
SOCIAL, POLITICAL AND EQUITY ASPECTS OF LAND AND PROPERTY RIGHTS

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“Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property.”² Locke

Introduction.

Land is a valuable commodity. Its fertile soil is the source of agricultural produce for our sustenance. The vast savannah grasslands provide fodder for our cattle. The mineral wealth beneath provides revenue and the rivers and lakes on it, provide both water to drink and fish to feed us. The forests produce timber and firewood. The control and use of this vast resource has been at the center of great political and philosophical debates. History informs us that land has also been at the core of most human conflicts, both minor and great. Land is and has been at the center of the ancient conflict in the Middle East. A Land boundary dispute pitted Ethiopian and Eritrean allies against each other resulting in great loss to life and human suffering, and it is land that has turned Zimbabwe into a pariah State. How we handle the burning problems of land, therefore, is important for present and future generations.

Of Land, Ownership and Property Rights

It is difficult to discuss the question of land, property rights and equity without thinking of the tragic events going on in Zimbabwe, where the right to property – a human right – claimed by the White farmers is seen to be threatened, and the plight of the landless peasants of Zimbabwe lends justification to ongoing expropriations of land, as a kind of restitution. Various reports indicate, for example, that as far back as 1965, there were 7,800 White farms (held by 1% of the population) from 2000 to 50,000 acres occupying nearly half of the available agricultural land area and the bulk of the fertile land.³ And, yet one cannot but

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² Locke, Treatise of Government.

³ Downs and Reyns: “Land and Society in Contemporary Africa”, 1988; Downs and Reyns also report that in Kenya, “one-tenth of a percent of the country’s farms occupy 14 percent of the arable land; 2.4 percent of the farms occupy 32 percent of the land. In the country as a whole, 54 percent of the holdings contain less than one hectare, and 30 percent under half a hectare; at the other end several hundred holdings exceed one thousand hectares and some exceed twenty thousand.” see also: Martin Adams, Siphos Sibanda and Stephen Turner “Land Tenure Reform and Rural Livelihoods in Southern Africa, in *Evolving Land Rights, Policy and Tenure in Africa*, Edited by Camilla Toulmin and Julian Quan.

fear that the illegal occupation of White farms by ex-freedom fighters was as much a rebellion against past colonial policies, which dispossessed the Black population of their land on the defeat of Chief Lobengula, as well as Mugabe's own misdirected distribution of purchased land for white farmers after independence, to benefit the wealthy and privileged class, á la Kenya.

Early land reforms, in Latin America and Asia were ideologically driven. In Latin America, the reforms were egalitarian, in order to address a situation a meager part of the population, often times foreigners, occupied large estates, constituting the bulk of available agricultural land, taken away for peasant farmers. In Asia, on the hand, the reforms were intended to benefit the tillers of land, who often worked rented fields from wealthy landlords. Land Reform is needed in Africa and is long overdue. It is true that certain legislative measures have been adopted in some of the African countries to institute systems of individualization, registration and titling, but meaningful land reforms will not be complete until a more equitable system of land distribution is put in place and the traditional tenure is rationalized and given legal effect.

The Idea of Individual Property

In a most unusual submission, the Attorney-General of Tanzania, in *Attorney General v. Lohay Akonnay and Joseph Lohay*,⁴ contented that the taking of land held under customary tenure without compensation, by the Government, was not a violation of the Bill of Rights provision under the Constitution, guaranteeing the right to property, because land held under customary tenure was not 'property'.⁵ For this proposition, the Attorney General relied on an old Privy Council decision, in *Amodou Tijani v. The Secretary, Southern Nigeria*, where Viscount Haldane, quoted with approval the findings of Rayner C.J in the Report on Land Tenure in West Africa, as follows:

"The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner."⁶

In a similar vain Monique Caveriviere and Marc Debene in their book "Le Droit foncier Sénégalais" assert of les systèmes coutumiers": " La notion d'exclusivité consubstantielle au

⁴ [1995] T.L.R. 80

⁵ Tanzania had no Bill of Rights in the Constitution until the early '90s and practices such as Ujaama, under which villagers were dispossessed of property without compensation for decades, suddenly became the subject of Constitutional challenge.

⁶ [1921] 2 A.C. 399, see also "Le Droit Foncier Sénégalais" by Monique Caveriviere and Marc Debene.

droit de propriété était inconnue. Il est d'usage d'insister sur le choc des cultures que traduit notamment l'introduction de la propriété foncière individuelle.”⁷

The Court of Appeals of Tanzania rejected the Attorney General's submission made in the Lohay Akonaay's Case (1995). Writing for the majority, the Chief Justice stated:

“...Article 24 of the Constitution of the United Republic of Tanzania recognizes the right of every person in Tanzania to acquire and own property and to have such property protected. Sub-article (2) of that provision prohibits the forfeiture or expropriation of such property without fair compensation... It is the contention of the Attorney general, ...that a 'right of occupancy', which includes customary rights...is not property within the meaning of the Constitution. ...We have considered this momentous issue with the judicial care it deserves. We realize that if the Attorney General is correct, then most of the inhabitants of Tanzania mainland are no better than squatters in their country. It is a serious proposition. In the present case, for the reasons we have given earlier, we are satisfied that Sections 3 and 4 which provide for the extinction of customary rights in land but prohibit the payment of compensation with the implicit exception of unexhausted improvements only are violative of Article 24(1) of the Constitution and are null and void”: Nyalali C.J.⁸

The dispute over the interpretation of the word 'property' as reflected in the discussion in the Akonaay Case, is not semantic but fundamental. The Right to property, is enshrined in Article 17 of the Universal Declaration of Human Rights, in absolute terms.⁹ It provides:

- “Everyone has the right to own property alone as well as in association with others.”
- “No one shall be arbitrarily deprived of his property.”

This notion of the absolute right to property is founded on the 'conception bourgeoise', prevalent in western Europe in the eighteenth and nineteenth centuries, glorifying the virtues and rights of the individual, a period generally known as the period of enlightenment that gave birth to the French Revolution. It still prevails as the cornerstone of capitalism and the free market.

In this sense 'property' is defined as "the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it."¹⁰

This definition, however, is not quite borne out by a reading of some of the works of the philosophers of the time. For example, the notion of the right to 'property' resulting from one's labor, as propounded by Locke in the extract at the head of this paper, in his First Treatise on Government, had two limitations: –

⁷ *Le Droit foncier* Sénégalais: Monique Caveriviere and Marc Debene, paragraph 36.

⁸ [1955] T.L.R. 80

⁹ Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly Resolution 217 (III) on 10 December 1948.

¹⁰ Black's Law Dictionary.

the one relating to ‘sufficiency’, the other to ‘spoilage’. According to Locke, labor could supply the basis for property rights “at least where there is enough, and as good left in common for others.” And, Lockean rights to land are also limited by the notion of waste: in Locke’s view, a person is entitled only to such land as he or she can use without spoilage. The value of the Labor theory of property rights in the context of the Akonaay Case, is the assertion by Locke that Labor “puts the difference of value on everything”, being responsible for “9/10” and perhaps “99/100”, of the value derived from land. By Locke’s account, therefore, so great is the value added, and so inseparable is it from the object, that property rights as to the value added and the object itself vest in the individual supplying the labor. This theory alone justifies the finding of the Chief Justice that compensation that is limited just to the improvements over land violates the standard of just compensation and would be contrary to the Constitution.

The question that arises from the differing perceptions of ‘property’ is whether justifiable limits can be imposed on the freedom to acquire and dispose of property, even where such freedom results in other members of the community remaining, in this case, landless. And, where limits may be imposed, is it legitimate by law to adopt redistributive policies to achieve equitable distribution of vital resources, such as land. In brief, to what extent can market forces alone be the only determinant in the allocation, use and disposition of land rights. These questions go to the very core of modern Land Law Reforms and will be examined here in the context of the history of land management arrangements carried out during and after colonial rule. In this context, the African [Banjul] charter on Human and People’s Rights attempts to establish a balance between the absolute right to property and the need to achieve equity in the manner of access and distribution of such property for the common good. Articles 13(3) and 14 provide:

Article 13

Every citizen shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

Colonial Land Policies

The notion that customary tenure admitted of no individual ‘property’ became a convenient tool of the colonialist. The protection of the right to individual property known under most European legal systems did not extend to the ‘usufruct’ rights or ‘communal’ rights as the customary tenure was conceived. Instead of the individual, the Chief or Headman was said to possess the ‘seigneurial’ right to communal property. He could, however, conveniently transfer it, or sell it, upon requisition for a public purpose, in

accordance with the eminent domain ordinances, which called for acquisition of native lands upon ‘payment of compensation’. The compensation to be paid, however, extended only to produce and constructions on land, and did not include the land itself, under the theory that such ‘owners’ had only an ‘usufructuary right’. The compensation did not also extend to unoccupied land, as this was ‘Crown Land’. It covered only occupied and used land and was limited to the value of developments on the land. These were the principles enunciated in the Tijani Case, the often-quoted decision of the Privy Council on the nature of African Customary Tenure.¹¹

In Tanzania, just as in all other former British Colonies and, indeed, all former colonies in Africa, land and rights in land were inseparable from the policy and political objectives pursued upon colonization. In order to acquire full sovereignty over a given territory, it became necessary to devise the concept of binding treaties and agreements with supposed ‘Kings’, where possible, for conveyance of sovereignty over a given territory, by grant or conquest. This conveyance had the effect of ceding control over all ‘unoccupied’ lands to the Crown as ‘Crown Land’ under the British and, in the former French territories, a similar effect was achieved by application of Article 539 of the Code Civil, which provides, most succinctly: “Tous les biens vacants et sans maître, et ceux des personnes qui décèdent sans héritiers, ou dont les successions sont abandonnées, appartiennent au domaine public”. Apparently, only registered land was considered ‘owned’, and land held under customary law was declared ‘vacant et sans maître’.

The effects of these concepts were to permit the colonial administration to grant titles to large tracts of land for commercial agriculture and other uses to settlers or entrepreneurs, to generate revenue. The idea of ‘individual’ property to land other than by title from the Crown became a problem as land occupied by ‘natives’ became desirable for further appropriation. In introducing the concept of ‘eminent domain’, with its attendant requirement for just compensation, the question arose whether having acquired sovereignty over the territory, the occupation by the natives had such value as was worth compensating in the same way as individual ‘property rights’.

The Privy Council addressed this question squarely in 1921, in a case arising from Nigeria concerning the status of the territory of Lagos.¹² The Privy Council held that the idea of ‘estates’ in fee simple, being the most comprehensive estate in land recognized by the law in England, is not recognized outside of England, and thus the Crown having acquired the root title purportedly by grant or conquest from the putative ruler. Accordingly, all other subordinate rights in property did not qualify as individual “ownership” in the Austinian sense; that is, ownership, which is “indefinite in point of use, unrestricted in point of disposition and unlimited in point of duration”. In some areas, however, chiefs whose function

¹¹ See also *Sakiriyawo Oshodi v. Moriamo Dakolo and Others* [1930] A.C. 667

¹² *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 A.C. 399

traditionally was to ensure that adequate land was left available for common use: open land for grazing, forests for gathering firewood and rivers for water, were taken to be vested with property rights, which were recognized by issuance of forms of title deeds.¹³ Peasant farmers that had tilled the land for generations became tenants at will overnight, on the land they claimed as their own by descent from time immemorial. The balance of the land was declared 'Crown Land', for future allocation and titling, while customary holders on such land were treated as tenants of the crown.

This misconception of customary land rights, allowed the colonial administrations to reduce the compassable value of any rights in land held by the 'natives' on 'crown land'. Compensation being limited to crops and structures erected on land, without regard to the potential value of the land to the individual, his family and future generations who would be deprived of the land, through any sale or grant. On attaining independence, succeeding Governments have found it convenient to hold on to the legacy of the colonial land administration, in view of the obvious benefits to the elite in Government. But, unfortunately, these benefits are known to have been abused in some countries and Land Reforms which begun with the best of intentions got to be used to benefit a few such as the elites, the wealthy and those who wield political power. In Tanzania, for example, it has proved difficult for the Government to accept to surrender the fiction of retaining the root title vesting in the President, as successor to the Crown, a convenience that permitted the Government to introduce experimental land management structures that failed to respect the rights of individual owners or to adequately compensate them. I cannot help but reproduce a classic quotation of comments attributed to a Commissioner of Lands in Kenya in 1933 and a Chief Native Commissioner on this issue:

Commissioner of Lands: "In the early days of European immigration. the theory appears to have been followed that provided adequate arrangements were made for the natives who happen to be on land, and compensation was paid for disturbance and any loss of crops, the Government was fully entitled to regard the land concerned as available for alienation".

Chief Native Commissioner: "The whole fallacy of such a theory appears to be contained in the word 'adequate'. There can be no adequate arrangement for a man evicted from the only spot on earth where he has the right to live."¹⁴

African Concept of Land Ownership

On the issue of land and the village peasant in Tanzania, Putterman is quoted as having stated, in 1983: "The judicial status of land seems a matter of little concern to most peasants. Thus, although all land in

¹³ Chiefs in Buganda became beneficiaries of large areas of land they administered on behalf of the Kabaka, as personal property, under individual 'mailo' land tenure, which is equivalent to freehold

¹⁴ Downs and Reyna: "Land and Society in Contemporary Africa": 1988.

Tanzanian villages legally belongs to the nation and is under the authority of the elected village governments, peasants continue to regard their plots as their own.” There has been so much written about the nature of customary tenure that it perhaps serves no purpose to repeat what has already been said. As Putterman puts it, the individual in the village, who by his sweat, cleared marshlands or forests to establish a place he/she calls home, where he or she cultivates crops for food consumption and grows cash crops, such as coffee or rubber for commercial purposes, and has surrounding land for grazing his/her goats or cows, cares little about where the root title is vested, in the political head of the nation or the village chief. All that concerns this villager is that he/she is free to establish a garden adequate for his/her family use and available commons for cattle grazing. He or she is also interested in knowing that should the need arise, due to expansion of family or otherwise, additional land will be available for allocation to him to satisfy his/her needs.

Therefore, our village peasant cares if he/she is threatened with eviction or is forced to leave his/her land due to war or civil strife or if a neighbor encroaches on his/her territory. This villager demands that there be stability and order that allow for continued agricultural use of his/her property, open and adequate markets for his/her crops and administrative or judicial mechanism to resolve any boundary or other disputes over his/her right to continued use of the land. The land thus carved out provides our villager with the means to feed himself/herself, and to derive revenue to clothe himself/herself and family and space to expand his/her animal wealth. Our villager rests comfortably in the knowledge that his/her land will pass to his/her children and their children’s children. Maybe, today, we are looking at a villager who is beneficiary of the first tiller of the land of his/her forefathers. This villager demands no less and no more than the ability to continue to use his/her land and pass it on to his/her progeny. It may also be that this villager went to school, leaving his/her parents on the land. Equally, this educated person wants the security of knowing that if working in the city comes to an end, there is security in returning to the land of his/her fore-bearers, for shelter, livelihood and final resting place.

On the other hand, the status of the villager of whom we speak, may depend on what has occurred between the time when his/her forefathers first carved out this land for themselves and their successors and the present, and the country where he/she lives. If in a country that adopted a policy of replacing customary tenure with titling, perhaps by a stroke of the pen, the land he/she occupies, long ago fell within the title deeds of a prosperous African farmer who obtained it during the land purchase and re-sale of the land previously owned by White farmers. He/she is, perhaps, still classified as a squatter. If the land was in the area previously designated as a Native Reserve, where customary tenure was preserved until recent changes in Government policy, ushering in titling and registration of land, it is possible that our villager now faces eviction, because a wealthy, politically connected person succeeded to lay claim to

his/her entire property and will be registered as the individual owner. However, our villager may be lucky that his/her son is a lecturer at Nairobi University and is now able to obtain the title to the land as the eldest son of his recently deceased father. Having acquired the title, however, he proceeds to sell parts of the property eventually dispossessing his sisters and leaving little for his own mother to feed herself. On the rest of the land, he sought to obtain a large loan to develop a dairy farm on the property, which is in danger of repossession by the bank for failing to pay the outstanding installments, because of a recent severe drought left his entire herd without water or fodder, resulting in the elimination of half of the herd.

It is also possible that our villager comes from a country where chiefs and sub-chiefs were handed out vast lands as rewards for their royalty to the colonial administration, in fee simple. The land on which he/she was born has been in the family since time immemorial. Legend has it that it was allocated to his/her great grandfather by the mythical god of his/her tribe. The family fell on bad times at the turn of the twentieth century when the white man came. Suddenly, the land was said to belong to the village chief, to whom the family paid tithe, that had become so exorbitant that his/her great grandfather joined the peasant rebellion to fight for the rights of the common man. In the days past every peasant had his/her cultivated plot, with rights to hunt in the village forest, draw water from the village stream and graze in the open lands adjoining the village. Needing more land, the chief was always there to show the applicant appropriate land for the proposed use, to plant eucalyptus trees for building or for cultivation of food crops. A pot of beer was usually enough to cheer up the chief, in which all other villages partook to rejoice in our villager's good fortune to get more land, without immigrating elsewhere to clear virgin forests. All this changed, because the chief acquired title to the land and started resettling strangers to increase his rent. Over time, with the chief or his successors selling land to increase revenue, our villager is today a tenant-at-will on a seven acre land, paying tithe to a newcomer that threatens to evict him/her unless, as provided under a recent Land Reform law, he/she can buy "himself/herself out.

These may appear fictional examples, but they are true renditions of the plight of the African peasant in many countries, in the face of changing land policies and legislative reforms. In former French colonies of West and Central Africa, customary tenure was first ignored in the hope that matriculation of land under the Civil Code would eventually bring about its natural death. This, however, did not happen as few Africans opted for matriculation, which would result to opting out of their customs and practices. Although in some countries such as in the Congo, the abolition of customary law was continued and is now incorporated in the Congolese Constitution, most other countries have restored the efficacy of customary tenure and are experimenting with mixed results to formalize the institutional framework for its operation. In Senegal, for example customary land tenure was the basis of the Land Reforms of 1964, aimed to usher in rural development. However, the bundling up of customary rights were into community

rights, under politicized community institutions which control its administration, has reduced the benefits of the reforms, as increasingly the privileged classes take advantage of the system to amass large areas of land and some poorer peasants are dispossessed of their land for nonuse. In Côte d'Ivoire, customary rights are being registered to provide evidence of ownership and in Niger, arrangements are being made to grant individual and group negotiable certificates of customary land tenure.

It is conceded that in open savannah areas, group cultivation is the norm, and individual families do not carve out self-contained areas for individual cultivation and habitation. In such areas people live in a homestead consisting of several families and cultivate in fields away from the homestead. However, while it is common for several families to join together to open new fields and to harvest jointly, each family will always have an identifiable plot or plots known to belong to them. In case of shifting agriculture, these plots are used for grazing when fallow and cultivated during the rainy seasons. It would be very wrong to interpret such land use as 'communal' and I have doubts whether they fit the description of 'corporate' property assigned to them by Kwamena Bentsi-Enchill.¹⁵ The bundling up of customary rights, to the exclusion of individual or group customary titles, for management by bureaucratic institutions, with the discretionary power to allocate land and also dispossess land holders for nonuse, as was done in Senegal, would not be a true rendition of customary tenure. By Décret 64-574 adopted on 30 July 1964, it was provided that "les droits fanciers traditionnels ne sont pas reconnus comme droits de propriété. Les terres objet de tenures coutumières ne sont pas –en principe– susceptibles d'être immatriculées à la demande de leurs possesseurs."¹⁶

Overlapping Customary Interests in Land.

Customary tenure recognizes overlapping interests in land based on the family relationships of the individuals concerned and the rules of succession. These interests vary in hierarchy and fall in definite and identifiable categories, depending on the tribe or clan in question. The head of the family would normally be the person who first cleared the land and is recognized as primary owner of the property. His wife has right of occupation and use of the land, for as long as the marriage subsists and, upon death of the husband, remains on the property inherited by her children. The rules of succession ordinarily favor the eldest son, but daughters have been known to inherit land if not yet married. What is required is to ensure that a register and certificate of customary ownership of land is made available as evidence of the 'property' rights enjoyed by the primary owner, but also recognizing the competing interests of the family members. This is not new. In the United States, land is almost always registered in the names of the husband and wife in common. In view of the emerging norms of gender equality, customary law can be

¹⁵ "The Traditional Legal Systems of Africa", International Encyclopedia of Comparative Law, Vol. VI Chapter 2.

¹⁶ Caveriviere and Debene, *Supra* at paragraph 71. (essentially, the law put an end to individual titling of customary land, except for existing titles on developed land)

updated in the course of registration by recognizing the equal shares of husband and wife in the property as primary owners and the equal rights of the sons and daughters as secondary interests in the land.

Once the overlapping interests in land existing under customary tenure are recognized, one can appreciate why modern titling arrangements have resulted in untold hardship for various levels of beneficiaries over land registered as individual property in the name either of the primary owner or his customary heir. Such registration has the effect of extinguishing all other claims and interests, thus rendering whole generations landless without other resources for sustenance. It is not uncommon that once such property has been titled to the heir or primary owner, it will be sold or mortgaged to defeat all other competing claims. Since attempts to subdivide the land into separate plots to satisfy the individual interests in the land would only result in fragmentation into uneconomically viable units, the registration and certification of the whole land, while recognizing the competing interests, is the best option in the circumstances. In order to meet the economic efficiency objectives of creating a credit market, the certificate of customary tenure should be capable of being mortgaged, or even sold, but only with the consent of all the registered beneficiaries. It has been contended that such a scheme will complicate land marketing, but equity cannot be sacrificed to achieve expediency.¹⁷

Land Tenure Systems and Agrarian Law Reforms: policies, purposes, aims and objectives.

Asia

In the countries of Asia land reform was characterized by a desire to cure historical injustices caused by the deprivation of the cultivator of the right to own the worked land and remaining in a state of an indentured servant. Countries such as Taiwan, Korea, the Philippines and Thailand, introduced land reforms directed at restitution of the rights of the cultivating farmer to own the land and the fruits of his/her labor. In Taiwan, for example, Government intervention was intended to promote family owner-cultivation as the most efficient and productive form of agriculture. The land reform was three pronged: sale of public lands to cultivators/ tenants; rent reduction for farmers to a maximum percentage of the annual production from the land and, finally, the land-to-the-tiller program under which the Government purchased land from large landowners for resale to cultivators/tenants. By 1973, eighty percent of the agricultural population was owner-cultivators.

Latin America

In Latin America, the reforms were aimed at the transfer of excessive land from large-scale landowners to the peasant farmers. In Mexico, the programme of land redistribution was born out of the peasant rebelling of 1917, which resulted in a constitutional amendment to protect peasant farmers from wealthy

¹⁷For a list of arguments against individualization, titling and registration, see page 116 of the Report of the Presidential Commission of Inquiry into Land Matters, Vol. I: "Land Policy and Land Tenure Structure"

landowners. Article 27 provided: “The ownership of the lands and waters comprised within the limits of the national territory is vested originally in the Nation, which has had, and has the right to transmit thereof to private persons, thereby constituting private property.” Having thus defined the source and limits of private property, Article 27 went on to give the government the mandate and the requisite authority to expropriate land (with indemnification) from large landholders and to give it to eligible agrarian communities. All transfers of indigenous property made by previous regimes were declared void: only those owners who had held less than fifty hectares for more than ten years were to be exempt from this restitutionary provision. Article 27 also limited the ability of foreigners, churches, charities, corporations, and banks to own land. Status, not contract, was the foundation of land tenure in revolutionary Mexico. Article 27 of the Constitution, nicknamed Zapata’s dream’, was jealously defended by successive governments until 1992, when it was amended, to introduce land-market reforms.

Africa

In contrast to the ‘distributive’ and ‘restitutive’ policies pursued in Asia and Latin America, land reform in Africa south of the Sahara has followed no discernible ideological stance, except in the former settler states in Southern Africa, where governments are still struggling to re-distribute land, now held by settlers to the poor peasants. African governments have been content to be driven by outside forces in handling land reform. By and large they just continued to follow the colonial legislated land tenure arrangements, which were superimposed over the indigenous customary tenure systems. Land being such a valuable resource and being so crucial to the social and economic structure of a society must be managed with regard to the impact that all the envisaged changes would have on the lives of all the people concerned.

Kenya

Kenya is perhaps the first African country south of the Sahara to have adopted a clear, though mistaken, policy on land access, management and control. The policy first introduced by the colonial administration is based on implementation of a comprehensive program of registration and titling throughout the country. Apart from being expensive and time consuming, it has been criticized as having failed to achieve its original objectives of establishing a credit and land market. Driven by a desire to stimulate economic growth among the indigenous Africans and to promote large scale settler farms, the colonial administration, as early as 1949, advocated “to devise a means of providing a better title to land in the native Land Units”, partly to provide security for agricultural credit.¹⁸ This was followed by the famous Swynnerton plan, which was devised partly in response to the Mau Mau emergency, to establish a middle class. The plan was expected to create a stable class of relatively wealthy yeoman farmers, who the

¹⁸ Report of the committee on Agricultural Credit for Africans, headed by J.H.Ingham.

Agriculture Department expected would help stabilize society.¹⁹ That desire completely overshadowed any concern for the equitable distribution of resources, as the Swynnerton plan, a clear application of 1950s evolutionist “modernization” theory in economics, made clear:

In the past government policy has been to maintain the tribal system of tenure so that all the people have had bits of land and to protect the African from borrowing money against the security of his land... In future, if these recommendations are accepted, former government policy will be reversed and able, energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and a landless class. This is a normal step in the evolution of a country.” (Swynnerton 1954:10).²⁰

The arguments advanced in the Swynnerton report, and which have since driven the pursuit of ‘individualization’ of land tenure, in Kenya, are:

Security of Tenure: Individual ownership and the ‘pride of ownership’ are often thought to give farmers incentives to invest in their holdings. ‘Communal’ tenure is thought to discourage long-term planning and investment in land. The title would encourage farmers to use fertilizers, dig wells and carry out irrigation without fear that the land might be re-allocated to other farmers.

Facilitation of credit. It is argued that land titles give farmers and other rural people something to mortgage as collateral for loans.

Dispute reduction. Possession of title deeds cuts down costly litigation, particularly in densely settled or extensively farmed land.

Scope for personal enterprise. Easily transferable titles allow richer or more ambitious farmers or those with larger families, to buy up or otherwise acquire land from less fortunate or less hardworking neighbors, thus maximizing an area’s total productivity.

Other African Countries

Recent Land Reforms have taken place in Uganda (Uganda Land Act 16 of 1998), Tanzania (Land Act and Village Land Act, 1999) and Mozambique, (Land Law of 1997). In West Africa, Senegal has undertaken, perhaps, the most thorough reforms since independence by the promulgation of Loi 64-46 of 17 June 1964. Major reforms have also been undertaken in Côte d’Ivoire, Cameroon, Niger and Burkina Fasso. It is safe to say that in most of the Land Reforms mentioned, the Governments were content to establish institutional arrangements for allocation, adjudication and management of land. Faced with the obvious failure to eradicate customary tenure, undertaken in Kenya and Côte d’Ivoire, in order to institute a land market based on individual tenure, the land laws enacted in Uganda, Mozambique, Tanzania, Niger and Senegal make provision for continued occupation and use of land in accordance with

¹⁹ Swynnerton 1954:8; East Africa royal Commission 1955:5346; Downs and Reyna:98

²⁰ Land and Society in Contemporary Africa: R.E.Downs and S.P. Reyna, at p.98.

customary tenure, but under varied administrative regimes. In Uganda, Senegal and Mozambique, new institutions are created for allocation of land and verification of land claims. Provision is made in Uganda and Mozambique for acquisition of individual or group title over customary land, which in Uganda is called the “Certificates of Customary Tenure”.

The following comments have been made recently on the new institutional arrangements established for land management.:

Tanzania: “Unlike Uganda, Tanzania has chosen to use the existing and well-established village governance machinery for tenure administration and local dispute resolution, rather than depositing these functions in district level agencies. Each Village Land encompasses the vast majority of lands in the country. The Land Act and Village Land Act designate Councils as Land Managers, responsible for guiding community decisions as to the distribution of land within the village into household, clan community or other lands, and their adjudication, registration and titling.”²¹

Senegal: “In Senegal, Rural Councils were set up by legislation in 1972... In principle they enjoy considerable authority over land, being responsible for the allocation of use rights over land, as well as land use planning, such as the marking out of cattle routes, and of residential zones, as well as financing development projects...The legal framework within which councils are meant to carry out their function is both contradictory and ambiguous. The council agrees land allocations on the basis of whether the applicant is able to make good use of the land (*mettre en valeur*). Some farmers have been able to make claims for very large areas of land, which they have no means of farming, while others seize the opportunity of cultivating much larger tracts than those formally attributed. In contrast to cultivation, the grazing of land is not considered putting land to good use and therefore, pastoralists have seen large areas of former grazing converted to farmland.”²²

Uganda: “In Uganda, in spite of the elaborate administration and dispute settlement mechanism set up under the Act, there is very little room provided for the involvement of traditional institutions. Land tribunals may pass on to traditional authorities the cases which they think fall within their jurisdiction, but this can only be done at the discretion of the tribunals. The same applies to the administrative set up. The Act only provides that ‘the parish committee may, in the exercise of its functions in relation to application for a certificate of customary ownership refer any matter to any customary institution habitually accepted within the parish as an institution with functions over land for its advice and, where relevant, use it with or without adaptations.’”²³

Ethiopia: there have, indeed, been egalitarian land reforms undertaken in some parts of Africa. In Ethiopia, the Derg military regime abolished feudal land ownership in 1974 and distributed usufruct rights to peasant associations (*kebelle*), in an attempt to reverse the long standing social differentiation

²¹ Case Study Boxes on Land Reform in Uganda, Tanzania, Mozambique and South Africa -iied.

²² Camilla Toulmin: Decentralisation and Land Tenure: in *Evolving Land Rights, Policy and Tenure in Africa*, at p.229.

²³ Camilla Toulmin, *supra*.

found under the imperial period.²⁴ The ownership of land resides with the state, but the right to use it is exercised by the peasant farmers occupying the land. This user right could not be sold or exchanged, but could be passed on through succession. Despite the fall of the Deng, this land arrangement still remains in force. Article 40 of the Constitution of Ethiopia adopted 8 December 1994, provides:

“The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the state and in the peoples of Ethiopia and shall not be subject to sale or to other means of exchange.

Ethiopian peasants have right to obtain land without payment and the protection against eviction from their possession. The implementation of this provision shall be specified by law.

Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law.

Niger: In Niger, the advent of colonial administration and its reliance on the local chiefs had resulted in a deeply rooted family-oriented system of land holding, whereby land remained in the extended family and was inherited. The amount of land one received was no longer based on need but rather on family connections. Despite the abolition of slavery, several groups remained in subordinate relationships and land ownership became a major class distinction. Alliance with the colonial administration gave rise to privileges which were exercised by accumulation of land for ones self and family. This, plus the individual ownership of land introduced by the French administration created a class of landless farmers, living either as indentured servants or tenants on land. As a result of the prolonged drought and famine in the decade after independence, which resulted in a large number of internally displaced persons, agricultural export production collapsed. In the wake of the disorder, in 1974 Seyni Kountche seized power under the promise to eliminate hunger by making food production and national self-sufficiency the country’s highest priority. In a speech following the coup that year, Kountche, assigned all farmers ownership rights to the lands they were cultivating, regardless of the previous tenure arrangements, a policy popularly referred to as “land-to-the-tiller”. He said:

“About field, the first measure is that from this declaration on, any field cultivated by a given farmer under any status, stays and remains permanently at the disposal of that farmer, regardless of the previous arrangement that allowed that farmer to acquire the field.”

Since then subsequent legislation has been introduced to rationalize the institutions administering land.²⁵ In Article 1 of the 1993 ordinance, the objective of the reforms is stated as the assurance of the security of rural farmers by recognition of their rights and a preference of development by the rural population. In this regard, Article 4 provides that all the rural natural resources form part of the common heritage of the

²⁴ Julian Quan: Land Tenure, Economic Growth and Poverty in Sub-Saharan Africa, in *Evolving Land Rights, Policy and Tenure in Africa*.

²⁵ Ordinance No. 93-015 of 2 March 1993

people, and all Nigeriens have equal right of access to it without discrimination based on sex or social origin. Article 5, states that the property rights exercised over land resources are equally protected by law whether derived from custom or written law. Finally, Article 7 provides that, the utilization of the rural natural resources is determined by the competent authorities, in consultation with the population concerned. The organization and composition of the competent authorities for land administration are set out in the Décret No, 97-008/PRN/MAG/EL, of 10 January 1997.

Social, Political and Equity Aspects of Land

The predominant economic activity for the majority of people in most countries of Sub-Saharan Africa is agriculture, and the greatest number of the population live on the land in rural areas. In the face of growing populations and land scarcity, largely due to ecological changes extending the Sahel southwards, the conservation and allocation of the vital land resource is critical for the development of many countries in Africa and the well being of the individuals that depend on it for their livelihood.

In the face of overwhelming evidence that poverty in Africa is increasing rather than diminishing despite millions of dollars in development aid, donors have keyed on land reforms as the solution to creating wealth and eradicating poverty in Africa. It has been argued forcefully, I might say, that traditional land use has been the cause of the failure to develop a land market and credit system for rapid income growth for the rural and urban masses interested in agriculture. Customary land use has been characterized essentially as ‘communal’ and ‘usufruct’, thus temporary and not conducive to individual entrepreneurship, which is largely credited with the rapid economic revolution in Europe. For this reason, policy makers have long assumed that, instituting individualized freehold tenure, accompanied with a universal titling system, is the key to development, as it would result in increased security and efficiency for land users. In turn, tenure security is deemed critical to stimulate long-term investment in both land and production and to encourage efficient resources management. Furthermore, they argue that land registration would encourage the development of land markets and provide an opportunity for officials to monitor land transfers, thereby clarifying ownership. “In contrast, customary land tenure –which is often perceived by scholars and policy makers to be founded on communal land ownership, free access to resources, and a near or total absence of user regulation – has often been seen as an obstacle to agricultural intensification and the goals of the modern state”.²⁶

The experience in Africa, so far, with titling has not been very encouraging. First of all, the fact that many countries that attempted to eradicate customary tenure are now restoring its application is a sign of its

²⁶ Annmarie M. Terrciano: “Contesting land, Contesting Laws: Tenure Reform and Ethnic conflict in Niger” 19 Colum. Hum. Rts. L. Rev. 723 (1998)

enduring value as a stabilizing social force for the ordinary African man and woman.²⁷ Secondly, the results of titling in most parts of Africa show that the intended benefits have not been realized. In Kenya, for example, empirical research carried out in Western Kenya shows that the titling has not increased access to credit. The ordinary African man or woman holds land not as a commodity of exchange but as a reservoir of wealth, prestige and social status. A source of belonging in the community and existence on this earth. In the soil, he/she finds produce for nourishment, and trees for timber, firewood and clothing (barkcloth). It is again in the soil that he joins his ancestors. The family burial grounds are sacred and as important as the soil itself. Thus, the myth long held that the African does not have any conception of individual ownership of property, does not represent the true relationship between the African and his/her land.

In order to be true to the African concept of land tenure, agricultural land (including pastoral land), covering the soil and water, excluding minerals, must be considered a national treasure, as proclaimed in the Ethiopian Constitution and the Land Law of Niger. The latter states in Article 4: “Les ressources naturelles rurales font parties du patrimoine commune de la Nation. Tous les nigériens ont une égale vocation à y accéder sans discrimination de sexe ou d’origine sociale.” That would be the beginning and end of the ‘communal’ property theory. True to custom, once land has been allocated and exploited, it then belongs to the ‘tiller’ absolutely, to the exclusion of others, except for the reserved commons which are preserved for common grazing or preserved forests which are used for timber, firewood and other natural fruits of the soil, and the interests of successors in title. This should be the beginning of the enquiry, on how these rights can be secured and exploited for maximum economic benefit, in accordance to the traditional rules of the community concerned on land use. For example, individuals traditionally were only allowed to own as much as is sufficient for themselves and their families. Excess land was distributed to families that needed it and to new comers if no community members needed it. The duty of Government should be to install institutions and mechanisms that facilitate the identification and enforcement of and development of the customary rules. It is important that such mechanisms ensure that the rules can be administered flexibly to allow for evolution of norms in keeping with changing times. Limitations on land allocations and restrictions on land sales, especially to strangers are not novel. Locke’s sufficiency and spoilage theory would obviously support such limitations.²⁸

Property Rights and Democracy

A common feature of many Land Reforms so far undertaken in Africa is the lack of democratic participation in their formulation. It is conceded that extensive consultations are conducted, as was done

²⁷ Caeriviene and Debene, *supra*, report that in French speaking Africa, the natives viewed the registration of land as an incomprehensible colonial imposition, used as a vehicle for disconnecting them from their culture. It was largely ignored. See Para. 32.

²⁸ See also the Report of the Presidential Commission of Inquiry into Land Matters, Vol. I, at P156.

in Mozambique, and debates are conducted in the legislature, as happened in Uganda and Tanzania, but one must ask whether these forums are adequate for evaluation and crystallization of concepts such as are needed for reform of a vital sector like land on which virtually every individual in the country derives his/her livelihood. A subsidiary question may also be asked whether in absence of a truly democratic form of government, it can be said that the necessary 'consent' or 'social contract' is achieved through the consultation process or parliamentary debates conducted before passage of such important reforms. Another problem that arises is that commissions of inquiry established for such consultations are manned by highly trained individuals, with definitive ideas as to what they wish to obtain from the public inquiries, but the ordinary peasants, most likely to be affected by the proposed reforms, are inadequately represented. In most cases, the NGOs who take up the cause of the rural poor come to the game rather too late to affect meaningful changes to already fixed recommendations. In absence of a democratic process, the consultations and deliberations, which precede these reforms, remain suspect as representation of the common will.

In the writings of St. Thomas Aquinas, for example, we find a justification for private rights to goods held in common, "insofar as those rights serve to promote the common good." It is asserted that "the division and appropriation of property, which proceeds from human law, must not hinder the satisfaction of man's necessity from such goods. Equally, whatever a man has in superabundance is owed, of natural right, to the poor for their sustenance."²⁹ And, introducing his 'social contract' theory, Locke asserted that the moral foundation for private property rights is derived from the 'social contract, grounded in 'right reason', which people enter into when they form a State. Thus, people 'may by social contract agree to a system of unequal landholdings so long as the general well-being of the populace is improved.' If unrestricted private property rights are to be morally justified by this line of reasoning, there must be a demonstration that members of the society consensually entered into a social contract that accords legitimacy to inequality in property holdings and secondly, that such inequalities promote, or do not harm, societal well-being. These are not archaic theories of other bygone ages. The New York Times of April 14, 2002, reports that the plans for reconstruction of ground zero, the site of September 11th plane crash in the Twin Towers in Manhattan, will be developed by consensus, for the 'common good'. "Few mourn the time when a handful of powerful people could shape a city-scape at will, as historians say the Rockefeller family did in the building of the World Trade Center in the 1960's and 70's.

In countries like Senegal, Uganda and Tanzania, institutional arrangements have been made to ensure that village or District committees involved in the adjudication of land disputes, allocation and management of land are elected. On the face of it, this process may satisfy the requirements of democracy in the

²⁹ Jeffrey Riedinger: Property Rights and Democracy: Philosophical and Economic Considerations" (1993) 22 CAPULR 893.

management of land resources in the rural areas. However, reports from actual operations of such committees seem to suggest that land allocation has not been fair and equitable. In many cases the wealthy and politically connected have succeeded to amass land beyond their immediate needs, through wielding influence and in some cases corruption. In other cases, rights to land are often asserted by individuals who do not actually own the land, to the exclusion of others. Similar problems have been recorded in the process of Land Reform in Côte d'Ivoire and Niger by Camilla Toulmin and Julian Quan.

³⁰For the process of land reform to be successful, a process of democratization and good governance must be promoted, and specific rules must be set up to curb the discretion of those entrusted with land management. The national land laws should be followed by detailed regulations specifying the criteria for identifying claimants to land, the extent of land that may be registered in their names and use to which particular lands should be devoted, and over what period of time unused land may held before being re-distributed to others in need. Once such rules and regulations have been adopted through a process of consultation and debate, at the local and national level, any variances to them should only be granted after consultation and consent by the communities concerned. In fact, this is what prevails in many towns in developed countries where the process of titling exists. In my town, Westwood, any extension to a house beyond a given perimeter, within a given area of land, requires the consent by neighbors and must be approved by the town council.

Conclusion

There are valid economic reasons for attempting to create a land market in Africa, and this cannot be done without establishing a reliable system for ascertainment of the various property rights of individual landowners. It should be realized, however, that in the case of societies dependent on agriculture, as the sole source of livelihood and revenue growth, establishing a free market trade in land generates social and economic problems, that must be addressed at the same time as the reforms are undertaken. As countries experience population growth and expenditures on such modern necessities as education, medicine and amenities such as improved housing, electricity and better communication, the temptation to sell or mortgage land will grow, resulting in reduced agricultural output. In addition, more and more people will leave the rural areas in search of gainful employment as land becomes scarce. It will thus become necessary to match the land reforms with creation of an industrial sector, which can absorb the increased labor force.

On the question of land reform, we can proceed from the premise that Governments have an interest in correcting any injustices in the distribution and utilization of such a vital natural resource as land. Furthermore, Governments would have an interest in reducing land disputes generated by uncertain

³⁰ Registering Customary Rights in Evolving Land Rights, Policy and Tenure in Africa.

boundaries and undefined land rights. On this basis, then there would be good reason for government to institute a process of land reform, which aims to correct any patent injustice in land distribution and use, as well as establish a credible land adjudication mechanism. Almost all African countries have inherited land laws, which provide for issuance of registered titles to land, in the form of leasehold or freehold titles, upon individual or group application, depending on the area in which the land is situated and the its intended use. In general, however, titles or concessions are mostly issued for urban land and large estates, often owned by foreign investors. In the rural areas, land is held on small family-owned plots in accordance with customary law. i

In the case of land held under customary tenure, the recent experiments with issuing Certificates of Customary Tenure in Uganda, Mozambique, Niger and South Africa to individuals and to communities would seem to be a commendable way to proceed, in terms of beginning a process of establishing irrefutable evidence of land rights. In Niger, the Government even embarked on establishing a Rural Code aimed at setting out a legal framework for identification of rights and duties, obligations and sanctions, levels of competence and rights of appeal associated with different structures of land management. The Rural Code operates within the overall principles established in the 1993 Land Ordinance, which provides that rural natural resources are part of the common heritage (“patrimoine commun”), to which everyone in Niger has equal right of access, without discrimination as to sex or social origin.

The titling of land inherited from the colonial period uses the Torrens system of land registration. It is incorporated in most African laws and continues to form the basis of current schemes for issuance of land titles. The Torrens system was meant to be a simplification of the English tenure system and was first devised for use in Australia.³¹ It actually does not represent the system of real property under English Law, which in former British colonies, is the prevailing substantive law governing land. The titling system, once adopted, extinguishes all other competing legal forms for holding and managing land. The land title is conclusive proof that the holder is the absolute owner of the land specified in the title. Short of fraud, the title deed is indefeasible in any dispute over ownership of the land. If there are any other valid interests in land, these must be registered as liens, otherwise they are unenforceable.

In Africa, however, few people bother to comply with all the registration requirements under the law. As a result, interests in the land, which subsequently arise from inheritance or gifting remain unregistered and are legally unenforceable. The end result is that a lot of injustice occurs when such interests are asserted and rejected by the courts. I believe that it is necessary to devise a new system for operation with

³¹ Webster's Law Dictionary describes the Torrens title system: A system for registration of land under which, upon the landowner's application, the court may, after appropriate proceedings, direct the issuance of a certificate of title. With exceptions, this certificate is conclusive as to applicant's estate in land. System of registration of land title as distinguished from registration or recording of evidence of such title. The originator of the system was Sir Richard Torrens, 1814-1884, reformer of Australian Land Laws.

the recording and certifying of customary land rights, which would be capable of reflecting the complexities of the customary interests in and over land.

It should be possible to require that the certificate of customary tenure bear all the names of individuals with interests in the land, the husband and wife as primary beneficiaries, in equal share, and the children, as secondary beneficiaries, also in equal shares without discrimination.³² A register would be established in the village for the demarcated private land and also for the ‘commons’, whether on private or public property. The “commons” would cover areas for common grazing or forests for common use for cutting trees and fetching firewood, and streams or water holes used in common by the community to draw drinking water. Also, the recognized paths and roads connecting villages should be identified, and each landholder should be assured a right of way to the waterholes for his cattle or for going to the village market. These are important issues because in most villages, these rights exist and are respected. Once land is titled, the registered owner would feel capable to extinguish these rights, by fencing off land and other means.

While collective or group rights, as recognized in the land reforms in South Africa, Mozambique, Uganda, Tanzania, Niger and other countries, are important, they may not be the solution in the long term as society develops and demands for more individualized rights grow. The experience in Madagascar, where group titles were first instituted, shows that some individuals who registered the group lands in their names as trustees for communities or families, subsequently sold the property as if they were individual owners. It seems that sophisticated legal mechanisms would have to be devised, such as establishing trust and other legally binding agreements to govern the regime of group rights. Also, while it may be convenient now to hold land as a collective, in future years such arrangement may not be the most productive use of the land and undoing the collective could prove difficult.

In summary, while it is recognized that in order to accelerate the pace of development, it is not possible to stop the march towards formal recognition of individual property rights through a process of mapping, demarcation of boundaries, registration and certification of interests in land in the rural areas of Africa, this process should be allowed to evolve at a speed which allows those most affected to adjust, and in full respect of the customary or traditional land tenure.

³² This would be a necessary reform to bring customary law up-to-date with prevailing international conventions and humanitarian law.

SOCIAL, POLITICAL AND EQUITY ASPECTS OF LAND AND PROPERTY RIGHTS

COMMENTS: JEAN-PIERRE CHAUVEAU¹

Synthèse du document du Dr Ssekandi

Le document du Dr Ssekandi défend essentiellement la thèse que la principale injustice à laquelle est confrontée la paysannerie africaine est la non reconnaissance juridique des droits coutumiers. Il analyse de manière compréhensive les conséquences de cette injustice fondamentale :

- Elle fait de la grande masse des agriculteurs et des éleveurs du continent des squatters dans leurs propres pays ;
- Elle les rend vulnérables vis-à-vis des groupes sociaux les plus riches et les plus puissants ;
- Elle les soumet à la contingence des décisions judiciaires ;
- Elle les prive de manière arbitraire de la valeur patrimoniale qu'ils attachent à la terre, comme le manifeste sur un plan économique la façon dont est tranchée la question des compensations en cas d'expropriation pour cause d'intérêt public.

La raison de cette injustice s'explique historiquement par le jeu des intérêts et des rapports de forces socio-politiques. Les groupes dominants ont toujours accredité l'idée que les modes traditionnels de tenure foncière sont incompatibles avec les conditions du développement. Or, selon l'auteur, l'argument selon lequel l'échec des politiques de développement est imputable aux modes coutumiers de gestion foncière est difficilement soutenable. C'est au contraire la conception erronée des droits coutumiers, restreints à de simples droits d'usage, qui a légitimé la substitution de l'autorité foncière des chefs coutumiers par le pouvoir colonial conquérant afin de préserver les intérêts fonciers coloniaux au détriment de ceux des producteurs ruraux. Les gouvernements africains indépendants ont ensuite repris à leur compte l'héritage colonial. La non-reconnaissance juridique des droits coutumiers a permis d'assurer aux élites politiques, administratives et économiques le pouvoir de définir les droits de propriété de manière discrétionnaire et conforme à leurs intérêts.

Le Dr Ssekandi tire les conséquences de cette analyse sur le plan des politiques foncières et propose une solution. La démarche peut être résumée par les propositions suivantes :

Dans le contexte contemporain du développement, la place du marché dans l'affectation des droits ne peut être ignorée. Toutefois, il est légitime et économiquement souhaitable, avant d'entreprendre des réformes qui promeuvent les mécanismes de marché, de tenir compte des conséquences sociales et des effets d'exclusion massive qu'elles pourraient avoir sur les catégories les plus vulnérables. Il est donc nécessaire, dans un premier temps, de corriger la principale injustice que constitue la non-

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reconnaissance juridique des droits coutumiers détenus par la grande masse des agriculteurs et éleveurs africains.

La reconnaissance juridique des systèmes traditionnels de droits collectifs peut concilier la réhabilitation de la conception africaine de la propriété foncière et la nécessaire rationalisation des droits coutumiers, en particulier au regard du recouvrement des différents intérêts au sein des familles et des clans concernant l'usage et le contrôle de la terre. C'est précisément faute d'avoir négligé le caractère patrimonial de la terre que les pays qui ont tenté, à juste titre, de réhabiliter la tenure coutumière n'ont pas abouti aux résultats escomptés. Les droits communautaires ont continué à être administrés par des institutions politisées qui n'ont pu empêcher les classes privilégiées de tirer avantage du système.

En conséquence, le Dr Ssekandi propose la mise en œuvre d'une procédure systématique de certification des droits coutumiers collectifs, faisant apparaître l'ensemble hiérarchisé des ayants droit. Un registre établi au niveau de chaque village permet de délimiter les zones de propriété privée, de propriété coutumière et de terres communes (tant privée que coutumière). Une telle procédure permet de rationaliser les droits coutumiers tout en leur donnant une validité juridique. Gérée localement au niveau villageois, elle permet en outre d'assurer la flexibilité des droits et d'éviter la confiscation par les plus riches ou les plus puissants des avantages de la loi. Toutefois, une telle réforme doit être accompagnée par un processus de renforcement de la démocratie et de la bonne gouvernance.

L'analyse séduisante proposée par le Dr Ssekandi me semble globalement convaincante sur le plan historique (on pourrait nuancer certaines interprétations en tenant compte des différences dans les politiques coloniales et les trajectoires historiques entre l'Afrique de l'Ouest et l'Afrique de l'Est ; je n'y reviendrai pas dans mes commentaires). Toutefois, elle me semble incomplète en ce qui concerne le diagnostic des processus liant les aspects sociaux, politiques et d'équité aux droits de propriété. En outre, il me semble important de ne pas centrer le thème de ce panel uniquement sur les droits de propriété au sens strict et de considérer à leur juste importance la question des droits délégués (ou dérivés, c'est-à-dire les modes de faire valoir indirects). La prise en compte de ces droits peut donner des pistes de réflexion intéressantes pour appuyer la dynamique des droits de propriété dans des contextes où la question foncière est fortement politisée et porteuse de conflits dont on ne peut sous-estimer l'importance.

Mes commentaires ne peuvent être que succincts et visent essentiellement à introduire à la discussion.

Compléments sur les processus liant les aspects sociaux, politiques et d'équité aux droits de propriété

La dimension socio-politique est inhérente à la définition des droits.

La réalité des processus d'affectation des droits et leur dynamique ne relèvent ni seulement de la préférence des agents pour la sécurité et la valorisation économique de l'accès à la terre, comme le prévoit la théorie économique des droits de propriété, ni seulement de la préférence des populations

paysannes pour les normes collectives, comme le postule le Dr Ssekandi. Les études empiriques, notamment historique et anthropologique (Berry, Firmin-Sellers, Leach et al., Ribot, Lund, Mathieu, Moore, Brenda-Beckman entre autres) montrent que la définition des droits sur la terre ou sur les ressources naturelles relèvent de la confrontation-négociation politique entre des groupes d'acteurs sociaux hétérogènes, aux intérêts différents, et entre des instances d'autorités diversifiées, porteuses de principes contradictoires quant à la légitimation des droits.

Cela vaut pour comprendre l'influence des États (qui ne sont jamais neutres, comme le souligne le Dr Ssekandi) sur l'évolution des droits de propriété, mais cela vaut également pour comprendre l'influence des systèmes politiques domestiques, villageois et locaux sur l'évolution des droits dits coutumiers. En particulier, il faut prendre en compte le haut degré " d'intégration compétitive " entre élites traditionnelles et élites modernes et sa conséquence sociologiquement normale : la politisation des autorités locales et, au niveau national, la politisation de la question foncière elle-même. Les travaux de Christian Lund au Niger sur les effets concrets de la réforme foncière, à laquelle le Dr Ssekandi fait référence, montrent que le renforcement des autorités coutumières via les certificats fonciers coutumiers n'aboutit pas nécessairement à une clarification des enjeux fonciers et à une plus grande équité dans le jeu foncier.

La légitimation des droits coutumiers, considérée comme un " contre feu " à l'expression des asymétries de pouvoir social et politique, n'épuise donc pas la question du renforcement de l'équité dans l'affectation des droits. Au lieu de clarifier les règles du jeu, elle peut contribuer à exacerber le pluralisme institutionnel et légal qui prévaut de fait dans les pays africains (et ailleurs : Griffiths), ce qui peut favoriser les jeux de pouvoir et l'inéquité (Mathieu). Il peut sembler préférable, par conséquent, de clarifier l'enjeu foncier en assumant explicitement sa dimension politique.

Les droits coutumiers de propriété doivent être envisagés comme des ensembles complexes et négociables de faisceaux de droits. Les régimes de propriété empiriques ne sont pas réductibles aux oppositions simples entre droits individuels et droits collectifs au sein des familles ou des lignages, entre droits centrés sur une logique de subsistance et droits orientés sur la recherche de rente et de profit, ou entre droits patrimoniaux et droits de propriété absolue (un nombre significatif de régimes locaux de propriété reconnaissent de facto et quelquefois légitiment l'aliénation des droits sur la terre). Il arrive aussi, assez souvent, que le village ne soit pas une unité pertinente de maîtrise ou de gestion foncière traditionnelle (cas de maîtrises foncières supra-villageoises ; cas de dysharmonie entre régimes de résidence et régimes d'héritage).

Que signifie alors la mise en œuvre rationnelle et équitable de la validation juridique des droits coutumiers ? On sait que les situations foncières sont souvent caractérisées, en particulier en Afrique de l'Ouest, par des tensions à propos de l'accès à la terre au sein des groupes familiaux ou villageois (entre jeunes et vieux, entre villageois et ressortissants citadins, entre notables traditionnels et

“ cadres ” ou “ intellectuels ” urbanisés), par l’existence de contestations entre villages, et par la coexistence de communautés “ autochtones ” et de communautés de migrants (nationaux ou non) ayant acquis des droits d’administration foncière, souvent individuels, dans un cadre coutumier. Quelle interprétation de la tradition, parmi les diverses interprétations possibles, devra-t-on privilégier alors ? S’agira-t-il, par exemple, de reconnaître les droits d’administration, voire de cession, acquis par des agriculteurs non autochtones dans un cadre coutumier, ou de les ignorer au nom du principe présumé général d’incompatibilité de la coutume avec les pratiques de cession de droits ? On sait que cette question fait l’objet dans certains pays de débats et contribue précisément à la très forte politisation de la question foncière.

La procédure de certification des droits coutumiers proposée par le Dr Ssekandi constitue certes une approche utile, d’ailleurs expérimentée partiellement dans certains pays et que prévoit aussi la nouvelle législation ivoirienne de 1998, en voie d’application. Les “ certificats fonciers ” prévus par la législation ivoirienne peuvent permettre de compléter les suggestions du Dr Ssekandi : les certificats peuvent être individuels ou collectifs et prévoient la prise en compte des “ occupants de bonne foi ” étrangers à la communauté autochtone, qui peuvent accéder à la propriété s’ils sont de nationalité ivoirienne avec l’accord des “ propriétaires coutumiers ”.

Mais on sait également que le processus de mise en œuvre de dispositions juridiques nouvelles (même lorsqu’il s’agit de réhabiliter officiellement les droits coutumiers) peut alimenter un processus clandestin de renégociation des droits acquis, même lorsque le dispositif d’identification et d’enregistrement des droits coutumiers s’efforce d’être le plus neutre possible (Koné et al., sur le cas du Plan Foncier Rural en Côte d’Ivoire). On doit donc appliquer à une politique systématique de réhabilitation des droits coutumiers la mise en garde de bon sens que le Dr Ssekandi adresse à une politique volontariste de privatisation des terres : associer la mise en œuvre d’une telle réforme à l’identification précise des problèmes sociaux et économiques qu’elle peut soulever et à une procédure de suivi-évaluation indépendante.

Dans la perspective de lutter contre l’injustice que constitue la non-reconnaissance juridique des pratiques locales (que je préfère pour ma part à l’expression rhétorique de “ droits coutumiers ”), les observations précédentes engagent à sortir d’une alternative trop simplifiée entre une approche misant sur l’officialisation des droits coutumiers et une approche misant sur une offre d’innovation institutionnelle exclusivement basée sur la titrisation.

On peut avancer les éléments de réflexion suivants:

- Ni la réhabilitation des droits coutumiers ni la titrisation ne semblent possibles sans coûts sociaux élevés lorsque les situations foncières sont très conflictuelles. Les demandes locales sont alors trop contradictoires pour aboutir immédiatement ou rapidement à des accords stables et pour permettre des constats sur les statuts fonciers existants.

- L'enregistrement systématique des droits coutumiers ne peut faire l'économie d'une procédure d'information voire d'une phase de médiation et de négociation collective, qui peuvent être longues et délicates en fonction des situations foncières.

L'approche misant sur la réhabilitation des droits coutumiers et l'approche misant sur la titrisation ne constituent pas les seuls outils possibles de sécurisation des droits locaux. L'appui à la formalisation des droits les plus "sensibles" (en particulier les droits qui découlent de transferts et de transactions coutumières ou d'héritage), si les conditions le permettent, est plus sélective et laisse le champ ouvert à la demande locale en matière d'enregistrement de l'ensemble des droits locaux ou en matière de titrisation.

D'autres approches peuvent ne pas se concentrer sur les droits en tant que tels, mais sur les conditions d'accord sur les règles et les dispositifs locaux de régulation dont les droits sont le résultat. Elles peuvent conduire à promouvoir l'action collective et l'organisation collective privée comme autres formes de coordination possibles entre les différents acteurs, en complément des normes traditionnelles, du marché et de l'intervention publique. Les observations empiriques montrent par exemple qu'il existe des dispositifs conventionnels de proximité originaux, visant à assurer la sécurité des droits et la confiance dans les transactions (Koné & Chauveau, Mathieu et Lavigne Delville). Largement informels, bien que tolérés par les autorités administratives, ces dispositifs mériteraient d'être mieux connus.

La contribution des pratiques de délégation de droits à un accès équitable à la terre et à l'évolution des droits de propriété²

Comme en témoignent le document du Dr Ssekandi, les débats de politiques foncière se polarisent sur la question de la privatisation des terres, et donc sur les seuls droits d'appropriation permanents et transmissibles, qu'ils relèvent d'une appropriation coutumière ou d'un titre de propriété. Bien que particulièrement fréquentes dans les systèmes d'accès à la terre et aux ressources, les formes indirectes d'accès à la terre, à partir d'une délégation de droits de culture ou d'administration détenus par un tiers, sont rarement prises en compte, y compris par les législations officielles. Elles relèvent de formes traditionnelles et non marchandes de prêt ou de clientèle ("tutorat"), de formes marchandes, de type location ou métayage, ou encore de formes mixtes, lorsque les rapports de clientèle se monétisent ou se stabilisent sur le versement d'une rente foncière.

La prise en compte des procédures de délégation de droits semble indispensable pour éclairer les aspects sociaux, politiques et d'équité dans les dynamiques de régulation foncière et dans l'évolution des droits de propriété. La prise en compte de ces droits peut donner des pistes de réflexion

² J'utilise ici et cite abondamment les résultats d'une enquête collective coordonnée par le GRET et l'IIED, avec l'appui scientifique de l'IRD : "Droits fonciers délégués en Afrique de l'Ouest. Reconnaître et sécuriser les procédures. Synthèse", DGCID-MAE, Série rapports d'études, ainsi que Colin 2001 "Efficience et équité des droits fonciers délégués : éclairage économique", Document de travail N°1 de l'Unité de recherche IRD Régulations foncières, politiques publiques, logiques des acteurs.

intéressantes pour appuyer la dynamique des droits de propriété dans des contextes où la question foncière est fortement politisée et porteuse de conflits dont on ne peut sous-estimer l'importance.

Étant donné leur importance, leur impact sur l'équité est potentiellement important. Les droits délégués jouent un rôle essentiel dans la régulation foncière locale et leur importance a crû avec celle des migrations rurales (celles-ci étant aussi déterminées par la possibilité d'accéder à ces droits).

Les modes de faire-valoir indirect sont les canaux privilégiés de la marchandisation et de la contractualisation des rapports fonciers. Ils sont donc également porteurs d'enjeux sociaux et politiques importants.

Du fait de leur forte dimension conventionnelle, les droits délégués marchands semblent compatibles avec l'enchâssement encore très fort des droits d'appropriation dans les relations sociales. D'après des enquêtes disponibles (cf. note 2), leur impact sur l'équité est variable. Il ne peut s'analyser en dehors d'un contexte donné et de la répartition des droits d'appropriation. Le contenu même des arrangements dépend du degré d'asymétrie entre les acteurs et des rapports de force locaux : un même type de contrat peut, dans des contextes différents, avoir un impact opposé (c'est principalement pour des systèmes de culture exigeants en capital que les droits délégués peuvent favoriser les grosses exploitations, davantage capables de faire face aux avances aux cultures). Les contrats agraires semblent ne pas souffrir d'une insécurité particulière. Par contre, la préférence des propriétaires coutumiers pour le revenu tiré de la délégation de droits peut être préjudiciable à la sécurité d'accès au foncier des ayants droit familiaux.

Malgré leur caractère traditionnel, les droits délégués non marchands, relevant de formes de prêt, sont souvent soumis à des renégociations, quelquefois drastiques et allant jusqu'à des retraits de terre. Dans les situations, fréquentes, où ces droits délégués constituent la principale forme de coordination entre des communautés d'agriculteurs et d'éleveurs d'origines différentes (autochtones, migrants nationaux et non nationaux), leur déstabilisation, notamment par la remise en cause des délégations de droits par les nouvelles générations, peut entraîner des conflits violents. C'est en particulier le cas lorsque les délégations de droits camouflent des arrangements fonciers marchands ou des pressions de la part des gouvernements de promouvoir une colonisation agricole. Ces conflits peuvent avoir des répercussions au niveau national et international (notamment avec la politisation de la question des "étrangers").

Dans le contexte qui prévaut en Afrique, le marché du faire-valoir indirect peut être néanmoins, sous certaines conditions, un dispositif plus approprié que le marché de l'achat vente (Colin 2001) :

Pour constituer un élément souple et évolutif d'efficacité et d'équité dans la phase de transition des droits de propriété. Les droits délégués permettent une adaptation des systèmes de production face aux changements rapides des conditions et des stratégies économiques. La grande majorité des économistes reconnaît désormais la fonctionnalité et l'efficacité des contrats agraires, en particulier

dans un contexte de marchés imparfaits (Deininger et Feder, 1998:26). La palette des formes de délégation de droits permet, en général, un ajustement efficient (sous contrainte) des dotations différentielles des acteurs en facteurs (terre, travail, capital, capacité techno-économique, insertion dans les réseaux marchands, etc.), dans un contexte d'imperfection ou d'inexistence de certains marchés et de risque de comportements opportunistes (ainsi que de risques liés à la production). Le marché du faire-valoir indirect peut permettre un transfert à la fois efficace et équitable de la terre des grandes vers les petites exploitations. Il peut également pallier les imperfections du crédit, de l'assurance, de l'expertise technique de la location d'équipement de culture, etc. auxquels se heurtent les petits exploitants.

Pour faciliter l'évolution des droits de propriété dans un sens qui soit moins conflictuel et moins excluant vis-à-vis des catégories d'usagers les plus vulnérables, tant vis-à-vis de la législation que de la coutume. Du fait de leur forte dimension conventionnelle, les droits délégués peuvent contribuer à la négociation d'accords sur l'évolution des droits d'accès aux ressources foncières et naturelles.

SOCIAL, POLITICAL AND EQUITY ASPECTS OF LAND AND PROPERTY**DISCONTINUITY AND EVOLUTION – COLONIALISM AND BEYOND****COMMENTS: CHRISTIAN GRAEFEN****Introduction**

Colonies were acquired mainly for economic reasons. At first trading posts were established, followed by military and administrative installations and missions. The main interest was to extract raw materials, minerals and agricultural export crops with a maximum of return. To reach this objective it was necessary to control labour and land. Legislation was the most favoured instrument to intervene within autochthonous (used in this paper parallel to customary) land management and land tenure. European concepts of land tenure were introduced with the intention to assume control over “vacant” and “unused” land or land required for the purposes of the state.

However, claims based on the theory of vacant land under e.g. the Code Civil were difficult to enforce. Thus the term “vacant” was defined by the colonial administration in 1935 to mean “not used for more than 10 years”.

The traditional subsistence groups also objected to the introduction of cash crops. By introducing poll or hut taxes and by issuing concessions for plantations it was tried to break up the structures of subsistence farming, to raise the necessary funds for covering the expenses of the colonial administration and to transfer surplus earnings to Europe. By introducing cash crops and perennial crops, investments into the land became essential and the value of land increased manifold, turning it into a commercial asset and object of sales and speculation. Especially in and around towns, along major roads and coastal lines and in climatically favoured (highlands) regions a land market developed (Muenkner, 1995).

It was officially declared that the rules of customary African law would be respected, however, in practice it was the aim of all colonial governments to transform African society and economy and to “develop” it. Development in this context meant imposing European models, standards and living styles. This influence of acculturation covered all aspects of life.

The autochthonous, unwritten land law with its collective use rights in favour of subsistence groups, its balanced conflict solving institutions, its complexity and close linkage to inheritance, cultural and social rules/regulations was considered as an obstacle to development. Acquisition of land for development projects, infrastructure, farms for (white) settlers, plantations and the broad-scale production of cash crops was “hindered”. Thus, the long-term goal was a land reform leading to the

introduction of individual property of identifiable pieces of land. In this way, individual households would be emancipated from their lineage and kinship and the (semi-)autonomous subsistence groups would be weakened (Muenkner, 1995).

Despite different legal systems applied in Britain and France, the land tenure policy of British and French colonial administration was similar as far as the legal basis and the effects are concerned. The first and most important question was: Who is the owner of the conquered land? (CILSS, 1994)

Both colonial powers adhered to the doctrine that all occupied land was held in the communal tenure and that the ownership of such land was vested in chiefs as trustees (indirect rule) for existing and future generations, that individuals had only use rights and that all vacant land came under the jurisdiction of the colonial authorities and could be appointed to their discretion and subject to conditions determined by them. In the long run a remarkable distinction on land tenure systems, its administration and arising conflicts emerged between countries with large white settler communities (e.g. South Africa, Southern Rhodesia, parts of Kenya, Namibia, Ivory Coast, Mozambique, Angola) and countries with relatively small or even marginal settler communities (Rwanda, Malawi, Lesotho, Nigeria etc.). Regarding land reform, land redistribution and past and present severity of land conflicts, settler countries obviously have to be described in a complete different manner (GTZ , 1997).

The British Model

In East Africa (and basically not the countries of West Africa) the first rights to parcels of land in private occupation were recorded by certificates of occupancy for a period of 21 years in 1897 under the East Africa Land Regulation (Maini, 1967). In 1901 the East Africa (Land Acquisition) Order empowered the colonial government to sell land and buyers to obtain freehold, however, these rights were granted subject to the obligation of the buyer to develop the land. Leases of Crown Land were granted to Europeans and Americans for a maximum period of 99 years. Africans (natives) or other non-Europeans could only obtain licences of temporary occupancy of one year including a period of notice of 3 months and on payment of a monthly rent. They were not allowed to erect buildings on this land, only huts or other temporary structures were permitted. The licence could be rescinded by the Commissioner of Lands, if the rent was in arrears for one month or if the land was not kept in a reasonably clean condition. In theory, the rights of Africans were respected. In 1908 the Land Titles Act came into force drafted along the lines of similar legislation in Ceylon (Sri Lanka) and based on the uncertainty, which had developed mainly with regard to the vicinity of towns. It was feared, that squatters could occupy large tracts of land, claim to have customary rights and demand compensation for leaving the land. This Act contained rules for adjudication of claims, however, did not provide for registration of transactions. It emphasised the legal character of titles and formality of procedures. Land Registration Courts were established. Thus, it provided the legal base for slow and expensive procedures, out of reach of the ordinary small land user. A certificate of ownership issued under this

law conferred absolute title to the property not subject to any interest not expressly mentioned in the certificate (Maini, 1967; Muenkner, 1995).

Racial segregation was introduced in areas in and around towns and in specially fertile land (e.g. highlands of Tanzania and Kenya) According to the Land Act of 1925, under which leases could be granted for 99 years, together with the Kenya (Annexation) Order in Council of 1921, all lands reserved for the benefit of an African tribe were vested in the Crown so that the rights of the Africans in such lands were lost (Maini, 1967). The British colonial government accepted the existence of a dual or plural legal system of land tenure and land law. Colonial law served primarily to acquire land for public purposes and for leases to investors and settlers, while customary law applied to indigenous people in “reserves”. Only in Uganda, absolute private titles to land for Africans were issued and conferred to the Buganda chiefs with powers to apportion land to cultivators who became tenants-at-will and had to pay rent (Platteau, 1992).

While the British colonial administration proclaimed to respect customary law on the surface, this law was interpreted in a way to suit the needs of the colonial authorities and their doctrine of indirect rule. While strengthening the role of the indigenous authorities in some respect, it weakened their role by integrating them into the colonial administrative system. One element of British colonial land policy in settler economies was that only land under active, visible cultivation was considered to be really occupied. All unoccupied land was declared “crown land”. Within crown lands Africans were mere tenants-at-will of the crown subject to development conditions and payment of rent and the land could be leased to European settlers. Land other than native reserves (occupied by African) and lands set aside for Africans but not used could be made available to Europeans whenever the latter deemed it necessary. This permitted expropriation of large portions of the most fertile lands. Sales of “native” lands to non-Africans were strictly prohibited. Within “native” areas traditional land use practices had to be continued in the sense that individual titles could not be granted, because all “native” land was deemed to form a corporate patrimony. Land transactions among Africans had to be approved or undertaken by chiefs.

In 1938/39 new ordinances and amendments allowed to reserve certain regions (highlands) for the permanent exclusive occupation and ownership of Europeans. Reserves ceased to be called crown land, native lands and native reserves were called tribal trust land. Land sales between Europeans and Africans were prohibited, contracts between settlers and non-settlers discouraged (Platteau 1992, Muenkner 1995).

The French and Portuguese Model

In the French colonies, the general policy was that of assimilation and the land policy was based on the doctrine “one law for all”. The application of the Code Civil gave all (Africans and Europeans) the right to obtain concessions and to acquire private property of land, if they complied with the rules and procedures of the Code Civil. In theory, customary law was respected, however, the colonial

authorities saw African customary law as inferior and in practice refused to recognise the existence of an indigenous system of land tenure. Gradually, a land monopoly of the state was established, a development which contributed to the feeling of insecurity on the part of the African peasants. The French assumed that the African local chiefs were a kind of feudal monarchs to whose rights they had succeeded by conquest. Even in “occupied” areas, an African inhabitant had no rights without title registration, irrespective of the time he or she had occupied the land (Platteau, 1992). The resistance of Africans to the administrative procedures established by the French colonial administration forced the latter to reconsider their policy and to adopt a more positive approach to customary land tenure practices. Financial constraints and lack of settlers/expatriate staff forced the French to rely more on Africans than they had initially intended. Direct ruling by appointed African representatives became the governing pattern, who often abused their authority. Proof of cultivation and occupation remained with the Africans in front of colonial courts. Recording of customary rights were allowed, however often not their individual registration (Platteau 1992).

In the Portuguese territories (mainly Angola and Mozambique) the official policy was assimilation like in the French colonies. In matters of land law, dualism of customary and colonial law prevailed. The Portuguese colonial regime did not explicitly recognise the different, often highly diverse, local land tenure practices, but was forced by circumstances to integrate them in its administrative machinery, using local chiefs as intermediaries (regulos) among other things to collect taxes and to mobilise labour. As in the case of the other colonial powers, the Portuguese colonial administration issued concessions for land use to settlers without much concern for claims based on autochthonous land rights. Under the policy of assimilation, some assimilated Africans were admitted to the settler schemes. Even though the government officials replaced the customary authorities in charge of land matters, and an informal land market developed around settlements, the customary land tenure system continued to be an important factor everywhere up to present time. Plural social, economic and legal systems are the present feature of this system.

Under the European colonial system, the registration and titling were all cost intensive, time consuming (22 visits to the prefecture in Mauritania for a land use title of 5 years, preparation of 10 documents including a topographic survey) and beside settler colonies without almost any impact (in Senegal only 2 percent of the land was registered according to “modern” procedures during a period of 100 years).

It would exceed by far the scope of this paper to give an account of the development of land tenure systems, land policy and land law in sub-Saharan Africa after independence with respect to tenure security, access to land and equity aspects. Thus, three countries namely Botswana, Mozambique and Senegal, are tackled very briefly to demonstrate different potential land developments and to provoke some guiding questions, probably useful also for future policy decisions (GTZ, FAO, UNEP, 2000).

Botswana Land Boards

Three major types of land tenure system exist in Botswana, namely, customary land (71 percent) state land (23 percent) and freehold land (6 percent) (Riddel/Dickerman 1986). Before 1970, usually the Chief allocated the land to the villages and wards, and the overseers allocated the land to the individual households. Most pasture land remained communal at independence, residential plots and farmland remained with the family for generations, tenure in the land was secure and the land was heritable. The reliance on traditional authorities to manage land in the colonial period produced a reaction later. Even before independence in 1966, there were accusations of favouritism and abuse of power levelled against the chiefs. The first president, Sir Seretse Khama, himself in the royal line of the Bamangwato sub-tribe of the Tswana, moved to dilute the authority of the chiefs and to strengthen the political power of the new national government. The Tribal Land Act was passed in 1968, coming into force in 1970 (Bruce et.al. 1995). The Act has been seen as a relatively effective decentralisation of authority over land, but concerns have been voiced about the domination of the boards by large livestock holders (Parson 1993). There have been frequent changes in the composition of the boards in the attempt to achieve a balance between participation and control.

Under this Act, customary land tenure remained intact. The actual rules for the land distribution and administration on tribal lands did not change, but the power of the chiefs was undermined. The Tribal Land Act vested all the powers of the chief related to land matters in the newly created Land Boards. Twelve Land Boards were established, which started operations in district headquarters in 1970. In 1973, thirty-seven Subordinate Land Boards were established to assist the main boards (Bruce et.al. 1995).

The major functions of the boards are stipulated as follows:

- Granting rights to use land
- Cancellation of any rights, including those made by the chief
- Imposition of restrictions on the use of tribal land
- Land use planning for tribal lands
- Authorizing any change of use and transfer of tribal land
- Hear appeals from Subordinate Land Boards.

The Main Land Board works with the three other local authorities, namely, the District Administration, District Councils and the Tribal Administration. Appeals have to be routed through the District Administration. Consultation by the Board on land policy matters with the Councils is necessary, however, not binding. In the Tribal Administration, the Land Board relies upon overseers/ward heads to sign the application forms for customary grants to ensure that the plots requested are not already occupied. Also, the overseers check to see that the plots are suitable for the land use proposed.

In practice, only heads of households are entitled to apply for and receive land. Thus, women are seriously disadvantaged. Applications for farmlands and residential plots are also made to the Secretary of the Main Board. If the Land Board decides to grant the land, it applies for the Minister's

consent. The common law grants are registered in the Deeds Registry under the Deeds Registry Act (Mathuba, 1992). Disputes of two kinds are observed: between individuals, and between individuals and the Land Board. Disputes between individuals (usually boundary disputes) become difficult to resolve because there are no records regarding the allocations, witnesses may be too old or may have relocated. Disputes between individuals and the Board might occur due to refusal of granting land rights, cancellation of rights, refusal of transfer etc. Previously, all disputes went to the customary court system, which was also under the administration of the Ministry of Lands. Today, all parties and witnesses concerned with the dispute meet with the subordinate Land Board. Land disputes are inherently judicial and not administrative, whereas the Land Boards are solely administrative bodies and have no judicial authority. Often Land Boards are part of the conflicting parties. Thus, 1993 the Amendment to the Tribal Land Act empowered the minister, to establish independent Land Tribunals to negotiate and decide land disputes.

The Tribal Grazing Land Policy (TGLP) has been the most significant tenure reform undertaken by the Boards to date. Land is been classified into three categories:

Communal areas: rights in these customary communal lands remain unaltered;

Commercial farming areas: ranches of 6,400 hectares are surveyed, inventoried, demarcated and then advertised for leasing to individuals, groups, or communities;

Reserved areas: lands were set aside for future use and as safeguards for the poorer members of society (Bruce et.al. 1995).

The TGLP provides the lessee of the commercial farm a number of rights s/he did not possess under customary law. The leases are valid for 50 years, are heritable, and give the lessee exclusive possession of the land and the right to fence. Modern methods of cattle management should be practiced. However, a number of shortcomings evolved in application TGLP:

- The policy completely overlooked the user rights of the San people
- Capital required for modern infrastructure for the rancher was expensive and difficult to obtain at the credit market
- Although ranchers had exclusive rights to large ranches, they continued having access to communal grazing, contributing to further misuse and over-exploitation of pastures (Bruce et.al., 1995).

Concluding, the case of coordinating customary tenure and “modern” tenure forms in Botswana has seen mixed success. A uniform system with institutions was chosen for the whole country, favoured by a relatively homogenous ethnic composition.

The process of privatisation, regardless of effects by TGLP, would have occurred in the communal/tribal lands of Botswana. The TGLP only granted de jure rights to de facto occupations of lands by individuals. Both the TGLP and the Land Boards can be potentially replicated elsewhere and show a remarkable potential for adaptation in legal and institutional terms. Security of tenure has improved, access by minorities and women constitutes one of the major constraints of the present

administrative system. However, Botswana has been able to subsidize its land reform projects and Land Boards (through profits from the mining sector) without establishing a sufficient taxation and re-financing system for the administrative machinery. It serves as an outstanding model for historically developing through three doctrine stages (pre-colonial and autochthonous, colonial, post-colonial with strong evolutionary elements). In general, progress for demarcation of TGLP ranches is slow and reaches in 1993 4 percent of all lands. Injustices are potentially addressed. (Mathuba 1992, Bruce et. al. 1995)

Mozambique – Political Disruption

After having undergone already a doctrine change with assuming the Portuguese colonial power at the beginning of the former century, Mozambique experienced another revolution during and after independence. Severe problems of uncertain land rights, lack of a clearer land tenure policy and absence of an appropriate legal framework governing the use and development of land prevail.

The country's poor economic performance since achieving independence in 1975 can be attributed to a variety of factors. These include destructive legacies of brutal Portuguese colonial rule, recurrent periods of severe droughts and floods, and a devastating war which fragmented political authority, destroyed much of the country's infrastructure, left over one hundred thousand civilians dead, and forced over five million from their homes. Also contributing to the country's poor economic performance and persisting human misery, however, have been ill-advised government policies in the agrarian sector, especially those regarding land tenure. Without stabilizing property rights in a fair and transparent manner and administering and adjudicating disputes over land and natural resources, political stability will be not achieved (Myers, 1995)

Upon assuming power in 1975, the Frelimo government promulgated policies premised on a rigid form of socialism completely exclusively opposed to free markets, international investment and decentralised control over political and economic resources. This "hard-line" socialism had a significant impact on the country's land laws and their administration. In particular, the government adopted a constitution and a set of land laws (Lei de Terras, 1979; Land Law Regulations, 1987) which gave central state officials extensive interventionist authority over land administration; local state officials or customary institutions were granted little formal discretionary authority. The state also outlawed private land rights and regulated the alienation of land and other resources. The basic land tenure right was defined as the right of use and enjoyment. Thus the state itself exercised paramount rights over land and had the authority to revoke individual use rights and attribute rights in land to investment and other development projects. Formal land markets were not permitted (Effler, 1996).

These land policies were coupled with a trio of programmes – collectivised farms, villagization, and state farm intervention – designed to rapidly develop the agrarian sector. The state farm sector claimed the majority of resources; in 1991 approximately 100 state farms continued their function, covering

between 500,000 and 700,00 hectares (Meys, 1995). Often these farms occupied the most fertile and accessible lands in Mozambique. They were also strategically located next to markets and transport routes, sources of labour, irrigation schemes and often situated in more secure military zones. The land policies, in conjunction with the other mentioned programs, produced disastrous economic and social consequences. The state farms incurred enormous debts. In 1984, at the fourth Frelimo party congress, it was acknowledged that all of the state farms were operating at a loss. Emphasis should be more rendered to medium sized commercial farms. In 1989, the government finally considered to restructure the state agricultural sector and privatise, lease, or close many of the state farms (Myers, 1995, Muenkner, 1995, Graefen, 2001).

Likewise in the smallholder sector, productivity also diminished considerably. Absence of market price incentives led many smallholders to withdraw from the formal economy; resources by government were solely focused to the state farms. Perhaps more significantly, because the country's property rights regime granted extraordinary prerogatives to a central government, whose official ideology viewed smallholders as backwards ("obscurantist") and economically inefficient, it diminished tenure security for many smallholders. Additionally, smallholders became alienated from formal structures, as the vitality of smallholder land rights eroded, and resources were diverted to villagization schemes, state farms, and collectivised farms. Many communities viewed the agrarian programs as an attack by government akin to the colonial Portuguese state's efforts to dispossess smallholders of their lands. Frelimo further opposed customary institutions and authorities (regulos).

Since 1990, because land has become more valuable in a context where agricultural producers are more adequately compensated for their products, macroeconomic policy changes have often deepened the insecurity of smallholders whose land is now often the target of domestic and foreign investors or speculators. Between 1992 and 1994 alone, some 20 Mio. hectares of land were acquired as concessions by private farmers, commercial interests and highly placed government officials. This was done in a largely unregulated, non transparent process of transfer of state land, leaving room for speculation, land grabbing and corruption (GTZ, 2000, A). An ad hoc Land Commission was established in 1992 within the Ministry of Agriculture. However, this commission had no substantive powers and insufficient resources to carry out effective work. In 1995 it was replaced by a Land Commission, and during this workshop we will listen to the major results so far, presented by the Head of the Commission, Mrs. Conceicao Quadros. Since 1990, basic parts of the former land law remain still in place. Revoking of the private use, however, is nowadays only possible in the public interest and with some kind of compensation.

Due to the legal pluralism, the in-transparency of land markets and access regulations, numerous conflicts arise and their number increased substantially in the last years:

Conflicts involve individual commercial farmers and state/joint venture enterprises, break out between commercial farmers and smallholders/communities and between state enterprises and small peasants

and among the latter. Furthermore, it is necessary to introduce open, transparent, democratic procedures at the local level. The Municipality Law of 1994 could provide such procedures, however, up to 1999 it has not changed the existing, vague legal framework governing rights and interests in and acquisition of titles to land. It offers a new, decentralized, autonomous administrative authority, but its powers in respect of land matters and its financial resources are not significantly clarified. (Graefen, 2001)

In conclusion, with four ideological time periods in a century (pre-colonial, colonial, socialist, post-socialist) legal security in land has vanished widely, discrepancies and absence of linkages between statutory and customary systems widened, land disputes and conflicts multiplied and corruption regarding transfer and transaction of land is rampant.

Senegal - Integration

In the first half of the 20th century, the French colonial government prepared the legal framework and laws of Senegal to support primarily export oriented agriculture, based on groundnut production, and to bring the “civilizing” influence of the Napoleonic Code to France’s overseas territories. Various legal regulations were introduced at the turn of the century to try to introduce to the West African colonies the concept of the “domain” of the state. A decree in 1904 stated that all “vacant and unowned land” belonged to the state. Throughout the colonial period the administration attempted to promote the privatisation of landholdings. The registration of customary land use rights was promoted on several occasions. Rural populations largely resisted these initiatives (Eidam 1993, Bruce et.al. 1995)

In 1964, the Republic of Senegal passed one of the most innovative land laws yet devised in Africa. The *Loi Relative au Domaine National* is considered an excellent legal compromise creating a statutory framework for local governance of natural resources. It declared practically 95% of all land to a national domain (in the continuity of former colonial efforts) , abandoned customary landownership and placed the control of land in the hands of state and decentralized administrative and community structures. In contrast to other West African legislations, the Senegalese innovation consisted of retro ceding land use prerogatives to democratically elected representatives of rural communities. In 1972, the Government of Senegal passed a comprehensive law, *Loi Relative aux Communautés Rurales*, that established the administrative structure including Rural Community Councils, to administer land and set rules governing responsible and appropriate use of natural resources.

Actually, 2% of all lands registered under private ownership remained untouched by the different laws. Other lands, already being registered under mortgage conditions or in the process of being mortgaged were also not considered and excluded from the public domain.

The twin pieces of legislation set up the structure for a co-management between state and rural society of natural resources. The *Sous-Préfets* have the legal power of approval/disapproval of all executive

orders decided by rural councils. However, customary landownership – even not recognized by law - nevertheless is still extremely present in large parts of the rural space. Land owners e.g. are forbidding land borrowers, a significant portion of the rural population, from planting trees and making other permanent investments in soil and water conservation. Customary landowners themselves utilize the concept of *mise en valeur* to protect traditional rights to land. Land is cleared and planted with little or no intention of harvesting crops, just to demonstrate that land is under production (GTZ, 2000, B)

The failure successfully to adjudicate land disputes and devise new rules of resource utilization results in outbreaks of violence. The administrative structure for conflict resolution (Sous-Préfets and Préfets) is in many regions not accepted and lacks enforcement instruments. The severe civil disturbances in the south-western Casamance in the nineties are in part an expression by the native Diola that natural resources are being irrevocably lost to new migrants from northern Senegal, themselves fleeing from decades of drought and environmental degradation. Also the Senegal/Mauritania crisis in the early nineties is partly due to severe resource conflicts (pasture lands) along the Senegal river, of course coupled with ethnic conflicts. Land values are increasing fast in peri-urban and rain fed areas of Senegal. Both the concept of *mise en valeur* and the mandate and professionalism of rural Councils is under severe pressure to be adjusted to the reality of emerging land markets.

Some questions for discussion regarding security, access and institutions on land

The Senegalese and Botswana institutions have common elements. Both have approached tenure reform through the creation of new public institutions, which have introduced democratic processes in local land administration. Both have sought not to generally replace customary law, but to change customary rules in specific priority areas. Both continue to deal with village-based traditional authorities in land matters (more so with village and ward authorities than with higher ranking chiefs), though they have formally deprived them of their traditional authority over land. In both countries, in spite of the decentralized intention of the laws concerned, the state has maintained a uniform and strong control, regardless of regional differences and ethnic/cultural diversity.

Should a uniform or patchwork solution to administer land been followed, with regard to legal, administrative and procedural aspects? What criteria have to be considered to recommend one or the other approach? Is the Rural Code of Niger and the results from the Tanzanian Land Commission for example with space for legal differentiation and regional adoption more relevant for African reality? (GTZ, FAO, UNEP, 2000)

Derived from all three samples: Should the democratic, decentralized institutions (councils) be further empowered? Or – in case state structures are ceding in their power and enforcement – should an active revitalizing of chieftaincy authority for land issues been followed?

Land grabbing by chiefs and relatives, respectively investors is an increasing phenomenon with severe consequences on equal access to land. By revitalizing chief mandates to land dissemination and usage control – and in view of ever more dynamic land markets and land values – is the threat of a neo-

feudalism and land lordism been real? If so, what are successful and proven measures to counter this threat?

The World Bank is presently appraising a large-scale program on land policy and administration together with the Republic of Ghana. Preliminary results point to a positive recognition of assisting Ghana in setting up modern registration and titling institutions in urban centres (Accra/Kumasi), however, refraining on getting not to deeply involved into rural land administration. Bilaterals such as GTZ and DFID are involved in the discussion process and future program. Similarities to economically dynamic South-Eastern Asian countries are deliberately drawn, also in defining respective instruments for solution. This applies to emerging land markets, high scarcity of land in particular for investors, multiple conflict scenarios in towns with an often multitude of claims to the same plot, exploding land prices and land speculation.

Are urban and peri-urban areas “ripe” for large-scale registration and titling programs? Is this the key instrument also do guarantee access and equal rights for urban settlers? Is the proposed legal (land law) transformation/harmonization in line with social transformation and dynamics? (Kirk et.al. 1998)

During privatisation and exclusion processes being observed in prime land areas of the whole region the key question arises: How to compensate for secondary rights during privatisation? What kind of successful and practical samples can be quoted and relied on? (GTZ, 1999)

Looking at the Mozambique sample, four ideologically very different periods and too many revolutions during 4 generations are obviously disintegrating social structures, diminishing land and investment security and leading ultimately to a piling up of land conflicts. A question in this context: How to deal with (illegal) land and rental markets, not covered by legislation? Often reality is far beyond legal provisions. Are the African governments preparing the legal framework not dynamic enough in capturing reality?

Looking at the urbanization process and urban population increases (up to 12% yearly in some African cities) a question to each expert in land management and any urban citizen alike arises: How to enforce urban planning and public space provision in order to sustain urban life, transportation and communication?

The economic and social importance of overseas population in the various countries is often underestimated. According to the authors observation, overseas population tend to invest into “hard structures” basically house constructions, dwellings and land improvements such as plantations, less into soft skills like education. How important is the investment capacity and pattern by the respective overseas population for land issues? What kind of instruments have proven to be successful to channel effectively capital into desired directions?

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SOCIAL, POLITICAL AND EQUITY ASPECTS OF LAND AND PROPERTY RIGHTS**THE CASE OF BOTSWANA.****COMMENTS: MARTIN ADAMS¹****Introduction**

Contributors to the session on the social, political and equity aspects of land and property rights were asked, first, to focus on: (a) how colonial policies had transformed traditional systems of tenure; (b) how the vesting of land in the state and the co-option of traditional leaders had undermined their accountability and stifled the evolution of customary law; and (c) how the imposition of restrictions on land ownership, building standards, and zoning regulations, particularly in urban areas, had undermined scope for development of land markets.²

Secondly they were asked to consider the implications for social structure and the political structure of rural areas in Africa. In particular, contributors were asked to describe the consequences of colonial dispossession on: (a) the ability of peasants to access land and the enhanced importance of the state in the regulation of land access and use, at the expense of local structures and land markets (b) the creation of large corrupt bureaucracies; (c) the establishment of institutions that either questioned or were directly contradictory to the legitimacy of traditional ones; and (d) the concentration on received law and the neglect of local level institutions for conflict resolution. Finally contributors were asked to identify key constraints to the development of land tenure institutions in specific countries and to point to the way in which these issues have been taken into account in recent land legislation.

Francis M. Ssekandi, in a scholarly and wide ranging paper, confirms the negative impact of colonialism on land relations in Africa. He argues that meaningful land reforms will not be complete until a more equitable system of land distribution is put in place and the traditional tenure is rationalized and given legal effect. He raises a number of issues and makes some propositions about what is needed to bring about tenure reforms that give due recognition to customary rights, that reflect the complexities of customary interests in and over land and that will accommodate societal changes.

As a counterpoint to Ssekandi's paper, and to show how difficulties he identifies can be tackled, this comment focuses on the experience of Botswana where the colonial legacy has had a less harmful impact on land relations than elsewhere (e.g. Zimbabwe, Namibia and South Africa). Settlement by white farmers was never a major feature of the country. Britain declared a protectorate over Botswana in 1885 and pursued a policy of indirect rule that involved minimal interference with customary law.

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² Terms of Reference for the Presentation on Social, Political and Equity Aspects of Land and Property Rights, Regional Workshop on Land Issues in Africa and the Middle East.

Since political independence in 1966, Botswana has developed a system of land administration that has been a source of inspiration for other countries. Nonetheless, although on a smaller scale than elsewhere, Botswana is grappling with land problems, similar to those experienced elsewhere in the region. These arise mainly from the need to accommodate modern ideas of land administration and management within a framework of traditional rights and values relating to land. This paper draws freely on a White Paper published by the Botswana Government in 1992 on the subject of land problems in peri-urban settlements on customary land.³ This revised draft of my initial comments on Francis Ssekandi's paper also examines some of the challenges facing land administration and management in Botswana. Some of these are identified in the recent Review of Rural Development Policy.⁴

Land Administration and Land Management in Botswana

Land laws in Botswana, fall into three categories. Modern customary law draws its inspiration from an ancient African culture. While its origins are indigenous, many modifications have taken place during the past one hundred years. They derive from a substantial quantity of cases decided by local courts and on appeal to the High Court. Setswana customary law is described in two seminal works, on the customary law of Botswana by Schapera, *A Handbook of Tswana Law and Custom* (1938) and *Native Land Tenure in the Bechuanaland Protectorate* (1943). The received common law is based upon the law in force in the Colony of the Cape of Good Hope in 1891, that is Roman Dutch common law. Broadly speaking, the current common law of Anglophone southern Africa constitutes the modern common law of Botswana. Since independence in 1966, there has been a considerable amount of statutory law applicable to land. For the purposes of this paper, the most important are: the *Constitution of Botswana*, Cap 1; the *State Land Act*, Cap 32, 01; the *Tribal Land Act*, Cap. 32:02; the *Town and Country Planning Act*, Cap. 32.09.

In 1966, about 49% of the national land area was tribal land, less than 4% was freehold and the balance state land. By 1972, a further 15,000 square kilometres of state land was alienated and sold as freehold. While whites acquired most of this land, wealthy Batswana also acquired freehold land under this programme. By 1980, transfer of state land on a substantial scale and purchase of freehold land in congested areas, had caused the proportion of tribal land to increase to 69%, while the proportion of freehold land had reached 5.7% and state land 25%. In 1998, tribal land comprised 71% of the land; freehold about 4.2% and state land the remainder. The policy in Botswana has been to increase tribal land at the expense of both state and private ownership. The purchase of freehold farms by government to relieve urban congestion and add to tribal land (and to provide land for urban development as state land) continues.

³ *Land Problems in Mogoditshane and Other Peri-Urban Villages*. Government Paper No. 1 of 1992. Gaborone: Republic of Botswana Government Printer.

⁴ *Rural Development Policy Review, Final Report, Volume 2*. September 2001, Botswana Institute of Development Policy Analysis, Gaborone, Botswana.

Table 1 Area (sq. km.) and percentage of land in each tenure category⁵

| Year | Tribal land | | State land | | Freehold land | |
|------|-------------|------|------------|------|---------------|-----|
| | Area | % | Area | % | Area | % |
| 1966 | 278,535 | 48.8 | 270,761 | 47.4 | 21,356 | 3.7 |
| 1979 | 403,730 | 69.4 | 145,040 | 24.9 | 32,960 | 5.7 |
| 1998 | 411,349 | 70.9 | 144,588 | 24.9 | 24,572 | 4.2 |

Land allocation processes for both tribal and state land are partly market/rule-based and partly state/rule-based. This situation is expressed diagrammatically in Figure 1, with the three spherical areas representing the domain of land transactions in Botswana for freehold, state and tribal land. The *allocative dimension* in the figure determines whether the power to make decisions over the allocation of (and access to) land resources is vested in the state or left to the market. The *procedural dimension* reflects whether decisions are primarily rule-based or discretionary.⁶ State land is administered under the terms of the State Land Act by the Department of Lands in the Ministry of Lands, Housing and Environment. Tribal land is administered by the District Land Boards in terms of the Tribal Land Act. Government is not directly involved in the transaction of freehold property.

State Land

State land consists of unalienated and reacquired land. The former is the residual land category of the country: land which isn't land included in any tribal territory – tribal land – or freehold land. State land was designated as Crown land before independence.

According to Ng'ong'ola⁷:

The legal instruments under which the Crown claimed the residual, undesignated lands of the protectorate were somewhat threadbare. There was no indication of the precise nature and content of the rights of the Crown in the land... (page 9)

The 'threadbare' nature of the law on state lands gives rise to some problems. First, two types of interest have emerged as the forms of tenure granted on the disposal of state land for urban use: the Fixed Period State Grant (FPSG) and the Certificate of Rights. The first is a grant of ownership for a fixed period – usually 50 years – paid for by a lump sum at the beginning of the term. It was created in the early 1970s. This was thought to be a more attractive form of tenure than leasehold in terms of the common law and the registration procedures of the *Deeds Registry Act*. However, as the 1992 White Paper notes, the FPSG is conceptually, a long lease with a fixed period of termination.

⁵ Land Issues Paper, IUCN and ZERO Study on NGO involvement in land issues by Richard White www.iucnbot.bw

⁶ For further explanation of this figure, see the paper by Professor Patrick McAuslan for this workshop entitled *The Legal Basis for Land Administration in an African Context; the Five Circles of Law in Land Administration*.

⁷ 'Land rights for marginalized ethnic groups in Botswana, with special reference to the Basarwa', by C. Ng'ong'ola, *Journal of African Law*, 1997, 41, 1, pp 1-26.

The certificate of rights (COR) also evolved in the early 1970s and was a response to the problem of informal settlements in some urban areas. Here too there is no clear legal framework for the COR. Dickson⁸ refers to it as a usufruct rather than real ownership but given the nature of the rights conferred by the certificate – the rights are inheritable, potentially indefinite, transferable with the permission of the relevant local authority – they appear to be more in the nature of a perpetual lease. The holder of a COR may however convert his interest to a lease or a FPSG. Ng'ong'ola points out that this would be inadvisable as the COR provides the most secure form of tenure for urban state land in Botswana short of the right of ownership.

A third issue arising out of state land is more contentious. Up to independence, there were large areas of state land that were generally rather sparsely populated and were occupied by communities who did not owe allegiance to the major tribes who occupied the so-called Tribal Territories. It was decided after independence to vest the bulk of the unalienated state land in District Land Boards, to manage the land on behalf of the communities concerned in terms of customary law. However, the right to land for hunting is not recognised under Setswana customary law and it has not proved possible, except in the Central Kalahari Game Reserve, which is state land, to allocate land to the Basarwa and at the same time legitimately exclude other citizens and their cattle. In 1985, the Government adopted a policy of re-locating all services for the inhabitants outside the reserve, and encouraging the inhabitants to follow. Thus the Basarwa have now lost their land rights on state land too.

Tribal land

The term 'tribal land' is something of a misnomer. Customary land is a more satisfactory term. It describes land that is administered according to rules of customary land law. The chiefs on behalf of the tribes no longer hold tribal land. It is now vested in the twelve District Land Boards in trust for the benefit and advantage of citizens and for the purpose of promoting the economic and social development of all the peoples of Botswana. Section 13 of the Tribal Land Act, 1968, provides that:

All powers vested in the chief under customary law in relation to land including:

- the granting of rights to use any land;
- the cancellation of the grant of any right to use any land including a grant made prior to the coming into operation of this Act;
- hearing of appeals from, confirming or setting aside any decision of any subordinate land authority;
- the imposition of restriction on the use of tribal land.

shall be vested in and performed by a land board acting in accordance with the provision of this Act.

The Tribal Land Act 1968 did not change customary land law in any way other than by transferring the authority over land from the chief to the land board, and by introducing certificates as evidence of customary grants of individual rights for wells, borehole drilling, arable lands and individual

⁸ *Land Tenure and Management in a Developing Country: the case of Botswana 1966-1985*, by W. L. Dickson, Working paper No. 54, May 1990, National Institute of Development Research and Documentation, University of Botswana.

residential plots. The jurisdictions of land boards were based on the tribal areas into which Botswana was divided at independence.⁹ The Tribal Land Act effected only partial codification of the customary law on land tenure. A more complete description of customary law is necessary in order to understand the role and responsibilities of the land boards, which assumed the powers vested in a chief.

Prior to 1968, the allocation of land did not depend on the discretion of the chief. He was by law required to provide residential, arable and grazing land for all his subjects. A tribesman was entitled to land without giving anything for it, but he had a duty to protect and conserve it. Although the concept of individual ownership was unknown, the rights to residential land were exclusive and permanent. The holder could protect his rights by civil action against any person, even the chief, except in the case of land being needed in the public interest (e.g. for services, a road, etc). In this case the chief would allocate an equivalent piece of land in compensation. The rights of the holder were permanent and inheritable. Customary law permitted tribesmen to transfer interests in residential land among themselves. Although the concept of land sales was unknown, there was no rule forbidding payment for improvements in land. However, the free transfer of unimproved land could be taken for granted. It was received free and was given free. It was not viewed as a commercial asset.

Allocation of arable land was to family heads, taking into account the size of the extended family. Tenure of allocations was permanent, although allottees often requested new allocations when the original fields lost fertility. But rights to arable land differed from rights to residential land in that the holder enjoyed exclusive occupation only when the land was under cultivation. After harvest it reverted to communal use, if only for grazing purposes. A holder had the right to allow anyone in need to cultivate part of his allocation, and to collect payment or part of the harvest in return for the land clearing and ploughing done by the holder.

Every member of the community was entitled to free access to communal grazing land. An area that was neither residential nor arable was regarded as grazing land. All had the right to graze their animals there. There was no fencing and cattle roamed and mingled freely. However, each owner was entitled to a site for the purpose of drawing water, usually from a well. Once a well was sunk, the holder acquired exclusive rights to it.

These customary rules (crudely paraphrased here) are, of course, unexceptional. They will be recognised across the vast savannah areas of Africa. In Botswana, as elsewhere, they provide the basic framework of customary land law. It must accommodate new rules governing changes in land use and peri-urban settlement resulting from the growth in the human and livestock population and the expansion of the economy. How Botswana is going about this process and tackling some of the problems will be of particular interest. Despite the tensions and challenges arising from a burgeoning market economy, the Government seems to be standing firm on the subject of retaining customary tenure.

⁹ Professor Clement Ng'ong'ola has discussed the extent to which the Land Boards are democratic, *National Land Boards: the Experience of Botswana*. Paper presented at a Workshop on National Land Policy, Harare, June 14-15, 1999.

Whatever the truth about ownership [Roman-Dutch term for freehold], it does not appear that there is anything that cannot be achieved by our customary tenure as it is without converting it to the Common law concept of individual ownership. This however is subject to one vital qualification, which is; all unnecessary systematic obstacles must be relaxed. These obstacles are both conceptual and administrative. (Govt. White Paper No. 1 of 1992, page 18).

The situation in Botswana with reference to some issues raised in the main paper

We have already concluded that as far as Botswana is concerned, customary concepts of property encompass **individual rights**. The second issue is that of **compensation** to customary holders for loss of individual land rights. This matter is the subject of a policy pronouncement by the Government in the 1992 White Paper and important amendments to the Tribal Land Act in 1993, which demonstrate both the need and capacity to update customary rules. In the case of land acquired for public purposes, the requirement for land boards to grant alternative land was changed to include provision for market-related compensation.

The 1992 White Paper arose from a report by a Presidential Commission appointed to inquire into illegal transactions of tribal land at Mogoditshane, a suburb of the Capital, Gaborone.¹⁰ Without reference to the Kweneng District Land Board, people were subdividing what were customary residential and arable allocations, converting residential plots to commercial and industrial uses in defiance of the land-use plan for the area (in contravention of planning law), and selling plots without any legal authority. Among the causes for this breakdown of law and order, the Commission of Inquiry listed the low compensation paid by government for tribal land when acquiring it for public purposes. If plots were to be acquired by the Land Board for urban development, allottees would receive P2000 for a 40 x 40 sq. m. plot, while the open market value was P5000.¹¹ So people refused to sell to government and sold to the developers. Official development could not get going and the Land Board could not allocate and grant plots.

In the White Paper, Government responded as follows:

While historically [*tribal*] land was not regarded as a commercial asset we cannot turn the clock back. The influence of the towns and other usages of land under Common law, have put pressure on customary tenure for change. We can no longer rely on evolutionary adjustment in response to economic change or artificially suppress the value of Customary land.... [*The constitutional provision for prompt payment of compensation*] has so far been treated as not applicable to the Customary law, ostensibly because the holder does not have ownership. However, the Constitutional provision is wide enough and was clearly intended to apply to “property of any description” and “interest in or right over property of any description”.

¹⁰ Report of the Presidential Commission of Inquiry into Land Problems in Mogoditshane and Other Peri-Urban Villages. December 1991. Gaborone: Republic of Botswana Government Printer.

¹¹ At that time, about US\$1 = P3.0.

The low compensation for Tribal land is the result of policy, influenced by the mode of acquiring such land as well as the fact that the land is not held in absolute ownership. But this has now led us to the crisis that we find ourselves, where excessive artificial intervention in the operation of market forces led to a collapse of tribal land administration....

The Government has considered the long term corrupting effects of excessive artificial suppression of Tribal land values and has decided in principle that Tribal land should be covered by both the Constitution and the Acquisition of Property Act to enable landholders to receive compensation commensurate with the value of the land as dictated by market forces. (pp 12-13).

In Botswana, the problem posed by the transaction of **overlapping family interests** by the male head of household has not received the same degree of attention. However, the 1992 White Paper states that the Married Persons Act and the Deeds Registry Act will be amended to eliminate discrimination in land transactions.¹²

*The extent to which the **land market** should be the determinant in the allocation, use and disposition of land rights on tribal land in rural areas is an issue with which Botswana has been grappling for some thirty years. Under the Tribal Grazing Lands Policy (TGLP) in 1975, land boards were instructed to divide the tribal grazing into communal and commercial zones, as well as set aside reserves for future use.¹³ Exclusive rights to specific areas of grazing land were given to individuals and groups for commercial ranches with boreholes and fencing. Leases were granted and rents paid to the land boards. Tenure conditions in unfenced communal grazing areas remained unchanged. The policy is generally recognised to have marginalized the rural poor and concentrated livestock ownership in the hands of the elite.¹⁴ The stated justification for the scheme was that it would relieve grazing pressure on the communal range to the benefit of the pastures and the remaining small farmers. The policy had a negative impact on both counts and led to the emergence of inequitable 'dual grazing rights', under which ranch owners keep their cattle on the communal lands, only to withdraw them to their farms when grazing is exhausted. Applications for loans under the scheme were understandably monopolised by better-off Batswana - mostly businessmen and officials. A further White Paper in 1991¹⁵ recommended further enclosure of the commons, despite all the negative evidence.*

In 1985, the policy of granting of common law leases on tribal land was reviewed.¹⁶ Permission for leases was extended to residential and commercial plots (subject to the land board's permission) for the purpose of mortgaging. Sales in execution no longer required the permission of the land board. There has been no corresponding demand for leases for traditional arable cultivation. Common law

¹² The Deeds Registry Act has since been amended but the clause dealing with the 'marital powers' of the husband in the Married Persons Act still awaits amendment.

¹³ *National Policy on Tribal Grazing Land*, Government Paper No. 2 of 1975. Gaborone: Republic of Botswana Government Printer

¹⁴ Richard White, *Livestock Development and Pastoral Production on Communal Rangeland in Botswana*, 1993, Botswana Society, Gaborone. See also P. E. Peters, *Dividing the Commons: Politics, Policy and Culture in Botswana*, Charlottesville: University Press of Virginia.

¹⁵ *National Policy on Agricultural Development*, Government Paper No. 1 of 1991. Gaborone: Republic of Botswana Government Printer.

¹⁶ *National Policy on Land Tenure*, Government Paper No. 1 of 1985. Gaborone: Republic of Botswana Government Printer.

leases are registered in the Deeds Registry, just as freehold titles. A title deed must have a plan attached, drawn by a registered surveyor in a manner approved by the Director of Surveys. Applicants must meet survey costs. No systematic survey of the impact of common law leases for residential and commercial plots seems to have been conducted, unlike grazing leases under TGLP.

In April 2002, the Revised National Policy for Rural Development was debated in Parliament following the completion of the Rural Development Policy Review in September 2001. Among other things, it examined issues relating to the development of a land market in tribal land. It argued that the nature of property rights in rural areas limited individual ability to raise capital and constituted an obstacle to rural development. The RDP Review put forward arguments that clearly have their origins in the work of Hernando de Soto.¹⁷ It argued that more secure land transfer rights would result in higher allocative efficiency in the rural economy. Plots on tribal land are allocated but are never developed. Others remain idle long after the holder has left. The customary prohibition of land sales is seen as an impediment to development as land is not made available for others to use. Proposals were made that would open the way for a market in leases on tribal land.

Somehow, a balance between enabling a property market to develop and avoiding the potential consequences of a completely free market needs to be found, and the retention of state and Land Board reversionary interest is the most likely mechanism in achieving this. This implies that an acceptable first step might be to take measures to establish a market in leases rather than in freehold title. (RDP Review Volume 2, page 87).

The permitted nature and scope of Botswana's expanding land market is an issue to be resolved by the current National Land Policy Project, which commenced in April and is due to finalise its review of the issues by the end of 2002.

Other important policy issues are (a) those relating to the management of the commons, a problem which has been aggravated by failure to resolve the 'dual grazing' by ranch owners and by opening of access to communal grazing to all 'citizens' rather than merely the 'tribesmen' of the particular area; (b) land-use planning and land development of settlements, especially those issues relating to the provision of land for affordable housing; (c) the growing challenge faced by decentralised land boards (and customary law) in meeting the demand for efficient land administration and land management, particularly in fast growing peri-urban areas, and (d) the institutional relationships and responsibilities of the land boards, the district councils and the central government.

Botswana with reference to the propositions made in the main paper

Evidence from land reform in Botswana certainly supports the propositions offered by Dr. Ssekundi on the subject of the customary law and the need to allow for the evolution of norms in keeping with changing times.

¹⁷ *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Elsewhere*, by Hernando de Soto, 2000. London: Bantam Press.

The Land Tenure policy, which has been pursued by Government so far, has been one of careful, moderate changes responding to particular needs with specific tenurial innovations....

This left intact the Customary rules governing the residential, arable and grazing land. (page 2, National Policy on Land Tenure, Government Paper No. 1 of 1985).

However, contrary to Dr Ssekandi's experience of such processes elsewhere in the region, Presidential Commissions of Inquiry into land matters, one in 1985 and another in 1991, have proved particularly effective in Botswana. They have been followed by substantive amendments to the Tribal Land Act. The Commission of Inquiry into Land Problems in Mogoditshane in 1991 and the subsequent White Paper (1992) went to great lengths to follow up reports of corruption and to nail the culprits, in particular the 'violation of procedures by highly placed citizens' (Cabinet Ministers, no less).

Figure 1 Decision making powers over allocation in Botswana (based on McAuslan 2002)

