

Land Governance

A Positioning of Terms

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25.9.2012

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Summary

In the development literature and development practice, there are **no universal definitions of core terms** such as governance, land tenure, land ownership, or access to resources. These terms are closely interlinked.

Land governance is the main concept used to describe how land is managed by governing bodies – for example parliaments – and the role land plays in sociocultural and economic frameworks. Ideally, it is at the level of land governance that norms are decided upon and shaped into laws. These laws establish the basis upon which – at the level of land administration – ministries and departments create rules and guidelines for land management. These rules and guidelines, in turn, provide the basis for local decisions on land management.

In development cooperation, the term **land tenure** is often used as a synonym for land governance. However, for some authors, land tenure relates more to the legal framework that is a part of land governance.

Ownership of land refers to the state or fact of being an owner, usually one who holds a legal right or title of possession. However, there are various forms of ownership, ranging from absolute private ownership to mere use ownership.

Access to land describes the extent to which a person or a group of people can use the land or natural resources to which they may hold some form of ownership or access right.

The **challenge for land governance** is not only to address questions of direct ownership in the sense of titled ownership, but also to provide clarification on behalf of land administrators, land managers, and local communities regarding the **multiplicity of rights to land**. This multiplicity can, for example, range from titled ownership of a piece of land, to access and use rights for a certain piece of land, to use rights only for a specific fodder tree on a piece of land for a set period of time. The structure of land ownership may be further complicated by the degree to which **customary systems of land governance** influence decision-makers in land management. Customary systems of land governance often exist side-by-side official land governance systems. Acceptance of customary systems of land governance is usually greatest at the local level.

There is a lot of variation in developing countries in terms of the **quality of the land governance** process and the degree of participation it allows. Unspecific or diffuse laws and regulations directly affect the sustainability of land management by enabling rent-seeking and resource grabbing. These risks increase as the demand for land increases.

Many **projects in development cooperation** opt to address specific aspects of land resource management. Examples include projects on water, land degradation, grassland management, or agriculture. Such projects often avoid directly addressing the broader issue of land governance, due to its sensitive nature. However, the potential success of these projects largely depends on the quality of the existing land governance system.

Those involved in development projects and programmes must recognise when countries' systems of land governance fail to provide sufficient clarity regarding land ownership and land access. Sustainability in this area cannot be ascertained solely from individual project outcomes. Indeed, it is the quality of land governance present that broadly determines the sustainable use of land and resources.

1. Introduction

Anchored within the SDC's Global Programme Food Security (GPFS), the Agricultural and Rural Development Network (A+RD Network) supports SDC projects and programmes and their partners with knowledge relevant to agriculture, food security, and rural development. One out of four core themes selected by the network as priority areas of work is *Land access, ownership, and governance*. The present document seeks to clarify terms used in connection with land governance. The aim is to assist projects in placing these terms in the context of the international debate.

This document aims to orient readers on the four most important terms discussed in on-going international debates, and provides selected definitions of these terms. These definitions have been shaped by the cultural and sociopolitical contexts out of which they emerged. Accordingly, this document is intended as a guide, and not a comprehensive reference document. Quotes in boxes show how the terms have been interpreted by various internationally important actors.

Land governance on the development agenda

The intrinsic link between weak land governance and land degradation became obvious to those working in development cooperation already in the 1960s. Hardin (1968) argued that commons – land that was formally under the jurisdiction of a village or district – was often left without any regulation of access, ultimately leading to its depletion by self-interested users. Some authors concluded from this that such land needed to be privatised. Subsequent debates on the topic yielded more insights into the complexity of seemingly “unclear” tenure rights (Ostrom 1990). Today, secure access to agricultural land and natural resources is broadly acknowledged as a central factor in poverty reduction and sustainable development.

Land governance and poverty reduction

“In large parts of Latin America and Asia, securing fair and secure access to agricultural land and natural resources for the poor has been a key challenge for many years. With the recent trend of rich domestic and foreign investors’ fast-growing interest in agricultural land, water sources and production, this challenge is becoming even more complex and is rapidly expanding to and within Africa. The phenomenon commonly referred to as ‘land grabbing’ puts family-based peasant, pastoralist, and agroforestry production systems and livelihoods under additional pressure and further stresses the importance of enforceable, pro-poor land governance.”

“As far as the country level is concerned, recent debates and donor-supported initiatives (e.g. by the WB, USAID, etc.) seem to converge towards strengthening tenure security, improving land administration, and favouring the emergence of a land market (or land user rights market), as well as territorial demarcation where this does not yet exist. Some time ago, China engaged in similar, quite controversial practices which could provide interesting insights.”

SDC, Global Programme Food Security.

http://www.sdc-foodsecurity.ch/en/Home/Focus_areas/Land_governance

Sustainable land governance thus depends on secure land rights as a basis. This basis is undermined or deteriorates in situations where important elements of land ownership remain diffuse (as is often the case under customary or informal law) or contradict each other (as in the case of overlapping tenure rights).

Recent global developments pose new threats to agricultural land, land policy, and land management in developing countries. An expanding biofuel sector and the rise of food prices on the world market have led to what is commonly known as “land grabbing”: a process where new and often foreign actors obtain rights to land in countries where land governance is not well defined and even less well executed. Large foreign direct investment (FDI) projects invest in land for biofuel or agricultural production. These land deals often disregard the needs of land users whose land is governed by inadequate national legislation or by inappropriately expressed customary or informal law. As a result, land users are deprived of their livelihoods (Cotula et al. 2009). In this context, the SDC and in particular the Global Programme Food Security call for improved regulation and for the promotion of a land and natural resource governance framework that respects rights and livelihoods and can provide guidance to governments and investors. An additional suggestion is to develop guidelines and standards for responsible governance of, and investment in, land, with a particular focus on gender.

2. Overview on Core Terms

In the development literature and development practice there are no universal definitions of core terms such as governance, land tenure, land ownership, or access to resources. These terms are closely interlinked.

Land governance is the lead concept describing how land is governed by governing bodies – for example parliaments – and which role it plays in the sociocultural and economic framework.

Land tenure, in the context of development cooperation, is often used as a synonym for land governance. Nonetheless, some authors see a difference between the two terms: land governance focuses more on norm-based legislation, institutions, and processes, while land tenure focuses more on the legal framework in a given society. Norms, in this context, are to be understood as a framework of values that a society decides upon through its representatives and through more or less democratic procedures. As land tenure is more related to the act of using land or the right of holding property, the concept of land tenure is closely related to the concept of land ownership.

Ownership is the state or fact of being an owner, usually holding a legal right or title of possession. However, there are various forms of ownership, ranging from absolute private ownership to mere use ownership. They are described further below in this document.

Access to land is a concept that describes the extent to which a person or a group of people can access land and natural resources to which they may hold some form of ownership or access right.

In development cooperation, the above terms usually occur within specific technical and cultural contexts. For this reason, the terms should always be discussed and differentiated with respect to these specific contexts.

3. Land Governance

The overarching concepts: governance and good governance of land

The meaning of the terms “land governance” and “land governance system” can be deduced directly from the term “governance” along with its principles, problems, and implications.

Governance as an analytical tool

“Governance is the framework of social and economic systems and legal and political structures through which humanity manages itself” (IAASTD Glossary 2009).

“Governance: defines the way in which power is exercised and applied at different levels...”

(SDC. 2007)

Governance in a broad sense encompasses “the rules of the games in a society”, that is, the way power is exercised, or the “act of governing”. It is an analytical concept. Governance is usually administered by a **government** – elected or imposed – that establishes a formal and juristic regime, for example, for governing land. Government in this sense can be an instrument of a governing body other than the state government, that is, a community, family, company, global organisation, or any network of various actors. Acts of governance, therefore, can also take place at the very local level of individual land users or villages. Land governance – that is, the act of governing the resource “land” – is responsible for the tenure and management of land and determines the way in which the use of land-based natural resources is organised (FAO 2011).

Since the 1980s, this analytical concept of governance has been complemented by the normative concept of **Good Governance**.

Governance as a normative framework

“Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.” (Commission on Global Governance 1995).

Principles of good governance

“The following describes the five principles adopted by SDC, to which a state should adhere in order to implement governance: accountability, transparency, non-discrimination, participation, and efficiency. The essence of these five principles stems from the value system of universal, indivisible human rights and legitimatizes the promotion of governance. The principles resemble five different lenses that allow for close analysis of the activities of a state under certain priority aspects. They are rooted in the fundamental concept of the rule of law.” (SDC 2007).

The norm “good”, in the context of land governance, refers to a type of governance that promotes development towards “good” – for example, sustainable – land

management. Consequently, actors in development cooperation generally assess issues of land governance in terms of how they relate to sustainable development: To what extent does land governance in a specific context contribute to social, ecological, and economic sustainability, and to what extent does the land governance system provide a basis that development cooperation, for example, can build upon in order to improve land governance? Land governance is not only part and parcel of local economies but also deeply integrated in local culture and society.

General understanding of land governance

FAO (2009) describes land governance as an existing system of rules, processes and structures by which decisions regarding natural resources (i.e. land) are made, access to natural resources is regulated and conflicting interests are managed. Six dimensions of land governance are identified.

- **Political:** means of gaining negotiating power / land reform as a tool for winning elections
- **Economic:** land as livelihood base for poor / means of economic exploitation / instrument for economic growth / land as basis for urbanisation and industrialisation
- **Social:** means of exploitation, social exclusion, and discrimination / means of establishing access and ownership rights / social security base for poor / symbol of prestige and power
Cultural/religious: land as symbol of divine power (mother earth) and worshipping nature / historical value and cultural roots
- **Legal:** land rights for users without title / land rights as means of accessing other services (provided by the state), legal recognition / denial of or access to justice
- **International:** opportunity for investment ("land grabbing") / means of exerting influence and power (deals between states)

(SDC, Global Programme Food Security. Land Governance, LG Round 1: Bishnu Upreti, 2010) (Adapted by Cordula Ott). http://www.sdc-foodsecurity.ch/en/Home/Focus_areas/Land_governance

Land governance regimes are the result of historical processes, and are specific to a given space and time. For this reason land, its use, its ownership, and its value is, in many cases, a central part of a society's or a nation's identity.

Customary, informal, and formal land governance

In each specific context, specific localised land governance systems reflect the prevalent hierarchies and distribution of powers and responsibilities in the local society. Land plays a major role in determining the development potentials of individuals, families, and communities. Land and the way in which it is governed is a basic livelihood asset. The relationships between wealthy and poor, urban and rural, women and men, and between different age categories are often closely related to specific dynamic contexts of land governance.

At the global, national, regional, and local levels, state and customary legal systems may exist side by side creating complex networks of ownership and use rights. This results in different layers of ownership of, as well as access and use rights (usufructs) to, various natural resources embedded in a given piece of land. Examples include the rights to cultivate crops, to gather wild plants, to harvest trees, and others. As Ranger (1983) and Chanock (1985) described for Africa, customary land governance and land tenure systems are largely unwritten. They are based on local practices and norms, and they are flexible, negotiable, and location-specific. The principles of customary land governance systems may be based on rights established through first clearance of land, conquest, or historically grown arrangements of resource access and use. Customary systems are usually managed by a local authority – a village

chief, traditional ruler, or council of elders – and often in close interaction with neighbouring groups. Customary systems are not static, but evolve continuously as a result of various factors such as cultural interactions, socio-economic change, and political processes. Especially in contexts where formalised legal systems are weak, traditional (customary) systems with their own bundles of formal and informal rights play a major role in resource governance.

The dominance of formal rights

Elements of customary and informal land governance provisions may, in many contexts, coexist undisputedly. In times of scarcity, however, conflicts over natural resources and land come to the surface and become visible. In situations of conflict, formal rights generally prevail over informal or customary rights. However, there are also examples where the formal legal system explicitly accepts and protects customary land governance systems to various degrees. This is the case, for example, in Uganda, where the mandate to govern local resources has explicitly been transferred to the customary governance system.

In many contexts, customary land governance is increasingly under pressure from commercial interests. In cases where formal land governance and its institutions are weak and unable to guarantee adequate platforms for sustainable development, or where they serve the interest of elites, commercial pressure renders customary governance systems ineffective. As a result, people who depend on rights guaranteed by customary law may not be adequately protected. This has negative effects on these people's livelihoods, on the quality of natural resource management, and on the local potential for development.

4. Land Tenure

The legal framework

As mentioned above, policymakers and practitioners in international development cooperation often use land tenure as a synonym for land governance (see section on “Core terms”, p. 2).

Land tenure

“Land Tenure: The relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land and associated natural resources (water, trees, minerals, wildlife, and so on). Rules of tenure define how property rights in land are to be allocated within societies. Land tenure systems determine who can use what resources for how long, and under what conditions.”
(IAASTD 2009)

There is, however, a difference, because land governance encompasses governing institutions and governance processes and is based on defined norms. Land tenure systems, in turn, are defined based on the normative framework agreed upon at the level of land governance. Tenure systems are moulded into rules and regulations and are administered at the level of land administration. For example, decisions on whether women are allowed to own land are taken at the governance level and are based on national or customary norms. The same is true for fundamental decisions on land markets, their structures, and their objectives. Land administration, by contrast, is in charge of organising, regulating, and monitoring land markets according to the decisions taken at the governance level.

Security and insecurity of land tenure

It is broadly acknowledged that a secure tenure system is a prerequisite for sustainable investments in land. Despite this consensus, an estimated 700 million people worldwide are forced to fend for their livelihoods that are based on informal settlements without any security of land tenure or of other forms of access to the natural resources associated to that land.

In India, approximately 40% of the agricultural land is largely inhabited by marginalised farmers who live in situations of insecure land tenure. In many countries secure access to land is skewed towards socially influential groups. Women are frequently disadvantaged in land tenure systems due to biases in formal land law, customs, and labour division in society. They bear the bulk of agricultural work but frequently have no accepted right to own land or take decisions on land use.

Tenure insecurity affects not only local people using the land and its resources for their subsistence, but also investors in need of land.

Land Governance

“Land governance is a key issue in rural development that has received more attention lately due to the land grabbing practices. Clear legal frameworks on land issues (land reform, land distribution, etc.) are needed to secure rights and access to land. However, poor performance of land governance institutions favours tenure insecurity which hampers peasant driven investment of land and land conservation.”

(SDC, Global Programme Food Security. Land Policies and Land Laws)

http://www.sdc-foodsecurity.ch/en/Home/Focus_areas/Land_governance

A study found that 27% of sampled investors in Mozambique named land access as the most serious problem they faced. Similarly, 57% and 25% of sampled firms in Ethiopia and in Kenya, respectively, reported this as their major problem (Nasir et al. 2003).

5. Land Ownership

Degrees of ownership

Ownership in its basic sense means the state and fact of being an owner, of having a legal right of possession, a lawful title (to something). Hence ownership is defined by the land tenure system, which, in turn, is normatively defined by the land governance system.

Unlike in the more formal legal tenure systems in developed countries, land ownership in many developing countries is fuzzy and dynamic. It entails a complex system with various degrees of ownership and rights to resources and land. Land ownership thus needs to be looked at from two angles: (1) the existing land tenure system as a result of the existing governance system of whatever democratic quality, and (2) the resulting degree of legitimacy of that land tenure system. The *Rural Poverty Report 2011* (IFAD 2010) differentiates between various degrees of ownership ranging from private ownership to non-formal tenure.

- *Private ownership*: Exclusive ownership in perpetuity, with a high degree of ownership security. Legally recognised usually through a title deed.
- *Registered leasehold*: Ownership of leasehold is, in most cases, secured in a written lease deed for a defined period. Offers a high degree of security. The landowner (in the sense of private ownership) can be the state, a legal person, or a legal institution.
- *Rental arrangements among private or public bodies*: High degree of security. Often based on written contractual agreements.
- *Cooperative*: Ownership (of land) is vested in a cooperative body, whose members are co-owners. Land decisions are taken by the general assembly.
- *Customary / traditional*: Land ownership is vested in a community, clan, family, or other group. The land is administered by the group's leader. This form of ownership is widely practiced in developing countries. It is accepted by the official legal system to various degrees.
- *Intermediate tenure*: A system of various short-term land use arrangements (grazing or lopping rights granted to specific users for a specific season by the landowner – that is, a private entity, a community, or the state).
- *Informal tenure*: Any form of unauthorised and illegal squatting or use. This situation is often due to a failure of both the legal and the traditional systems to adequately regulate land occupancy and solve conflicts.

Degrees of legitimacy

Adding to the various forms of land ownership, the FAO (2011) defines various degrees of legitimacy, that is, legal robustness:

- *Legal legitimacy*: Ownership rights and use rights to land are legally recognised and protected by formal law.

- *Social legitimacy*: Ownership is recognised through broad social acceptance, but there is no legal recognition. Land ownership rests with the state, while use rights are vested in various forms of communities. Social legitimacy also exists in situations where the state accepts informal settlements (e.g. of refugees, squatters, or pastoralists) and informal use of land.
- *No legitimacy*: Various forms of land occupancy often occur in the absence of legal regulations. It is precisely the lack of legal regulations that allows for such land occupancy without legal legitimacy in the first place.

Degrees of ownership and legitimacy are not only important in economic terms; they also have significant social implications. Participation in societal decision-making and access to services provided by a government may, in some societies, be linked to the robustness of land ownership or at least to vested access to the natural resources on a given piece of land. Similarly, access to loans may depend on the legitimacy of a certain form of ownership. Development cooperation actors need to take account of such underlying social and legal contexts, as they can influence the sustainability of resource management.

6. Access to land

Access to land as a livelihood asset

Experiences from decades of development cooperation show that for many resource users, whether individuals or groups, private ownership of land is neither a fact nor an option. What seems important, however, is the security of access to land – a security that needs to be recognised and protected as part of the land tenure system.

Access to land is defined by the prevailing land tenure system, which determines who can use what resources for how long and under what conditions. Informal rights to land might include access to common land, or to land owned by others, for a specific use or at a specific time. In some areas, for example, pastoralists have access rights to fallow land or post-harvest plots. Private land owners or communities may confer access rights to landless farmers or pastoralists based on a lease deed or other contractual deeds, allowing the beneficiary to use specified resources, such as grass (for grazing), trees, water, or simply the ground (to move across the property). These rights are not well reported and often unclear.

In many countries, accessing the legal system in the event of a land conflict has remained very difficult for poor people who have no land titles. Other restraining factors include geographical distance to land institutions, fees and other costs, use of the official language, the length and complexity of legal processes, the extent of corruption, and various sociocultural factors.

Many people's livelihoods depend on the right to use natural resources on land that belongs to others or is common property. Access to land is, therefore, an important element in livelihoods approaches and needs to be taken into account in projects and programmes aimed at improving rural livelihoods. An undifferentiated call for land titling, however, might not be the appropriate approach when it comes to improving the clarity of land use rights and access to resources, especially for poor people.

Access to services, access to land

"It is generally agreed that access to livelihood assets is negotiated through institutions. However, the way in which these institutions operate in everyday practice and in specific contexts is less well understood." (Shahbaz et al. 2010)

Secure access to land

Secure access to land has a direct effect on people's potential to grow themselves out of poverty. However, Poverty Reduction Strategy Papers (PRSPs) often deal insufficiently with problems related to land access. Eight of thirteen PRSPs reviewed by the IIED discussed the importance of improving poor people's access to land, but only four papers suggested how this could be done. Only two of the thirteen PRSPs specifically mentioned women's access to land (Niger and Guinea), and five touched upon the importance of land tenure in relation to urban poverty (Benin, Central African Republic, Chad, Guinea, Mauritania). The most important issue here continues to be the willingness and ability of governments to tackle and clarify issues of land tenure and land access. (See Cotula et al. 2004)

"A bundle of rights" to land and natural resources

Having secure access to land may not be synonymous with enjoying a legally recognised form of ownership of a particular piece of land. Access as it is understood here encompasses access to various property rights, such as the right to use specific natural resources on the land. Various resources on a given parcel of land, or control over their use, may be leased out to people who do not own the land per se. The expression "bundle of rights" describes this potential multiplicity of rights held by various persons to the same piece of land: (1) A person may hold **transfer rights**, allowing them to sell or mortgage the land or reallocate use rights within the community. These rights often closely resemble a state of land ownership. (2) A person may hold **rights to use** land for grazing or lopping for a specified period. Another person may hold rights to use the same piece of land for water abstraction and irrigated agriculture. (3) Yet another person may hold various **control rights**, such as the right to specify the particular use to which the piece of land may be put.

Final Version 25.9.2012

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