	110
Total		428,000	100	100	

Source: (Gallardo, 2002)

It is evident that the level of equality or balance in land tenure was, to say the least, inadequate. But this situation, that is, a concentration of land in the hands of the rich people and companies and a highly fragmented landscape, is nothing new. This kind of distribution has been a characteristic of a considerable part Chile's history still is, to some extent.

2.7 Chile's Land Tenure System today

2.7.1 Land tenure regimes

The military coup of 1973 was followed by a dictatorship that lasted almost two decades. In 1988, Chile's people voted for the dictatorship to end and for a return to democracy.

One of the most evident consequences of the military government regarding land tenure was the very strong concept of "private property" that still exists in Chile. On this matter, the law allows a landowner to use the land for the purpose that he or she determines, as long as the rights of others are not compromised. There are restrictions on this use of land, for example in forestry and agriculture, with regard to environmental protection, but in practice these are not sufficient and are frequently not followed due to a lack of strict enforcement.

With regarding to the right to property, the current Constitution (*Constitución Política de la República de*

Chile, 1980) specifies that the state is responsible for ensuring:

- That every citizen can enjoy the liberty of acquiring the dominion of every kind of good, with the exception of those which nature has made common to all men or which must belong to the nation itself according to the specifications of the law ... Some laws, if the national interest requires it, can establish limitations or requisites for the acquisition of the dominion of some goods (Chapter III, Art. No 23).
- The right to property, in its several types, over every kind of corporal or in-corporal goods (Chapter III, Art 24).
- That only the law can establish the way of acquisition of the property, of use, enjoy and manage it and the limitations and obligations that come from its social function (Chapter III, Art. No 24).
- And that the property cannot, by any chance, be taken from its owner, with the exception of special

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cases in which the law authorizes the expropriation in order to fulfil the requirements of the society or the nation itself. The affected owner has the right to compensation (Chapter III, Art. No 24).

Private properties can be rented out with the owner retaining the legal right of ownership and giving tenancy to someone else in an arrangement usually characterized by a fixed rent and the transfer of all associated risks to the tenant (Garrido, Guerrero, & Valdes, 1988).

Another form of contract that can be used, particularly in the agrarian sector, is the mediería or sharecropping. This is characterized by a variable rent, expressed as a percentage of the revenue and the sharing of risks and benefits between the owner and the tenant. However, it does not guarantee secure tenure for the sharecropper or mediero.

Another form of land tenure under Chilean law is collective property, which refers to property that belongs to all who work personally on the property, or that belongs to a cooperative that constitutes an economic community. In this scenario, every member contributes to common work and also profits from the products obtained from it (Garrido, Guerrero, & Valdes, 1988).

With regard to indigenous people, the law also allows for collective ownership of land but with restrictions that are specific to these lands. The Indigenous Law of 1993 (No 19.253), which created the Indigenous Land and Water Fund and the National Corporation for Indigenous Development (CONADI), gives a formal definition of indigenous land and stipulates that it will not be affected by normal property taxes (Government of Chile, 1993)

CONADI, through the use of the Lands and Water Fund, can give subsidies to individual indigenous people and communities for the purchase of land. This fund also supports the solution of land conflicts, especially with

regard to law enforcement, provides financial resources for regularization or purchase of water rights or for infrastructure to provide this service, and stipulates a period of 25 years in which the lands and water rights obtained through this fund cannot be expropriated. These lands can neither be sold nor taken, except when this is between people or communities of a same ethnic group, and it cannot be rented, used by or administrated by non-indigenous people. The individual lands will be inherited in the same way as the non-indigenous land and the community land, as the traditions of each ethnic group specifies (ibid.)

CONADI is a public institution in the Ministry of Planning and Cooperation and its mandate includes: (Government of Chile, 2010 (a))

- To promote the recognition of and respect for ethnic groups, their communities and the people that belong to them.
- To promote the empowerment of indigenous women.
- To legally defend indigenous people and their communities, particularly in conflicts over land or water rights.
- To protect indigenous lands and the possibility of access to land as well.
- To protect the rights of indigenous people.

During the almost two decades CONADI has operated it has given a considerable amount of land to indigenous communities and has solved several conflicts, but the current process is far from adequate and needs improvements that will take another decade to achieve, possibly longer.

In addition to the land falling under the above-mentioned tenure systems, there is the 32 per cent of the country's land that belongs to the state itself. In other words, around 240,000 km² that can be managed by the government in the way it determines, of which 59 per cent (around 141,600 km²) is protected by the National System for Protected Areas (SNASPE)

‘ *The government is free to give land to individuals, companies, or other legal entities as leasehold when the objectives of the land use projects are of public or environmental benefit or are in accordance with the state's plans. The contracts can have a monetary agreement between the parties or can be without any cost to the tenant if the project does not feature any profit. Normally the contracts are for a 50-year term, but the period can be extended*

and includes national parks, reserves and monuments (Government of Chile, 2010 (b)).

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Today, there is much concern about the concept of tenure security and property regularization in Chile. For this reason there is a national campaign on this issue encouraging people to regularize their situation, in certain cases through the use of the law of usucapión. This law, translated as “Acquisitive Prescription”, is similar to what is called Adverse Possession in other countries and is a very old procedure that has been used for a long time not only in Chile, but also all over Latin America. The Acquisitive Prescription is defined by the Internal Taxation Service (2001) as follows: “*The Prescription is a way of acquiring goods of others, or to annul the actions or rights of others, due to the possession of these goods or for not having used these goods or rights during a certain lapse of time...*”

Usually the time required to execute this law is five years; in other words, if after five years of occupancy

and use of a plot there are no justifiable objections from any other person, the land can be acquired by the occupier and legally registered under his name (ibid).

2.7.2 Informal settlements

Informal settlements exist mainly in marginal areas of cities across the country. This is one of the government's most important priorities and major efforts are being made to improve the situation of the people living in poor conditions. However, rural-urban migration still occurs where there are few employment possibilities in the formal sector and this drives the proliferation of informal housing.

The 2007 Census of informal settlements by the Centre for Social Research of the Chilean non-government organization *Un Techo para Chile* (“A Roof for Chile”) showed that there were 28,578 families living in 533 informal settlements across the country. According to the same source, only 10.3 per cent of these settlements had more than 100 families, 73.3 per cent of them were in urban areas and 27.5 per cent had no formal access to basic services such as drinking water, electricity and sewage (Centre for Social Research, *Un Techo para Chile*, 2007).

Un Techo para Chile had a national campaign to eliminate all informal settlements by the end of 2010. The initiative included housing, socio economic and legal assistance to the shack dwellers to effectively improve their livelihoods. Although major setbacks, such as an earthquake in February 2010, seriously affected the achievement of this goal, the institution remained optimistic that by the end of that year Chile would celebrate the fact that there were no more informal settlements within its territory.

Even though the work of *Un Techo para Chile* has been extremely valuable (and has even recently expanded to other countries in the region), the 2011 Census conducted by the Ministry of Housing and Urbanism showed, however, that the problem of informal

settlements persists. In fact, according to this Census, the number of informal settlements has increased to 657 (approximately 83,000 people); out of these, 402 settlements (including approximately 70 per cent of the total number of families living in informal conditions) are located in disaster-prone areas (high risk of landslide or flooding). Furthermore, 40 of the total number of settlements are not connected to the sewage system (Government of Chile, 2011).

With regard to the ownership of the land where the settlements are located, Figure 4 shows that 44 per cent of these settlements are on public land and 35 per cent are on private lands. Also, 10 per cent of settlements are on land classified as mixed because both formal owners and informal settlers occupy the land.

2.7.3 Land registration system

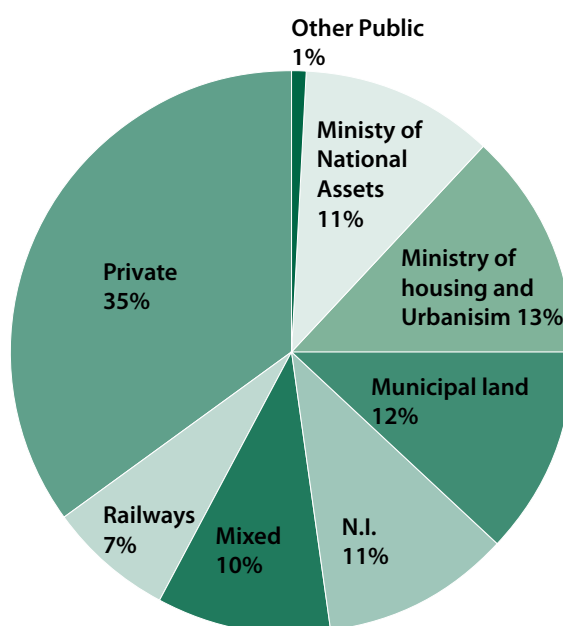
The registration system in Chile was developed two centuries ago as a compromise between the French tradition, particularly the Civil Code, and the German, and was contrary to other legal frameworks that come more directly from the Spanish norms (Mohor,

El Sistema Registral Chileno: Reformas e implicancias doctrinarias, 2010).

According to the Registrar of Santiago (Conservador de Bienes Raíces de Santiago, 2010) the legal framework of the land registration system in Chile is based on the following components:

- Property rights as stipulated in the Constitution
- Civil code
- Organic code of the Tribunals
- Regulation of the registrar
- Decree 247 of 1931 about the organization of the Real Estate Registrar of Santiago
- Civil procedure code
- Commerce code
- Code of mining
- Code of water
- Code and laws on taxation
- Laws on special pledges (agricultural, industrial, sale and purchase of movable goods)
- Laws regulating the electoral system
- Judicial power
- Law of banks and financial institutions

Figure 4: Location of informal settlements



The framework is complex and thus difficult to understand unless the user has extensive legal knowledge.

In the Chilean system, registration is person-based, not real-based (with a unique parcel identifier). In other words, the registration is carried out based on information about the owner and is considered to be a pre-requisite, proof and guarantee for possession. Nevertheless, the system aims merely to register a fact, the change in possession; that is, a registration of deeds (Conservador de Bienes Raíces de Santiago, 2010). This has the following consequences as explained by the Real Estate Registry of Santiago (Conservador de Bienes Raíces de Santiago, 2010):

- The registry is simply declarative and not constitutive as it validates the present possession, but not dominion.
- It does not prevent claims by third parties (previous owners) on the same parcel.
- It does not constitute a source of real rights but only material (possession).
- The purpose of the registration is to record the change, which can only happen through prescription.

Public display of the transactions is a pre-requisite.

The system is organized as a legal service by lawyers known as conservadores (registrars) who are under the authority of the Supreme Court (headquarters in Santiago). There are currently over 400 conservadores in the country and are appointed by the president in collaboration with the Ministry of Justice (Corporación Chilena de Estudios de Derecho Registral, 2010).

The registrars are responsible for the registration of real estates and there are three registries: the property registry, the mortgage and encumbrances registry, and the registry of interdictions and prohibitions. Their jurisdiction is defined by the territorial limits of the authority of the local courts (one or more municipalities). The only exception is the Registry of Santiago, founded

The lack of tenure security thus persists for a large number of properties and there is an urgent need for accurate information on the total number of irregular properties in Chile.

in 1931, which is composed of three registrars with a jurisdiction of 36 municipalities (Mohor, 2003).

Since it was instituted, the registration system has been adequate, efficient and secure, and it has had a number of substantial modernization changes. The digitization of the registry goes back to 1998 when paper files were turned into digital documents but there was no online access by users (Conservador de Bienes Raíces de Santiago, 2010).

By 1999, the first upgrade of the online system was done to improve the services for the public. In the following years the database system was modernized and all the registries were integrated into the same database. This significantly increased the efficiency of the system (*ibid*).

However, as mentioned before, according to estimates by the Agricultural Census of 2007 there are over 69,000 cases of informal land tenure in rural areas. Since 1993, the state campaigned to regularize at least 30,000 properties by the year 2010 and the progress report in 2009 (Bello, Gaymer, & Guevara, 2009) showed that the scale of the problem certainly justified the existence and continuity of the regularization programme. In fact, in 2011, this campaign was once again endorsed by the Ministry of Public Assets and Ministry of Agriculture and, considering the experience gained during the initial implementation phases, the technical norms and procedures for property regularization were updated and adapted to the conditions encountered, and the campaign was renamed to “Land Tenure Consolidation Programme” (Government of Chile, 2012).

The lack of tenure security thus persists for a large number of properties and there is an urgent need for

accurate information on the total number of irregular properties in Chile. There is also no current information on urban areas and it is not possible to extrapolate this amount on the basis of the agricultural census. For the country to strengthen its security of tenure, it is thus crucial that a systematic survey of irregular properties in urban areas is done as soon as possible. Naturally, a cadastre system would support information management and facilitate decision-making for this purpose.

3. SWOT ANALYSIS OF LAND TENURE SECURITY IN CHILE

The advantage of SWOT analysis is that it summarizes key positive and negative characteristics of a particular system or institution and considers the main aspects to address in order to improve the situation. Thus the overall goal of the analysis will be to develop strategies to maximize strengths and minimize weaknesses. The following matrix shows the main aspects resulting from the information provided in previous sections of this paper with a focus on strengths, weaknesses, opportunities and threats of land tenure security in Chile:

	Helpful	Harmful
Internal	<p>Strengths:</p> <ul style="list-style-type: none"> Secure titles if registered: the current land registration system is efficient and effective, thus once property is registered, it has a high level of security. Electronic platform in place: the internet platforms as well as the integrated digital databases are a considerable contribution to good land governance as they increase transparency substantially and make the system more efficient. Financial resources are available: the state is in a good financial position to initiate land law reforms. Ongoing reform, modernization or improvement projects: there are ongoing projects to improve the efficiency, effectiveness and coverage of the system, for instance the registry reform project and the property regularization campaign. Willingness to change on the side of the government and the registrars: the government and the association of registrars have both demonstrated their will to change and improve their systems and methods. In fact, the registrars have adopted a leadership role in reform and improvement projects. From a land governance perspective, this aspect is crucial. 	<p>Weaknesses:</p> <ul style="list-style-type: none"> Person-based registry: the registry is currently not real-based; this has negative consequences for the efficiency of the system. Lack of information on irregular properties in urban areas: this has negative consequences for policymaking processes. It is hardly possible to formulate or reform policies appropriately without knowing the size of the problem. Geo-referencing is still deficient: the cadastre is incomplete and obsolete, thus the geographic information has low relevance in the security of titles. The security is provided exclusively by the registry. Conflicts with indigenous people: there are a number of unresolved problems with regard to the indigenous population and their claims on land. The conflicts generated have escalated considerably and violent clashes often occur between indigenous groups and the government. Weak governance of land: there are serious obstacles to the implementation of good land governance. For example, the land administration system is deficient, particularly the cadastre. The legal framework is too complex and difficult to understand. Also, because of the strong protection for private property there is a tendency for owners to overlook the social responsibility which owning private property should imply.
External	<p>Opportunities:</p> <ul style="list-style-type: none"> Good economic position in the regional and global contexts: Chile is in a good economic position in the international markets. This increases the motivation for public and private investment in modernization and reform. OECD membership: this implies that a number of policies need to be improved in order to meet the standards. This is a great opportunity for the country to move forward towards its development targets. Global trend to look closer to governance of the land sector: there is currently an international trend to look closer to land governance as a way to understand the system, see how it operates and what and how to intervene. Because governance of the land sector in Chile is weak, this is a relevant opportunity to improve the situation and build on international experience and collaboration. 	<p>Threats:</p> <ul style="list-style-type: none"> Socio-economic trends: the market is too often seen as (single) decision maker. As a consequence, serious problems may be overlooked if the market fails to point them out. Civil unrest: particularly related to indigenous people, there are a number of conflicts generating civil unrest and violent clashes. In the future, these conflicts will continue to cause severe damage to governance and thus to land tenure security.

CONCLUSION

Chile's current land tenure systems are a mixture of old conservative legal frameworks and new initiatives, ideas and projects. Land tenure security is provided through registration; however, the high number of properties that are "irregular" implies there is widespread land tenure insecurity. There is currently a lot of concern throughout public institutions, the private sector and the civil society about this and it is thus hoped that the situation will improve in the years to come.

From the period of colonization to the present, Chile has been through very different periods of politics, economics and culture. Immediately after the conquest, the land tenure system was based on the characteristics of a conventional monarchic government, that is, one in which the land belongs to the royal family, without restrictions on management or administration. The traditions, especially those regarding land ownership among original ethnic groups, were not considered appropriately or, frequently, were completely ignored in policymaking processes. This generated conflict that still persists.

This conflict is one of the most important issues the state has dealt with in recent decades and is likely to continue doing so for some time. So far, the government's approach has solved some problems but created new ones as well. A considerable amount of land was given to indigenous people, hoping that they would be able to manage it and develop a good quality of life, but often this has not solved things.

For some time, a large section of the indigenous population has not lived in rural areas; their families moved to the cities decades ago and now, when they receive the land, some of them are not able to manage it in a sustainable or proper way. Also, there is a clear over-dependence on available subsidies, credits and other sources to finance their improvement projects and so there is only a small possibility of sustainable development.

From the period of colonization to the present, Chile has been through very different periods of politics, economics and culture. Immediately after the conquest, the land tenure system was based on the characteristics of a conventional monarchic government, that is, one in which the land belongs to the royal family, without restrictions on management or administration.

The problem, then, is that the legal framework and government policies are not enough to improve the quality of life of indigenous people in Chile. Giving them land is only part of the solution. It is clear that land as property is only one of the subjects addressed by the Indigenous Law, but it is also clear that the problems will persist for a very long time.

On the subject of reforms, it is important to note that even though the measures were called "Agrarian Reforms", the process was oriented towards the redistribution of land than to a complete restructure of the system. Agrarian reform should include several development measures, including the redistribution of land, training, economic and technical assistance, etc. In Chile, some development measures were applied, but the process is more accurately called land reform than agrarian reform.

The land reforms had major political connotations, especially the most recent during Salvador Allende's government. After the military coup, the political plan was to undo all that socialism had done to the country and forget it as fast as possible. But the country did not forget and the political notion of "property" is still part of Chilean society.

The strong concepts of private property and freehold that were established by the Constitution during the military government gave the government the ability to manage the land virtually without restriction. This is

still the case. Restrictions exist, but in practice they are often not sufficient or not respected.

It is also useful to comment on the law of usucapión. This system has been used for a very long time in Chile and in Latin America and is currently used by the state to regularize the situation of landless citizens who have occupied a piece of land for a specific period. The procedure is in itself interesting, but it is important to note that in some cases it is easier to regularize an inherited plot through the use of Acquisitive Prescription than to do it through the related laws. In other words, if a person inherits a property from his or her father or mother, it is often easier for this person to wait five years and then demonstrate effective occupation of this land than to make the transfer through the procedure that is stipulated by the law with respect to inheritance.

For these and other reasons discussed, there is an urgent need to revise and restructure the legal framework to make it more accessible and coherent for users and others. The current situation is the result of a series of historical events. Chile is a country struggling to develop a better functioning society; the road to achieve this is still long, but progress is being made. To speed up this process, there is a need to maximize the strengths and opportunities of the current system and minimize the weaknesses and threats.

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15

Mexico

Belize

Guatemala

Honduras

El Salvador

1. INTRODUCTION

Guatemala is located in Central America where it is bordered in the north and west by Mexico, in the northeast by the Caribbean Sea and Belize, in the east by Honduras and El Salvador, and the Pacific Ocean on the southern coast. The country is characterized by its predominantly mountainous topography and two extended fertile plains in the south and north. Its potential is remarkable, although this is marred by many concerns about its natural resources.

The country is of medium income level with very high poverty rates, mainly in the rural highlands areas which are populated almost completely by indigenous communities. The inequality in the distribution of wealth, resources and opportunities is notable, and adversely affects mainly the indigenous population, the vulnerable rural areas and their labour force. The National Institute of Statistics (INE) reported in 2011 a poverty rate of 53.71 per cent of the 14.7 million inhabitants of the country. Regarding the distribution of lands, the Gini¹⁸⁹ coefficient slightly worsened from 0.555 in 2000 to 0.587 in 2008. Thus, the wealth gap within Guatemala society increased and continues to do so. The problem is also confirmed by the performance of the Gross Domestic Product per capita, which had a negative value of around -0.4 from 1999 to 2003. By 2008, 61 per cent of the population still lived in rural areas, with a slight tendency to migrate to urban centres.

The agricultural development in rural areas is vital to the economy and society of Guatemala, and was 13.1 per cent of the Gross National Product in 2011. The agrarian sector in Guatemala is characterized by extremely unequal land distribution. According to the Ministry for Agriculture, Grains and Food (MAGA), until

2003, less than 1 per cent of landowners held 75 per cent of the best agricultural land and 96 per cent of the producers cultivated 20 per cent of the arable land mass while living under subsistence conditions (Tanaka and Wittmann).

Guatemala's child mortality rate is declining and for the years 1995, 1998 and 2002 was 57, 49 and 44 deaths per 1,000 live births respectively. In 2004, the chronic malnutrition of children reached 49.7 per cent. This indicator is the result of the poverty levels in the country, primarily in the rural highlands. Regarding the fertility rate, the global standard for Guatemala was 4.4 for 2002 and 4.9 for 2004, compared to the Central American average of 3.28.

The literacy rate was estimated at 67.8 per cent in 2000, while in 2007 it was around 73 per cent.¹⁹⁰ Although it improved, there are still important differences in literacy rates between genders in rural and urban areas. The alphabetization rate for men is almost constant with slight drops, while the one for women increases with very low rates. For women living in urban areas the results are better.

Regarding the tenure of home and shelter, privately owned dwellings show an increasing rate for the estimations made in 1981, 1994 and 2007. Rental performances show a value of 11 per cent of the total dwellings of Guatemala. The availability of water was observed to have increased in the Census of 2011. Consequently, the need to carry water from pits or wells has decreased to 22 per cent of households and the availability of sanitation has increased from 21.4 per cent in 1981 to 43 per cent in 2002 in the whole country.

The number of people living in one shelter has been stable since 1981 with an average of five people per home.

189 The Gini-coefficient of land distribution is a figure between zero and one that measures the degree of inequality in the distribution of land. The coefficient would register zero inequality (0.0 = minimum inequality) for a country in which each individual received exactly the same amount of land, and it would register a coefficient of one (1.0 = maximum inequality) if an individual got all the land and the rest got nothing.

190 For more information about official statistical data, visit: <http://www.ine.gob.gt/index.php/sociedad>

2. GUIDING PRINCIPLES OF LAND POLICY IN GUATEMALA

To allow poor people to access land, land reform programmes, particularly in the 1960s and 1970s, attempted to expropriate large landholdings in Latin America (Herrera, 2006). However, since then Latin America has seen the failure of those land reform programmes and realized the need to guide policies towards a stronger respect for private property. The failure of revolutions in Latin America led to a push for a more capitalist ideology and steered policy in a direction that favours the development of land markets.

The land market strategy in Latin America hides the reality of access to lands, particularly in Guatemala, where access to land is still reserved for only a few. There is a confusing model of land management in the country because it is not clear whether land

policy is more environmentally or socially oriented. For example, rather than regularizing and re-engineering land management models, the governments still deliver state land to the poor or indigenous communities. Titling is done without any consideration of land tenure security issues. The only document that Guatemala's Constitution recognizes as proof of ownership of real estate is the certificate extended by the General Registry of Property; indeed the title is just a part of the deeds or legal records of a land portion. On the other hand, delivering undeveloped land hides two important aspects. The first is the reality that large landholdings should be more closely observed with regard to effective land use and oriented towards land reform approaches where idle parcels may be expropriated following clear compensation principles, and the second is that the mere delivering of state lands will not solve the access problem by itself.



Tenure insecurity in rural lands is increasing due to land grabbing in Guatemala © Mario Salán

Regionally, the Government of Guatemala is committed to follow policies on sustainable rural development due to the Regional Unit for Technical Assistance (RUTA)¹⁹¹ and Plan Puebla Panama¹⁹² (PPP) projects. RUTA is a regional project created in 1980 to support the efforts of Central America to achieve rural sustainable development and reduce poverty. It is an initiative from Belize, Guatemala, El Salvador, Costa Rica, Honduras, Nicaragua and Panama, with support and monitoring from seven international agencies such as the World Bank, the Food and Agriculture Organization and the Inter-American Development Bank.

The RUTA's mission is to contribute to sustainable rural development, which will reduce the poverty in Central America by developing national and regional capabilities, and to achieve the cooperative efforts of the governments, civil society and donors (RUTA, 2007).

One of the most important policies and strategies of regional development in which Guatemala is involved is the Project Mesoamerica,¹⁹³ which is constituted in part by the "Plan Puebla Panamá (PPP)". This takes care of sustainable development problems from the point of view of regional actions; it is geographically located from Puebla Mexico along Central America to Panama. It was promoted in Tuxtla, Mexico, in 1991 and formally launched in 2001. Its main functions are to stimulate regional cooperation, to take advantage of the wealth and potential of the Central American region, to rectify its historical lack of physical infrastructure and to reduce its marked poverty lines, as well as its vulnerability to natural disasters.

The integration efforts of the PPP also aim to fortify the Central American region in the face of challenges with its growing integration into a globalized economy (PPP, 2001). The implementation of the great PPP was

initially contemplated in the "Plan Trifinio (PT), 1988" as a way to decentralize the "Plan Puebla Panama" in sub-regions in which PT includes Guatemala, El Salvador and Honduras. The PT reinforced the policies to prepare these nations for the responsibility of implementing the international agreements for sustainable development, principally the PPP. The PT, which began as a pilot plan, focused on the following:

- To increase the average incomes level of the area population;
- To improve the economic competitiveness of the three nations;
- To improve physical infrastructure;
- To improve the coordination between the inter-institutional mechanisms.

In terms of land administration, the demand to modernize the General Registry of Guatemala is becoming an essential feature to provide enough tenure security to the estates' owners, as well as to strengthen all those development plans in which land is involved. In principle, the Government of Guatemala must create an efficient and simple method of registration, freeing it from unscrupulous groups, and guaranteeing a functional and efficient office so that saved resources that can be applied in other fields.

Guatemala's land policy is not easily understood and the guiding principles always depend on popular political concerns. Theoretically, the land policy must be based on the peace accords signed in 1996 between the government and the guerrilla representatives, but each government changes policies and reorients their politics to fulfil popular wishes, mainly for election purposes. In the Alvaro Arzú government, significant efforts were seen to clarify land-related problems in terms of what was written in the peace accords. During Alfonso Portillo's government,¹⁹⁴ a tendency to regularize the possession of lands was demonstrated,

191 For more information visit: http://www.ruta.org/historia_de_ruta.php

192 For more information visit: <http://www.proyectomesoamerica.org/main-pages/concepto.htm>

193 For more information on the Project Mesoamerica visit: <http://www.proyectomesoamerica.org/>

194 Portillo's government was identified with the defence of rights of all dispossessed. The government initiated many rural development programmes but in the short-term.

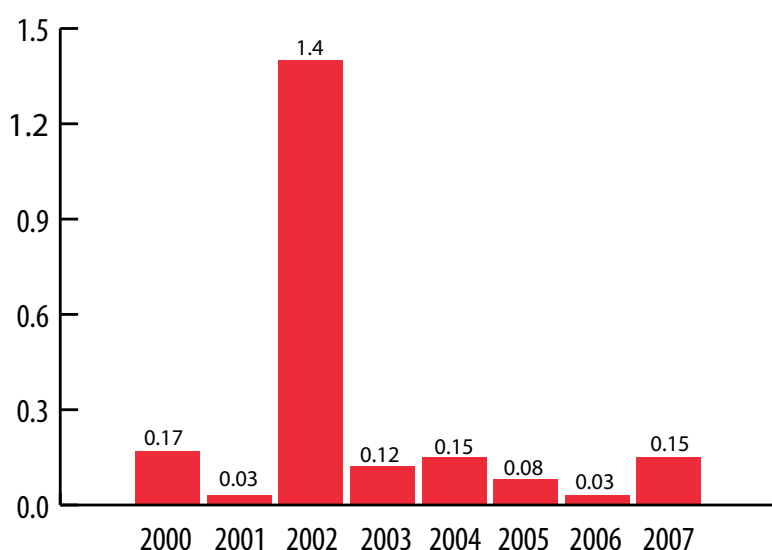
mainly in urban slums. It is remarkable that both Portillo and Arzú delivered hundreds of rural titles to indigenous communities and repatriated individuals after the peace accords were signed, as reflected in Graph 1.

The intention to promote the titling strategy, after the peace accords were signed, was a result of the compromises in the peace documents. However, the strategy still relies in the recognition of dubious ownership deeds. Indeed, it is important to note that peace accords also meant the delivery of funds to finance post-war social process. Every citizen in the country understands that presidents were guided by the need to absorb those funds, and thus the philosophy underlying the peace accords and the regularization of lands was over-done and concealed the real problems. One example is that subsequent to the post war governments (Arzu's and Portillo's), little effort has been made to deliver titles. The reality is that the titling of lands is connected more to political interests and election concerns than legalization or registration of rights; it is an issue far from being dealt with by the

politicians who appear to be motivated only by the advantages they will gain.

After the peace accords were signed, several national farms were given to repatriated groups who received the land as part of a trust arrangement for periods of about 50 years; the amount was approximately 360 ha for 50 families. On the other hand, some families have been favoured with basic shelter which comprises of a house and essential services built on a small plot that belongs to the beneficiary family. The current government is delivering on its responsibility for regularization and legalization of lands through the National Registry of Cadastral Information, although its efficiency is questionable. Indeed, the institution has often been linked to corruption, since the output of RIC is very low. The next section looks at the legal framework that complements Guatemala's policy and institutional infrastructure.

Graph 1: Regularized lands in Guatemala by fontierras (2000-2007) millions of ha/year



Source: FONTIERRAS (2008)

3. LAND RELATED LEGAL FRAMEWORK

The Guatemalan legal framework related to lands is very broad and land issues are included in several legal instruments. For the purpose of this paper, the following legal aspects have been extracted to summarize the most important parts concerning lands. In Table 1, the name of the law, the number of the article and a brief explanation to what it refers to can be found.

Until now, it has been understood that the land-related legal framework must be consolidated in fewer documents to reduce the problems of overlapping legal documents. For example, the Agreement 21-93, which facilitates the procedures to register untitled properties in the National Registry, and the Agreement 307-97, which creates the institutional commission for the development and enforcement of the property on land, can be omitted when Decree 41-2005 is used; the Decree establishes the Registry of Cadastral Information, since the last one features both figures, based on a recognized institution over them.

From Table 1, it can be seen that there is a broad variety of laws on land issues. The laws mostly originate from the compromises made by the state with donor countries and few are the initiatives of nationals. But the existing legal framework features most of the tools of a land policy or land development strategy. Aspects such as conflict resolution, regularization, legalization of land rights, obligations, capabilities, financial mechanisms, land markets and cadastre can be found. Although the legal framework has to be improved and

some errors corrected, it can be said that it covers most of the legal possibilities. Indeed, the framework covers important pillars such as cadastre and land markets, but hinders procedures such as land consolidation, land readjustment and land reallocation.

Table 1 shows that the history of land law issues is a long one. For example, the FYDEP¹⁹⁵ (Fomento y Desarrollo del Petén) institution has operated since 1971. The principal view of FYDEP was the colonization and regularization of the lands of the Franja Transversal del Norte, an area at the limit of the northern plains of Guatemala. During the 1970s and 1980s, the FYDEP developed cadastral services, regularization, titling, infrastructure and land delivery projects. Its strategy was well established and seemed to be complete. El Petén was the departament with the best land tenure security framework, even better than for the most of Guatemala's developed land (the southern coast). However, the land development strategy of FYDEP was closed down due to political changes and so far, no other project with such consistency has been launched in the country.

Thus, the rationale to deal with the current land law problems could be the modernization of the whole framework. Such a strategy must cover all aspects related to land and create channels where the fundamentals for a modern land administration and development concept are in place. The existing legal framework should be compiled, focused and renovated in order to clarify the roles and hierarchies of laws and identify the best way to apply them.

¹⁹⁵ The FYDEP was the maximum authority below the President of Guatemala to rule El Petén. It has been administrated by military authorities with support of other ministries.

Table 15: Legal framework oriented to lands in Guatemala

National Political Constitution of the Republic of Guatemala	Article # 67-68	Those articles refer to the commitment of the state to protect indigenous lands and agrarian cooperatives, as well as to provide lands, support and financial mechanisms to those entities.
	Articles# 79	Refers to the obligation of the state to provide agrarian education due to the National interest and dependence on agrarian issues.
	Article # 230	Refers to the National Registry of Property.
Law on Social Development	Articles# 3,4,5,22,37,38	It refers to the commitment of the state to develop policies with equality, equity and liberty approaches. Concerning lands, refers to the responsibility of the state to locate human settlements in safe sites protected from natural threats.
Decree 24-99 of the National Congress	Complete	It contains the law on creation of the land's found in order to fulfill compromises acquired with the sign of peace accords.
Decree 38-71 of the National Congress	Complete	It refers to the normative to deliver, adjudicate and use of the lands of Petén.
Municipality, Poptún and Petén Governmental Agree 113-2007	Complete	It contains the rule on the land tenure of all properties delivered by the state of Guatemala in Petén.
Governmental Agree 307-97	Complete	It creates the institutional commission for the development and enforcement of the property on land.
Governmental Agree 386-2001	Complete	Regulation of all lands delivered by the state.
Governmental Agree 452-97, 151-2005	Complete	Creates the Presidential Dependency to attend land conflicts and provide legal assistance on land conflict issues. As well the creation of the Secretary of Agrarian issues.
Presidential Decree 170	Complete	All the private owners of land are obligated to provide their colons with enough land to plant yearly crops for their own consumptions.
Governmental Agree 2193	Complete	Facilitates the procedures for that entire land owner which don't possess updated titles to register their properties in the National Registry of Property.
Municipal Acts 02-051/2002	Complete	Those acts refer to the territorial order, regularization and legalizations of the lands in the jurisdiction of several Municipalities.
Ministerial Agree 21-2005	Complete	Fixes the procedures for the appraisal and valuation of real entities in Guatemala.
Decree 41-2005 of the National Congress	Complete	Law of the Registry of Cadastral Information, it creates the current cadastral office of Guatemala.

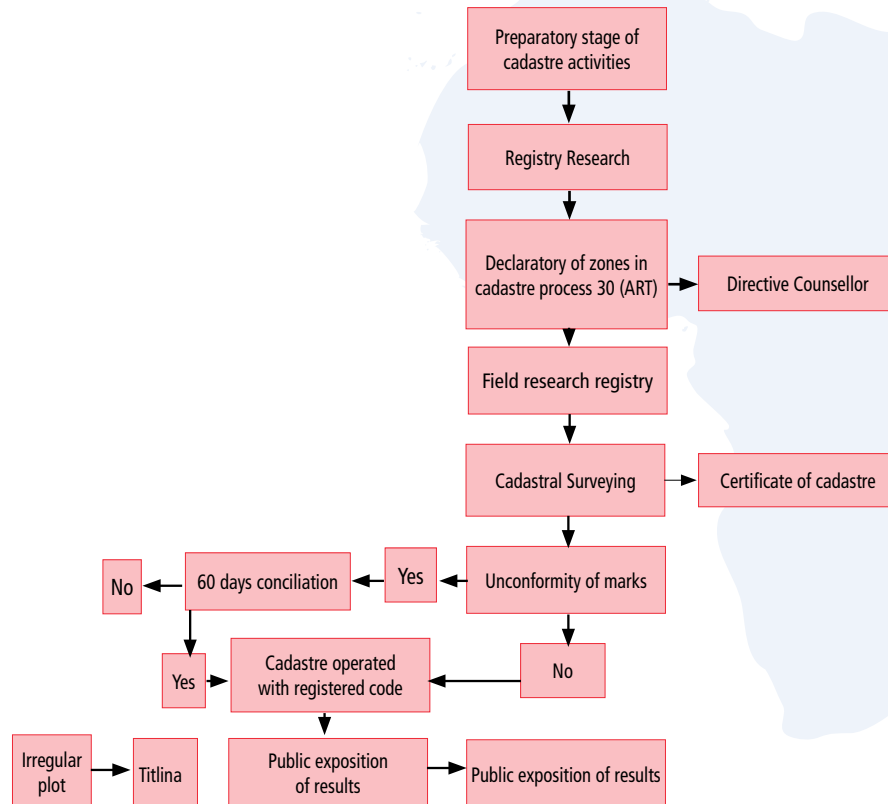
Source: Author based on literature

4. INSTITUTIONAL FRAMEWORK

The institutional framework dealing with land issues in Guatemala is also a broad one. Several institutions deal with land issues but the communication between them is particularly ineffective for two reasons: it is

not clarified in the law which are the mechanisms to establish connections between land-related institutions; and there is no will to share the information about the projects that each institution develops on land. Several principal institutions have different land related duties.

Figure 1. Cadastre and registry process



Source: Author based on RIC's Law

4.1 Registry of Cadastral Information (RIC)

The current cadastre service of Guatemala was created just a few years ago after the collapse of the former cadastre office. In fact, the new cadastre of Guatemala began totally new operations, with new technology but little available data. The Registry of Cadastral Information (RIC) was created by Decree 41-2005 and its fundamental purpose is to provide juridical security over the use and tenancy of lands.

The new cadastre is based on the following pillars: social communication, register diagnosis, surveying of cadastral information, surveying of indigenous lands, analysis of cadastral information, analysis of judicial information, resolution of cadastral parcels (regular and irregular properties), public exposition, declaration of cadastral zones, conciliatory solutions, training of technicians and

employees, representation and cadastral codification and data base (CRG, 2005).

The RIC works in cooperation with the Geographical Institute of Guatemala to acquire the geographical data needed to carry out its tasks. Until now, there have been limited results with the cadastre; there are only a few declared zones resulting from the cadastral process and these are mainly concentrated in the north. The low output of the institution is understandable because it is relatively new; however, it is expected to complete the cadastre of the whole country in 15 years. The RIC has still not yet reported the exact percentage of territories covered, but it is trying to give priority to protected areas and agricultural zones.

Many municipalities are, however, allowed to develop their own cadastral systems. This is mainly in urban

centres, such as Guatemala City and a few in rural municipalities where there is a problem of overlapping data and information from the RIC or former cadastral operations. The process established by the RIC to regularize lands is described in Figure 1. A significant issue is the lack of a standardization protocol to facilitate the exchange of data between institutions, and this will be a priority if the country wants to have a functioning land information system.

The cadastral process has three major stages: preparation, surveying and exposition of results. The preparatory stage focuses on the fulfilment of all official protocols and the background research. Next is the cadastre surveying, which has two parts: parcels with conflicts and without conflicts. When a parcel is declared to be irregular or has conflicts, the issue goes to the conflict resolution unit. If the problem is solved, the parcel is declared to be part of the cadastre, and the titling process continues in the courts. Regular properties are declared to be part of the cadastre. Finally, the process ends in a public awareness campaign to inform the public.

4.2 General Registry of Property (RGP)

The Registry of Guatemala is a renovated electronic and digital system, which allows the institution to offer more efficient and quicker services. The security of deeds has been improved by the scanning of all documents on the security of property titles, deeds and others. In 2003, the electronic system of the register was damaged, and 90 per cent of the digital information was lost but the register has recovered almost 97 per cent of the information. In terms of inter-institutional cooperation, there are still no formal links between the RGP and the RIC, but independently they carry out tasks well.

The new processes implemented by the RGP focus on providing the user with information and access to consultations via the internet. The decentralization of RGP is still not done, but it should be implemented as soon as possible as a unique way to facilitate access to the register's services in rural and remote areas.

4.3 Land information systems, SIG-MAGA/IGN

There are two institutions able to provide geographical information on Guatemala, the SIG laboratory of MAGA and the National Geographic Institute. The SIG is a geographic information system dependent on MAGA. It was created in 2001 as a result of the projects designated to support the emergency programme when there are natural disasters. The working area of this project comprises the whole country's territory, covered with digital layers at a scale of 1:250,000 and created information of six catchment basins at scales of 1:25,000 and 1:50,000. The limits of SIG are its depth of analysis: the SIG is ideal for planning purposes covering large areas at the national level, but not more than that. The scales are not appropriate to analyse at municipal or parcel levels: for better and more detailed resolution it would be necessary to work at a scale of at least 1:10,000. This means that the information from SIG should be suitable for planning purposes at the national and the regional levels.

4.4 Land conflict resolution

Guatemala has a lot of structures to deal with land conflicts. The institutions mentioned here all have a legal mandate to mediate in social conflicts. Who is in charge of the case depends on too many actors, but it also depends on the affected inhabitants' willingness to accept external intervention as well as who the authorities designate for the process. Some cultural obstacles can affect this process, as mainly rural inhabitants have no confidence in governmental agencies. It is very common that in conflicts involving rural villages the CNOC¹⁹⁶, MINUGUA¹⁹⁷ or the Catholic Church will intervene. In 2003,¹⁹⁸ the Food and Agriculture Organization outlined the variety of institutions focused on land conflicts in Guatemala, they were: CONTIERRA (presidential unit for legal assistance and lands' conflicts resolution), FONTIERRA (National

¹⁹⁶ CNOC, Coordinadora Nacional de Organizaciones Campesinas

¹⁹⁷ MINUGUA, United Nations Mission in Guatemala

¹⁹⁸ FAO studied Guatemala in 2003 looking to define the causes of violent evictions in the country.

Fund of Lands), CONAP (national council of protected areas), Pastoral Social (Catholic Church), CNOC-CONIC-CUC¹⁹⁹ (campesinos, peasants), and organizations such as CARE and several other NGOs.

5. TOWARDS LAND TENURE SECURITY

After the revolutionary periods of the 1950s and 1960s, most Latin America countries adopted significant economic liberalization policies in the 1980s and 1990s. Governments have implemented policies aimed at opening up and deregulating internal markets, as well as privatization programmes in an attempt to improve the functioning of markets, to enhance foreign direct investments and to contribute to higher international competitiveness. Throughout the democratic history of Guatemala (since 1985), the government has tried to introduce cadastral projects with more effort in rural areas. From its beginning, the National Geographical Institute developed cadastral projects which emphasized geometrical information and very little legal data such as registration deeds. The Institute also defined the municipal boundaries within the country.

The peace accords required that, firstly, an institutional commission for the development and enforcement of land had to be created to plan, coordinate, guide, execute and administrate the activities related to the establishment and maintenance of the national cadastre; secondly, that a pilot cadastral projects had to be launched in eight municipalities within seven departments of Guatemala.

Meanwhile, agriculture-related conflicts began to erupt more frequently and became worrying when they endangered security. The main conflicts that arose from the institutional uncertainty on land tenure security were:

- Lots not being registered in the General Registry of Property
- Unclear boundaries between two or more owners
- Physical overlapping of parcels
- Documentary overlapping of parcels
- Uncertain measurements
- Duplicity of sales
- Heritage conflicts
- Transit rights and rights of way
- Uncertain landmarks and boundaries
- Uncertain municipal limits
- Neighbours' reallocation

Thus, the National Congress decided to create a new legal framework to guide the cadastral activities in the country as follows:

- To create an institution responsible for the national cadastre.
- To respect the following needs and social demands: certainty and judicial security on lands, credit access, and introduction to formal land markets, social conflicts and agrarian justice.

Guatemala signed the peace accords in 1996. After that, the government defined an agrarian policy within the peace accord framework, added the definition and creation of land related institutions, created the Land Fund in order to facilitate credits and technical assistance, and initiated cadastral pilot projects in order to regularize land tenure. With these actions, the cadastre in Guatemala was reactivated.

¹⁹⁹ CNOC, CONIC and CUC are the most important organizations representing the campesinos and indigenous interests.

6. LAND TYPOLOGY

Guatemala has several land-use patterns that are determined by its geographical location and socio-economic conditions. On the plains, there are mainly large- and medium-land holdings. The minimum parcel sizes are found in the highlands of the country. Thus, land typology is classified by geographical location and by geometrical configuration, and land can be classified in highlands, bocacostas²⁰⁰ and flat plains. However, as indicated in Table 2, the typology of land also follows its geometrical configuration, which defines size and shape. In Table 2, one can relate the land's distribution in the country to the size of properties and infer the average size and classification of each.

For clarity, it is necessary to define what kind of economic units can be found based on size and location. These are: *parcelamientos*, *latifundios* and *minifundio*, and these are described in the following paragraphs.

6.1 Parcelamientos

Agrarian parcelamientos go back to the revolutionary political periods; their purpose was to provide land to several peasants and landless people in order to develop idle land in rural areas, as well as to facilitate a better quality of life for people. Several things led to the failure of these projects, some important ones are the lack of technical assistance, unproductive project programming and weak financial mechanisms. Referring to Table 2, parcelamientos patterns are organized into the categories subfamiliares and familiares. The infrastructure of parcelamientos is questionable and most lack basic access to power, accessible roads and, as mentioned, technical assistance. Consequently the parcelamientos are considerably fragmented with regard to the needs of the owners to profit from the sale of their lands as they normally lack proper infrastructure to use them.

6.2 Latifundio (large properties)

Latifundios originated during the colonization of Latin America and have continued as a legacy of that period until the present day. In Table 2, *latifundios* are

Table 2: Land distribution in relation to size of property

Parcels (fincas) size	Number of fincas (%)				Surface of the national territory			
	1950	1964	1979	2003	1950	1964	1979	2003
Year								
Micro-fincas (<0.7ha)	21	20	33	45	1	1	1	3
Sub-familiar (0.7 to 7 ha)	67	67	54	47	13	19	14	19
Familiar (7 to 44.8 ha)	9	10	10	6	13	19	19	22
Multi-familiar medium(44.8 to 900 ha)	2	2	3	2	32	37	45	44
Multi-familiar large(44.8 to 900 ha)	0.2	0.1	0.1	0.0	41	26	21	12
Total	100	100	100	100	100	100	100	100

Source: IARNA (2006)

²⁰⁰ Bocacosta is a topography phenomenon located between the highlands and plains. The bocacosta is characterized by its humidity, exuberant flora and fertile soils.

divided into the categories: familiares, *multifamiliares* medium and *multifamiliares* large. These type of properties can reach up to 45,000 hectares of land.

Normally the *latifundio* is owned by private individuals or corporations, in a few cases by the state and in recent years, the land mafia have acquired large extensions of lands by transgressing the law in Petén. In the *latifundio* the land is normally used for cattle or for extensive agriculture cropping such as sugar cane, palm oil, bananas and rubber plantations; some of the *latifundios* also feature large extensions of forests.

6.3 *Minifundio* (small properties)

Minifundios are normally the result of parcelamientos' fragmentation or a piece of land from a large *latifundio* being given as a gift to labourers, colons, or peasants, who work on large plantations. The *minifundio* can be found over the whole of Guatemala but are concentrated in the highlands and are found only rarely on the southern coast. The *minifundio* pattern is usually a subsistence unit with very poor people are connected to it. The differences between *latifundios* areas and *minifundios* areas are large. Referring to Table 2, *minifundio* can be related to the category microfincas, in contrast with the *latifundio*, *minifundio* parcels can reach just up to 0.02 ha. *Minifundio* patterns have normally very limited access to energy and roads; for instance these parcels are normally subsistence units, they are used for direct livelihood generation and there is high water and soil pollution in the areas due to the lack of sanitation infrastructure.

6.4 Possession and Tenure Regimes

Talking about possession and tenure regimes is confusing. The law recognizes several categories of possession and tenure regimes in Guatemala, although not all of them are legally recognized. Officially, the legal framework recognizes private property, rent/leasing, *colonato*, usufruct and natural occupation as tenure regimes.

Private property

This tenure regime applies when the owner (an individual or a legal person) holds the most comprehensive property rights allowed by law, with some environmental and use restrictions. Private property or private ownership is the safest tenure modality in the country. Normally, private property is backed by the certificate issued by the General Registry of Property.

Rent or lease

This type of tenure is regularized by law and its intention is to legalize the delivery of use and possession rights to the lender or renter in order to protect the interests of both the owner and the leaseholder. Normally, the contract conditions are flexible and depend on each individual interest without prejudice of all the concepts stipulated in law. Although the possession of estates by rent or lease is safe and protected by law, it becomes a risk when verbal agreements are affected in future negotiations or are not recognized in courts.

Colonato

This is a legal term to identify a tenure regime where a portion of an estate in private property/ownership is given to the workers of a farm for subsistence purposes. In accordance with Presidential Decree 170, the owner is obliged to provide the workers with enough land to live on and to cultivate crops for consumption. The *colonato* results from the history of big *latifundia* as a way to alleviate claims on land by the peasants working on them. In some cases, such as with old German possessions in the country, the lots given in *colonato* were legalized as private properties in order to avoid future conflicts.

Usufruct

This regime refers to the legal right to use and profit from a portion of land that belongs to another individual. The usufruct contract establishes many use restrictions in order to guarantee that land will be used reasonably, without damage and for a certain period. The usufruct's beneficiary never holds private property



Rapid expansion of slums in Guatemala © Mario Salán

rights, although the period can be extended and, in the case of state-owned lands, is almost undefined.

Natural occupation

This tenure regime always refers to those possessions that lack legal legitimacy, but are legal when the land is not claimed from other individual within a defined period, when the land is rightly used, exploited and occupied for a period of time defined by law; it depends on the location or the use designated in the national use plans.

However, possession and use rights can be arranged in several other tenure forms. It is important to recognize different scenarios in urban and rural areas. Urban areas have particular tenure and possession regimes adapted to a metropolitan situation; rural areas, on the other hand, are where possession is often arranged by verbal agreements only. The limited existence of land-related data in the country makes it difficult to explain the broad configuration of regimes. In the following paragraphs,

both rural and urban scenarios are explained with their respective tenure and possession models.

Urban model

After the signing of the peace accords, there was constant growth of urban slums in Guatemala and, as a result of the government's inability to provide enough support in rural areas, there was massive immigration to urban centres. Slums in urban areas are very vulnerable in terms of tenure security and lack of basic services infrastructure compared with lawful urban settlements. Urban squatters will never receive support in court since the slums are located in areas not approved for human habitation.

Although some slums have been titled by some governments, it causes debates and contradictions because the municipalities have tried to apply urban development plans in slum areas. The uncontrollable growth of Guatemala City is one of the most notable cases, followed by Quetzaltenango and Escuintla,

among others. The non-legitimate urban settlements will never be included in official registry certificates because normally the land where they are located either belongs to the municipality or is occupied illegally. The urban possession and tenure figures are in Table 3.

As mentioned, for official purposes the state recognizes the following tenure regimes: private property, rent/leasing, colonato, usufruct and natural occupation. The National Institute of Statistics (INE) figures on the performance of those tenure regimes in rural areas in 2005 are given in Table 5.

Table 3: Urban land tenure model

Situation or possession form	Land Tenure System
Invaders of recreational areas or railroads	Squatters
Merchants living in the municipality reserves and idle parcels	Slums and squatters with or without basic services infrastructure ²⁰¹
Legitimate parcels and middle class houses or condominiums, houses, apartments, etc.	Private ownership/property, rent with written or verbal contracts, usufruct, leasing, etc.
Possessions or invasions in temporary agree with the real owner	Squatter, word contracts, ²⁰² rent or leasing
State public and private lands. Municipal lands.	State public and private land

Source: Author

Table 4: rural land tenure model

Situation	Land Tenure System
Invasion of private lands, municipal reserves and idle parcels	Squatters
State-owned lands divided and delivered in many units	Freehold parcel, cooperatives, usufruct, parcelamientos
Repatriate communities	State owned lands on lease or freehold agreements, usufruct or private cooperatives
Large and middle land possessions	Private property, rent, leasing, illegal occupation ²⁰³ or in legalization procedure ²⁰⁴
National parks and protected areas	Cooperatives, state private lands, concessions, usufruct, etc.
State public and private lands. Municipal lands.	State public and private land

Source: Author

Rural model

Officially, the tenure forms recognized in urban centres are the same as in rural ones. However, as the rural situation is complex, the law recognizes other forms of tenure and intends to accommodate them into the official regimes. Table 4 describes the possession status and what is to be considered to be the existing land tenure security on each.

Thus, private property is the preferred tenure regime used by rural stakeholders. This is followed by usufruct, which facilitates the way the government delivers state owned lands to claiming communities. Regarding gender, men are mostly favoured with land holdings, with women having 16 per cent of the holdings; this

²⁰¹Squatters are recognized by the Constitution and laws and are provided with basic services infrastructure after a reasonable period of time.

²⁰²The Constitution and laws recognize the verbal contract when it is to be discussed in courts

²⁰³The lack of cadastre results in the appropriation of state lands on idle status by the mafia.

²⁰⁴The Constitution allows the legalization of properties of land after certain periods of occupancy or possessions without claims from the real owner.

Table 5: Tenure regimes and possession by gender in Guatemala

Tenure regime	Women		Men	
	Number of estates	%	Number of estates	%
Total	114,894	16.29%	590,201	83.71%
Private property	108,242	16.20%	560,077	83.80%
Leasing	859	5.13%	15,895	94.87%
Colonato	1,750	33.23%	3,517	66.77%
Usufruct	2,873	48.45%	3,057	51.55%
Occupied	1,170	13.90%	7,250	86.10%
Other tenure forms ²⁰⁵	0	0.00%	405	100 %

Source: INE (2006)

limits women's chances of developing land, getting access to finance or having better living conditions.

In the next sections the main factors influencing the land tenure security status in Guatemala are presented.

7. FACTORS INFLUENCING LAND TENURE SECURITY

7.1 Corruption and lack of good governance principles

Guatemala is marred by corruption²⁰⁶ that is deeply rooted in society; both the private and the public sectors manipulate the land tenure system to benefit their particular interests. The idiosyncrasy of Guatemalans is turning corruption into a common practice, violating fundamental human values and principles. In terms of land tenure security, corruption is one of the most dangerous factors influencing the safe possession of estates. Susan Rose-Ackerman²⁰⁷ (2008) writes "[...] states emerging from conflicts generally have very weak institutions and an influx of outside funds. These two conditions provide incentives for officials to make

corrupt deals for personal gain. Outsiders, brought in to monitor and manage the transition, may become corrupt as well. The conflict itself is likely to have bred a culture of secrecy and impunity where self-dealing is easy to conceal." This situation increases the vulnerability of the institutional framework.

The accountability of land-related institutions is constantly questioned. Although the World Bank advocates transparency and accountability programmes, established controls are easy to avoid and ignore because the officials involved in the monitoring process are also involved in cheating them. In reference to the lands sector, the RIC is the most questionable institution due to its low output since its official foundation in 2005. Among several programmes, the RIC initiated two important cadastre projects: Land administration I and II financed by the World Bank. Land administration I was intended to work on the irregular cadastre in El Petén, however, two years after the implementation of the project, any municipality could declare its cadastre was operating²⁰⁸ due to the lack of municipal boundaries, the limited updating of cadastral data after the surveys and the constant accusations about the RIC's procedures.

205 Other tenure forms, e.g. share cropping.

206 Guatemala has a low score of 2.8 in Transparency International's 2007 Corruption Perceptions Index, where 10 is the best score. Global Integrity rated Guatemala as "weak" in its 2006 integrity index, and it received especially low scores in administration and civil service.

207 Corruption and post conflict peace building is a document written for Ohio's Northern University law reviews.

208 To declare a municipality as having an operating cadastre, the National Congress obliges the involved institutions to fulfil the requirements established in the rule of cadastre and in the Constitution.

On the other hand, land administration II (PAT II) intended to establish a cadastre in 44 municipalities mainly concentrated in the eastern region of the country. The project was started in February 2008 and until now has spent almost 35 per cent of the initial USD 62,3 million,²⁰⁹ for building renewal, labourers' contracts, workshops, learning trips and conferences. This situation has resulted in a loss of credibility and accountability, suspicion about corruption, indebtedness without benefits and, the most important, an increase in the vulnerability of land tenure security due to a lack of cadastre registers.

7.2 Weak judicial system

The importance of a healthy judicial system related to land issues lies in having an institution capable of dealing with legal problems arising from conflicts in tenure and use of lands. The judicial system in Guatemala has been converted into a tool to control social activities instead of being an institution that closely observes the rule of law.

There is also a Constitutional Court. Judges of the Supreme Court and Court of Appeal are elected for four-year terms by the National Congress from lists prepared by active magistrates, the Bar Association and law school deans. Judges are appointed by the Supreme Court. Courts of private jurisdiction deal separately with questions involving labour, administrative litigation and conflicts of jurisdiction, military affairs and other matters (EOTN, 2010).

The weak judicial system is severely hampered by corruption and this blocks the hope of many individuals claiming justice in land conflicts such as illegal evictions, claims on land, boundary conflicts, etc. Due to its inefficiency on land issues, the judicial system refuses to face its responsibilities and would never solve land conflicts when officials do not benefit. Therefore,

individuals claiming justice in land issues must get assistance from others, such as SAA²¹⁰ or the other conflict resolution units already mentioned.

7.3 Mafias and parallel power groups

A problem that arose from the signature of peace accords is the phenomena of mafias and the empowerment of parallel power groups and this is a problem threatening all aspects of the government's ability to provide security. The topic is quite broad but will be confined here to how it relates to land issues. As mentioned in previous chapters, the peace building in Guatemala led to the empowerment of mafias which threaten the security of citizens and also land tenure protection. It is easy to understand how it works: powerful drug cartels seize land from national reservations, private properties and communal landholdings. To develop their criminal activities, cartels need an efficient money laundering system and huge extensions of land to hide their criminal activities. The threat to tenure security occurs when those groups that require land threaten the owners and their family and force the sale of the land at the price they offer. Naturally, owners sell their land, despite the poor prices offered by the mafias. There is little documentation on this topic beyond what people know, what the newspapers publish and what is in some official but classified documents. Consequently, the mafias apply these tactics instead of buying through the property market. This needs to be discussed because any parallel power structures will go through hidden markets to hide their operations.

Powerful groups also threaten the security of the RGP as they infiltrate institutions in order to steal and change the figures on landholdings in their favour. Any person can confirm how the infiltration of the information systems can be done. However, there are daily complaints of fraud in the inscription of property rights or ownership statements. This is a very dangerous activity and any owner could be a victim at

209 For detailed information about PAT II visit: <http://web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P087106>

210 Secretary of agrarian matters

any time by losing their properties instantly, without any compensation or consent.

7.4 Lack of land tenure data

Collecting, standardizing, maintaining and disseminating land tenure data in the region is a difficult but necessary task. Often, the data created by one organization can be used by other organizations with similar needs, so sharing yields considerable advantages, (OAS, 2006) for example creating a more transparent system. The ability to access land tenure data creates the basis for informed choices. Land tenure data must be included in initiatives to create a spatial data infrastructure. To trigger the necessary reforms on land issues, participants will need access to reliable data to guide precise decisions.

Indeed, it is notable that Guatemala does not have that detailed or updated information. Regarding either urban or rural cadastre, there are no significant differences between the concepts in Guatemala; but either way there is no access to the limited existing information on both. Regarding indigenous tenure data, agricultural census and gender, although there is data which belongs to the INE, the data is hardly accessed by anyone. Information in the land registry data is accessible to every citizen paying for these services, however, there are few offices performing registry operations and the access to these offices is geographically difficult. There is a lot of information on forest concessions but it excludes the information from INE, and the data is not accessible by web services.

The “*Estudio del Mercado de Tierras en Guatemala*” (Study on Land Market in Guatemala) reveals that the highest concentration of people claiming land is located in Alta Verapaz, followed by Huehuetenango, El Petén and Quiché. Including Izabal and Baja Verapaz, these areas account for 67.3 per cent of the demand for rural land. Besides the geographical location, there are five important issues considered in the study and the situation of the plaintiffs:

- More than 90 per cent of the demands are by poor campesinos, small producers and agrarian peasants owning very little or no land, and are considered to be poor or extremely poor people.
- Twenty-nine per cent of the claimants migrate from their home lands for seasonal work such as harvesting of crops, therefore it is supposed that they do not have enough land to settle permanently
- Seventy-nine per cent are indigenous people who speak just one language, with the qek'chi (36 per cent) being the largest group. This ethnic group is located in the north, where the demand for land is concentrated.
- The linguistic groups following are the Quiché (11 per cent), chuj and mam (9 per cent each), but there is low representation considering the participation of these ethnic groups at the national level.
- Just 21 per cent speak Spanish, which confirms that the majority of people claiming access to land are indigenous people.

8. THE CONFLICTS ARISING FROM WEAK LAND TENURE SECURITY

8.1 Type of land conflicts in Guatemala

As the FAO outlines in its report on the agrarian situation and experiences in land conflicts resolution in Guatemala, the four main sources of conflicts are: territorial limits, regularization, social land access and occupation.

Territorial limits (boundary conflicts)

The main trigger for this kind of conflict is the lack of a reliable system of cadastre and register in Guatemala. The Guatemalan Government has made many efforts to finish the cadastre, but nothing has been done. The result was that almost 66 per cent of the country lacks a reliable control over property. This limits the public's ability to deal with the social and economic development of the country (GTZ & MAGA 1997). Therefore, because much of the land lacks a technical and legitimate cadastre system, it is very difficult to locate and to define the general attributes of most of the properties within the country. The result is constant conflict between landowners and municipalities. There is uncertainty as to when the responsible authorities will define the boundaries

Territorial limits (geographical conflicts)

Guatemala has been transformed by its social history into a country with many ways of land structuring. One problem arising from this is the misunderstanding about ownership rights because of political changes and economic interests. With each historical period certain groups of owners and rights existed, which may or may not be the same after another land structure transformation. The consequences are conflicts and uncertainties originating from cultural, religious and political concerns. To understand these complex conflicts, an example is the indigenous land which lacks statutory recognition but is underpinned by de facto knowledge of this situation. Problems arise when these lands are claimed by the state as national lands and

the natives' rights are hindered because of a lack of documentation. Other examples are when the rights of use are misunderstood between managers of political divisions and municipalities.

Regularization

By means of regularization many conflicts arise mainly from the protection of informal property rights. The regularization of land plans are included in the government's development policies and because they contemplate the creation of land inventories within the territory; many frictions appear when the registration processes take place. The regularization of conflicts in Guatemala has identified the following: lack of deeds and legal documents, misused of land or tenure rights, ownership uncertainty, and boundaries regularization as discussed.

Lack of deeds and legal documents

Guatemala's Constitution establishes that ownership can be proved only with the certificate of the General Registry of Guatemala, the body in charge of archiving all the goods and physical assets. If the supposed owner lacks these documents, the ownership is illegal or informal and can be regularized by procedures prescribed by the law (CRG, 1997).

The conflicts in this area arise with a reclamation of a piece of land from a second party and the first party cannot support the supposed ownership with legal documents. Despite the processes that lead to legalization of land due to certain periods of occupation, conflicts due to lack of documents exist and need to be considered.

Misuse of tenure rights

These categories of conflicts arise mainly when the misuse of rights has consequences for the environment. With these kinds of conflicts there is at least one party affected by the conduct of the other or by its own behaviour. An example is that of conflicts arising as a consequence of the implementation of land-use plans, where restrictions are the main instrument used by the

executor to control and achieve the goals included in the development plans.

Ownership uncertainty

The causes of this kind of conflict are mainly historical. Throughout history political interests and favouritism have created many owners due to the land being a gift from the powerful. Whether legal documents exist or not, when there are discussions between certain parties conflicts will arise and the mediation process is not well prepared to deal with it.

Social land access

This cause is one of the most questionable regarding the context of land conflicts. From the time of the Spanish conquerors to the present, the land and social structure created by the Spanish Crown is still reflected in the unjust welfare and wealth distribution among the people of Guatemala, and reflected in the Gini coefficient of land distribution of 0.81 for the year 2003 (INE 2003). The information about the demand for on land is still limited and the institutions in charge of quantifying, characterizing and identifying the plaintiffs of land have not been able to deal efficiently with those aspects yet. Estimates by several NGOs have identified that the demand for lands at the national level is around 400,000 families; since the average is for four people per shelter this would be around 1,6 million inhabitants.

Statistics from the INE and IARNA are that Guatemala has 122 municipalities (36.9 per cent) with a high demand for land, corresponding approximately to a 40.8 per cent of the national territory. The areas where this occurs most frequently are Guatemala, Suchitepéquez, Alta Verapaz, Quetzaltenango, Escuintla, Jutiapa, Quiché, Retalhuleu, Chimaltenango and San Marcos. A medium rate is concentrated in 150 municipalities (45.3 per cent), representing approximately 48,9 per cent of the national territory and concentrated mainly in the highlands region. Finally, the lowest pressure on land demand with just 59 municipalities (17.8 per cent) is concentrated in regions characterized by a

higher concentration of lands with productive units typed as *subfamiliar*, *familiar* and *multi-familiar*. This last condition is more evident in Santa Rosa, Escuintla, Izabal, Alta Verapaz and Petén.

Occupation

Violent strikes and cases such as one which took place in August 2002 are motivated by agrarian and land conflicts and are regularly seen in Guatemala. In that incident, around 30,000 peasants went on strike, blocking roads and occupying large farms. The strike was organized by the National Coordinator of Campesinos Organizations (CNOC), who called on President Alfonso Portillo to develop concrete plans to rectify the grossly unequal distribution of land (CNOC, 2012). Just a few years later, the same thing was repeated in Retalhuleu in the “Finca María Linda” where families of campesinos and peasants invaded a modest piece of land and demanded their rights. The government’s response was extremely dramatic. They sent out the National Police to forcefully remove the invaders who killed more than 18 workers, including 1 child and 2 policemen. These cases are just two out of hundreds that show how urgent it is to bring sanity to land issues in Guatemala and how the occupation conflicts have been manifested.

In spite of offering a rich array of initiatives on land issues, the region may not yet be prepared to make a radical shift in land policy. Some of the problems that have to be dealt with in order to make changes in the land tenure patterns of Latin American countries are the following (OAS, 2006):

- High levels of tenure insecurity.
- Large numbers of informal property holders.
- Insecure property rights of women and indigenous groups.
- Complicated and obsolete land administration systems.
- Disorderly data on property and lack of adequate sources of information on land tenure for risk

assessment, resource management and good governance.

- Centralization of authority.
- Absence of mechanisms to access credit using land as collateral.
- Conflicts over land and lack of adequate land dispute resolution mechanisms.
- Resistance by political and economic interest groups.
- Non-implementation of existing laws and lack of a legal framework for pursuing reforms.

8.2 SWOT analysis

Nowadays, to discuss the strengths, weaknesses, opportunities or threats presented by the land tenure security issue in Guatemala is very confusing and even a matter of vigorous debate. To analyse the situation correctly it is important to set an objective, for example to improve the conditions which guarantee land tenure security within the territory of Guatemala for all its inhabitants, individuals and institutions holding lands in the country.

Strengths:

Different attributes could be considered as strengths in the Guatemalan system. In order of importance, they are: 1) the existence of a cadastral system, supported by a broad and clear legal frame and an institution specifically created for this purpose; 2) the support of the National Registry of Property and the National Geography Institute, which provide essential data for cadastre purposes; 3) the financial and technical support of developed countries, important donors and experienced institutions.

Weaknesses:

Harmful attributes are: 1) lack of substantial knowledge on specific matters of land tenure security; 2) the weakness of the institutions trying to create capabilities in land tenure security issues, such as the Cadastre School (sponsored by the Registry of Cadastral

Information, the National Geography Institute and the Swiss Government) and the lands institute administered by the National University, among others; 3) constant signals of corruption and dubious operations; 4) lack of valuable and historical land tenure data; and 5) the idiosyncrasy of some nationals opposing the land regularization policies based on political arguments.

Opportunities:

The external conditions that might be helpful in achieving the established objective could not be defined, since the only limit recognized in this matter would be the good will and efforts from the leaders, authorities and officials. However, among some of opportunities are: 1) the constant support from donors and the international community; 2) the existence of renewed tools of land analysis and new methods of land-related data acquisition and study; and 3) the claim and need for land tenure security matters.

Threats:

Finally, external conditions that are harmful can be easily recognized. However, the threats faced by the issues in Guatemala are to be addressed and balanced by the whole group of solutions proposed as strengths. To face threats it would be important to observe that strengths have also been defined and this aspect must address the problems towards the achievement of the established objective. Some threats are: 1) social and political barriers; 2) parallel power groups; and 3) the extremely weak awareness on land tenure security.

CONCLUSION

The intention was to explain the land tenure situation of Guatemala as simply as possible but the complexity of the land issues makes it difficult to study or address them. It has been shown that Guatemala needs infrastructure to develop and implement effective land policies. Although the pillars of land policy are well addressed, the ideas are being hindered by the official documents needed. The country lacks the support of everyone involved in the lands sector to clean up

the existing model of land management. Thus, the instruments providing land tenure security are extremely vulnerable.

It can be established that land tenure vulnerability is clouded by corruption in Guatemala. It is not possible, even to assess the development of land-related institutions when it is obvious that corruption is part of any evaluation. Landholders will wait for substantial tenure security until the signs of dishonesty are reduced considerably. The officials and authorities must have a conscience about these problems, but the people mainly responsible for land rights is the landholders' conglomerate, supported by the participatory decision figures established by law. Circumstances call for the attention of other individuals or institutions observing land tenure issues around the whole world. Vulnerable countries should enforce the law and educate their people to address their behavioural principles and values.

Guatemala could benefit from its relative infrastructure advantages. Socially and institutionally, the law establishes mechanisms specifically created to deal with these issues. The call is for all Guatemalans to know their rights and obligations, and the legal mechanisms to enforce them; on the other hand, all decisions takers need to think about future generations and guarantee that the standards of the country will be improved rather than further damaged.

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GENERAL CONCLUSION

Land tenure is an institution where rules are developed or newly invented by societies to regulate behaviour regarding land related issues (FAO, 2002). The country case studies outlined in this document have shown that all countries have been fairly successful at redefining their tenure-related legal framework over the past two decades. They have addressed important issues, such as the need for a clearer definition of key terms like ownership, leasehold, private or state land. Although not all countries have followed international scientific standards with regard to these definitions, they have at least created certainty in land-related debates and allowed these tenure system elements to be embedded into broader legal and regulatory frameworks. Indispensable preconditions for dealing with land issues based on the rule of law are not questioned any longer. For example, at least *de jure* problems with expropriation and compensation, minimum components for land sale or leasehold arrangements, the influence of customary tenure, how to deal with eviction from informal settlements and so forth can be settled. Many countries are sensitized about the incentive problem for long-term investment in urban and rural areas in cases where a dominant state has tried to regulate ownership as well as leasehold.

All countries have realized that much more is needed to be done to transform the new legal framework and land policies into practice, and to bring institutional innovations closer to citizens, either in megacities or remote villages in the countryside. Many countries have realized that implementation, enforcement and acceptance by people are major challenges. All countries have realized that there is an urgent need to set, and particularly to enforce, adequate and appropriate rules and sanctions at all levels to achieve tenure security. Tenure security has a different meaning for different groups; for informal settlers in peri-urban areas it means a formalization and acknowledgement of their “rights of sitting”, which in turn means a “cold” expropriation for those holding the title for the same plot. For informal settlers, the threat of expropriation means they have

With the on-going land management and land administration projects in various countries, tenure security is certainly improving. This is only part of the truth, however. As long as powerful interest groups are able to ignore the law, to bribe ill-paid civil servants, to implant bad governance in the land sector and ignore the interests of disadvantaged groups, tenure reforms will only have a limited impact.

the most severe form of tenure insecurity. As Table 1 below clearly underlines, additional threats to tenure security often arise from overlapping and contradictory legal frameworks, from inconsistencies in bridging statutory and customary tenure, or from a weak land administration and land development framework that largely ignores, for example, secondary rights holders, creates trade-offs and fans smouldering land conflicts.

Since all the countries are experiencing tenure insecurity at different levels and with different intensity, the experiences outlined in each of the case studies suggest that rules are either inadequate, too weak, inconclusive, or are not properly enforced or communicated. All these require additional financial, technical and human resources together with an even more finely-tuned, revised and comprehensive institutional and legal framework. With the on-going land management and land administration projects in various countries, tenure security is certainly improving. This is only part of the truth, however. As long as powerful interest groups are able to ignore the law, to bribe ill-paid civil servants, to implant bad governance in the land sector and ignore the interests of disadvantaged groups, tenure reforms will only have a limited impact. The issue of effective and good governance practices in land relations remains crucial across all the continents to the achievement of a lasting tenure security.

Table 1: Challenges for Land Tenure Systems

Countries	Overlapping Legal frameworks	Legal Pluralism	Weak institutional framework	Gender Inequality	Tenure Insecurity	Conflicts	Evictions	Weak Conflict resolution mechanisms	Corruption	Type of tenure*				
										Statutory	customary	Public	Religious	Informal
Bangladesh	√	√	√	√	√	√	√	√	X	√	√	√	√	√
Bolivia	X	√	X	X	√	√	X	√	√	√	√	√	X	√
Brazil	√	√	√	X	√	√	X	√	√	√	√	√	X	√
Chile	X	X	X	X	X	√	X	√	X	√	X	√	X	√
China	X	X	√	X	√	√	√	√	X	X	X	√	X	√
Ethiopia	X	X	√	X	√	√	√	√	√	X	X	√	X	√
Ghana	√	√	√	√	√	√	X	√	√	√	√	√	X	√
Guatemala	√	X	√	√	√	√	X	√	√	√	√	√	X	√
Indonesia	X	√	X	X	X	√	√	√	X	√	√	√	√	√
Kenya	√	X	√	X	√	√	√	√	√	√	√	√	X	√
Nigeria	√	√	√	√	√	√	√	√	√	√	X	√	X	√
Philippines	√	√	√	X	X	√	X	√	√	√	√	√	X	√
Thailand	X	X	X	X	X	√	√	X	X	√	X	√	√	√
Uganda	√	√	√	√	√	√	√	√	√	√	√	√	X	√
Zambia	√	√	√	√	√	√	√	√	√	√	√	√	X	√

*The current tenure system

X: No

√: Yes

Current reforms do not necessarily keep pace with changing national and international framework conditions and influencing factors. Among these factors are the “food crisis” - the dramatic increase in demand for plant and animal production for food - plus the demand for biofuel, the complex contribution of sustainable land management to the protection of the global commons, or technological progress in information and communication being relevant for cost-effective land administration and development. How can governments address the trade-off between offering attractive land investment opportunities for large-scale agricultural production and protecting the often customary rights of smallholders working on the

land on their family farms? Will the state recognize those civil society organizations that fight for the rights of smallholders and pastoralists in cases of large-scale investments and so contribute to tenure security of the poor? Will the state be willing to tax land adequately in these cases to generate a solid financial basis to establish and maintain an effective land management and land administration infrastructure? Will social responsibility for all citizens and equity considerations motivate governments to re-start and further regulate land sale and tenancy markets and, if so, how efficient will be the state be as a regulator, keeping the negative experiences of the first decades after independence in mind? These are just some of the questions that arise

when analysing existing shortcomings and threats in a quickly changing environment.

In general, the country studies are not conclusive about options, instruments or the processes necessary to create a closer link between land management and administration, legislators and end users, particularly in poverty-stricken marginal regions. What is not addressed in the studies is the vision of local and national decision makers on using land as an important instrument to generate income for the poor, to allow them some asset accumulation to reduce their vulnerability, to better link land to credit markets available to them, to ease capital formation for investment in education of the next generation, for old age security or for diversifying income sources by new businesses. The same applies to innovative conflict resolution mechanisms or approaches to better attack the causes of some land conflicts instead of lamenting the tendency for conflict to increase. Cooperation with bi- and multilateral donors is still conservative and is

guided by approaches to support land management and administration, to facilitate land use planning, to speed up registration or to help, for example, in boundary identification and documentation. What are innovative concepts of international development cooperation to anticipate future conflict lines, to address the negative tenure implication of foreign direct investment or the continuing trade-off between statutory law and specific customary regulation?

Many countries have already achieved a lot to improve tenure systems, address tenure security and invest in land management and land administration. Perhaps even more still needs to be done within each country to generate tenure security, particularly for the weaker elements of the population, for the urban and rural poor, for the more vulnerable and for those in danger of falling below the poverty line again because of power relations, clientelism, or corruption that works against their interests in getting access to and defending existing rights in land

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UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME (UN-HABITAT)

UN-Habitat helps the urban poor by transforming cities into safer, healthier, greener places with better opportunities where everyone can live in dignity. UN-Habitat works with organizations at every level, including all spheres of government, civil society and the private sector to help build, manage, plan and finance sustainable urban development. Our vision is cities without slums that are livable places for all, which do not pollute the environment or deplete natural resources.

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GLTN aims to contribute to poverty alleviation and the Millennium Development Goals through land reform, improved land management and security of tenure. The Network has developed a global land partnership. Its members include international civil society organizations, international finance institutions, international research and training institutions, donors and professional bodies. It aims to take a more holistic approach to land issues and improve global land coordination in various ways. For further information and registration visit the GLTN web site at www.gltn.net.

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ABOUT THIS PUBLICATION

In this publication, the issue of tenure security is addressed and assessed in several countries where government, civil society, the private sector and development cooperation initiatives have been implemented for decades. The selected case studies from fifteen countries in Africa, Asia and Latin America ensure not only a geographic balance but they also represent countries with different socio-economic and land-related histories and that have followed different pathways. The studies' key findings underline the still precarious state of tenure security in many countries. The findings also show best practices for legal and administrative reforms that have generated incentives for long-term investment in land, or incentives to include the poor more comprehensively.

Led by the Global Land Tool Network (GLTN) the publication is a joint endeavour with the Chair of Land Management at the Technische Universität München (TUM) and the Land Management Sector Project of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). The country studies presented here have been prepared by Alumni of the TUM's Master's Programme Land Management and Land Tenure who can best bridge the demands for most recent and high quality research results on tenure security and intimate country-specific knowledge and experience

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