

Formalising the informal:
Is there a way to safely secure majority rural land rights?
A review of decentralising land administration in Africa

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Abstract

This paper reviews current land reform developments in Africa as a means of determining how far and in what manner informal land interests are being catered for. The overall finding is that whilst the back of century-long inattention to customary tenure has been broken, new norms through which customary and especially common property interests may be formally secured need further evolution. Of related concern is the difficulty being experienced in making promised changes real on the ground; it is concluded that the land sector as a whole is failing to adopt sufficiently localised and empirical approaches to produce practicality in design and the level of public ownership needed to prompt and sustain uptake of new legal opportunities. Nonetheless, decentralisation of land administration as a whole is proving to be a potentially crucial conduit for the safe formalisation of informal land interests, and in ways that will definitively reduce their vulnerability.

Keywords: customary, common property rights, development process

JEL Numbers: Q15, Z13, D78

Introduction

All but a tiny minority of rural land interests in Africa today remain outside the formal land registration regime.¹ Various opportunities for formalisation have existed over much of the last century but through procedures that have often transformed rather than secured land interests, failed to capture their range or meaning, or been beyond the means of the majority to take advantage of and sustain. Limited reach and breakdown in the systems themselves has been widespread.

The most cited case is Kenya where mass rural registration began in the 1950s and continues until today, with still well under half the total land area covered, and enormous costs incurred.² Of more concern has been the failure of this programme to fulfil its early promises to increase uptake of rural credit through collateralisation of the family farm, to reduce land disputes, to provide an indisputable system of evidence and within which every transaction is routinely logged.³ Nor have more recent perceived requirements been met, such as protecting rather than subdividing common properties, ensuring women have equitable ownership rights, that the majority poor are able to use and benefit from the system, or that the integrity and the promised sanctity of title deeds is sustained.⁴ Nor are expensively arrived at boundary coordinates proving useful for farmers, who need to hire surveyors to know where their boundaries officially lie.

Similar problems with titling programmes from the 1960-1980 period have arisen in Ghana, Senegal, Rwanda, Uganda and Somalia – and indeed, worldwide.⁵ Nonetheless, recordation of land rights remains critical in the modern literate world. Promotion of improved approaches has become a virtual holy grail for agencies like the World Bank (and now the IMF), and within which pro-poor livelihood objectives are an (often awkward) adjunct to the more classical titling objective - to bring more land into the market place for growth.⁶

Not unrelated ambitions to remove such problems as listed above also characterise national land reform efforts in upwards of twenty sub-Saharan states at this time, including those commented upon in this paper: South Africa, Namibia, Swaziland, Lesotho, Botswana, Mozambique, Angola, Malawi, Zambia, Uganda, Tanzania, Kenya, Ethiopia, Eritrea, Rwanda, Niger, Burkina Faso, Ivory Coast, Ghana and Senegal.⁷ A range of strategies ensue but among which the most common structural change is indisputably decentralisation of institutions and procedures nearer to landholders, with corollary localised land dispute resolution machinery (simply for space, the latter is not covered here). A related instrument is provision of new legal paradigms through which customary and other informal land interests are recognised

¹ Less than one percent of the land area of Sub-Saharan Africa is covered by cadastral survey and entitlement and most of this is in South Africa and Namibia; even there most of the population live outside these titled areas (Augustinus 2003).

² KLC 2003.

³ Carter et al. 1994, Migot-Adholla et al. 1994, Bruce et al, 1994.

⁴ Alden Wily & Mbaya 2001, KLC op cit.

⁵ Platteau 2000, Bruce & Migot-Adholla (eds.) Chapters 4, 5, 8, 9 & 10 respectively for Rwanda, Ghana, Uganda, Somalia and Senegal. Also see The World Bank 2003, El-Ghonemy 2003.

⁶ The World Bank 2004.

⁷ For details refer Alden Wily & Mbaya op cit. and Alden Wily 2003a. Also see Toulmin & Quan (eds) 2000 and FAO 2003a and Marongwe & Palmer (eds) 2004.

and administered. How far one has given rise to the other is moot; on the whole the latter arises as a logical corollary of decentralising administration.

This paper looks closely at these and related reformist measures that suggest fairer and more effective links between formal and informal elements of rural land ownership. These indicators focus investigation –

- The extent to which decentralised land administration is genuinely sharing authority over land administration with landholders themselves;
- The extent to which new or proposed systems provide for group and other communal rights as well as individual interests; and
- The workability of envisaged mass recordation procedures and with what effect to customary interests.

Land Reform in Africa

With the exception of Zimbabwe, South Africa and Namibia where restitution is a main objective, improving land administration rather than redistribution centres current reform. However, in the process, as this paper will illustrate, many land interests that have been under-catered for in the past receive much more support, and out of which significant adjustments in the balance of power in land relations between both state and people and rich and poor could result. Although in many instances early drivers to reform were not to secure peasant landholding but to bring their properties into the market place to mainly entrepreneurial benefit,⁸ majority customary right holders are showing signs of being a main group of beneficiaries. In addition, whilst urban interests including those of the untenured urban poor ('squatters') are positively affected, the focus of much reformism at this time in Africa is rural.

Commitments to reform tend to follow common formulation through articulated new national land policies, subject to widely varying degrees of public consultation, and subsequent drafted new land laws.⁹ Often the latter sees the repeal of laws with colonial origins and in some cases complete separation from metropolitan law and issue of a single new basic land law, the case for example in Tanzania.¹⁰

In most cases these new policies and laws embody new if rarely radical tenure norms or approaches to tenure administration. This reformism resonates widely around the world.¹¹ Among agrarian societies, the turn of century is likely to be held as a period of watershed in land and related natural resources governance. Not coincidentally, most of the African states pursuing land reform have also seen political change in the same post-1990 period, marked by issue of new national constitutions and local

⁸ Specifically the case in Uganda, Tanzania, Zambia, Mozambique; refer Alden Wily & Mbaya op cit.

⁹ For details refer Alden Wily & Mbaya op cit., Alden Wily 2003a, Palmer 2000.

¹⁰ Together the Land Act, 1999 and Village Land Act, 1999 and the Courts (Land Disputes Settlements) Act, 2002 provide almost complete coverage of land matters, with mainly the Land Acquisition Act, 1967 outstanding. Section 180 of the Land Act removes the interpretative reference of the law from English law in favour of guidance from the National Land Policy 1995, local customary law, and common law and doctrines of equity as applied variously in the Commonwealth, not just England, and encourages courts to develop a common law of Tanzania which will as near as possible express local national norms.

¹¹ The World Bank *passim*, FAO *passim*.

government laws.¹² Reform in forest governance has been even more prolific (and implemented) with at least forty or more African states enacting new forest management laws.¹³

All of these have a role to play in the emerging new character of land administration. They share the same general (if uneven) democratising trend in the way in which society governs itself and its resources. In some instances, new constitutions effectively serve as the new land policy (e.g. Eritrea, Ethiopia, Uganda, and with less welcomed effect, Zimbabwe),¹⁴ or boldly set the agenda for land reform (e.g. South Africa and Kenya).¹⁵

Local government reform mirrors these trends, often providing more local institutions than at district or commune level through which tenure may also be more locally governed (e.g. the Community Councils in Lesotho 1997, Parish and higher councils in Uganda 1997 and promised in the Community Development Councils of Swaziland). In Sahelian states, the linkage between local government development and new land administration systems has been particularly close with key functions integrated (e.g. Senegal, Niger, Burkina Faso, Mali).¹⁶

The links between natural resource management reform and land governance are well illustrated in Pastoral Codes in Mali, Guinea, Mauritania and Burkina Faso, which help pastoralists secure land access at the same time as using these developments to lay down frameworks for improved pasture management.¹⁷ Decentralisation of the way in which forests are managed and/or owned is a main thrust of around three-quarters of the above-mentioned new forest laws, and delivered most potently in the new construct of 'Community Forests'. This is provided for in at least 20 states and most widely implemented on the ground thus far in The Gambia, Tanzania and Cameroon.¹⁸ This important development is having an enormous impact upon community land interests, helping to drive new legal recognition of common property tenure and to realise this on the ground.¹⁹

Still, it is necessary to avoid exaggerating the impact of the current wave of land reform, for currently it remains more promise than realisation, the forestry case withstanding. Although in many instances, reforms were planned a decade past, on the ground delivery is quite limited. Few states yet operate the particular version of reforms they have determined upon. The notable exception is Botswana, where Land Boards at district level have been administering most of the country's land area since the early 1970s and where recent reform plans are more accurately 'improvements'²⁰

¹² Dates and details of laws in Alden Wily & Mbaya op cit. and Alden Wily 2003a.

¹³ Alden Wily 2003b.

¹⁴ In the form of the Constitutional Amendment (June 2000) that removed legal obligation to compensate owners of expropriated property (Alden Wily & Mbaya op cit.).

¹⁵ In Kenya the Draft Constitution 2004 published first in 2002 not only laid out a clear vision as to how land relations should be ordered but eclipsed the work of the long-standing Land Commission, chastened into publishing its findings.

¹⁶ Ribot 1999, Toulmin et al. 2002.

¹⁷ Hesse 2000, IIED 2001.

¹⁸ Alden Wily 2003b.

¹⁹ Ibid.

²⁰ NRS 2003.

– and even these are contested.²¹ Elements of new systems and norms are at an early stage of implementation in Tigray and Amhara States in Ethiopia, Niger, Burkina Faso, Ivory Coast, Mozambique and Uganda.²² Lesotho has made striking progress in actually putting the first three new district land administrations into operation.²³ Operational plans are being devised in Tanzania and Namibia. Implementation of the long-promised reform of tenure and its administration in the former homelands of South Africa affecting around 13 million people, has yet to begin following long and tortuous legal development and within which early commitments to both localised tenure administration and support for communal rights have arguably been diminished.²⁴ A radical new approach to rural rights and administration in Zimbabwe in 1998/99 (and which built significantly upon the Tanzanian model) has been entirely set aside with the preoccupation with restitution issues.²⁵ Plans in Malawi, Lesotho, Angola, Rwanda, Kenya, Ghana and Swaziland have not got much past the drawing board for diverse reasons.²⁶

Backtracking and dwindling political will have afflicted many cases, both in the finalisation of policy and in implementation. Just how far land relations and their management will in practice be reformed is still an open question; this will be probably more extensive than government administrations originally intend and less extensive than majority rural populations (and the urban poor) are being encouraged to hope for.²⁷ Certainly the transitions involved are proving more time-consuming, complex and contentious than most Governments envisaged.²⁸

Decentralisation

A word on the relevance of decentralised land administration to majority populations may be in order. First, it may be assumed that the nearer to the landholder, the more accessible and therefore usable, cheaper, speedier and ultimately efficient the system is likely to be. In matters of recordation, the ultimate test of efficacy is the proportion of transactions actually registered. Second, modern land administration also needs to meet the demands of ‘good governance’, in this instance meaning less extending the reach of procedure to the majority than structuring procedure so that landholders have a significant role in both its design and operation; land is after all their primary and often sole capital asset. Third, whilst local tenure norms may need to be brought into line with accepted human rights, they need to be norms which people themselves approve and the exercise of which is accountable to themselves as the clients rather than only upwards to remote state agencies. These norms also need to serve their land management and use interests, not just those of the private sector. Finally it may also be argued that effective devolution requires simplification of procedure for mass uptake and use, critical in determining, for example, how far formal survey and mapping of properties is required in the majority smallholder sector. Out of such

²¹ Marongwe & Palmer op cit.

²² Alden Wily 2003a.

²³ Marongwe & Palmer op cit.

²⁴ GoSA 2004, Mostert & Pienaar 2004.

²⁵ Alden Wily & Mbaya op cit.

²⁶ Alden Wily 2003a, Palmer 2003, Marongwe & Palmer op cit.

²⁷ Alden Wily & Mbaya op cit., FAO *passim*.

²⁸ Palmer 2000, The World Bank *passim*.

considerations, the very nature of formal systems may need to compromise with the objectives and norms of informal regimes.

Deconcentration or Devolution?

In principle commitment to decentralisation is almost uniform, with only Eritrea, Zambia and Mozambique among those listed above not making institutional decentralisation a key thrust of land reform (although the last two do permit customary tenure to continue as shortly outlined). The extent to which authority is devolved or merely de-concentrated and the level of authority actually transferred is far from uniform. De-concentration is effectively the norm in Eritrea and Zanzibar and as proposed in Angola and Rwanda.²⁹ Sometimes administration is decentralised for only certain types of land rights (most commonly customary) whilst other land interests in the same geographical area (e.g. freeholds, leaseholds, granted rights) remain administered centrally, creating dual regimes (e.g. Tanzania, Burkina Faso). Or rights in general may be administered locally but their registration is still to be handled by central administrations – and sometimes result in conversionary process in the process (e.g. Ivory Coast, Zambia, Ghana).

Mozambique provides an example of the above. On the one hand, its strategy enables majority rights to be administered locally through customary practices (although with no guidance given as to how this should be exercised or regulated). On the other, non-local persons and non-citizens may access land in the same rural area and have those land rights formalised and administered by state machinery. Furthermore, should a group of existing, customary owners seek to have these rights recorded, this may only occur through the state system; a system that only has branch offices at provincial level and some districts. Nor do customary interests automatically prevail over those sought by investors.³⁰ The case in Ghana is similar.³¹

Even where new and localised regimes are established, these are frequently to be operated at different levels, and/or with different sets of actors. Thus in Namibia, proposed Communal Land Boards at Regional level has both control over formalisation otherwise administered by Traditional Authorities (chiefs) and in addition will issue other rights itself (leases).³² It is generally the case in Francophone states that whilst involved, traditional authorities have powers that are formally subordinate to state agencies; in Niger for example chiefs have responsibilities subordinate to around 57 Commune (district) Land Commissions.³³

Uganda more fully than others has decentralised land administration to both urban and rural areas, but within which a two-tier structure also operates. Autonomous District Land Boards are to administer all types of rights within their area of jurisdiction (freehold, leasehold, *mailo* and customary).³⁴ The registration of each may be

²⁹ Eritrea has abolished customary rights and set up a system which de-concentrates its exercise to local levels (GoE 1994, 1997, Lindsay 1997). For Zanzibar, which makes its land laws separately from Mainland Tanzania, refer GoZan *passim*. The redrafted Land Bill in Angola (2003) is contested, partly in respect to the limited devolution of authority to local levels.

³⁰ GoMoz *passim*, Norfolk & Liversage 2002, Quadros 2003.

³¹ GoG *passim*, Augustinus op cit., The World Bank & MLF 2003.

³² GoN *passim*.

³³ Yacouba 1999, Lund 2000.

³⁴ GoU *passim*.

undertaken at district level or for first stage certification of customary rights, at sub-district level. Parish Land Committees were originally to provide evidential and approval inputs, now effectively abandoned, due to high costs of the Government supported regime designed.³⁵ Lesotho and Malawi plan to introduce a similar paradigm.³⁶

Districts are also the operational level of land administration in Amhara Regional State in Ethiopia, under the aegis of a newly-launched Regional State Land Authority.³⁷ Committees are also being established at village level and could be quite significantly empowered.³⁸ District Land Commissions are proposed in Rwanda with no indication that supporting community level bodies will be created,³⁹ such as evidently widely the case elsewhere as outlined below.

Corollary Change to Land Dispute Machinery

The creation of more local and informal mechanisms for dispute resolution has generally accompanied decentralising land administration. This is being achieved either by simply adding these functions to those of new local land administration bodies (e.g. Eritrea, Ethiopia), or more formally mandating and assisting chiefs to resolve certain disputes, and with appeal to the formal courts (e.g. Ghana, Niger, Burkina Faso, Namibia, Mozambique), or by creating semi-judicial dedicated land tribunals. In Tanzania, each village will elect its own such body with referral to higher Ward and District Land Tribunals, only the last staffed by a qualified lawyer.⁴⁰ In Uganda original provision for tribunals in every district and sub-county has given way for reasons of cost and staffing to simply designating existing informal village and parish 'courts' as the responsible body, with recourse to a single District Tribunal, itself only now served by a part-time Magistrate.⁴¹ In Mozambique, land conflicts following the new land legislation and its opportunities especially for investors, have multiplied, raising the importance of local participatory processes and which more fairly balance local and outsider interests, only weakly provided for in law and practice.⁴²

Autonomy

The real measure of devolution is in the level of powers granted more local agencies. District level agencies which have significant legal autonomy from central government prominently include the District Land Boards of Botswana,⁴³ Uganda and the Communal Land Boards of Namibia. This is also the case with the Regional State

³⁵ Alden Wily & Mbaya op cit.

³⁶ KoL 2001, GoM 2002.

³⁷ ARS *passim*.

³⁸ Orgut 2004.

³⁹ GoR *passim*.

⁴⁰ GoT 2002.

⁴¹ GoU 2002.

⁴² De Wit 2002.

⁴³ The 12 Main Land Boards and 37 Subordinate Land Boards today govern 70 percent of the total land area (NRS op cit.). They have comprehensive jurisdiction within their respective areas, administering customary rights and non-customary rights which may be acquired in the area, both brought under a single statutory law (GoB 1968).

Land Authorities of Ethiopia in relation to the Federal State.⁴⁴ Partial autonomy is elsewhere the norm; the case in Niger for example where District Land Commissions are mainly staffed by central government technical officers.⁴⁵ Rwanda's proposed District Land Commissions are likely to be only semi-autonomous of central government and may not even hold registration powers.⁴⁶

In practice even the most autonomous legal entity is hardly free from central government dictate. This extends somewhat beyond appropriate Ministerial powers to regulate or provisions which provide useful checks and balances. In general, the more sophisticated the proposed land administration operation, the more dependent the local body is upon Government for finance and technical expertise. This in turn circumscribes decision-making autonomy. This is visibly already the case in Botswana, where Government provides land use planners, surveyors, and other technical, professional and administrative staff directly to each Main Land Board. The Land Board Secretary, a civil servant, is especially powerful.⁴⁷ The State retains the right to hire and fire the Secretary and other support staff. This is a model which Namibia will pursue.⁴⁸

In Swaziland, proposed 'autonomous' Community Development Councils will in practice be so only to the extent that they will be contractually bound to do so for a ten year period by a supervising National Land Authority.⁴⁹ A hefty programme of administrative and technical support to Uganda's undeveloped Land Boards may be expected to have a similar effect, even though these boards are arguably the most legally autonomous bodies of all, the Land Act having made them explicitly independent of control 'by any person or authority', only binding them to take account of national and district land policies.⁵⁰

Plans or legislation which makes the community level the indisputable primary authority and empower it accordingly are in reality few. This is most concretely delivered in mainland Tanzania where each of the 11,000 existing elected village governments has been designated the land authority for its respective environs.⁵¹ Ivory Coast, Burkina Faso, Lesotho, Swaziland and Tigray in Ethiopia provide similar but less empowered and doubtfully autonomous.⁵² Community level bodies are also legally provided for in Malawi, Niger, Benin, Botswana, Mali, and proposed in Kenya (by the Draft Constitution 2004), but with even less legal autonomy or powers delivered, largely formed to provide local level consultative and permissive inputs.⁵³

On the whole however, community level land administration bodies are posed as simpler operations than those at district level, more self-reliant and cost-covering, and

⁴⁴ The Federal Rural Land Law in Ethiopia (1997) empowered Regional Nation States to autonomously administer land, and importantly, to determine the manner in which they implement this (GoEth 1997), an opportunity which Tigray and Amhara so far lead on.

⁴⁵ Yacouba op cit.

⁴⁶ GoR 2003, Liversage op cit.

⁴⁷ White 1998.

⁴⁸ GoN 2002.

⁴⁹ GoS 1999.

⁵⁰ GoU 1998.

⁵¹ GoT 1999b, Alden Wily 2003c.

⁵² GoIC *passim*, GoBF *passim*, TRS 1997.

⁵³ Alden Wily 2003a.

therefore potentially more likely to escape bureaucratically delivered dominance. This is especially so with the autonomous bodies in Tigray and Tanzania, designed to be minimally funded from either district or regional state coffers. This is certainly the case in Tanzania where Village Councils, the new Land Managers, are not promised any form of financial or technical support beyond verbal facilitation, to be provided by also existing District Councils.⁵⁴ The salary of their single administrative employee, the Village Executive Officer, and now also the Village Land Registrar, is increasingly covered by community taxes. Recordation costs associated with land administration are to be met through community levies and fees. Regulations set these at very low levels.⁵⁵ Village Councils may use village taxes to cover adjudication costs where they decide to systematically pursue this, thus making it 'free and fair' for all villagers.⁵⁶ The main cost to be covered will be sitting allowances to members of the local Village Adjudication Committee and the external Adjudication Adviser whom they select to advise them. More expensive 'spot' adjudication may also be provided on demand, a provision which could provide revenue for land administration but which could also open the door to stratification of landholders into richer title holders and poor untitled households.⁵⁷ Malawi, Swaziland, Namibia and Ivory Coast aim to pursue compulsory and/or systematic registration partly to avoid such stratification;⁵⁸ a procedure which could however be enormously expensive and increase dependence upon the directives of the centre.

The abandonment of formal survey and mapping requirements to rights registration is also proving an important route through which the controlling hand of the central State may be lessened, as well as making registration more affordable and accessible to majority landholders. Attention to this characterises the plan of action of the Tanzania and draft Lesotho legislation.⁵⁹ On the other hand, reluctance to simplify procedures or reduce technical standards tends to correlate with formal encouragement to private sector roles in these spheres (e.g. Ghana, South Africa, Mozambique) but which will require subsidization or loan schemes if the better-off are not to be the only clients who can afford these services, acknowledged in Malawi.⁶⁰

The relationship of district or community institutions with *local* governments is also often substantial; Tigray State in Ethiopia and Tanzania in fact designate their existing community level local governments as the land administration authorities. In Burkina Faso, similarly elected village governments administer land but in this case alongside newer Village Land Use Management Committees.⁶¹ Functional overlap and conflict between the two bodies exist, exacerbated by the uncertain status of customary authorities, originally eliminated in the reform process but latterly permitted to deal with communal areas.⁶² In Lesotho, local land administration is unevenly already in the hands of elected Village Development Committees under the terms of the Land Act 1979. The proposed strategy is to remove these functions into more formally

⁵⁴ Alden Wily 2003c.

⁵⁵ These run at between US\$ 25c to \$1.50 for most tasks; GoT 1999b.

⁵⁶ GoT 1999b.

⁵⁷ Alden Wily 2003c.

⁵⁸ GoM op cit., GoS op cit., Stamm 2000.

⁵⁹ GoT 1999b, Alden Wily 2003c, KoL op cit.

⁶⁰ GoM op cit.

⁶¹ Pare 2001.

⁶² Ouedraogo 2002.

elected Community Councils.⁶³ In Mali elected bodies at a higher level (Commune) have been empowered to administer land rights.⁶⁴ This is also the case in Senegal.⁶⁵

Limiting the Powers of Chiefs

Chiefs or other traditional authorities administer customary land tenure in most other states, either by permissive legal acknowledgement without support (e.g. Zambia, Nigeria, Cameroon) or by more formal policy and legal decision (e.g. Ghana, Mozambique, Niger). A developed case of this is Ghana, where 80 percent of the land area is administered by Traditional Authorities. Government policy (1999) and a scheduled multi-donor funded support programme (the Land Administration Programme, 2003-2008) promotes an improvement approach, but without enabling them to formally register customary freeholds (as they are known in Ghana) or other customary interests themselves, which remains the prerogative of the central state. Nor will Traditional Authorities be improved to the extent that they are forcibly required to adopt more participatory process or be more accountable to their 'subjects', a growing issue where chiefs have increasingly behaved as more landlords than trustees, and their subjects, their tenants.⁶⁶

This is not the case in Malawi where national policy has laid down how chiefs will operate in future as land administrators, including a requirement that they work with three locally elected advisers within a context of Village Land Committees, thus combining traditional and modern regimes. As recorded above, the Committees are not however especially powerful entities. Proposed Community Development Councils for land and other administration in Swaziland have a similar objective; these will be elected bodies of which Chiefs may be members.⁶⁷ Under local government law (1997) up to two traditional leaders may have places on Lesotho's otherwise elected Village Councils. An important exception is South Africa where with each draft of the Communal Land Reform Act 2004 since 1997, traditional authorities gained more presence for mainly political reasons until the final approval by Parliament which effectively hands the authority over former homeland farms to traditional authorities.⁶⁸ Central government influence is additionally potentially strong upon these Committees in the persons of non-voting members appointed by various public officials. Nor do the powers of the Committee include registration.

Overall chiefs are not gaining new powers along with gains to the status of customary rights described below. That is, from Ghana to Namibia, Niger to Mozambique, chiefs retain customary roles as allocators of new land, and serve as notaries and endorsers of transactions and may, if they wish, establish registers in support of this. These registers do not however constitute form registration and entitlement.

⁶³ KoL op cit.

⁶⁴ Intercooperation 2001.

⁶⁵ Ribot op cit.

⁶⁶ IIED 2001, The World Bank & MLF op cit.

⁶⁷ GoS op cit.

⁶⁸ GoSA 2004.

Accountability

In almost none of the district or community institutions being established, is downward accountability to client landholders well provided for. The best case scenarios are expectedly those where the land administration institution is not only locally based but also operates as an elected local government (the case in Tigray and Tanzania). Even at district/commune level, the paucity of elected decision-makers is notable; only five of twelve members of Botswana's Main Land Boards are elected and this election is arrived at through public meetings rather than private ballot.⁶⁹ None of the supporting laws require these bodies to even report problems and progress to land holders; most are accountable upwards to their appointees; departmental heads, commissioners or Ministers.

Whilst in theory Traditional Authorities may be presumed to be accountable to their communities, there is all too much evidence that they are not, rent-seeking trends widely observed.⁷⁰

Registration of Rights

It will be evident from the above that the core function of registration of rights and transactions remains central in new paradigms. In not a single case has this been diminished. Ultimately, it is this recordation function that represents not only the *raison d'être* of land administration bodies, but the main conduit through which customary interests may enter the statutorily regulated (formal) system.

Localisation suggests the need for simplified, cheap and easily useable procedures. Most countries *are* laying the groundwork for this but often only to the extent that the register is moving closer to landholders, if only to district/commune level. As we have seen, it is only in Tanzania and Tigray where the main registry is (to be) located at village level.

How far new land policies genuinely seek to support smallholder rights is also open to question. Often steps enabling them to more easily register their rights derives not from pro-poor commitments but interest to make their land more freely available in the land market – the early catalyst to reform in countries as far apart as Eritrea, Ghana, Tanzania, Angola and Mozambique. This may blunt equity aspects of encouraged formalisation of local land rights. This is seen clearly in Mozambique, where local consultation exercises were introduced into the Land Law 1997 to enable communities to indicate where a proposed land concession to a non-local person or foreigner will interfere with their own occupation and use. In practice, documented community consultations have taken place in a minority of cases.⁷¹ Moreover, there is nothing in the law that require Government to *not* allocate the land if it is found to be occupied or used by communities. Acknowledgement of the vulnerability of communities to invasive land applications has however since catalysed a more elaborate procedure, enabling communities to have their general areas surveyed,

⁶⁹ The law has not been assented by President Mbeki and is effectively already under review (Marongwe & Palmer op cit.).

⁷⁰ Lund op cit. for Niger, Alden Wily & Hammond op cit. for Ghana, Negrao op cit. for Mozambique.

⁷¹ For example, 12% in Zambezia Province (Norfolk & Liversage op cit.).

mapped and entered into the national land registry.⁷² Whilst this represents an important step towards recognising a modern community based property right, the procedure is expensive and so far achieved only with external resources and assistance.⁷³ In addition, the resulting certification is less entitlement than a more binding version of delimitation, illustrated in the naming of the deed received – a Delimitation Certificate.⁷⁴

The Handling of Customary Interests

Finally, we may look more closely at the treatment of customary rights. On the whole, the picture is favourable. To recap, these countries now permit customary land interests to be directly registered without conversion into introduced forms like freehold or leasehold tenure: Uganda, Tanzania, Namibia, Botswana, Mozambique, Niger, Ghana, and proposed in Lesotho, Malawi and Swaziland.⁷⁵ In most cases registration of these interests is or will be undertaken by a decentralised body at district or even community level as outlined above (Ghana and Mozambique being the main exceptions). Six other states enable rights that may be existing or have some foundation in custom to be registered but do in the process reconstruct these into new and centralised tenure forms; a Lifetime Usufruct in Eritrea, a Holding Right in Ethiopia; a Right of Private Ownership in South Africa; a Leasehold in Zambia, a Concession in Rwanda and a Land Title in Ivory Coast.⁷⁶

The modernisation of common property

A crucial element of this development is that in a growing number of cases, these entitlements may apply not only to individually held estates like farms, shops or houses, but to common properties such as pasture, forests, marshes or local public spaces. Families, groups or whole communities may thereby become the private registered landholder, the land in effect conceived of as private group-owned property.

It is this innovation that most represents such innovative political attitudes to customary land tenure as exists in the reform movement. It also opens the way for many millions of hectares of informally shared resources to be definitively secured as local common property. Off-reserve forests and woodlands under customary tenure of varying strength account alone for several hundred million hectares in Sub-Saharan Africa; these are the residue from the as many millions of better quality forest already drawn out of local control as government reserves and parks, with the support of state laws which did not recognise communal tenure as having the incidents of private property; for the purposes of the state, such lands were advantageously considered un-owned or *terres sans maitre*.⁷⁷ New recognition of customary rights as fully legitimate private rights and accordingly registrable in their diverse forms, turns the tide on such losses. Not least of this is the reality that as private property, properties

⁷² GoMoz 2000.

⁷³ Hanlon op cit., Norfolk & Liversage op cit.

⁷⁴ During 2002 only 100 communities had received this certificate and some were not communities but interest groups within communities, raising problems of process and elite capture (Hanlon op cit.).

⁷⁵ Details in Alden Wily 2003a; 32-47.

⁷⁶ See footnote above.

⁷⁷ Alden Wily 2004.

customarily held in common are due the same level of compensation if acquired for public purpose as other more obviously private (individually-held) properties.⁷⁸

It is unfortunate therefore that the constructions through which common property registration may be effected are still often awkwardly formed, if showing steady evolution. Collective titles in Mozambique and Ivory Coast have the disadvantage of including common and individual properties and are in practice less entitlement than confirmation of community jurisdiction.⁷⁹ In South Africa, the earliest country to provide for common property registration, the title itself is more refined but achievable through a burdensome, expensive and complicated creation of a legal body in the form of a Communal Property Association,⁸⁰ and which has met with limited success and much frustration.⁸¹ A simpler device was entered into Uganda's Land Act, but which still requires the establishment of a new legal body to represent the landholding body.⁸² South Africa's Communal Land Reform Act 2004 now introduces a simpler mechanism, in which the community must first elaborate and register rules associated with the property and which through this are subject to external approval.⁸³ This is pragmatic in targeting the issue that most distinguishes individual and common properties; the need for there to be fair and inclusive means through which any change in the status or use of the shared asset is undertaken (e.g. sale or subdivision).

Some other countries which we have seen provide well for customary land registration do so however to the exclusion of common property areas (e.g. Namibia, Botswana, Ghana, Tigray). Recent policy reform in Botswana proposes that a common property right finally be introduced, having not been available for the full 30 years that individually-held customary occupancy has been registrable, with severe effect.⁸⁴ Most recently, Kenya's Draft Constitution creates a new class of land, Community Land, registrable in respect of common properties like local forests, pastures and shrines and directs that a law be enacted to give effect to this.⁸⁵

The most straightforward mechanism to date has been to make blanket provision for land to be held "by a person, a family unit or a group of persons recognised in the community as capable of being a landholder", and providing for registration of this as a single process, irrespective of the nature of the owner. This route exists in the new land laws of Uganda, Amhara, Tanzania, and potentially in the laws of Lesotho, Swaziland.⁸⁶ In addition, these laws meet the problematic noted above by requiring the community to agree and record at the same time how the common property will be accessed, used and transacted, in the form of a simple management plan.⁸⁷ The Tanzanian law is particularly mindful of the centrality of common estates in customary land areas and the need to limit wanton subdivision that may be prompted through entitlement opportunities. The Village Land Act 1999 goes so far as to

⁷⁸ Ibid.

⁷⁹ GoM 1997, GoIC 1998.

⁸⁰ GoSA 1996.

⁸¹ Mostert & Pienaar op cit.

⁸² Communal Land Association; GoU 1998.

⁸³ Mostert & Pienaar op cit.

⁸⁴ NRS op cit.

⁸⁵ GoK 2004.

⁸⁶ Alden Wily 2003a.

⁸⁷ Alden Wily 2003c.

disallow adjudication and entitlement of *individual* holdings until the community has identified and registered its common properties first. Moreover, this law

Integral to the above, is the fact that family title is also emerging in registrable form. This is to be most distinctly provided for in Ethiopia and Malawi. The nature of family title has its own problematic, in its benefit in protecting the land interests of family members. Developing workable procedures which limit transfers of family land without the full support of family members but which also do not unduly inhibit transactions has preoccupied several states (e.g. Uganda, Malawi) and is likely to preoccupy Lesotho and Swaziland, also planning to introduce family or spousal co-ownership entitlements.⁸⁸

Another common aspect among registrable customary entitlements is that they are generally restricted to citizen access; an interesting trend given many early intentions to make rural land much more available to entrepreneurs. In all cases foreigners may access customarily held lands but only through mechanisms where these are first procured and then issued by the state (e.g. Tanzania) or through state regulated derivative rights like leaseholds (e.g. Ethiopia, Eritrea, Malawi, Lesotho).⁸⁹ It is also commonly the case that even non-local or non-resident citizens may not register customary ownership in the area; in some cases residency is defined by custom and may work against certain tribes or workers who have been in the vicinity for a generation or more (e.g. Ghana, Ivory Coast), contributing to explosive inter-ethnic relations. In other cases, residency is defined by occupation (e.g. Tanzania) with exemption made only for soldiers and civil servants, unavoidably absent from their home areas (e.g. Ethiopia).

Some new land laws do endow registered customary interests unequivocal equivalency with other forms of tenure, most specifically provided for in Uganda and Tanzania. In Tanzania, a Customary Right of Occupancy is in fact superior to a state-issued Granted Right of Occupancy to the extent that its term is unlimited. In Uganda, the benefits of equivalency are somewhat undermined by full legal provisions to convert a registered Customary Certificate of Occupancy into a Freehold Title, similarly available in Ghana and proposed in Lesotho. Some other new laws make no attempt at equivalency; in Ivory Coast an Ownership Certificate is not held to be full ownership but may be registered subsequently and converted in the process.⁹⁰ Ivory Coast is additionally one of the few countries not to offer legal protection of customary rights that are not registered. Whilst all new land strategies encourage registration to entrench rights, this is made voluntary at least up until such time as systematic assisted registration in the area is launched.⁹¹

Finally, customary norms are not being absorbed entirely into formal processes. Whilst many laws allow that local traditional or practice will determine whether a registered customary land interest may be bought, sold, gifted, inherited, leased or mortgaged, the final discretion of the landholder is also recognised (e.g. Uganda, Tanzania). Certain constitutional strictures, such as those designed to prevent rendering wives and children landless, are also entered into the law, customary

⁸⁸ Alden Wily 2003a.

⁸⁹ Alden Wily & Mbaya op cit., Alden Wily 2003a.

⁹⁰ Stamm op cit.

⁹¹ Alden Wily & Mbaya op cit.

practice notwithstanding. Moreover the norms through which rights are recognised and recorded, are as often reframed with principles of inclusiveness and fairness heightened.⁹²

Custom is being modernised in other ways. In Tanzania and potentially Lesotho and Swaziland new land laws declare customary rights as still existing and registrable at the same time as vesting authority over this in definitively *non-traditional* bodies, the elected village governments. A more or less similar position exists in Uganda, Burkina Faso, Mali, Niger and Senegal where non-customary bodies at higher levels confirm or register customary rights. A modified version is proposed in Malawi, where we have seen chiefs will be accompanied by elected representatives in their decision-making. Of note is the fact that over 30 or so years of decentralised land administration in Botswana, the role of traditional authorities has been slowly but steadily reduced to one of informal allocation and mediation.⁹³ The trend toward this is visible in the construction of the relations of traditional authorities with Communal Land Boards in Namibia.⁹⁴

In sum, the case can be made that customary tenure, both as a regime of administration and in terms of the rights it customarily gives rise to, is under highly significant transformation – and one that is democratic in the main. One route towards such democratisation is the Botswana model, broadly followed by Niger and Namibia; this has seen customary rights themselves remain unchanged but their administration removed from chiefs into the hands of supposedly more neutral, and better equipped and skilled bodies like variously elected/appointed Land Boards. This does however remove authority from the periphery.

An equally strong trend is to keep administration at the periphery but alter how customary administration operates. The trend here is for authority to move from traditional to elected hands at community level. The result may be described as ‘communitisation’, a move from customarily based to *community based* rights and administration. Poorer people, women, and many others who may have been excluded from land-related decision-making on the basis of customary norms, may have a better chance to have their interests considered in these new governance regimes - and to participate as members of the new decision-making bodies. That this is so is evidenced in common statutory requirements for their membership.⁹⁵

Conclusion

Policy and legal commitment to decentralised rural land administration is clearly surprisingly widespread as are initiatives to improve the status of customary land rights. In the process, national policies have had to give more space to the operation of the regimes that support these rights, both in terms of providing for local level decision-making and in respect of the characteristics of customary interests. Especially where this results in formal recognition of common property rights, the change may be seen as unexpectedly innovative.

⁹² See footnote 88.

⁹³ NRS op cit.

⁹⁴ GoN 2002.

⁹⁵ Usually from one quarter to one third of members must be women (Uganda, Tanzania, Niger, South Africa, Malawi, Namibia; Alden Wily 2003a).

In other respects, radical departures are few; after all, customary tenure has enjoyed permissive existence in most states throughout the last century and provided the basis for some of the entitlement that has taken place, albeit in converted forms. What is new today is the opportunity to register customary rights 'as is', without necessary conversion or loss of customary incidents (such as if and how the property may be sold or in whom the property is vested; one, two or more persons). Even without registration possibilities, the current reform movement appears to enhance customary security, long overdue.

Despite relatively consistent broad trends continent-wide, there is significant diversity in strategic choices, and which sometimes lack internal coherence. Reforms as a whole are hesitant, with stops and starts and long delays. Implementation is proving particularly slow and problematic. Planning failures are usually blamed; ambitious policies and laws requiring levels of institutional change and support programmes that are overly-expensive, institutionally too demanding, and too weakly supported by politicians - in short, not terribly different from the kind of problems that arose out of earlier periods of land reform, and similarly arising in good part from poor process.

Lesson learning appears to have been limited. Despite much-proclaimed consultation in modern policy making,⁹⁶ genuinely participatory planning has been strikingly absent. It is frequently the case that central administrations (and their foreign advisers) argue that land rights are too important to be left to popular consideration and that in any event, a new national legal framework is required prior to such participation. While this has merit of sorts, the stronger reality is that empirical learning by doing, and incremental building upon improved practice in selected trial areas on the ground, has a much better chance of delivering practical and cost-effective paradigms. These are lessons to which sister sectors such as forestry have been as strikingly conscious and with excellent results, in terms of integrating community, private and public interests and limiting the impracticality gaps between plans and practice that so bedevil top-down developments.⁹⁷ Had, for example, Ugandans been afforded the opportunity to voluntarily set up their own local land administrations (as was briefly considered prior to the passage of the Land Act in 1998), then the impossible commitment made by Government to underwrite more than 4,500 statutory Parish Land Committees and several thousand land tribunals would not have been necessary – nor as inevitably eventually retrenched.

As important is the local empowerment that may be engendered through bottom-up approaches, crucial for sustaining meaningful social change and doubly important where governments lose enthusiasm for reform as they confront the realities of implementation, or the loss of control over the periphery that some more fulsome decentralisation embodies. Nor do devolutionary approaches always sit easily with other common objectives of current land reform, such as interest to free up the land market for local and foreign investment. Reaching fair compromises in stratagems requires both local and political will.

⁹⁶ See Alden Wily & Mbaya op cit., Palmer 2000, Negrao op cit., KLC op cit. for examples.

⁹⁷ Alden Wily 2003b.

Much is yet to be done in the current wave of land reform, and much will be done. The movement is tangibly not only new, but still underway, with great promise for further evolution. Whilst the potential for setbacks and back-tracking are amply evident, so also is the potential for new learning and democratic change in this most important of spheres for the rural majority. At this point, the possibility that millions of rural landholders in Sub-Saharan Africa will in due course genuinely gain through formalisation of their land interests, still exists.

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