

TITLING FAMILY LANDS: The easy way vs. the right way.

Sunil Lalloo

The University of the West Indies, St. Augustine

Abstract:

The government of Trinidad and Tobago proposes to embark on a nationwide systematic land adjudication process aimed at securing good title for all parcels and thus an accurate and 'all-inclusive' land register. This initiative was motivated by baseline studies that suggested less than 35% of land holdings in sampled study areas held state recognised title. Local land tenure scientists as well as those involved in an earlier investigation from the Land Tenure Centre of the University of Wisconsin suggested several reasons for the present informality in tenure relations. The major culprits were identified as squatting (mainly in Trinidad) and the existence of the customarily held 'family land' (particularly in Tobago). Although the data available at the time on tenure only implies the existence of family land, strong anecdotal supporting data made it sufficiently conclusive.

This study focuses on the issues relating to family land and uses data gathered from field surveys done in Tobago. It addresses the major concerns associated with the titling of family lands and presents the option of a strategic approach that seeks to retain the governance mechanisms currently practiced in family land tenure relations (the right way) against privatization (the easy way). Initial bias in the comparisons is justified by a prior examination of international experiences that have long met their stamps of success/failure. The paper concludes by highlighting mechanisms necessary to develop a land registration framework for titling family lands.

Key words: Land registration, land titling, family land.

Background

The then Ministry of Agriculture, Land and Marine resources put forward proposals for land registration and titling reform which was passed by Parliament in 2010 in a package of three (3) Acts. The Acts, known collectively as the “Land titles package 2010”, comprise: The Registration of titles to land Act; The Land Adjudication Act; and The Land Tribunal Act. This reform was geared toward facilitating a nationwide systematic land adjudication process that would register all parcels under a new system that would replace the two existing registration types (the common law deeds registration and title registration under a Torrens-type Real Property Ordinance - RPO). It came in an era where it was being slowly recognised that the existing informal tenure relations posed a formidable problem in rectifying an incomplete cadastre. Although a sufficiently comprehensive titling scheme exists under the RPO, it was thought that this system is plagued with one too many administrative hurdles that made it unnecessarily complex and costly. The reform thus was meant to only offer an administrative change and therefore, promoters of the bill declare that it neither creates new rights in land nor extinguishes existing rights. This statement however is only true with regard to land already titled under the RPO as it could be easily shown that it does in fact extinguish some overlapping interests in land that exists informally.

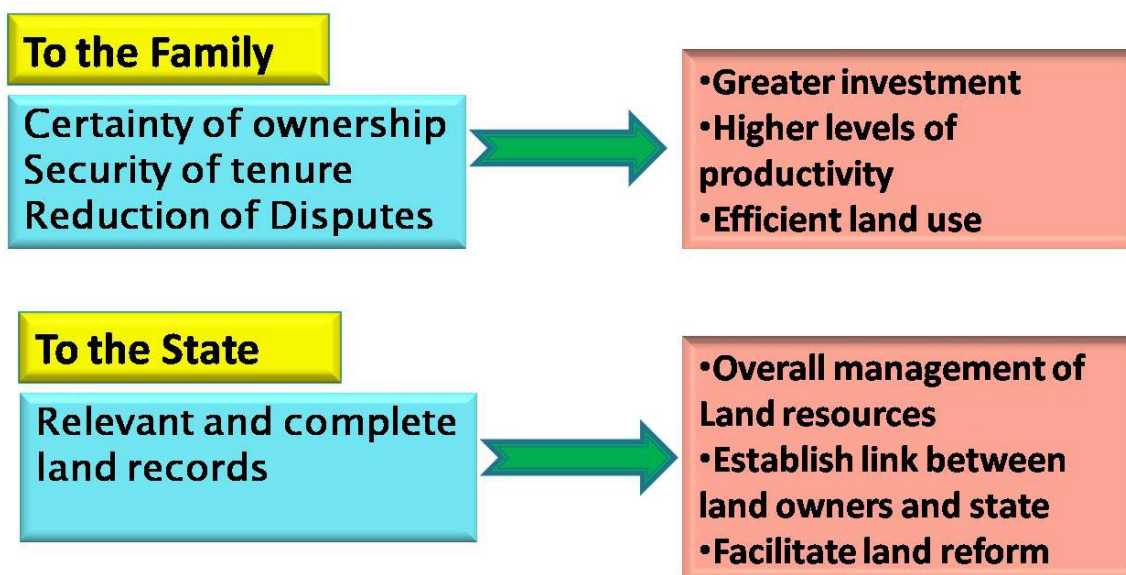
The ambit of the reform was to eradicate informal tenure (squatting and family land) and simultaneously create a complete land register. Whereas an adjudication process of this magnitude and nature is no simple feat, it is presented in this paper as the “easy way” suggesting that it is perhaps the most obvious yet least informed solution to the informality problem. Conversely, the ‘right way’ discussed below, outlines approaches that could be used to give state recognition to informal rights that is guided by the governance structures of the tenure relations already existing. This research focuses on the issues surrounding family land as there is already a wealth of published analyses on squatting. It is worthwhile at this point as a matter of good house-keeping to introduce the underlying concepts before examining the core issues.

Family land – this is a sub-group of customary land holdings which is one of the oldest systems of land rights that still exist today (Besson, 1994). Customary rights are found the world over,

most notably in Sub-Saharan Africa where such rights are held communally. In the Caribbean context, Family land is a system where rights to a single parcel of land are held by family members for their joint use and enjoyment. The individual members of the family do not hold shares in the land and thus the interests attached to the land are undivided and inalienable. Upon the death of a generation in the family, the next generation takes possession of the land automatically. This transmission of the land is usually informal with no form of testacy, legal conveyance or administration of estate (Clarke, 1953; Mycoo, 2005). It is therefore easy to see the complexities involved if one attempted to trace the root of the land title. With the increasing institutional need to have state recognised title, the issue of administrating the rights held on a parcel of family land and registering them is no novel conquest. Problems arise in assessing who holds rights to what and the strict, narrow and limited legal rules that form part of current registration systems usually do not fit the dynamic, fluid and complex tenure arrangements that exist in family land. The consequence is that forcing the parcel to be registered may in effect eradicate the customary practices that the occupants enjoy.

Why register family land?: - It may be thought by a few that since family land has been functioning well on its own without the need for intervention by the state, it may be best to leave it as it is – without formal title. There are however a myriad of benefits to be achieved in titling and registering family land which can be summarized in Figure 1 below:

Figure 1: Benefits of titling and registration



In giving state secured title to the family it provides security of tenure which in itself offers several benefits. Along with certainty of ownership and a reduction of disputes due to the legal standing of the title it would be expected that there would be greater investment in the land (agriculturally, commercial or simply improvement of residential dwelling) and for the cases where the land is used to produce, it is estimated that a greater level of productivity would be achieved (Boudreaux and Sacks, 2009). Once all family land is registered, the State will benefit by having accurate and complete land records with which effective land management can be achieved (UN Habitat, 1990; Dale and McLaughlin, 1988, Larsson, 1991).

Titling family land through privatization: the easy way

Privatization is the process of asserting rights over land to clarify and formalize the interests in such land at the individual level. Essentially, adjudication process that work with simplified models of titling and registration aim to privatize land holdings. It is believed that once all land is registered under existing legislation, the problems of informality will be no more, or for the very least, significantly diminished. Land registration in itself has several benefits as pointed out by UN Habitat (1990:5): “certainty of ownership, security of tenure, reduction of land disputes, improved conveyancing, stimulation of the land market, facilitation of land reform, support for land taxation, improvement of physical planning, recording of land–resource information and facilitation of overall management of land resources”. Therefore, the privatization of customary land holdings for the purpose of registration is supported by a number of experts (USAID, 1983; Hughes, 2003)

There are however, pertinent issues to be addressed when considering this option. In the review of international case studies where privatization was conducted or considered it was found to lead to a multitude of problems namely: dissolution of family land tenure relations; fragmentation of rights into unusable shares; Fragmentation of parcels into minimum plot sizes; Land easily sold to outsiders; reversion to informal transactions making land register inaccurate (Besson, 1979; UN Habitat, 1990; Dujon, 1997; Meinzen-Dick and Knox, 2001; Griffith-Charles, 2004, 2006; Fingleton, 2005;).

Dissolution of family land tenure – it is noted by Besson (1979) that family land plays an important social and symbolic role as there is a significant cultural connection with the tenure

form, family relations and heritage. Griffith-Charles in her 2004 dissertation added that family land has proven to resilient against pressures from urbanization and privatization, she went further to note in her 2006 report that it also provides security of occupation for the residents and prevents them from becoming landless. It is therefore seen that family land tenure relations is important to maintain the social benefits of access to land by the poor as well as to preserve the cultural heritage of possession and occupation of land by an extended family unit.

Fragmentation – As family land tends to retain the land as a single parcel, it prevents fragmentation of the land into smaller parcels which would further frustrate efforts identify parcel rights. The passing of just a few generations in a family would lead to a staggering number of claimants for one parcel of land (Davenport, 1961; Besson, 1979) and thus asserting rights at an individual level would create individual right holdings that are so insignificant that they are unusable.

Land easily sold to outsiders – Family land is difficult to sell in its current state of informality. Due to this fact (inter alia), occupants of family land have had very little option but to retain the land even when temptation to sell against better judgment would have prevailed. If family land were to be privatized, it could be easily foreseen that several occupants would wish to sell their interests in the property thereby undermining the benefits of the tenure form.

Reversion to informal transactions on the land – It has been shown that in some case studies where land was individualized, family land holders reverted to informal dealings on the land as this is what they were accustomed to (Espeut, 1992; Griffith-Charles, 2004b; Fingleton, 2005). After all the costs endured to convert family land to private freehold, a reversion to informal dealings would frustrate the very reasoning for the conversion. Therefore one must question whether privatization is a beneficial option in the medium and long terms if at all.

Considering the alternatives: the right way

It appears as though many state governments believe privatization is the only option to regularize informal tenure. This however is understandable as technocrats from institutions such as the World Bank (Brandao and Feder, 1996) and USAID (USAID, 1993) have been recommending it for decades years now. It is also an attractive approach as legislative mechanisms to facilitate such tenure reform already exists with strong legal research backing.

There are however other options that may be a lot more practical and beneficial in the long term albeit they come with greater difficulty for implementation in the short term. Some of these options are summarized below:

Two-tiered Registration system – Fingleton (2005) advocates a system where the group (in this case the family) holds jointly a ‘head – title’ and individual members of the group are granted subsidiary titles (similar to a lease) for their enjoyment of the property. This system would allow for the group to retain ultimate decision making, administrative and transfer rights whilst the individuals would also benefit from security of tenure facilitated by their individual titles which are subordinate to the head-title.

Community Land Trusts - Community Land trusts are non-profit organisations which were established for the purpose of holding title to land in perpetuity so that a community could never lose access to land for housing and income opportunities (Community Economic Development, 2009). This model has its roots drawn from the developing world, particularly Africa and India but was developed in central cities in the United States (Cirillo et al, 1982; Basset and Jacobs, 1997; Campbell, 2003). In brief, the vision of the CLT model is to better manage the competing claims of individuals who possess customary rights and the community at large. It seeks to integrate the benefits of private individual tenure as well as group ownership under customary law. Although community land trusts operate in part as a cooperative trust, the design of a family land trust system can take many operative and substantial mechanisms from this arrangement.

Nationalisation and Islamic ‘Miri’ land system – this is similar to eminent domain doctrines of English law where the state ‘owns’ all land and all others simply own estates and interests in land. The system of nationalization however (e.g. Miri lands) is where the state is the title holder and thus also owns the estate in all lands. Individuals/groups are given usufructuary rights. This may be a better approach to take in the interim before a more comprehensive titling and registration system is devised to accommodate customary types. In western civilizations however, this may seem like quite a radical step and thus may not get the needed support.

Intermediate steps – perhaps the best approach to take when the state is hampered by limited budgets or even when local experts are unsure of the best method to utilize is to give recognition to rights instead of titling. This is where interests in land at both the individual and group levels

are assessed and certificates of recognition of rights are given to support tenure. This approach is a highly logical strategy to deal with informal tenure in the short term. Here are some examples:

Certificates of use – In Botswana and Lesotho, Certificates of Use (also called Certificate of rights; customary land grant certificate etc.) are issued to occupants of customary land which guarantees their rights to plough, farm, tether livestock, occupy etc and such guaranteed rights are exclusive and hereditary (Adams et al, 2003). Such methods would increase the security of rights of the occupants without changing their tenure status (Payne, 2000).

Trusts for sale – this is a mechanism where a member (or a specified number of members) of the group are registered as trustees and they are vested (usually by legislation) to have a power of sale. This is where the trustees are capable of selling the land and also performing most other land transactions. The trustees remain liable to the other occupants who have rights however a purchaser may take free of the land (overreach) even though there are disputes as to whether the trustees consulted all the members prior to conveyance. This system was implemented in St. Lucia to deal with the family land informality problems (Vargas and Stanfield, 2003). The issue however remains that the rights of absent (not in actual occupation) family members who hold rights to the land under customary law will not have overriding status against a new registered disposition (e.g. conveyance; mortgage etc).

Cooperative tenure and Transfer Development Rights – Doebele (1988)¹ suggest the use of these tools as intermediate steps in establishing formal tenure for customary land holders. Cooperative tenure regimes are more typical of the agrarian environment but may have some key mechanisms that could be mimicked to develop rights certificates for family land members. Transfer development rights (a tool used in zoning) could also be considered when deciding on best practice strategies for controlling development on a parcel of family land that has a lot of claimants who cannot all use the land to build single-family dwelling homes.

¹ As cited in Payne (2002:12)

Reflections on Tobago

The author conducted research in Tobago on the existence and governance of family land in four out of the seven administrative parishes on the island. The findings show that in the rural areas of Tobago, in excess of 70% of all land parcels are under family land rights whilst in the built up areas - approximately 40%. Elements of the governance of family land identified overlapping rights that exist informally that will be eliminated if a privatization process was undertaken.

Some overlapping interests include:

- Occupational rights of all family members regardless of their current residence.
- Usufructuary rights in cases of both agricultural development of the land and subsistence farming.
- Easements of access and profits from fruit trees.

As mentioned in the St. Lucia study, interests of this nature may not be carried over under registration systems that only facilitate private freehold tenure. Furthermore, should the land be sold, following modern principles of land registration in English law, beneficial rights of those who are not in actual occupation may not override registered dispositions after first registration. Thus privatization may lead to a series of injustices against some family land claimants who for whatever reason did not register their rights.

Looking briefly at the issue of fragmentation, figures 2 and 3 below show that in the Tobago case study, the majority of parcels in the private tenure cases held an area of approximately one lot (5000 sq ft). Whereas in the family land cases, land parcels averaged 1.5 acres. This indicates that family land parcels have a tendency to remain un-subdivided over a longer period of time than land held under private tenure.

Figure 2

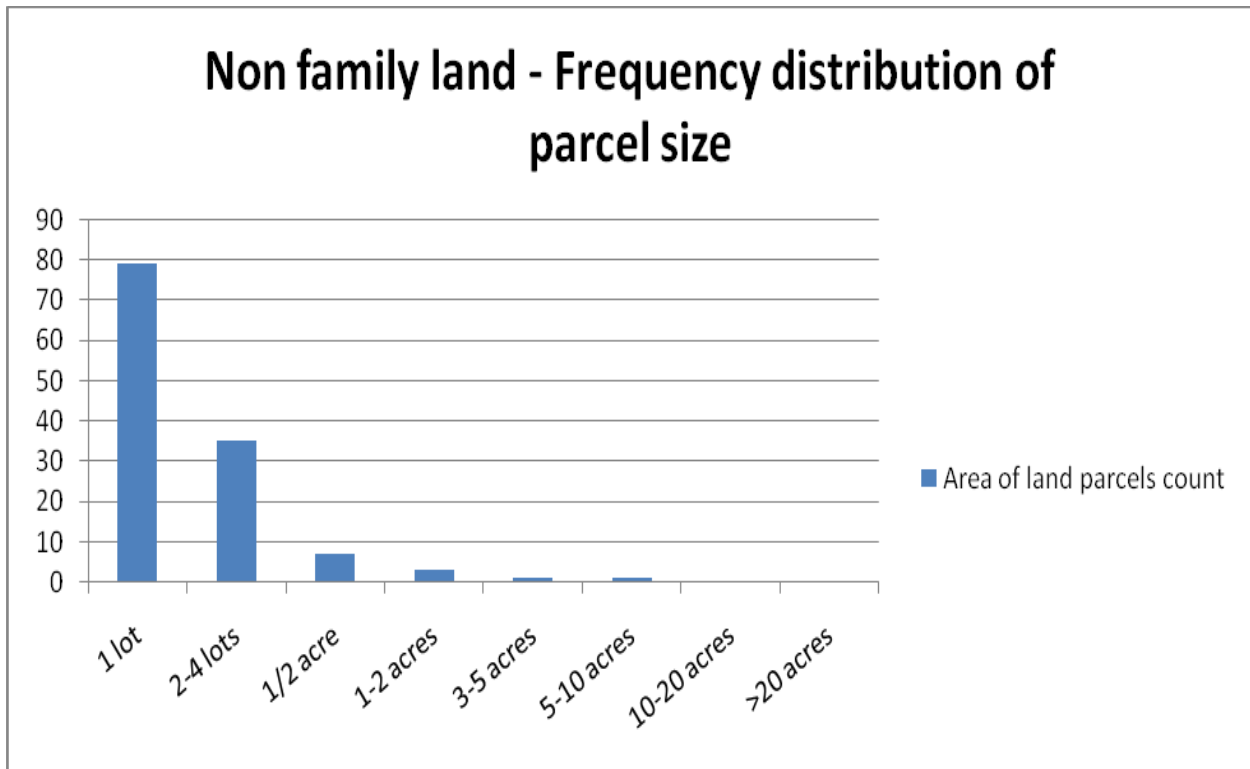
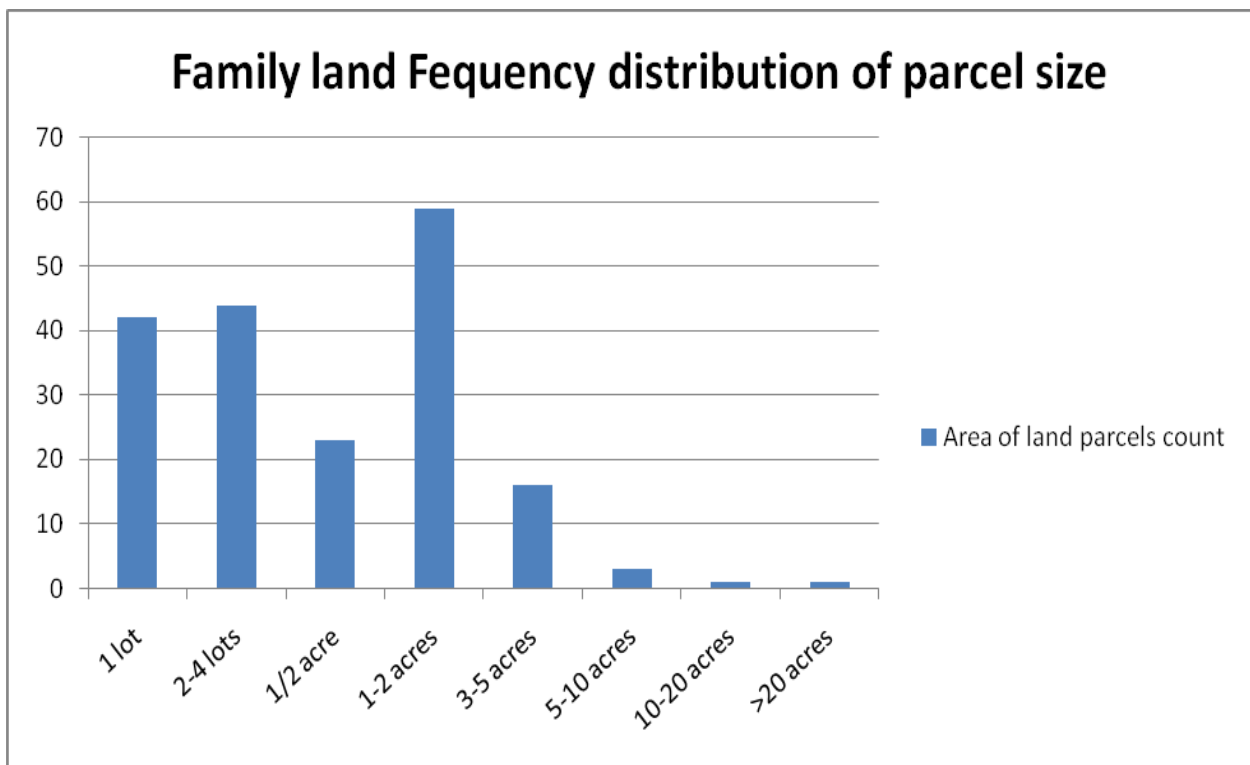


Figure 3



Conclusion

Family land has been in existence in the English Caribbean since the post emancipation era. It has served as a means of providing access to land to the descendants of the original purchasers of the land despite their financial standing. It therefore serves a very important social role toward the rural poor by providing them not only with means of occupation but also access to land resources for agriculture, small business enterprises and other forms of income generating resources.

Efforts to privatize family lands are sought due to its informal nature and the complexities of the problems associated with such. It has however been shown above that there are options available to give formal recognition to rights held by family land occupants without changing their tenure status. There are even options to formally title family lands in systems that parallel the governance procedures adopted customarily.

The best approach forward for countries like Tobago would be to consider intermediate steps for recognition of rights rather than devising a comprehensive titling scheme and forcing it upon occupants through an adjudication process. Therefore I fully support a 'rights-based' approach to deal with the informality of family land in the short term. Once as rights over land are assessed and documented for the family members collectively as well as at an individual level, substantial and sensible inferences can be drawn from the outcome of such an exercise to determine strategies (if necessary) to title family lands for the long term.

References

- Adams, Martin, Faustin Kalabamu, and Richard White. 2003. "Land tenure policy and practice in Botswana - Governance lessons for southern Africa." *Australian Journal of Development Studies* no. 19 (1):55-74.
- Bassett, Ellen M., and Harvey M. Jacobs. 1997. "Community-based land reform in urban Africa: the community land trust experiment in Voi, Kenya." *Land Use Policy* no. 14 (3):215-229.
- Besson, Jean. 1979. "Family land and Caribbean society: Toward an ethnography of Afro-Caribbean peasantries." In *Perspectives on Caribbean Regional Identity*, edited by Elizabeth Thomas-Hope. Liverpool: Centre of Latin American Studies, University of Liverpool.
- Besson, Jean. 1994. "Reputation and respectability reconsidered: a new perspective on Afro-Caribbean peasant women." In *Women and change in the Caribbean: a Pan American Perspective*, edited by Janet Momsen. Kingston: Ian Randle, Bloomington: Indiana University Press.
- Besson, Jean. 2003. "History, culture and land in the English-Speaking Caribbean." In *Land in the Caribbean; Issues of policy, administration and management in the English-Speaking Caribbean*, edited by Allan Williams, 31-60. Port-of-Spain: Caribbean Land Policy Network.
- Boudreaux, Karol, and Daniel Sacks. 2009. *Land tenure security and agricultural productivity. Mercatus on Policy*, http://mercatus.org/sites/default/files/publication/Land_Tenure_and_Agriculture.pdf.
- Brandao, Antonio Salazar P., and Gershon Feder. 1996. *Regulatory Policies and Reform: The Case of Land Markets*. The World Bank: Private Sector Development Programme.
- Campbell, M. C., and D. A. Salus. 2003. "Community and conservation land trusts as unlikely partners? The case of Troy Gardens, Madison, Wisconsin." *Land Use Policy* no. 20 (2):169-180. doi: Doi 10.1016/S0264-8377(03)00002-4.

- Cirillo, Marie, John Davis, Rob Eshman, Charles Geisler, Harvey Jacobs, Andrea Lepcio, Chuck Mathei, Perk Perkins, and Kirby White. 1982. *The Community Land Trust*. Edited by The Institute for Community Economics. Emmaus: Rodale Press.
- Clarke, Edith. 1953. "Land tenure and the family in four communities in Jamaica." *Social and Economic Studies* no. 1 (4):81-118.
- Community Economic Development. 2011. Expertise and resources for community economic development. Canadian Centre for Community Renewal 2009 [cited May 2 2011]. Available from <http://www.cedworks.com/CEDdefinition.html>.
- Dale, Peter F., and John D. McLaughlin. 1988. *Land information management : an introduction with special reference to cadastral problems in Third World countries*. Oxford: Clarendon Press.
- Davenport, William. 1961. "The family system of Jamaica." *Social and Economic Studies* no. 10 (4):420-54.
- Doebele, William. 1988. Issues paper on urban land tenure. Paper read at Land management review workshop, at Washington DC.
- Dujon, V. 1997. "Communal property and land markets: Agricultural development policy in St. Lucia." *World Development* no. 25 (9):1529-1540.
- Espeut, Peter. 1992. "Land reform and the family land debate: Reflections on Jamaica." In *Plantation economy, land reform and the peasantry in a historical perspective: Jamaica 1838-1980*, edited by Claus Stolberg and Swithin Wilmot, 69-84. Kingston: Freidrich Ebert Stiftung.
- Farvacque, C., and P. McAuslan. 1992. *Reforming urban land policies and institutions in developing countries*: World Bank.
- Fingleton, Jim. 2005. *Privatising land in the Pacific: A defense of customary tenures*. Australia Institute.

- Griffith-Charles, Charisse. 2004. The Impact of land titling on land transaction activity and registration system sustainability: A case study of St. Lucia. PhD Dissertation, Geomatics Engineering, University of Florida.
- Griffith-Charles, Charisse. 2004. "We are not squatters, we are settlers." In Demystifying the mystery of capital: Land tenure and poverty in Africa and the Caribbean, edited by Robert Home and Hilary Lim. London: Glass House Press.
- Griffith-Charles, Charisse. 2006. The persistence of family land in the Caribbean. In Meeting of the Latin American Studies Association. San Juan, Puerto Rico.
- HABITAT, UN. 1990. Report of the workshop on Land registration and land information systems. Nairobi: United Nations Centre for Human Settlements.
- Haider, Agha Sajjad, and Frithjof Kuhnen. 1974. "Land tenure and rural development in Pakistan." Land Reform, Land Settlement and Cooperatives no. 2 (1):52-67.
- Hughes, Helen. 2003. Aid has failed the Pacific. In Issues Analysis. Sydney: Centre for Independent Studies.
- Larsson, Gerhard. 1991. Land registration and cadastral systems - tools for land information and management. New York: Longman Scientific and Technical.
- Meinzen-Dick, Ruth, and Anna Knox. 2001. "Collective Action, Property Rights, and Devolution of Natural Resource Management: A Conceptual Framework." In Collective Action, Property Rights and Devolution of Natural Resource Management: Exchange of Knowledge and Implications for Policy, edited by Ruth Meinzen-Dick, Anna Knox and Monica Di Gregorio, 41-73. Feldafing, Germany: DSE/ZEL.
- Mycoo, M. 2005. "Minimising foreign control of land in an era of globalisation prospects for St. Lucia." Land Use Policy no. 22 (4):345-357. DOI 10.1016/j.landusepol.2004.06.003.
- Payne, Geoffrey. 2000. Urban land tenure policy options: Titles or rights? Paper read at World Bank Urban Forum, 03-05 April, at Westfields Marriot, Virginia, USA.

USAID. 1983. Caribbean Regional Project Paper: St. Lucia Agriculture Structural Adjustment.
Washington DC: USAID.

Vargas, Alberto, and David Stanfield. 2003. St. Lucia Country Brief: Property rights and land
markets. Madison: Land Tenure Centre, University of Wisconsin-Madison.