RIGHTS + RESOURCES 5th Anniversary

Putting 20th-Century Land Policies in Perspective

Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #2 of 5

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Briefs on *Reviewing the Fate of Customary Tenure in Africa*

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This brief looks at the tenure policies pursued by colonial and early post-colonial governments in Sub-Saharan Africa, to help explain current policies.[1] The focus is on how the customary land rights of Africans were treated, especially with respect to forests, rangelands, marshlands, and other collectively held resources.

The formal subordination of customary land rights in Africa began but did not end with colonialism, and the colonial legacy therefore should be kept in perspective. The situation for majority land interests deteriorated throughout the 20th century and some of the worst abuses followed independence.

Nor can colonialism be entirely blamed for the tenure and distribution inequities that so profoundly afflict African rural land rights today because they partly originated in pre-colonial feudal practices and even slavery. Other non-policy causes of subordination have derived from the capitalist transformation and class formation that accompanied modern state-making in the 20th century, and may well have occurred in Africa even without colonialism.

Still, the foundation for the mass abuse of customary land rights was indisputably established by colonial norms. This brief explores those norms and provides an account of changes in the post-colonial era up to 1990.

1 How were 20th century tenure policies expressed?

The principal vehicles of 20th-century tenure policies were laws and court rulings; accordingly, their content is the focus of this brief. Important policy statements began to appear in the 1950s, most famously in the report of the (British) East African Royal Commission 1953–1955 and the comparable 1959 *Rapport de la Commission du Secteur Rural* in Francophone Africa. The importance of law as instrument of land dispossession is significant; from the outset colonial administrators were determined to make dispossession of Africans legal. This was likely more to satisfy critical politicians and publics at home, than to keep things orderly.

2 Were colonial strategies similar across the continent?

The tenure strategies of the various colonial regimes in Africa had both commonalities and differences. Commonalities stemmed from:

a. A shared if competitive agenda to establish 'spheres of economic influence' and to exploit resources and labor to serve European economies.

b. The habit of colonizers of applying the same techniques in different colonies—e.g. Germany applied the same land ordinance in Cameroon

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and Tanzania in 1895/96.[2] Norms were also borrowed from earlier colonies— e.g. Britain introduced Indian Empire land laws into Africa.

c. The federated approach adopted by Portugal and France—Portugal treated its possessions[3] as part of Portugal (and eventually reconstructed these as provinces in the new "African–European State of Portugal" in 1951). France governed through two federations which covered West and Central Africa, respectively, directed from St Louis in Senegal and Brazzaville in the French Congo.[4] Laws were drafted in those capitals and sent to each territory to adopt and apply. This explains the largely uniform content and timing of land laws across Francophone Africa (1904, 1906, 1925, 1932, 1935, 1955 and 1959).

d. The common transformations enjoyed (or endured) by African territories, including the commoditization of land and hardening inequity of access through class formation and land concentration, as well as the effects of population growth, commercialization of agriculture, and expansion of towns.

AS THE COLONIAL MISSION WAS SIMILAR ACROSS EUROPE, THE STRATEGIES OF LIMITING AFRICAN RIGHTS TO LAND WERE SIMILAR

There were also differences between regimes. For example, Portuguese and German colonization was conducted by military men, while British and French colonialism was carried out by civil servants, who therefore had to work harder to appease especially influential African communities. Differences in pre-colonial mercantile relations also played a major role, as did the different status of territories as provinces of the European homeland, semi-autonomous colonies, protectorates, or, after 1919, territories mandated by the League of Nations then United Nations.

3 How did colonizers undermine african ownership?

Early international law played a pivotal role in the legal demise of customary rights in the colonial era in the form of the *General Act of the Berlin Conference on West Africa* (the "Berlin Act"), which was signed in February 1885 by 13 European states, Turkey, and the United States, all desperate to establish markets in Africa for unsold manufactures (Europe was in Depression from 1873 to 1896) and to secure raw materials and products (e.g. oil palm and rubber) to revitalize their industries. In practice, this economic scramble for Africa quickly segued into a political scramble as free trade gave way to competitive protectionism by key signatories, and as rapid expansion into hinterlands reminded Europeans of the existence of millions of hectares of invaluable resources and potential labor. Creation of political colonies and protectorates to safeguard interests was inevitable.[5] Fortunately for the Powers, the international law they had signed demurred from any commitment to pay for acquired lands, as had become a practice during the 19th century, anticipated in 1885 as amounting only to some expansion of already existing European enclaves along the West African coast (Article 34). Instead, the law specified that natives were to be amply compensated for any disturbances by the "blessings of civilization" that European presence would deliver in the form of education, Christianization, and the suppression of slavery (Article 6).

The devices for denying customary rights were borrowed from previous colonization experiences in Asia and the Americas—and, even further back, from the forceful replacement by the British of customary rights with English feudal ownership in parts of Ireland in the 12th century.[6] With differences and some exceptions, the following six stratagems were applied throughout Sub-Saharan Africa from around 1890:

a. *The 'right of discovery'*: replacing the territorial sovereignty of African kings, chiefs, and emirs with that of the conquering nation, on the grounds that there could not be two sovereigns.

This was especially efficacious where customary land ownership was indeed vested in kings and chiefs.

b. *Capturing property along with political suzerainty:* the colonizers exerted political control over their territories but, as they had done in the Americas, they cleverly expanded this to include founding ownership of the land within those territories (radical title or root title). This feudal device diminished African land rights to varying degrees of tenancy under European heads of state.

c. *Denial that indigenous possession amounted to ownership:* the claim to root ownership of the land was justified by colonizers on the grounds that Africans didn't *own* their lands in a manner which European law could accept, by the 19th century imbued with the tenure norms of industrialised Europe, signalled by land commoditisation, enabling owners to freely sell their properties in an open market. By virtue of Africans holding lands in common, not as individuals, and these lands not being fully tradable, Africans could conveniently be deemed to only *possess* the land rather than own it.[7] This opened the way for declaring native lands to be without owners (*terra nullius*) and Africans merely their possessors, that is, occupants and users. Customary norms aided and abetted this where land was viewed as belonging to God and/or in the temporal hands of communities, communities themselves a perpetual intergenerational entity which made absolute alienation of their lands difficult.[8]

d. *The wasteland thesis*: this strengthened colonial state possession of all but cultivated and settled lands by revitalizing the 17th-century thesis of Locke that real property only comes into being through labor.[9] Thus, forests, rangelands, marshlands, and other landscapes not transformed into farms could be deemed vacant or "wastelands". As such, they fell like ninepins to state tenure.

THE LEGAL TECHNIQUES OF DISPOSSESSION WERE WELL PRACTISED ON OTHER CONTINENTS

e. *Disempowerment*: this was easily achieved by centralizing control over landholdings, which undermined local determination of the meaning of property and rights and the ways in which these could be secured. Indirect rule was deceptive in this regard. It gave the appearance of local control, where chiefs were co-opted as agents of the state, but in reality it reconstructed the political geography of customary tenure in critical ways, including how community domains were defined and power relations within these exercised. It is not incidental that current land reforms in Africa are just as much about devolving power over land into more local and democratic institutions as about redressing the shameful suppression of customary ownership.

f. *Respecting native occupancy to keep the peace:* it was expedient to uphold local occupancy in order to salve colonial consciences and to ensure that useful production continued and natives were "kept fed and content" ("peaceful native occupancy" became a watchword). Defining areas where Africans could lawfully reside also helped limit rapacious land-grabbing by European settlers and profiteers. In the early decades of colonialism it seemed that there was enough land for all and that African occupancy and European land development and resource exploitation could co-exist, albeit one firmly subordinate to the other. Therefore native occupation was not to be disturbed unless necessary. "Necessary" meant where the lands were needed for state, settler, or investor enterprise (profiteers and companies abounded).

LEAVING THE DOOR AJAR

The legal effect of the six stratagems was not to deny that African land interests existed but to de-

contextualize and reconstruct them as rights of occupation and use, not outright ownership. As shown below, intentions were not always malign. Nor did colonial (or post-colonial) governments feel the need for or were able to formally extinguish customary rights, as this would have implied acknowledgement that Africans *owned* the lands. This has left scope for a reinterpretation of the legal meaning of customary interests in land, taken up with alacrity in current reformism.[10]

COLONIZERS DID NOT SO MUCH DENY THAT AFRICANS HAD RIGHTS TO LANDS, AS DENY THAT THESE RIGHTS SHOULD HAVE THE FORCE OF PROPERTY. TO ADMIT THIS WOULD BE TO DEPRIVE THEMSELVES OF VALUABLE LANDS AND RESOURCES

4 Were colonial strategies stable over time?

Taken as a whole, colonial policies remained consistent but implemented with much more severity as the reality that there was not after all enough land to meet colonial and native interests. Increasing use and exploitation of native labor for colonial enterprise also hardened official attitudes to customary rights. As independence neared, late colonial advisers focused upon what they thought best for Africans, strongly shaped by their own and aligned elite convictions of the forms of modernization required.

To describe these shifts, the colonial era is discussed in three broad phases.

PHASE I: UNDERMINING AFRICAN OWNERSHIP OF AFRICA: 1880–1919

Contradictions abounded between the inclination of colonizers to ignore local land rights and secure whatever resources they could for themselves, and the reality of not always being able to do so. Public opinion in Europe was partly responsible for blunting ambition, following the abolition of slavery and the rise of humanitarian and missionary activity. But more serious was the precedent which Europeans had themselves set by buying lands from natives.

Much land was simply taken from Africans by brute force, especially in the 17th and 18th centuries but decreasingly in the 19th century. Trading companies, and individual investors and profiteers often "bought" land from African coastal chiefs including with signed bills of sale listing the top hats, shoes, beads, etc.[11] By the 1830s colonization societies along the Liberian and Sierra Leone coasts were buying land for cash. More formal trading agreements also abounded (e.g. by 1881 the Royal Niger Company had no fewer than 400 contracts to use land along the West African coast) and what was in effect a bilateral investment treaty had been negotiated "between African and European sovereigns of equal power" of Britain and the Gold Coast (Ghana) in the 1840s and was explicit that this would not interfere with local land ownership.[12]

This posed difficulties for European Powers when it came to expansionism into hinterlands. Paying for all those lands, even at low prices, was out of the question. Without military support, conquest and subordination was also uncertain. Alliances with local leaders were necessary. Thus, in 1902, the British found themselves having to reward the assistance of the King of the Buganda in securing Uganda for them by granting him and his noble families legal title to their lands (and thereby turning the King's subjects into tenants), while the rest of Uganda was simply deemed British property (Crown Lands). Arabs along the Nile were also recognized as holding absolute property while Africans in the Sudan were deemed to be merely occupants of the property of the new colony.[13]

European law already governed relations with natives ahead of colonial expansion and could not be so

easily set aside. The French Civil Code had been established as the law in French enclaves in West Africa in 1830. As well as being interpretable as protecting customary rights (Article 713), the code's introduction into local regulations in 1855 guaranteed privileges to "assimilated" Africans, including their right to acquire private property. This directly shaped Francophone land policy thereafter.

English common law was also clear that existing protectorate arrangements did not allow colonizers the right to take and alienate native lands. This drove British determination to convert protectorate agreements into full colonies wherever it could, not achieved in Ghana until 1895, in Southern Nigeria until 1906, and in Kenya until 1920. Botswana, Lesotho, and Swaziland avoided the same fate by not being incorporated into the Cape Colony or Transvaal of British South Africa between 1885 and 1906. This set the treatment of customary land rights in those states on a novel path. In 1903 the Basuto King issued his own Laws of Lerotholi, which specified how land in the kingdom was owned and allocated. The Tswana also secured recognition that tribal customary law governed their land relations in Botswana—at least in areas not occupied by San (Bushmen hunter-gatherers), whose lands became Crown Lands.

With decades of dealings with Europeans behind them, African coastal communities were neither naive nor unknowing of colonial intentions with the signing of the Berlin Act. Some assimilated natives from St. Louis and Brazzaville had homes in Paris. The Ashanti King of Ghana, among others, had long maintained an embassy in London to service his slave-trading and gold-trading interests. Accordingly, Ghanaian elites successfully rebuffed British efforts in 1894, 1897, and 1910 to turn their gold-rich forest lands into property of the Crown, fully aware that this would deprive them of incomes able to be derived from leasing these lands to foreigners, especially gold-mining companies. These elites formed an Aborigines Rights Protection Society and sent a deputation to the Privy Council in England to argue that "no land was un-owned" in the Gold Coast and that customary tenure should form the basis of the modern colonial state.[14] Various researches and court cases backed them up. Their success in London meant that 70 percent of Ghana remains the private collective property of customary communities today, although this is not without problems (see below).

AFRICANS WERE NOT AS COMPLIANT AS COLONIZERS WISHED

Later, other influential chiefs in Nigeria would similarly use the British courts to secure their land rights. As colonial occupation of Lagos Island grew over the 1896-1919 period, local chiefs took the administration to court in a landmark ruling in 1921. Through this, the colonial government in Southern Nigeria was forced to accept that King Docemo of the Benin Empire had not actually *sold* Lagos Island to the United Africa Company in 1861 (a company which the British Government then bought); he had only ceded his *political sovereignty*, leaving native land ownership unimpaired. [15]

For the majority of Africans, such opportunities were not available or seized. Overall the fate of millions as the tenants of one or other European Head of State was firmly established from the outset.

Africans were not passive. Throughout the continent, protests and violence occurred and reoccurred as local lands were infringed by European settlers, merchants, and investors. Terrible killings followed the arrival of thousands of criminals shipping to Angola before 1900 told to help themselves to land.[16] In 1898, chiefs in Sierra Leone violently protested the loss of lands outside Freetown. Rebellion rages in Tanzania from 1905-07 as German settlers, companies and profiteers helped themselves to native lands and as the German military administration forced natives to grow cotton on their smallholdings. In Sudan, the first of many protests against land and forest loss occurred in 1908. Colonizers reacted to resistance oppressively, but none so severe as the genocide visited upon the Herero and Nama tribes in

German South West Africa (Namibia) during 1890-1908, as they fought against the clearance of their lands for white settlements; only angry public protest in Berlin eventually put a stop to this.[17]

AFRICAN RESISTANCE TO LAND THEFT WAS A GOOD DEAL MORE ACTIVE THAN USUALLY REMEMBERED TODAY

Commonalities in the early colonial mission

Despite difficulties colonial land capture proceeded satisfactorily, and with these broad similarities territory to territory, as embedded in early colonial legislation:

a. establishment of colonial *control* over all lands and imperial *title* over as much land as possible,

b. often distinct treatment of land law and administration for coastal/enclave areas and hinterlands,

c. early subdivision of territories into different *tenure classes*, particularly Crown/state lands, private lands and public lands, with the foundations laid for native reserves and separate development policies,

d. a strong orientation of early land laws towards controlling wayward and greedy European companies and settlers (mainly Anglophone Africa), and mainly to protect the claimed prerogative of the new colonial state to be the sole authority which could take the lands of natives; steps included making it illegal for Africans to sell or lease lands directly to Europeans,

e. swift promulgation of land acquisition laws to ensure a legal route for taking native occupied lands at will, including conditions that made it clear that no payment of compensation was required for lands that were uncultivated,

f. creation of dual land administration systems, one catering to Europeans, assuring them of tenure security in ways familiar to them and able to be upheld by courts at home, and one entrenching state ownership and control of native lands, usually embracing more than 90 percent of each territory. Examples of the above follow.

In **Sudan** the Land Title Ordinance, 1899, barred the sale of land to non-natives who had no paper titles to these lands and reduced the rest of the country to government land that was divided into lands "subject to no rights" and land "subject to rights vested in a tribe, section, or village". These rights were diminished in 1901 with the declaration that forests and timber belonged solely to government. The Land Acquisition Act, 1903, ruled that compensation for land-takings for public purpose would not be paid for lands "not amounting to full ownership" (i.e. without title deeds). The Land Settlement Ordinance, 1905, tightened the noose, making all waste, forest, and unoccupied lands government land. "Unoccupied" land was defined as land "free from private rights or not amounting to full ownership". Any sale, mortgage, or disposal of native lands without government consent was forbidden in 1918.

The foundation for homelands was established in **South Africa** during this era with the passage of The Land Act, 1913, which set aside seven percent of the country as native areas where customary law would apply. The millions of Africans living in the remaining 93 percent of the country were denied this right; they had the choice of becoming wage labourers on their own lands or moving to the reserves.

In **Kenya**, much larger tracts of land for natives were acknowledged by the passage of the East African Crown Lands Ordinance, 1915, but these were deemed to be Crown Land, making Kenyans tenants of the state. Settlers in Kenya acquired around three million hectares, while settlers in Malawi were given 1.5 million hectares in 1894.

Meanwhile, German imperial decrees issued for **Tanzania** in 1895 and **Cameroon** in 1896 also established the empire's ownership of *herrenlos*, lands considered vacant and ownerless due to the absence of proven rights or contracts. This was largely driven by the need to regulate the alarming behavior of colonization societies, which had been "buying up thousands of acres for trinkets".[18] The decrees did not stop them, causing the military governor in 1903 to deny settlers absolute rights until they had cleared and farmed at least half their allocations.

King Leopold II of Belgium adopted similar positions in his 1885, 1886, and 1906 ordinances for the **Congo Free State**, which halted native sales and cessions to outsiders and required missionaries and merchants to produce proof of past purchases or contracts they had made with native leaders. Native lands were described as "occupied" if visibly settled and farmed. "Unoccupied" lands became state land. A 1912 decree confirmed that "all ownerless things belong to the Colony, except for respect for customary indigenous rights and what may be said on the subject of the right of occupation".

Having previously allocated thousands of hectares of "fallow" (un-owned) land in **Angola** and **Mozambique** to Portuguese feudals, companies and criminals, Portugal introduced legislation in the 1890s requiring the registration of lands these arrivals had acquired. Settlers acquired 1,800 square miles between 1907 and 1932. Some 98 square miles in the midst of some of these areas were reserved for natives, defined as fallow lands and not permitted to be sold to private (Portuguese) citizens.

In **Senegal** (and most other French possessions), an undeveloped form of land registration had been in place since 1855. Its procedures were updated in 1900 and 1906, partly to make it easier for assimilated natives to register deeds of purchase in the *Livre Foncier*. In practice, registration was pursued by only handfuls of Africans living in coastal enclaves (only a couple of thousand Africans were acknowledged as French citizens in a

THE MOST PERNICIOUS INSTRUMENT AGAINST AFRICAN RIGHTS WAS INSTITUTIONALIZATION OF THE NOTION OF VACANT AND OWNERLESS LANDS SIMPLY BECAUSE THEY WERE UNFARMED. THIS DEEPLY AFFECTED FOREST TENURE

Francophone empire comprising 69 million people in 1939).[19] No provision was made for native family or community tenure. It was a similar case in Afro-American-settled **Liberia**, which extended registration (begun in the 1850s) only to "Aborigines who become civilized" (i.e. wear clothes and top hats and have windows in their houses).[20]

PHASE II: TIGHTENING THE NOOSE AGAINST NATIVE RIGHTS: 1920–1945

The period between the two world wars deepened contradictions in the handling of customary land rights. On the one hand, colonial enterprise came into its own as a support for metropolitan states. This was especially so following the Great Depression of the early 1930s, when there was increased capture of African raw materials and labor and an expansion of plantation agriculture for rubber, sisal, cotton and oil palm. Peasant commodity production was coerced through a combination of hut taxes, coerced labor for public works, control over crop movements and prices, and other negative incentives.[21] English soldiers were rewarded for their service with lands within Anglophone territories, accelerating local dispossession and forced labor and tenancy on white farms. An early resistance movement dedicated to nationalism, the East African Association (1921), arose in Kenya in response to these injustices, inspired by Gandhi's Indian nationalism and Marcus Garvey's black nationalism.[22] In Francophone Africa, where white settlement was never encouraged (except in a small area of Côte d'Ivoire), French commercial companies increased their control over native production as the main route of extraction.

On the other hand, the international community was increasingly aware and decreasingly tolerant of land-takings. For example, the new League of Nations was infuriated when, in 1920, Britain vested native lands in Tanzania in the Governor in trust for His Majesty the King of Great Britain. It formally reminded Britain, Belgium, and France that they had *not* been ceded former German territories in Africa in 1920 as *owners* but only as trustees with powers of management. Those countries had also formally agreed under international law to protect native land rights (Article 6 of the Mandatory Agreement).[23] The Governor of Tanzania got around this problem by enacting another law (Land Tenure Ordinance, 1923), which respected Tanzanian rights to "use and enjoy" (the King's land). Still hounded by the League of Nations, Britain grudgingly deemed (in 1928) these rights to be similar to the titled rights of occupancy that were being awarded to settlers—but only as long as *use* was visible and active. Meanwhile the Governor launched "a certain amount of white settlement to develop the country's resources" (1926), which in fact involved about a million more hectares.[24]

CAPTURING THE LANDS OF AFRICANS WAS NOT ALWAYS SMOOTH-SAILING

It was easier for the colonizers to tighten state tenure and control in non-mandated territories. In Sudan, therefore, laws were enacted in 1925 and 1939 confirming state ownership of native lands although presented in a positive light; while proclaiming that native rights would be protected, this was limited to "rights to cultivate, to pasture and to collect forest produce". Actually *owning* the land was not mentioned. Just to make sure, the law also stated that such rights could not "be promoted into ownership".[25]

In South Africa, policy hardened during the inter-war years against African occupancy outside scheduled reserves. Separate areas for Europeans and Africans were also formally established in Zimbabwe by the Land Apportionment Act, 1930. In Zambia, in contrast, Africans gained substantial lands through the creation of native reserves—but, as in Sudan, in ways that made it clear that these did not mean rights equivalent to the ownership recognized for non-local communities.

In Francophone Africa, *direct rule* was imposed through appointed indigenous authorities, religious courts, and native police. These were bound to apply clear sets of rules on all matters (the *indigenat*). *Indirect rule*, as created by the British in Gambia, Malawi, and other Anglophone territories as well as Liberia, spread through the 1920s and 1930s as a means to lessen the great expense of administering vast hinterlands. While it was claimed that the resulting "native authority" systems were acting in the interests of customary land law, even governors admitted that the system abundantly altered the meaning and boundaries of native tenure. [26] This was achieved by redefining tribal areas to suit the colonial state and through the continuing reconstruction of norms in rules handed down by provincial commissioners for recruited chiefs (with stipends) to apply.

As example, in central **Sudan**, only 16 of 65 Nuba territories were recognized in 1932; the rest were aggregated and placed under the control of Arab leaders, who were considered to be more competent. The common lands of the Nuba were also largely reallocated to Arab pastoral tribes, sowing the seeds for future conflict.[27] In **Ghana**, native councils sealed the subordination of commoner rights to chiefs in 1928. The powers of village chiefs were centralized to paramount chiefs. Rent-seeking by the latter became rampant; fees were extracted from mining and timber companies and from more humble cocoa farmers moving in from the north, and they were never distributed to community members.[28] Legislation in 1945 in Belgian **Congo**, **Rwanda**, and **Burundi** empowered chiefs by declaring that all abandoned lands reverted to them.

The creation of native reserves made it difficult for Africans to acquire lands outside their designated areas.

The most productive lands were targeted for European companies or settlers, making people squatters on their own land and helping to generate an ethnically rather than a community-based definition of "our lands". In **Kenya** this would become a source of conflict half a century later, as the Kikuyu, who possessed fertile lands attractive to Europeans faced an acute shortage of land within reserves but also resentment when they migrated with colonial encouragement to other parts of the country.

Anglophone and Francophone administrations still differed on whether better-off Africans should be able to secure title deeds for their private house plots and farms. The British believed that such privatization would trigger class conflicts.[29] The French felt compelled to make concessions given the Civil Code and introduced the Decret du 8 Octobre 1925 Instituant un Mode de Constatation des Droits Fonciers des Indigenes en AOF. This was designed to address the fact that assimilated Africans were not registering their lands by providing for a lesser procedure of rights confirmation, but it could still only be applied to individually held houses and fields. In 1935 another law sealed the dismissal of communal rights, stating that lands "not covered by title and not exploited or occupied for more than ten years belong to the state".[30] A 1920 law in the Belgian Congo dictated similarly.

Therefore, by one route or another, the inter-war period saw the uniform consolidation of customary rights as no more than rights of access and use, and occupation where villages were in place. Forests, rangelands, and marshlands were legally removed from native ownership. The situation was worst in **Lusophone** Africa (Portuguese). In 1926 the new fascist regime in Lisbon reneged on pre-war acknowledgement that customary occupation deserved some protection. Without the barrier of either native reserves or indirect rule, land losses rose sharply as European immigration accelerated, creating swathes of new cotton and coffee plantations.[31]

There were exceptions. In **Liberia** in 1921, the Supreme Court overturned a 1916 ruling that Monrovia only possessed political jurisdiction over the expansive hinterland, deciding instead that sovereignty included ultimate control of land disposition. In any event, said the Supreme Court, "it is unnecessary to seek or secure the willing consent of uncivilized people, as through (subordination to the state) they gained civilization".[32] However, chiefs from the hinterland, meeting in Suehn two years later, persuaded Monrovia that native land rights had to be respected. This led to regulations for the hinterland (1926, 1935, and 1949) that declared tribal title to exist, irrespective of whether it was described in formal deeds. The opportunity was given for chiefdoms to double-lock this security by acquiring fee simple Aboriginal Title Deeds on the basis of survey only. Five wealthy chiefdoms did so before 1945. This secured (they thought) one million acres as community-owned lands in absolute title.[33]

THE EXCEPTIONS TO ABSOLUTE DISPOSSESSION WERE SIGNIFICANT, PROVIDING MODELS STILL PURSUED TODAY

It should also be noted that the 1920s and 1930s saw a rising rural elite, often led by chiefs, members of native authorities, and protégés of Christian missions, who secured large areas of land for themselves, and avidly adopted cash-cropping. In Kenya, the Kikuyu Central Association was established to lobby for the issuance of private title deeds such as white settlers held and to secure the substantial areas of land these elites had carved out of reserves, at the expense of poorer families.[34] Commentators in both Tanzania and Kenya reported that "by 1940 there were Africans owning tractors".[35]

PHASE III: ABANDONING PRETENCE THAT AFRICAN TENURE COUNTS: 1946–1960

The end of the Second World War saw a surge in grant of lands to European companies and to settlers (in

Anglophone Africa), but at much greater scale than seen after the end of the First World War. Native production of cash crops was also coerced, itself creating considerable landlessness when farmers failed to meet targets. Large schemes were favoured. For example, around 85,000 families were evicted from lands in Tanzania between 1945 and 1951 to make way for the infamous "groundnut scheme" (1946) which was directly administered by the British Ministry of Food, partly funded by multinationals, and managed by former British army officers promised land at the end of the war.

PRIVATIZATION POLICIES GOVERNED TREATMENT OF NATIVE TENURE FROM THE 1950s

Throughout the continent, respect for "peaceful native occupancy" dwindled and the scope of public purpose expanded to allow the state a free hand in issuing concessions to agri-business and for timber and mining extraction. The creation of forest reserves was accelerated to mark out areas for indigenous timber extraction or, in drier countries, for the replacement of native forest with commercial exotic species.

Where natives resisted, ways were found to circumvent their claims. Thus, when Meru elders of **Tanzania** went to the United Nations to present their grievances against eviction for new settler estates, the government in Dar es Salaam responded by passing a new law (in 1950) that improved local consultation but did not require consent. The *Public Preserved Areas Act, 1954*, further limited the conditions under which compensation was payable. Attempts by some Africans to reassess the status of customary tenure in the courts failed in a landmark case (1953–57); this ruled customary rights to be no more than lawful possession (i.e. not ownership).[36] In **Liberia**, provisions for hinterland communities to secure collective titles were finally re-worded in 1956 to reduce such rights to mere possession. Such shifts in support for customary rights were echoed around the continent.

By the mid-1950s, the demise of customary rights was routinely justified as in the interests of natives themselves. Customary ways of landholding and the holding of lands collectively in particular, were marked out as an impediment to agricultural growth. It was concluded that land tenure should be "removed entirely from the sphere of customary law".[37] The East African Royal Commission (1953–55) led the way, its vision reflected in a similar investigation in Francophone Africa (the 1959 *Rapport de la Commission du Secteur Rural*) and by the Food and Agriculture Organization of the United Nations, the United Nations Development Programme, and the World Bank.

These agencies shared a vision of instituting an entirely free market in land through privatization at scale and the removal of the authority of the customary sector over land relations. This transformation was needed, they said, to enable poor farmers to sell their lands and to provide the landless labor needed to kick-start industry, while enabling richer Africans to buy up their lands and establish commercial farming. Programs to convert peasant farms into individual-owned and statutorily described entitlements were planned in many states to deliver the extinction of customary tenure. African elites needed no encouragement; they had already steadily been entering the (mainly urban) land market, taking advantage of the registration regime set up originally for settlers.

As independence loomed, new laws were drafted by colonial advisers to express these reforms (as they were called). Broadly they had similar precepts and procedures. A slight difference between laws in French and Anglophone territories at this time was that the former made it possible for Africans to acquire lands collectively, although it transpired, limited by the requirement that "evident and permanent possession of the land" must be demonstrated, thereby neatly excluding the opportunity for communities to secure

forests, rangelands or other unfarmed collective assets.

To be fair, there were also more benign moves designed to curtail the powers that chiefs and economic elites within the African community had acquired in the inter-war years. The *indigenat* of Francophone Africa was abandoned in 1947 and laws passed in Anglophone territories supposedly democratizing native councils. However, what this really meant was to draw powers more definitively into the safe hands of the state, not to devolve those powers to communities. "It is a sobering reflection", wrote the Governor of Tanzania in 1951, "that the whole of land administration is carried on without any participation by Central Government ….".[38] Nevertheless, the interests of local elites and colonial administrations were well aligned, these parties sharing the conviction that customary tenure must give way to introduced forms of privatised landholding, and in the process freeing up rights to millions of hectares of commonage.

5 Did independence liberate customary rights to land?

Little real change to the legal status of African tenure occurred in the period 1960–90. Some states (e.g. Central African Republic, Gambia, Madagascar, Sierra Leone, and Swaziland) barely altered colonial land laws at all until the 1990s. Those that did, largely circumscribed customary rights further, aided by conversionary titling programmes where these operated. Acknowledgement of property remained limited in law to statutory entitlements. Millions of *de facto* customary rights belonging to women, family members, and seasonal rights holders, and especially those held in common by community members over uncultivated forests, rangelands, and marshlands, were saved in practice only because of the limited reach of such programs.[39]

More perniciously, new post-colonial land laws took treatment of majority customary land rights to new depths of suppression. Even the few occupancy and use rights protected by colonial laws were frequently done away with. Thus Sudan passed the Unregistered Lands Act, 1970 making all untitled lands the private property of government, rather than unowned lands controlled by the state in trust for the population, a subtle but critical difference in the protection obtainable. The Democratic Republic of the Congo enacted laws clarifying customary tenure as strictly permissive (1966, 1973). Cameroon (1974) and Uganda (1975) did similarly. Chad converted customary lands to public land deemed vacant (1967), while Mauritania subjected customary possession to *Shari 'a* law, requiring holders to produce documentation and demonstrate active use to sustain legal occupancy. Somalia abolished clan tenure (1975) laying the seeds for terrible clan land wars. In 1982, newly independent Zimbabwe restructured the Tribal Lands Act into the Communal Lands Act, vesting these lands in the President without mention of trusteeship function and who at the same time pursued the restitution of white-owned farms in non-communal areas "in the interests of the black majority". In the same year Burundi aimed to overcome land shortages by making land rights dependent on sustained use, with title guaranteed after 30 years irrespective of how the land was obtained; a double discrimination for the thousands of people who had been forced to flee conflict and who found, on return, that their lands were "lawfully occupied" by others. Where loopholes existed through which rural communities might claim ownership, these were closed. In Liberia, the 1929-49 Hinterlands Regulations, already diluted in 1956, failed to appear in the 1973 Civil Code, followed by a 1974 law which laid down procedures for titling entirely shaped around individualization. Newly independent Zambia removed the special status of Barotseland, where the *Litunga* (king) had uniquely retained title. Malawi curtailed residual powers of chiefs over land in 1965, and rural Ghanaians, while not losing title, saw their lucrative forests taken into state custody (1962). In Kenya, the new government constitutionally acknowledged native areas as county council lands held in trust for the occupants, but granted those agencies and itself full powers of disposition.

Only in Botswana did Independence bring with it new acknowledgement that tribal land is owned, not merely occupied (1968) but in a manner which also leaves most of these lands vulnerable to the privatised ranching schemes the government favours (1975). Similar programmes, usually foreign donor-backed, mushroomed around the continent, from the rice schemes of the Niger Basin to the sorghum and sesame schemes of Sudan, the elite-led ranching schemes of Kenya, and the wheat schemes of Tanzania, governments convinced that large-scale mechanised farming and ranching schemes were the route to growth. Thousands of customary land owners were evicted in the process.

Nationalization and African socialism (particularly in Guinea, Senegal, Tanzania, Mozambique and Ethiopia) drove this heightened dispossession around the continent, new African Administrations taking over ownership of either all lands in the country or only the majority - those rural lands held under customary law and not yet titled. The effects (and purpose) of the former was to reduce freeholds owned by foreign companies and persons to leaseholds, held from the state and dictated by its terms. The purpose and effect of the latter was to give the new governments a free hand to lawfully take and reallocate even occupied and used lands at will, and, additionally, to not even be required by law to pay compensation for the few occupancy and use rights which colonial laws had acknowledged as protected. State landlordism flourished, sometimes for the creation of settlement schemes for land-needy but much more often to provide land to burgeoning numbers of state companies (parastatals) or private interests. Even long-declared national parks and forest reserves were not immune to excisions for such purposes.[40]

As in colonial days, real security of tenure was achievable only through individually established statutory entitlement, and only house plot and permanent farm lands eligible for such entitlement. However, by 1990, titled lands covered less than ten percent of Sub-Saharan Africa, mostly in the vast white farming areas of Namibia, Zimbabwe, and South Africa. Half a billion Africans were still technically landless—permissive occupants or even squatters on their own customarily acquired lands.

None of the above is particularly surprising. Class formation and land commoditisation had grown apace since 1945; politicians and civil servants who assumed power in the 1960s constituted economic elites, and yet closely tied to traditional forms of leadership and who bring with them to power and office a particularly paternalist and tribally-centred new nationalism, delivered for some decades in tribally-aligned one party governments.[41] At the same time members of this new African middle class shared not only political power and business interests but the convictions of market-led development so strongly advocated by the new donors (the former colonizers) and international agencies, and which reached an apogee in the land papers of the World Bank in 1975. By the late 1980s and early 1990s, steps to meet these same convictions will become conditions of structural adjustments loans.

The fact that Africans owned their lands, the provisions of introduced European laws notwithstanding, was conveniently forgotten during the 1960-90 era. Indigenous tenure regimes in general and communal landholding in particular were to be extinguished as fast as possible in service of individual-centric economic growth, but through programmes which were, as shown above, not delivered to significant degree outside Kenya. Template land registration laws, drafted in the offices of UNDP and donors were, on advice, adopted around the continent. And, as now so well-known, Gareth Hardin, confusing collective group-owned property with open access regimes, added his penny's worth to destructively good effect (1968), particularly in regard to the most expansive and arguably precious resource of African communities – their commons.

6 Conclusions

In summary, the rights of Africans to their lands began to be formally suppressed in the 1880s along with colonial state-making, and remained on a downward path for the next century. Because of public opinion at home in Europe, colonizers needed to make their actions lawful and used the law accordingly. The primary instrument was a denial that Africans owned their land, especially those lands that by tradition were held collectively. European notions of tenure, most marked by the necessity that lands should be able to be sold freely, consistently superseded African notions of property. The protection of even use rights plummeted after 1945. Tolerance gave way to an impatient determination to finally extinguish customary tenure. By then, African elites entirely shared the views of colonizers, and the most influential international agencies, giving the movement plenty of force and sustaining it through the 1960s to the 1980s. In this way, elite class interests took over colonial interests as the guiding hand of mass dispossession. The relatively straightforward theft of African lands by Europeans became class theft, making challenge much more difficult. By 1990, colonial norms were still underwriting the dispossession but they were being put to use by Africans themselves.

7 Implications for forest tenure

Setting aside exceptions such as those in Ghana and enclaves in Sierra Leone, southern Nigeria, and Zambia, it is clear that communal rights to forests were an early casualty of colonial capture of Africa—along with communal rights to areas of rangelands and marshlands and traditional rights over surface minerals, local waters, and beaches. More often than not, at a stroke of a pen, the ownership of such lands—"wastelands"—fell to state tenure.

This remains the case in most (although not all) African states.[42] Even customary access to these lands is often not allowed at all or is only tolerated until the lands can be put to productive commercial use by more powerful actors. The failure to provide statutorily for collective tenure or entitlement stands out as the most glaring legal omission of the last century. It is little surprise therefore that the state owns 98 percent of forests and woodlands in Sub-Saharan Africa today, with only 0.1 percent owned by communities and not much more (0.4 percent) set aside for legal local use.[43] It is not difficult to see where advocacy needs to focus.

Endnotes

[1] Current land policies are discussed in briefs 3 and 4.

[2] For clarity, the modern names of states, rather than their colonial designations, are largely used here.

[3] Angola, Mozambique, Guinea Bissau, Cape Verde, and Sao Tome and Principe.

[4] The West African federation, *Afrique Occidentale Francaise*, governed modern-day costal Mauritania, Senegal, Mali, Guinea, Côte d'Ivoire, Burkina Faso, Benin, and Niger from Senegal from 1904 to 1959, and Togo from 1921. The French Equatorial Africa Federation governed modern-day Gabon, Central African Republic, Republic of the Congo, and Chad from 1910 to 1959.

[5] Eric Hobsbawn. 1987. *The Age of Empire* 1875-1914. Abacus, London.

[6] The legal mechanisms and thinking are more fully covered in Alden Wily, Liz 2007 *So Who Owns the Forest,* SDI, Monrovia & FERN; Alden Wily, Liz, 2011. *Whose Land is It? The status of customary land tenure in Cameroon.*CED & FERN.

[7] The distinction between possession and ownership is thoroughly embedded in all European law.

[8] See endnote 5 above.

[9] Locke, John. 1689. Of property. In *Two Treatises of Government*.

[10] See brief 3.

[11] Examples of bills of sale are provided in Alden Wily, Liz. 2007 as cited in endnote 5.

[12] Amanor, Kojo. 2008. The changing face of customary land tenure. In *Contesting Land and Custom in Ghana*. Ubink, Janine and Kojo Amanor, eds. Leiden: Leiden University Press.

[13] In fact, an Anglo-Egyptian Condominium, ruled jointly by Britain and Egypt.

[14] Amanor 2008. As cited in endnote 11.

[15] Case of Amodu Tijani vs The Secretary, Southern Provinces, the Judicial Committee, His Majesty's Privy Council, 11 July 1921.

[16] Clover, Jenny, 2005. Land Reform in Angola: Establishing the Ground Rules. In Jenny Clover and Chris Huggins eds. *From the Ground Up: Land Rights, Conflict and Peace in Sub Saharan Africa*. ACTS Press/Pretoria: Institute for Security Studies. http://www.iss.co.za/pubs/Books/GroundUp/7Land.pdf

[17] Zimmererer, Juergen and Joachim Zeller, eds. 2008. *Genocide in German South-West Africa: The Colonial War of 1904-1908 and its Aftermath*. London: Merlin Press Ltd. See also http://en.wikipedia.org/wiki/Herero_and_Namaqua_Genocide.

[18] Iliffe, J. 1969. *Tanganyika Under German Rule 1905–1912*. Cambridge: Cambridge University Press.

[19] Hessling, Gerti. 2009. Land reform in Senegal: l'Histoire se repete? In Janine Ubink et al. eds. *Legalising Land Rights, Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden University Press.

[20] Alden Wily, Liz. 2007 as cited in endnote 5.

[21] Bryceson, D. 1980. Changes in peasant food production and food supply in relation to the historical development of commodity production in pre-colonial and colonial Tanganyika. *Journal of Peasant Studies* 7(2).

[22] Kanyinga, Karuti, Lumumba, Odenda and Amanor, Kojo. 2008. The Struggle for Sustainable Land Management and Democratic Development in Kenya: A History of Greed and Grievance in *Land and Sustainable Development in Africa*. Zed Books, London and New York.

[23] Rwanda and Burundi were handed over to Belgium; Tanzania and parts of Togo and Cameroon were handed over to the British; British South Africa took over the administration of Namibia; and France took over the administration of most of Cameroon and Togo.

[24] Wily, Liz. 1988. *The Political Economy of African Land Tenure A Case Study from Tanzania*. No. 2: Development. Norwich: School of Development Studies, University of East Anglia.

[25] Sudan's Land Settlement and Registration Act, 1925, and Prescription and Limitations Act, 1939.

[26] Phillips, A. 1955. The future of customary law in Africa. *Journal of African Administration* VII(4). The impact of indirect rule on customary tenure became a major subject in social research from the 1960s. For the case in Zambia, see Colson, Elizabeth. 1972. *Crime, Justice and Underdevelopment*. In *Colonialism in Africa, 1870–1960*. Volume 3. V. Turner, ed. Cambridge: Cambridge University Press. For a Francophone case see Snyder, F. 1982. Colonialism and legal form: the creation of 'customary law in Senegal. In *Crime, Justice and Underdevelopment*. C. Sumner, ed. Cambridge Studies in Criminology XLVI. London: Heinemann.

[27] Komey, Guma Kundi. 2010. Communal land rights, identities and conflicts in Sudan: the Nuba question. Paper presented at the Human Rights Dimensions of Land in the Middle East and North Africa, MENA Land Forum Founding Conference, Cairo, 10–12 May 2009. http://www.hic-mena.org/documents/Kunda%20Kumey%20Nuba%20Question.pdf.

[28] Amanor 2008. As cited in endnote 11.

[29] Kanyinga et al. as cited in endnote 20.

[30] Hesseling, 2009 as cited in endnote 18.

[31] Clover, 2005 as cited in endnote 15.

[32] Alden Wily 2007. As cited in endnote 5.

[33] Alden Wily 2007. As cited in endnote 5.

[34] Kanyinga et al. 2008. As cited in endnote 21.

[35] Bryceson 1980. As cited in endnote 17. Also see Ngugi wa Thiong'o. 2010. *Dreams in a Time of War*. Nairobi: East African Educational Publishers Ltd.

[36] Mtoro Bin Mwamba vs. Attorney-General, High Court, Tanganyika.

[37] Mitchell, P. 1951. Review of native administration in the British territories in Africa by Lord Hailey. *Journal of African Administration* 6.

[38] Mitchell 1951. As cited in endnote 36.

[39] Bruce, John and Shem Migot-Adholla, eds. 1994. *Searching for Land Tenure Security in Africa*. Iowa: Kendall/Hunt.

[40] Most clearly documented in Kenya in the 2004 report of the Commission of Inquiry into the Legal, Land Policy, Constitutional and Institutional Framework on Land (the Njonjo Commission).

[41] Chabal, Patrick and Jean-Pascal Daloz. 1999. *Africa Works Disorder as a Political Instrument*. The

International Africa Institute in association with James Currey and IndianaUniversity Press.

[42] See brief 4.

[43] RRI and ITTO. 2009. *Tropical Forest Tenure Assessment: Trends, Challenges and Opportunities.* Yokohama: International Tropical Timber Organization/Washington D.C.: Rights and Resources Initiative. http://www.rightsandresources.org/publication_details.php?publicationID=1075

The Rights and Resources Initiative (RRI) is a strategic coalition comprised of international, regional, and community organizations engaged in development, research and conservation to advance forest tenure, policy and market reforms globally.

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