

## **Potential and pitfalls of 'communal' land tenure reform: experience in Africa and implications for South Africa**

Paper for World Bank conference on 'Land Governance in support of the MDGs: Responding to new challenges'

Washington D.C., USA, 9-10 March 2009

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### **1. Introduction**

Controversies over land tenure reform in post-apartheid South Africa resonate with those taking place across Africa. This paper reviews long-standing arguments on the nature of land rights and authority over land in Africa, and on state policies to reform what is often termed 'communal' (or 'customary') land tenure. Individual land titling, in order to replace customary tenure with registered forms of private property, is no longer seen as an appropriate policy by many policy analysts (Sjaastad and Cousins 2009). For many, the core issue in tenure reform in Africa (and elsewhere) is how to recognize and secure land rights that are clearly distinct from private property, are 'communal' in character, but cannot be accurately described as 'traditional', given the profound impacts of rapid socio-economic and political change since the colonial era.

The *policy* challenge is to decide what kinds of rights, held by which categories of claimants, should be secured through tenure reform, and in what manner, in ways that will not merely 'add to possibilities of manipulation and confusion' (Shipton and Goheen 1992: 318) and produce a range of unintended consequences. Securing the land rights of women has proved particularly difficult. The *analytical* challenge is to characterise complex and dynamic realities using appropriate concepts and theories, which can then inform the design of laws and policies.

A central issue in tenure reform is authority over land matters and the design of appropriate institutional frameworks for land administration, ie. 'land governance'. If land governance is to be democratic as well as efficient, questions of accountability, transparency and participation are essential. From an analytical perspective, authority and power dynamics are key to understanding how tenure regimes work in practice, since 'struggles over property are as much about the scope and constitution of authority as about access to resources' (Lund 2002: 11).

In this paper I argue that 'communal' or 'customary' land tenure regimes are not static and tradition-bound, as sometimes perceived by unsympathetic outsiders, but dynamic and evolving. However, a number of important commonalities can also be observed over time and space, which derive from the underlying principles of pre-colonial land relations. These principles, rooted in social and political life, have underpinned and influenced the ongoing adaptation of tenure systems across Africa.

Exploring the policy implications of this analysis, I suggest that the most appropriate approach to tenure reform in Africa is to make socially legitimate occupation and use rights the point of departure for their recognition in law and for the design of institutional frameworks for land governance. In many cases occupation and use rights will be embedded within land tenure regimes that involve social obligations and community oversight of land holding and use i.e. will be 'communal' in character. The paper explores the potential benefits as well as pitfalls of such an approach to tenure reform and land governance.

## 2. What is 'communal tenure'?

Finding an appropriate terminology to describe African property regimes is difficult due to the historically specific character of legal concepts and language derived from European systems of law, which therefore may not be appropriate in African contexts. This difficulty was acknowledged by colonial administrators and in early anthropological research, and major debates have occurred on this issue (Bohannan 1963; Okoth-Ogendo 1989). According to Biebuyck (1963: 52) 'common general formulae like... ultimate or sovereign rights, rights of allocation or of control, or rigid oppositions between ownership, possession, use and usufruct... have often obscured understanding of the scope and nature of rights and claims relating to the land'<sup>1</sup>.

The term 'communal tenure' as used in the African context has been contentious, because it seems to imply joint or collective ownership and use of all land and natural resources, whereas in fact most African systems include clearly defined individual or family rights to some types of land and land use (eg. cropping land) as well as common property resources. On the other hand, these systems generally involve the conferral of rights on the basis of accepted group membership, and a degree of group control or supervision of land matters, which 'relativises' individual rights to a greater degree than in systems of private property. According to Bruce (1986) 'communal tenure' systems are in fact *mixed* tenure regimes, comprising variable bundles of individual, family, sub-group and larger group rights and duties in relation to a variety of natural resources.

In this paper the term 'communal tenure' will be used primarily as a way of distinguishing this tenure system from that of individual, private property. Lynch and Harwell (2002: 3), writing from an Asian perspective, suggest that the term 'community-based property rights' be used, since the distinguishing feature of these forms of property rights is that they derive their authority from the community in which they operate, not from the nation-state. This would also be an acceptable term in the African context, but of course would require clarity as to what constitutes a 'community'. In recent South African law and policy, this has proved to be difficult and contentious at times.

As Walker (2004: 5) notes, the terms 'customary', 'communal' and 'traditional' tend to be used interchangeably, yet do not necessarily have the same meaning: it is possible, for example, 'to have communal tenure systems that support poor people's livelihood strategies, that are not based on customary law, nor dependent on traditional institutions for their administration'. Both supporters and critics of communal tenure sometimes elide these meanings, but for analytical purposes they should be seen as distinct.

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<sup>1</sup> For similar comments on the inappropriateness of Western notions of 'ownership' in contexts where property rights are community-based, but from an Asian perspective, see Lynch and Harwell (2002: 12)

### 3. Characterizing 'communal' land tenure in Africa

This section of the paper, together with the one that follows, attempts to delineate the key features of contemporary systems of communal tenure in Africa. This lays the basis for a discussion of tenure reform policy issues.

#### 'Customary' land rights in the colonial period

A number of scholars have described the extensive reconfiguration of 'custom' that took place in the early colonial period. Chanock (1991), for example, suggests that:

*There is a profound connection between the use of the chieftaincy as an institution of colonial government and the development of the customary law of land tenure. The development of the concept of a leading customary role for the chiefs with regard to ownership and allocation of land was fundamental to the evolution of the paradigm of customary tenure. .... the chiefs were seen as the holders of land with rights of administration and allocation. Rights in land were seen as flowing downward. (Chanock 1991: 64)*

This 'feudal' model fitted well with British ways of thinking about states and societies, linked British land law and colonial contexts, and served the interests of regimes seeking to acquire land for settlers. The Privy Council pronounced in 1926 that 'the notion of individual ownership is foreign to native ideas. Land belongs to the community not to the individual' (*ibid*: 66). In contrast with these models, there is much evidence in the early colonial period of both the vigorous assertion of individual rights and of land sales, during a period of major changes in settlement and land use, and when new economic opportunities were emerging. People spread out from fortified villages and hilltop settlements to cultivate new lands they had been unable to use safely before, and were less dependent on immediate kin for security. The colonial state was generally happy to concede to them rights of permanent occupation and use, which accorded well with the promotion of new crops and markets, but the question of whether these rights could be bequeathed, and by whom to whom was more contentious (*ibid*: 69-70). Prohibition of sales of 'communal' land became a central feature of colonial land policy.

In addition, there was 'spirited opposition to individuation' from within African society itself. This was partly because the ambitions of settlers and corporations to increase their land holdings and to limit those of Africans aroused the resentment and anxiety of peoples already displaced and fearing further loss of their land. Given the politics of the colonial situation, land rights had to be discussed in terms of groups, and the land, Africans strongly asserted, was *ours*, not yours. Thus communalism was 'a way of certifying African control of occupation, use, and allocation of land, rather than a description of rights exercised. Individualism was a code word for sale to Europeans' (*ibid*: 66). Under these conditions, what had previously been porous boundaries between villages and chieftaincies were now vigorously enforced.

Chanock recommends stepping back from attempts at systematization, and from 'ideologies of traditional communalism' (*ibid*: 70). Instead, he says, questions should be asked about specific conflicts of interest over land during the colonial period: just who was pressing for a greater individualization of rights? What sort of rights did they have in mind? Who was resisting this pressure, and why?

*A cultivator might say 'mine' when title was challenged, or if it was advantageous to sell or mortgage, may think in terms of 'ours' – in terms of nuclear family – when asserting a right of inheritance against a larger group of kin, or 'ours' in terms of a lineage – if the claimant was outside the lineage (as a spouse might be) (ibid: 72-73).*

Chanock concludes that 'an indigenous system of land tenure did not exist under colonial conditions', and that its 'shadow' was used to deny the establishment of freehold tenure for Africans in an increasingly capitalist economy; this also 'distorted the rights recognizable and assertable in the customary one' (ibid: 82).

Colson (1971) outlines a similar argument, noting that customary courts were under the control of colonial officials, whose stereotypes of African land tenure were used to assess the legality of decisions. Systems of communal tenure with 'precisely defined rules' came into being, that now inhibited the development of individual rights in unused land because it was deemed that 'such rights encroached upon the ancient right of some community, lineage, or 'tribal' polity' (ibid: 197). In Zambia (then Northern Rhodesia), Reserves and Trust Lands were defined as areas for African use, and here government refused to recognise the legality of private transactions in land, which were 'assumed to be the permanent possession of African political communities, who in turn gave rights of occupation to their members' (ibid: 209). This was despite the fact that in those parts of the reserves located near railway lines, where commercial farming proved to be profitable, 'cultivators improved their fields, passed them on to heirs, and treated them as though they were a form of private property', engaging in both sales and rental (ibid: 209).

Biebuyck's (1963) overview of changes in land tenure in the early colonial period notes the influence of a growing scarcity of land due to increased population, agricultural development, the development of new markets and growing demand for good quality land; new ideologies of inheritance and economic co-operation; new legislation and interventions by the courts; and large-scale resettlement of people. He emphasizes the wide range of responses by people to these changes – sales of land became widespread in some areas, but elsewhere remained repugnant; in some places rights became highly individualised, in others they remained under the control of groups or political authorities. A general tendency where land was held in common by villages was for inheritance rights to fields to be exercised more strongly by individuals and families; where it was held by kinship groupings, the size and genealogical depth of these groups tended to shrink (ibid: 59). He also notes that:

*... in many situations the growth of a feeling of insecurity and of hostility towards outsiders, as the outcome of increased land scarcity and greater demand for land, have resulted in stressing the concepts of inalienability, of group ownership and of ritual sanction in land tenure (ibid: 60).*

Walker (2002) emphasises shifts in the character of women's land rights, in the context of pressures towards individualised interpretations of custom:

*..., the interpretation of 'customary' law by colonial administrators and magistrates served to strengthen, not weaken, patriarchal controls over women and to freeze a level of subordination to male kin (father, husband, brother-in-*

*law, son) that was unknown in pre-colonial societies... this project involved not simply the imposition of eurocentric views and prejudices on the part of colonisers, but also the collusion of male patriarchs within African society, who were anxious to shore up their diminishing control over female reproductive and productive power' (Walker 2002: 11)*

These analyses of 'customary' land tenure in the colonial era suggest that the character of these regimes cannot be understood using abstract and simplistic models that stand outside of specific and changing historical circumstances. Jane Guyer's approach to the analysis of monetary transactions in Atlantic Africa is apposite: she suggests that analyses that seek to 'establish... the persistent elements and relationships by which people individually and collectively create economies' should also acknowledge that 'local constructs emanate from experience and not from modular principles, either as these might be conceptualized in the Western model of a formal sector or as they might derive directly from local cultural principles' (Guyer 2004: 6-7).

In this perspective, land tenure is always historically situated and patterns of change and continuity emerge from the interactions and contestations of heterogeneous interests which are both enabled and constrained by wider political dynamics, unequal economic structures, the operation of markets and cultural discourses and practices (cf. Moore 1986). Historically informed ethnographies suggest that land-holders and land authorities have sometimes retained elements of 'customary land tenure', sometimes radically reinvented it, and sometimes moved on and effectively abandoned claims to land based on past identities and values.

#### Change and continuity in the contemporary period

Recent writing on land in Africa focuses strongly on change rather than continuity. Berry's (1993; 2002) influential view of property in rural Africa as involving multiple interests, the centrality of social identity and status, and hence ongoing social processes and 'conversations' (conflicts, litigation, negotiation) as the key to understanding the *de facto* realities of land rights, is being challenged. Peters (2002; 2004), however, take issue with images of African land tenure as 'relatively open, negotiable and adaptive customary systems', and stresses instead 'processes of exclusion, deepening social divisions and class formation'. She suggests that 'commodification, structural adjustment, market liberalisation and globalization' tend to 'limit or end negotiation and flexibility for certain social groups or categories' (Peters 2004: 270).

Competition and conflict over land are increasing in Africa, she argues, because of a number of intersecting processes: the need of many rural families to produce more from their land even though inputs are declining; civil servants and others in employment seeking to produce food and cash crops from family land; the state and environmental groups trying to extend the area under conservation; and the intensification of the exploitation of resources such as minerals, wildlife, water, trees etc (*ibid*: 286). According to Peters and other scholars (Daley and Hobley 2005; Woodhouse 2003) these realities require analysts to go beyond formulations of land being 'socially embedded' in order to raise questions about 'the type of social and political relations in which land is situated, particularly with reference to relations of inequality – of class, ethnicity, gender and age' (Peters: 278). Peters sees a key 'socio-cultural dynamic of differentiation' emerging within social units such as the family, lineage, village, 'tribe' or ethnically defined group', which can be understood as 'a process of narrowing in the

definition of belonging', with 'group boundaries [becoming] more exclusively defined' (*ibid*: 302).

Cotula and Toulmin (2007) assess evidence from across Africa on the cause, extent and effects of changes in 'customary' land tenure regimes, in the context of profound structural transformation. The impacts of social transformation vary substantially because of the diversity of local contexts, and the assumption that population growth leads inevitably to individualization does not hold in all cases – in some it is associated with the 'rediscovery' of collective dimensions of land tenure (*ibid*: 105). They emphasize that the dynamic and adaptive character of 'customary systems is nothing new – far from being static, such systems have always been reinterpreted to fit changing circumstances. In their view the 'customary' and the 'statutory' are now intertwined in 'complex mosaics' of resource tenure, and the line between the 'formal' and the 'informal' is increasingly blurred (*ibid*: 109). Given that land access typically involves multiple and overlapping rights over the same resource, and that claims evolve and are continuously renegotiated, determining who has rights to which resources is far from straightforward. A further complication is that customary systems can be highly inequitable in relation to status, age, and gender, and that local elites are often able to steer processes of social change in their own interests. The challenge is to "square the circle" of recognizing and securing local land rights ... while avoiding entrenching inequitable power relations and unaccountable local institutions... (*ibid*: 111)

Other scholars have drawn attention to the increasing prevalence of land being acquired through a variety of market transactions, including purchase, rental and sharecropping, in defiance of the idea that 'customary' land tenure prohibits such alienability (Andre 2003; Chimhowu and Woodhouse 2005; Lund 2001; Sjaastad 2003; Woodhouse 2003). This brings with it 'an increasing individualisation of control of land and in some instances its alienation from any form of customary authority, amounting to effective privatisation of land' (Chimhowu and Woodhouse 2005: 392). In most cases, however, market-based access 'remains governed by customary tenure', and hence transactions in these 'vernacular' land markets have no form of statutory protection (*ibid*: 392). Scarcity of land due to population growth is only one driver of this process; others include the growth of markets for agricultural commodities (eg, horticultural products for urban markets), the impact of new technologies for water management, tree cropping or crop transport, growth in non-farm and wage income, population migration, and urbanisation and the emergence of land markets in 'customary' areas around towns and cities (*ibid*: 393-96). Three main categories of buyers are identified – 'new big men' with jobs and influence, migrants without claims to customary rights, and those with kinship ties in areas where land is scarce, who purchase or rent from senior male relatives. Key sellers are 'senior men' and especially tribal chiefs (*ibid*: 401). For Chimhowu and Woodhouse, the 'idealised models of communal tenure' that abound in land policy discourses are an obstacle to developing policy responses to vernacular markets that could make them 'work for vulnerable groups' (*ibid*: 409).

Other analysts describe the emergence of informal institutional innovations in the recording of signed documents to legitimise increasingly widespread transactions in land, in an attempt to reduce the ambiguity and uncertainty associated with the rights so acquired (Andre 2003; Lavigne-Delville 2003; Mathieu 2001; Mathieu *et al* 2003.) They can involve local officials (who witness these transactions in the name of the government department they represent, but according to 'unofficial rules') as well as private individuals with local legitimacy (Lavigne Delville 2003: 102). These records are often

not sufficient however, to prevent their being contested by others with prior claims based on kinship or custom (Chimhowu and Woodhouse 2005: 400; Mathieu *et al* 2003: 123), and 'idioms of tradition' together with 'the perseverance of local politics and the logic of inclusion' preclude easy assumptions as to the exclusionary outcomes of such processes (Benjaminsen and Lund 2003: 9).

The picture that emerges from these studies is thus not one of linear, evolutionary change towards individual property and the disappearance of 'customary' identities and claims to land. Mathieu *et al* (2003: 126-27) suggest that where land becomes scarce and has increasing economic value, 'there is a social demand for more individualised, precise and formalised land ownership rights', but that 'this change is not so simple, not is it linear or automatic'. The process is 'totally embedded in social relationships' and hence 'contradictory, complex and ambiguous', since past meanings of land 'retain their significance in the local social reality'. Chimhowu and Woodhouse (2005: 401) acknowledge that 'the transition from the "gifts" expected as tokens of acknowledgement of customary authority and of anticipated reciprocity, to payments more closely related to exchange values of the land, is not always easy to define'. Lund (2001: 157-159) points out that formalisation of individual and private titles, as in Kenya, has not necessarily produced greater certainty and security of land rights because of a lack of social legitimacy, and that processes of 'informal formalisation' probably depend on a degree of uncertainty remaining as to the status of such transactions at the 'margins of the law as well as of customs'.

More generally, processes of change often generate resistance, contestation and the re-assertion of 'customary' claims to land. As Peters (2004: 302) suggests, (citing Woodhouse *et al* 2000: 2) they are inevitably 'uneven and contradictory' in character. 'Moreover, boundaries, physical and legal, do not automatically ensure exclusion where (some of) the excluded reject the legitimacy of the exclusion' (Peters 2004: 303). Alongside change is continuity in the nature of land rights, argued for and actively reproduced because of its advantages for many within the rural population, including, in some contexts, women. Characteristics of flexibility and negotiability, which in many places have given way to 'differentiation, displacement and exclusion', are still 'an important asset to small-scale producers across the continent' (Peters 2004: 305-06).

Do African communal tenure systems have 'distinctive features'?

Okoth-Ogendo's (1989) provides a persuasive analysis of the nature of property rights in Africa. The core of his argument is that a 'right' signifies a power that society allocates to its members to execute a range of functions in respect of any given subject matter; where that power amounts to exclusive control one can talk of 'ownership' of 'private property'. However, it is not essential that power and exclusivity of control coincide in this manner. Access to this power (ie. a 'right') and its *control* are distinct, and there are diverse social and cultural rules and vocabularies for defining access and control<sup>2</sup>.

In Africa, land rights tend to be attached to membership of some unit of production; are specific to a resource management or production function or group of functions; and are tied to and maintained through active participation in the processes of production and reproduction at particular levels of social organization. Control of such access is always

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<sup>2</sup> See also Cousins (2008), and Bennett's (2008: 146-47) discussion of Allott's analytical framework in which he distinguishes between interests of 'benefit' and 'control'.

attached to 'sovereignty' (in its non-proprietary sense) and vested in the political authority of society expressed at different levels of units of production. Control, according to Okoth-Ogendo, occurs primarily for the purposes of guaranteeing access to land for production purposes (*ibid*: 11).

In African land tenure regimes there is no coincidence of access and control, and property does not involve the vesting of the full complement of power over land that is possible (ie. private property), and variations in power (ie rights) derive from social relations, not the market. Rights over land are trans-generational and control is exercised through members of the units of production and is not simply the product of 'political superordination'. Different land uses attract varying degrees of control at different levels of socio-political organization (eg. allocations of arable are often controlled at the family level, while grazing is the concern of a wider segment of society (*ibid*: 11).

Using this conceptual framework, the distinctive features of African tenure regimes can be listed:

- Land rights are embedded in a range of social relationships and units, including households and kinship networks and various levels of 'community'; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character (eg. individual rights within households, households within kinship networks, kinship networks within local communities, etc).
- Land rights are inclusive rather than exclusive in character, being shared and relative. They include both strong individual and family rights to residential and arable land and access to common property resources such as grazing, forests, and water.
- Rights are derived from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including gifts, loans, and purchases). They are somewhat similar to citizenship entitlements in modern democracies.
- Access to land (through defined rights) is distinct from control of land (through systems of authority and administration).
- Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access (eg. trans-generationally), and resolving disputes over claims to land. It is often located within a hierarchy of nested systems of authority, with many functions located at local or lower levels.
- Social, political and resource boundaries while often relatively stable are also flexible and negotiable, given the nested character of social identities, rights and authority structures.

#### **4. Reforming communal tenure systems in Africa: lessons from recent experience**

As Bruce (1993:13) remarks, post-colonial African governments have been "remarkably activist" in their attempts to reform inherited patterns of land holding. The 1990s saw a new wave of tenure reforms in Africa, including commissions of enquiry in Tanzania, Zimbabwe and Malawi; national conferences in Namibia and Niger; new tenure laws in Uganda, Mozambique, Tanzania, Malawi, Namibia, and South Africa; and land commissions, public consultations or pilot programmes in South Africa, Ivory Coast, Mali, Niger and Swaziland. Land policy has formed a key component of post-conflict governance, as in Angola,



Rwanda, Sierra Leone and Sudan. These reforms have often focused on reconfiguring the relationship between customary and statutory tenure in law, and attempting to define a new legal status for indigenous tenure systems.

A major theme in the debates on African land tenure, in both the colonial and post-colonial periods, is the perceived need to provide certainty and clarity on who holds what kind of rights, within which boundaries. In this view, the greater the degree of clarity and certainty, the more secure are the land rights. This translates into a dual emphasis on *rules* and on the *authority* to enforce them - with the proponents of strong individual rights suggesting that a registered individual title, backed by effective administrative systems, provides the greatest certainty. Those who have argued the merits of retaining communal tenure, for a variety of reasons (Bruce 1993), have also tended to recommend measures to clarify the nature of rights and authority in these systems, and to sort out ambiguities in legal status and institutional configurations which have been inherited from the colonial era and reproduced after independence.

Tenure reform thinking in Africa currently emphasizes a pragmatic, 'adaptationist' approach rather than the radical replacement of existing regimes attempted, mostly unsuccessfully, in the past. Bruce suggests that the core elements of the dominant model are:

*... explicit recognition of indigenous tenure rules, legal protection for land held under them, strengthening of local institutions which administer those rules, and recognition or provision of mechanisms for resolving disputes (Bruce 1998: 46).*

This perspective acknowledges that private title does not necessarily bring security of tenure, and that "unsuccessful attempts to substitute state titles for customary entitlements may reduce security by creating normative confusion, of which the powerful may take advantage" (Bruce *et al* 1994: 260). Titling activities should be directed only towards localities where the need for titles has been expressed, as a result of changing social norms or a need for credit, and in particular to areas where valuable land is subject to competition and dispute (eg. urban and peri-urban areas) or in resettlement areas where no customary system exists (*ibid*: 262).

Lavigne Delville (1999) defines the key policy issue in Francophone West Africa as the "harmonisation of formal law and customary land rights". The need arises from the uncertainty over rights caused by legal pluralism and the weak legal status of customary rights, as a result of which locally determined rules can be overridden through resort to State law by urban elites and local stakeholders. The major problem, however, is "the multiplication of arbitration authorities", which deliver contradictory findings, as a result of which "outcomes cannot be predicted" and "conflicts escalate". Three main models have emerged thus far:

- *codification*, which attempts to integrate local systems and rules into law by systematising them and giving them legal definition. However, this has run into the obstacle of the diversity, variability, imprecision and flexibility of local rules (*ibid*: 9).
- *registration* of local rights. However, uncertainty remains over the legal categories to be created (Lavigne Delville 1999: 10) and the process has run into problems recording overlapping or interlocking rights, as well as secondary rights. In general registration runs the risk of producing a "most unwieldy system" which loses the

flexibility of procedurally-based (as opposed to codified and rights-based) local systems (*ibid*: 13). Additional problems which are anticipated include the costs of the administrative systems for managing and updating registers, the possibility of information becoming obsolete, the resort to informal mechanisms for tenure security, and consequent confusion surrounding rights.

- *reforming rules and procedures for land rights management, including arbitration*, rather than formalising land rights themselves. It seeks to "reduce ambiguity about which norms are legitimate", by stakeholders at the local level adopting a "system of shared rules", but within a hierarchy of arbitration bodies located within a framework of national law. This will create a "hybrid form of land administration" (*ibid*: 17-18), combining elements of customary authority and formal law. This approach includes an emphasis on decentralisation and devolution of authority over land management, and once again seeks clarity and greater levels of certainty - here in relation to conflict resolution and authority to make decisions on land rights and land use.

There are problems in all these approaches. Firstly, it may be unrealistic to conceive of local institutions such as village committees as "open [and] neutral" fora for managing tenure reform when this "profoundly alters the nature of local landholding systems" (Lavigne Delville 1999: 19). This is because authority and regulation are profoundly political issues, and thus subject to power plays by a variety of stakeholders. Secondly, tenure reform necessarily involves clarifying multiple claims to land, and resolving conflicting claims to "prior occupancy" while also balancing these against existing use rights is particularly difficult.

These two problems suggest that a hybrid combination of community and state regulation may be required. However, defining this framework more precisely remains a challenge, because it must both align closely with existing practices and anticipate "how the different players ... will try to use that framework... and attempt to distort it to their own advantage" (*ibid*: 22)

The third difficulty is also political, but at the national level - few countries are ready to go beyond rhetoric and devolve real authority over land to the local level (partly because of resistance by the political and administrative class), and furthermore, few states have the real capacity to carry through reform. These are similar to the constraints on tenure reform policies experienced in the colonial and early post-colonial periods.

Reviewing experience in Anglophone West Africa, Mortimore (1997) also considers the pros and cons of formalisation and codification, and of attempts to transcend the inherited dualism in tenure law. On the one hand, codification implicitly contradicts the necessary fluidity of local systems. Formalisation can also over-ride the complexities of marginalised, common access and multiple rights, and often has an in-built bias towards individual and exclusive rights. But codification, if extended to cover the rights of marginalised groups such as pastoralists, can perhaps help to protect informal rights threatened by change. Given rapid rates of social change and intensification of land use and production, "some form of codification is the only alternative to oblivion" for vulnerable groupings (*ibid*: 14). Protecting "custom" under the authority of state trusteeship, as under indirect rule, is no longer workable as the state has itself "has all too often become the instrument of interest groups" (*ibid*: 25). Moreover, continuation of legal dualism may be unsustainable in the long run because of the real advantages of statutory tenure to those investing capital in land and

able to afford its costs, and thus entrenching dualism is likely to increase ambiguity, instability and violent conflict

The policy choice is thus between on the one hand, a *laissez-faire* strategy allowing social fluidity in resource access and the continuing "natural evolution" of tenure systems, at minimal administrative cost, and on the other, formalisation or codification programmes which aim to preserve the rights of weaker groups which this evolution will eliminate, and reduce the ambiguities and uncertainties of dualism (which are often exploited by the powerful (*ibid*: 14, 27-28).

Decentralisation of land administration and management to local community level will be insufficient in itself, since decentralisation does not resolve the issue of authority and representation at local level, conflicts of interest are difficult to resolve locally and the disadvantaged may lack voice, and trans-local problems and outside incursions (eg. by state agricultural projects) cannot be dealt with at village level alone (*ibid*: 29). For these reasons, decentralisation requires central government to take responsibility for providing the broad framework and principles underlying tenure, and for ensuring the transparency and accountability of local structures (Toulmin 2000).

#### Emerging recommendations

There is a degree of convergence in emerging policy recommendations for tenure reform in contemporary Africa. Firstly, there is a general call for *greater recognition in law of rights under 'customary' systems*, and thus for legal protection of the rights of vulnerable groups, as well as of the secondary and multiple rights to land and resources which are often ignored in current statutory law. Given the predatory nature of the contemporary state and the interest groups which are able to use state power for their own ends, these protections are partly designed to keep the state itself at bay.

Secondly, there is a clear call for *the strengthening of local institutions for land administration and land management*, on the subsidiarity principle (thus saving on costs), and because of the advantages of local definition and flexibility in the application of rules. However, local institutions are vulnerable to the power plays of elites, as well as to a "politics of exclusion" (Lavigne Delville 1999: 14) and transparency and accountability (ie. democratisation), underwritten by central government, are also seen to be required.

Thirdly, since conflicts over land rights are inevitable, there is also a call for *support for institutions and procedures for mediation, arbitration and negotiation, particularly at the local level* (IIED 1999; Toulmin 2000). This involves defining clear roles for both customary mechanisms and institutions, on the one hand, and state authorities, on the other. Again, accountability and transparency are important (*ibid*: 36).

However, in relation to legal recognition of 'customary' rights, there is little agreement on just how this should be structured. Some suggest codification, others registration at the local level (backed by state recognition). Although "harmonisation" or "integration" of indigenous and statutory law is seen as desirable, the specific mechanisms to achieve this goal are not always clear. Lund (1998: 222) notes that in Niger the implementation of the Rural Code, although designed to enhance clarity, certainty and institutional order, has in fact had the opposite effect: increased unpredictability, increased institutional incoherence, and a greater state presence but with ever decreasing legitimacy.

Also, determining the social boundaries of the group in which rights should vest, or in relation to which individual rights are to be defined, is potentially problematic: in Africa, land tenure "represents a set of mobile social relations valid for a point in time" (Mortimore 1997: 5), and often comprises multiple and overlapping rights to different resources (Berry 1989). In addition, territorial boundaries are seldom clear and unambiguous, particularly in pastoralist systems and in relation to common pool resources such as forests and grazing.

In relation to support for local institutions and processes, some analysts have doubts as to both the willingness of contemporary Africa states to commit themselves to real devolution of control over land, and their capacity (both fiscally and in terms of skilled personnel) to provide appropriate levels of support (e.g. Moore 1998).

In a recent article Alden Wily (2008: 44-5) suggests that identifying the boundaries of customary domains or territories is a prerequisite to securing 'communal real estate' (property). Although boundaries can be complex, overlapping and contentious,

*.. the benefits to be gained from agreeing to the extent of respective customary territories in order for these to be entrenched as legally governed by one or other community and the communal estates within to be protected from further appropriation or loss, are so high that conflicts are almost always eventually resolved (ibid: 45).*

Alden Wily (ibid: 49-50) outlines ten stages of a practical programme to secure the African commons. *Inter alia*, stage 2 delimits the community domain; stage 4 establishes 'modern customary land management' institutions that serve as trustee owner as well as land administrator; stage 6 registers community domains and recognizes a local land management institution; stage 7 provides land use planning and regulations; stage 9 formalizes common properties, opening up opportunities for enterprise development; and stage 10 establishes community-based land dispute resolution arrangements. Some of her recommendations are very similar to the approach adopted by policy makers in South Africa, which has been questioned by critics and challenged in court. The question of boundaries is at the core of these contestations.

## **5. Communal land tenure in post-apartheid South Africa**

The wider African experience has informed both policy making and contestations over policy in post-apartheid South Africa. In response to a constitutional requirement that a new law be passed to secure the land tenure rights of black South Africans, a Communal Lands Rights Act (CLRA) was approved by parliament in early 2004. Five years on, implementation has yet to begin, in part because of inadequate government capacity for land reform, in part because of a legal challenge to the constitutionality of the Act.

### **The Communal Land Rights Act of 2004**

The CLRA transfers title of communal land from the state to a 'community', which must register its rules before it can be recognized as a 'juristic personality' legally capable of owning land. Individual members of this community are issued with a Deed of Communal Land Right, which can be upgraded to a freehold title if the community agrees.

Before transfer of ownership can occur the boundaries of 'community' land must be surveyed and registered. Also a rights enquiry must take place, to investigate the nature and extent of existing rights and interests in land (including competing and conflicting rights), options for securing such rights, measures to ensure gender equality, and spatial planning and land use issues. The Minister will then determine the location and extent of the land to be transferred, and whether or not the whole of an area or some portion of it should be transferred to the 'community'. A part of the land may be subdivided and transferred to individuals, and portions may be reserved to the state. The CLRA also requires that community rules are drawn up before any transfer of land, to regulate the administration and use of communal land.

The CLRA vests land ownership in the 'community', defined as 'a group of people whose rights to land are derived from shared rules determining access to land held in common by such group'. Senior government officials have stated that they view the population of areas under the jurisdiction of tribal authorities, headed by chiefs, as the relevant 'communities'. Land administration committees represent the 'community' and take decisions on its behalf. Tribal authority boundaries are often contentious, many having been demarcated during the implementation of the Bantu Authorities Act early in the apartheid era.

The CLRA contains a general provision that a woman is entitled to the same tenure rights as a man, and no laws, rules or practices may discriminate on the grounds of gender. It provides for the Minister to confer a 'new order right' on a woman, even where 'old order rights' such as Permission to Occupy certificates (PTOs) were vested only in men. New order rights are deemed to be held jointly by all spouses in a marriage, and must be registered in all their names. Adult female members of households who use land, but who are not spouses, are not provided for. The CLRA also requires at least that one third of the membership of a land administration committee be female.

In the CLRA, a 'community' which applies for title must establish a land administration committee, which 'represents a community owning communal land', and has the powers and duties conferred on it by the CLRA and by the rules of such a 'community'. It must allocate land rights, maintain records of rights and transactions, assist in dispute resolution, and liaise with local government bodies in relation to planning and development and other land administration functions.

Where they exist, traditional councils established under the Traditional Leadership and Governance Framework Act (TLGFA) of 2003 'may' exercise the powers and functions of such land administration committees. There are competing interpretations of this provision. In one view, it allows for choice on the part of rights holders as to which local body will perform land administration functions, but another view holds that the word 'may' is permissive only, enabling a traditional council to exercise the powers of a land administration committee, rather than creating a choice for rights holders. The Act does not explicitly provide for choice, for example by setting out procedures and oversight mechanisms, which suggests that the latter interpretation is correct.

The CLRA provides for the Minister to make a determination of 'community' boundaries, on the basis of the land rights enquiry. One interpretation of the Act is that 'communities' will coincide with the population currently under tribal authorities, when these are reconstituted as 'traditional councils'. These areas typically have populations of between 10,000 and 20,000, and tribal authorities and the chiefs that head them have jurisdiction

over a great many wards and villages, under the authority of sub-chiefs, headmen, or sub-headmen. They are thus aggregates of a large number of smaller 'communities'. The fact that many groups and individuals, as a result of apartheid-era decisions, now fall under the jurisdiction of chiefs and tribal authorities that they had had no previous connection to, and whose authority they now contest, is not acknowledged.

The CLRA establishes land administration committees to make key decisions and exert ownership powers on behalf of the 'community'. It does not require land administration committees to consult with the 'community' members it represents in relation to major decisions such as disposal of land or of rights in such land. The Act does not set out procedures for decision-making (eg. in relation to the adoption of 'community' rules or the holding of a land rights enquiry), but simply states that rights enquiries must be open and transparent, and that decisions must be informed and democratic.

### Debating the CLRA

The CLRA has been widely criticized and was debated at length in parliamentary consultations before the law was enacted, with the powers of traditional councils over land being one of the most controversial issues (Claassens and Cousins 2008). Presentations to parliament by senior officials made it clear that 'communities' would be defined as those people living within Tribal Authority boundaries, that traditional councils would be recognized as land administration committees, and that rights holders would have no effective choice on this matter. These provisions were greeted with dismay by community groups and NGOs, which saw this as undermining fundamental democratic rights. Some observers suggested that the last-minute inclusion of this provision in the draft law of 2003, just days before parliamentary consultations were to begin, was the result of a back-room political deal with the traditional leader lobby in the run-up to a national election.

In April 2006 four rural groupings initiated a constitutional challenge to the Act, with the assistance of the Legal Resources Centre. The question of whether or not traditional councils will act as land administration committees wherever they exist is one of the key issues in the challenge. In all four cases a history of interference with the land rights of groups and individuals by chiefs informs residents' anxiety that implementation of the CLRA will result in control over land being vested in traditional councils (ie. 'transformed' Tribal Authorities) at the expense of the rights of current land holders. In two of the four cases the jurisdiction of tribal authorities over subordinate groups ('communities') is contested.

Legal papers also assert that the CLRA is unconstitutional because the nature and content of 'new order rights' are not clearly defined, and the Minister of Land Affairs is given wide and sweeping powers to determine these rights on a discretionary basis. It is argued that no clear criteria to guide the Minister's decisions are provided by the Act, and few opportunities to participate in making these crucial decisions, or to challenge them, are created. A critical omission is the lack of consultation with rights holders on whether or not they desire a transfer of title.

Some critiques of the CLRA (Claassens 2008; Cousins 2007) suggest that the Act entrenches particular versions of 'customary' land tenure that resulted from colonial and apartheid policies, and that this will have the effect of undermining rather than securing

land rights. The CLRA shifts the balance of power away from individuals and households towards the group and its authority structures, on the one hand, and towards the Minister, on the other. Ownership at the level of the traditional council/chieftaincy will 'trump' the rights that exist at lower levels, such as household and individual rights to residential and arable land.

A second argument is that the transfer of ownership of communal land from the state to 'communities', with the requirement that outer boundaries be surveyed and registered, conflicts with the nested and overlapping character of land rights in 'communal areas'. As a result, implementation of the CLRA is likely to exacerbate existing tensions and disputes over boundaries (including disputes with sub-groups placed under the jurisdiction of chiefs under apartheid), and generate new tensions in areas which are currently relatively stable.

A central issue in the constitutional litigation currently under way is whether land rights derived from custom and practice are secured or undermined by the powers given to land administration committees by the Act. Linked to this is whether or not traditional councils can justify the exercise of their powers by reference to the Constitution's recognition of the role of traditional leaders in customary law. According to Claassens (2008) a 'living law' interpretation of custom would open up the determination of its content to the whole range of people who apply it in practice in local settings, thereby challenging the veracity of official and rule-based versions. This could open up the process of rule formation to include the multiple actors engaged in negotiating, challenging and changing property and power relations in everyday struggles in rural areas.

Claassens argues that the new laws entrench apartheid versions of unaccountable chiefly power, and that their key purpose may be to protect chiefly hegemony from the "threat" of countervailing authority over land and create a realm of sovereign authority for traditional councils (*ibid*: 377). Even if transfers of title from the state to 'communities' do not take place, the new laws will have a far reaching impact in rural areas by entrenching the jurisdictional boundaries of traditional councils and bolstering their legal powers to unilaterally determine the content of customary law. They will make it more difficult to challenge corrupt decisions by traditional leaders in relation to land sales and abuse of their power in relation to mining deals, development projects, restitution claims and tourism ventures.

Claassens also suggests that a wider compromise between the state and traditional leaders has been agreed, of which the two new laws form an integral part (*ibid*: 371). Recent provincial legislation on tribal levies indicates that chiefs' ability to extend their governance and taxation powers has been strengthened. Traditional leaders in Limpopo, for example, are again demanding the multiple levies of the apartheid years and refusing to issue letters to people showing proof of residence if their levies are not paid. If government is allowing traditional leaders to "tax" their subjects through tribal levies in return for carrying out certain administrative tasks, such as providing residents with proof of residence, and that the accountability of traditional councils is fatally undermined by a combination of the confirmation of their apartheid-era jurisdictional boundaries and enhanced control over land, then some of the fundamentals of post-apartheid democracy are at stake.

“Traditional communities” could once again become realms of semi-sovereign authority for chiefs at the head of traditional councils, and only truncated forms of “citizenship” will then be available to their members, as in the apartheid era. These realms may be considerably expanded through large rural land restitution claims that allow traditional leaders to enlarge the territory under their jurisdiction, often in “strategic partnership” with powerful business interests (Hellum and Derman 2006). This outcome would *not* be the inevitable outcome of a tenure reform policy framework aimed at supporting adapted versions of communal or ‘customary’ land tenure systems, but rather the triumph of a particular interpretation of ‘custom’ by a powerful lobby group. This underlines the political embeddedness of land questions in Africa.

#### Alternatives approaches to securing communal land tenure rights

Is there a way, then, to secure and rights within communal tenure systems without replicating problematic versions of ‘custom’, and in a manner that promotes democratic decision-making? Can policy both secure rights on the ground, and also allow rights-holders to adapt or alter their tenure system through deliberate choices over time in response to changing circumstances? Relevant here are the tenure reform principles set out in the South African White Paper on Land Policy (DLA 1997). These require that the law be brought in line with *de facto* realities, but that these realities also be transformed to bring them in line with constitutional principles of democracy and equality, and thus to include freedom of choice in relation to both land rights and the institutions that will administer those rights.

The way beyond the ‘customs versus rights’ polarity is to vest land rights in individuals rather than in groups or institutions, and to make socially legitimate existing occupation and use, or *de facto* ‘rights’, the primary basis for legal recognition. These claims may or may not be justified by reference to ‘custom’. Rights holders would be entitled to define collectively the precise content of their rights, and choose, by majority vote, the representatives who will administer their land rights (eg. by keeping records, enforcing rules and mediating disputes). Accountability of these representatives would be downwards to group members, not upwards to the state. Gender equality would be a requirement before legal recognition of rights could occur.

A key question is the nature of those individual rights. These could be a form of statutory right that is legally secure but also qualified by the rights of others within a range of nested social units, from the family through user groups to villages and other larger ‘communities’ with shared rights to a range of common property resources.

A key issue is the boundaries of the relevant social units within which land rights are held, and should therefore be the key decision-making units. Again, existing practice that is socially legitimate could provide the basis for decisions by groups of rights-holders as to their social and territorial boundaries, and allow legal recognition of grounded institutional realities, within a framework that requires the democratization of decision-making. A key requirement, however, would be recognition of the relatively flexible nature of those boundaries, depending on the resources and decisions in question, and given the nested or layered character of rights to shared resources. There would thus need to be acknowledgment of the multiple ‘communities’ within which land rights are held. As Alden Wily suggests (2008: 50), providing effective institutional arrangements, to resolve disputes that are both intra-community and inter-community in nature, would be necessary.



This approach does not require attempts at codification of what are likely to be dynamic and changing practices, but does allow the key features of property regimes that are distinct from private property to be secured in law. Moore's (1998) and Berry's (1990) suggestions that policy must aim to strengthen institutional spaces for the mediation of competing claims to land are critically important, but so are the views of Lavigne Delville (1999), Peters (2004) and Woodhouse (2003), who emphasize that unequal power relations within local institutional contexts have to be addressed. What is 'socially legitimate' is always subject to contestation. This means that the political embeddedness of land rights and land governance must be clearly acknowledged. Democratizing land administration will require providing support to rights-holders within local institutional processes, and central government oversight (Woodhouse (2003). In addition to clarifying the nature of the rights at stake, this approach could provide 'a framework for their further evolution' (Sawadogo and Stamm, 2000, cited by Daley and Hopley, 2005: 35).

## 6. Conclusion

Land tenure reform remains a key policy issue in Africa, given the large proportion of the population that relies on land and natural resources for their livelihoods. It is not enough to recognise the socially and politically embedded character of land rights, or the unequal outcomes of contemporary forms of 'enclosure'. Privatization and complete individualization of land are uneven and contested, and in many places the nature and content of land rights remain quite distinct from 'Western-legal' forms of property. In these situations, individual titling is not a feasible solution, and adapted and democratized versions of communal tenure should be promoted by law and policy. Viewed from within a 'rights without illusions' perspective (Hunt 1991), legal recognition of these distinctive forms of land rights can form part of a broader strategy to secure rights through political mobilization and pressure for democratic systems of land governance, and must involve external support for rights holders within local institutional and political processes.

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