

# IMPROVING TENURE SECURITY FOR THE POOR IN AFRICA

## FRAMEWORK PAPER FOR THE LEGAL EMPOWERMENT WORKSHOP – SUB-SAHARAN AFRICA



Professor Patrick McAuslan

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FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Support to the Legal Empowerment of the Poor (LEP)

Improving tenure security for the rural poor –

with the financial assistance of Norway under a Programme Cooperation Agreement





# **IMPROVING TENURE SECURITY FOR THE POOR IN AFRICA**

## **FRAMEWORK PAPER**

### **REGIONAL TECHNICAL WORKSHOP FOR SUB-SAHARAN AFRICA ON LEGAL EMPOWERMENT OF THE POOR**

**Professor Patrick McAuslan**

Nakuru, Kenya  
October, 2006

Photograph by Antony Kimani  
(Participants in the regional technical workshop for sub-Saharan Africa  
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Most of the world's poor work in the "informal economy" – outside of recognized and enforceable rules. Thus, even though most have assets of some kind, they have no way to document their possessions because they lack formal access to legally recognized tools such as deeds, contracts and permits.

The **Commission on Legal Empowerment of the Poor** (CLEP) is the first global anti-poverty initiative focusing on the link between exclusion, poverty and law, looking for practical solutions to the challenges of poverty. CLEP aims to make legal protection and economic opportunity the right of all, not the privilege of the few. (see <http://legalempowerment.undp.org/>)

CLEP has identified specific tenure issues, including i) how to make property rights accessible to all, especially poor and marginalized communities, groups or individuals and ii) how to ensure that property rights of the poor function as means of achieving economic and social empowerment, particularly in the context of gender equity and those affected by HIV/AIDS.

There is growing empirical evidence that giving legal recognition to informal property rights in urban areas brings positive results. However, a similar body of evidence does not exist for the empowerment of people in rural areas. Instead, the signs are mixed, resulting in a largely sterile and divisive debate on formalization of rights.

FAO, with donor funding from Norway, has undertaken a set of activities for "Improving tenure security of the rural poor" in order to meet the needs of FAO member countries and, in turn, support the CLEP. This work falls within the FAO corporate strategy on "Sustainable rural livelihoods and more equitable access to resources". Recognizing that secure access to land and other natural resources (forests, water, fisheries, pastures, etc.) is a crucial factor for eradication of food insecurity and rural poverty, FAO's cross-departmental and cross-disciplinary work focused 2005-2006 activities on sub-Saharan Africa which has the world's highest percentage of poor and hungry people.

This paper is part of FAO's effort to inform the CLEP through its working group on property rights. It was prepared for the regional technical workshop on "Improving tenure security of the rural poor" held in Nakuru, Kenya, October 2006, at which issues relating to property rights were reviewed and actions were initiated to develop common strategies for improving the protection of rights to land and other natural resources of the rural poor.



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## LIST OF ACRONYMS

ADR	–	alternative dispute resolution
CBO	–	community-based organization
CEDAW	–	UN Convention on the Elimination of All Forms of Discrimination Against Women
CLEP	–	Commission on Legal Empowerment of the Poor
CPA	–	Comprehensive Peace Agreement
EARC	–	East African Royal Commission
ETLT	–	evolutionary theory of land tenure
FAO	–	Food and Agriculture Organization of the United Nations
FIG	–	International Federation of Surveyors ( <i>Fédération Internationale des Géomètres</i> )
GPA	–	Global Plan of Action
IFI	–	International Financial Institutions
IMF	–	International Monetary Fund
JCPC	–	Judicial Committee of the Privy Council
MNC	–	multinational corporations
NGO	–	non-governmental organization
PAP	–	project-affected persons
PFR	–	<i>Plan Foncier Rural</i>
RDA	–	range development area
SPS	–	Sanitary and Phytosanitary Measures Agreement
TRIP	–	Trade Related Intellectual Property Rights Agreement
UNDP	–	United Nations Development Programme
URAA	–	Uruguay Round Agreement on Agriculture
WTO	–	World Trade Organization

## EXECUTIVE SUMMARY

### **The Framework for the Paper**

This paper aims to suggest answers to this penetrating question about land tenure and the poor in Africa:

*Why, when so much is known and so much seems to be done, does so little change?*

For this purpose, a framework has been developed that can be used to prioritize and explore the issues within a coherent and recognizable context that provides a practical as well as theoretical perspective.

↓ DIMENSION	TOPIC ↓	<i>Land markets &amp; land titling</i>	<i>Pluralism: customary &amp; statutory</i>	<i>Informal urban settlements</i>	<i>Gender</i>	<i>Decentralization &amp; institutional development</i>	<i>Pastoralism</i>	<i>Dispute settlement</i>
<b>International</b>								
<b>Colonial</b>								
<b>National</b>								
<b>Social</b>								

After discussing the seven topics along the four dimensions, the following are the conclusions.

### **The international level**

At the international level, there is and always has been a dichotomy between words and actions. During the last 40 years or so, actions have consistently favoured market-based solutions such as title registration, codification and unification of laws, regularizing informal urban settlements, tackling pastoralism or creating more efficient systems of dispute settlement. However, there are other issues, such as gender equity, alternative land dispute resolution and laws based on customary tenure, that do not fit within a market-friendly formula. They may have been featured in international policy statements and internationally funded research but have not been so readily put into practice.

It is argued that the market-led approach is designed not just, or even primarily, for the benefit of national development but for the benefit of globalization. With foreign direct investment in African agriculture, if the poor will benefit at all, it will be by being available for work on the large commercially run estates that will replace “inefficient” smallholder agriculture. It is not really possible to argue that the effect of the rules of international trade created by or under the auspices of the WTO are now or in the future likely to benefit the rural poor. They will benefit large-scale producers. A thriving land market with few controls, a system of registered titles, a land law recognizably Western in format and content, efficient dispute settlement mechanisms for commercial cases – these are the very essence of an international market in land and this is what is driving much international input into land systems in Africa.

### **The colonial level**

There can be no real quarrel with the proposition that the colonial impact on land relations in Africa was uniformly and wholly adverse. It is striking how so much of the colonial legacy lives on. The dual system of land laws and dispute settlement infects all aspects of land management and land relations, not just in matters of formal administration but also in attitudes. In colonial times, the systems the poor live by – customary tenure, pastoralism, informal tenure in unauthorized urban developments – were never considered part of the system of government. Women also were, in a sense, outside government when it came to land, and so they have remained. Only in the last few years has there been evidence that the legacy is being set aside. Solutions to challenges based wholly on considerations and policies grounded in the realities of life and land in Africa now are being developed. Even so, there are still areas in which what may be called colonial attitudes towards the poor continue to affect land policies and their formulation. Policies are still too often made for people, not with them.

### **The national level**

The national level is buffeted by the international and the colonial levels. For much of the era of independence, land policies in many countries were a continuation of colonial land policies. Few countries followed Tanzania's path and came forward with a coherent national land policy in the first two or so decades of independence. However, the thrust of land management in the early years of independence tended to follow, albeit in a more low key way, the route that Tanzania took which was continued or increased governmental control over and ownership of land. Land was the main source of wealth creation, both from national and personal points of view and, thus, governments generally were not willing to see the development of unrestricted land markets or too much private sector land development. The peasants, certainly not to be left to their own devices, were expected to grow primary produce that would be marketed for them by state marketing boards. In doing so, the peasants were, in effect, subsidizing the standard of living of the urban elite and small working class. Land and agricultural policies were certainly not geared to bettering the lot of the rural poor.

From this perspective, policy developments of the last few years – whether adopted as a result of international pressure, renewal of democracy within states or greater national awareness of the need to develop truly national policies – are very much to be welcomed. The commitment to decentralization is a major step forward in allowing citizens to manage their own land affairs. The new approach to land registration involves the community and local institutions with local and simple registration systems and can help protect the tenure rights of the poor. States are showing a greater willingness to tackle urban poverty by regularizing informal urban tenure and accepting, even developing, modes of financing the informal economy. There are welcome signs that states are beginning to think about creating a national land law by blending the best of customary and Western law. A genuinely national land law can be both a shield and a sword against unregulated globalization. Progress also can be seen in respect to women's land and property rights, at least as regards law, although women are too often left to fight their own battles.

There are matters that are still a cause for concern. It is right to note that this movement for the return to the customary is not necessarily going to benefit women in terms of land and property rights. In fact, some think it will not benefit them at all and that the notion of customary is being used deliberately to hold women back. The attempt to abolish customary tenure by law is still seen as viable policy option by some governments, but there is no reason to suppose that this will be any more successful in the twenty-first century than it was in the twentieth century. However, it will cause considerable disruption to the rural poor. Nor is it by any means certain that the battle for continuation and recognition of communal tenure as viable and economically

efficient, particularly by and for pastoralists, has been won. Lastly, the continuation by many states of an administration-orientated dispute-settlement system for customary tenure is no longer justifiable, if it ever was, and in many respects is the last relic of colonialism in land management.

### **The social level**

There can be little doubt that the social level has both benefited from and been a major contributor to the new approach to land policies and land management. National non-governmental organizations (NGOs) that focus on land issues now exist in many countries and are powerful factors in land reform. For instance, there can be little doubt that NGOs in Uganda had significant input into the process of law reform that culminated in the 1998 Land Act and have continued to have an impact on women's land rights in the law. NGOs, both national and international, have played an important role in the re-thinking of policies and actions on pastoralism. NGOs based in informal settlements play a role in managing land and settling disputes.

The social level is not just NGOs. It embraces the voice and the actions of the ordinary person. Decentralization has helped the rural poor find a voice and take action. What is significant, but little remarked upon, is that the voice and action that the poor are prepared to take is to go to court to assert their rights. This is one of the benefits of a more law-based land management process: the people learn they have rights and are prepared to assert them. This may not be comfortable for administrators but it makes for a more transparent and honest process of land administration. The greater recognition of the customary is also an element of the social: a recognition and acceptance of the norms by which the rural poor live their lives can only be of benefit to the whole society.

### **Overall conclusion**

With respect to land relations and policies designed to benefit the poor, there are two competing models of governance and development on offer in and for Africa. One is to adopt the agenda of the international community and its International Financial Institutions (IFIs) and donors: make land available for international investment and development via free and open land markets and homogenized national land laws and reap the benefits of globalization. Such an agenda downplays issues of tenure security for the poor, decentralized land management and women's rights to land.

The other model is to develop national agendas, not to repel globalization for that would be impractical, but to ensure that national considerations are at the forefront. This means giving primacy of place to the land concerns of the poor, both women and men, who are now the majority of land holders in all countries in Africa and are likely to remain so for some time to come. It is their land rights that need to be secured, their conflicts and disputes over land that need to be settled and not left to fester, and their productive uses of land that need to be developed by appropriate forms and institutions of finance. In short, this amounts to a partnership – a partnership between governments and their citizens in the twenty-first century, a partnership to ensure that globalization, so far as it affects land use and development, first and foremost benefits the nation and its citizens. The developments charted in this paper suggest that this is not an unrealistic approach. It is one for which the outlines are largely in place. The issue now is how to continue them.

## PREFACE

A brief note on the background of this paper. I was asked to prepare a paper to “foster a comprehensive, balanced and objective discussion on the specific rural issues faced in sub-Saharan Africa when strengthening of property rights is attempted, to set the stage for a creative review of available empirical material and to pave the way for preparing the messages of the CLEP,” with further guidelines of issues to address, question to ask and answer and literature to review, all to be summarized into 15 000 words of balanced, consistent and impartial discussion on controversial issues written in simple and straightforward English, with minimal references to be included in the text and full references in an appendix.

The task was clearly impossible. To do justice to all the issues listed would require a major work of scholarship. It is, in passing, regrettable that 40 or more years into the era of independence in sub-Saharan Africa, no such work of scholarship on land tenure in Africa has emerged from Africa. (This is deliberately not a balanced statement: it is regrettable and there is no case on the other side for there not being such a work of scholarship).

More important from the point of view of the workshop and the participants, I considered that a paper which seeks to summarise *all* the key issues in a balanced and objective way would be a bland and boring paper full of statements of the obvious, well known to all the participants and not providing the basis for a “creative review” of the empirical material for the CLEP.

I make so bold as to say that I think participants need and would prefer to be stimulated, challenged, even aggravated by a framework paper; that such a paper should lay the foundations for lively and controversial discussions where issues are confronted head on and not avoided. Only in that way will real progress on these crucial issues be made. I take it too that that is one of the reasons why I have been asked to write this paper.

There are many people with knowledge and *lived* experience of tenure issues in Africa who are much better qualified than I to write this paper. But perhaps precisely for that reason – a lack of lived experience – coupled with at least a degree of knowledge of tenure systems in several countries in mainly (but not exclusively – I have been working recently in Sudan, parts of Somalia and Rwanda on land issues) in anglophone Africa and a record of publications stretching back for 40 years in which I tell it as I see it on land matters in Africa that persuaded the FAO to invite me to write this paper.

FAO knows, or at least hopes, that any paper I write would be *objective* – I have no personal axe to grind; *accurate* – an academic author has to be that if he/she is nothing else; *reasonably comprehensive* – total comprehensiveness being impracticable; and *stimulating* – without being unbalanced or inconsistent.

## INTRODUCTION

This paper aims to suggest answers to this penetrating question about land tenure and the poor in Africa:

*Why, when so much is known and so much seems to be done, does so little change?*

For this purpose, I have developed a framework that can be used to prioritize and explore the issues within a coherent and recognizable context that provides a practical as well as theoretical perspective. Although it may be couched in academic form, it is a perspective to which everyone can relate because it accords with their own ideas and ways of looking at things. I set out the framework in Table 1 briefly explain how and why I arrived at it and then turn to using it to discuss the key issues.

The issues running along the top of the matrix have been constructed so as many related sub-issues as possible can be brought together under relatively few headings. More important, and possibly more controversial, are the four “dimensions” I am using to discuss the topics *and the order in which they are presented* – international, colonial, national and social. The dimensions chosen represent what I judge to be the best lenses through which to view and discuss the topics.

But, when we stand back for a moment, are they not, self-evident? There is an international dimension to tenure issues in Africa. This workshop and its genesis are proof enough of that. Whatever the protestations of its authors may be, the World Bank’s paper *Land Policies for growth and poverty reduction* (2003) is not an academic contribution to debate. It is designed to influence or set national policies. Ditto for FAO’s and UNDP’s policy papers and UN-Habitat’s Habitat Agenda which, as “soft” international law, puts countries at least under a quasi-legal-cum-moral obligation to adopt its precepts. The bilateral donors that fund tenure projects are not just automatons providing money as and when asked. They and the consultants they field have their own ideas and policies on the most appropriate way forward. International professional organizations such as FIG are increasingly influential in setting national agendas. More controversially, if only because they are less recognized, are international organizations whose policies and actions directly influence tenure issues (Fortin, 2005; Nyamu-Musembi, 2006). International Monetary Fund (IMF) and World Trade Organization (WTO) are the most relevant here and I will return to them later.

The colonial dimension is, and always has been, of fundamental importance to tenure issues in Africa. I do not suggest that history began with the imposition of colonialism in the nineteenth century. However, when it comes to tenure, the changes wrought by the colonial impact were so fundamental and so long lasting that those grappling with tenure issues and problems today have to recognize that their roots lie not in pre-colonial Africa but in colonial Africa. Colonial boundaries; colonial land grabbing and their spurious legal justifications as well as colonial policies, practices and laws within each colonial entity that is now an independent state provide the starting point and, too often, the framework for land management and reform today (Okoth-Ogendo, 2006; McAuslan, 2006a). In an era when the supposed virtues of empire are being offered as justifications for their recreation (Ferguson, 2003), it is well to put on record the disastrous effect that empire continues to have on tenure policies for the poor in Africa.

**Table 1** Policies and practices set in their multiple dimensions

<i>POLICY; PRACTICE</i> → ↓ DIMENSIONS	<i>Land markets: individualized tenure and land titling</i>	<i>Pluralism: role of customary tenure / statutory tenure</i>	<i>Informal settlements in urban and peri-urban areas</i>	<i>Gender</i>	<i>Decentralization and institutional development</i>	<i>Pastoralism</i>	<i>Dispute settlement</i>
<b>International:</b> World Bank (WB), IMF, WTO, UNDP, UNCHS, FAO; CLEP Donors: USAID; EU countries; International policy papers, professional bodies, consultants, “soft” international law.	International community committed to land markets; support for formal land titling and land laws; keeping regulatory controls to a minimum and ending state ownership of land. Impact of trade policies.	WB policy paper recognizes role of customary tenure and case for ETLT yet WB country programmes push land titling and individual tenure. UN agencies have no clear policy line. Donors have mixed policies.	Almost unanimous policy position by international community that these should be regularized and upgraded and not demolished and dispersed. Lack of policies joined with land markets.	Unanimous policy position by international community that gender issues must be addressed. Neo-liberal economic policies by IFIs and others do not facilitate this. Reluctance to push too hard in practice.	Policy and practice diverge. Policies support decentralized land management but aid and technical assistance nearly always flow to the centre and support for land markets and titling are centrist in practice.	Policy in the early years of the era of independence was to support commercial ranches, privatized grazing and top-down technical bureaucratic organizational developments. Later policies have moved away from this.	Rule of law programmes of donors show little interest in developing specialist dispute settlement bodies to deal with land disputes, preferring to focus on commercial dispute settlement.
<b>Colonial:</b> Basic elements of colonial land policies and laws late-nineteenth to mid-twentieth century (1880s to mid-1950s) East African Royal Commission 1955.	State land ownership is fundamental to colonialism. Imported systems and laws available to urban elite. In many countries, nationals not allowed to own or transact land until late in colonial era.	Dual and separate systems of imported law and land tenure and customary land tenure form the basis of land administration. Late colonial policies directed to replacing customary with “modern” statutory tenure.	Laws and policies aimed at preventing rural dwellers settling in towns and created segregated urban areas where they did. Informal settlements not tolerated. Repressive urban legal regime.	Policies, laws and practices ignored this dimension to land administration at both statutory and customary levels.	Colonial land policies and actions decided and implemented from the centre. Traditional land tenure institutions allowed secondary roles but were kept on a tight leash by colonial administrators.	Colonial land policies harmed pastoralism. Lands were seized on the basis they were unoccupied and pastoralists were removed. Policies of neglect were followed. At end of colonial era, modest efforts at regulation of grazing, etc., were attempted.	Colonial gvts. adopted a dual legal system of law and lawyers for settlers and commerce; administrator-applied law for the locals. Customary tenure dealt with by traditional or “native tribunals” with an appeal to an administrative tribunal, not a court.

<i>POLICY; PRACTICE</i> →	<i>Land markets, individualized tenure and land titling</i>	<i>Pluralism: role of customary tenure / statutory tenure</i>	<i>Informal settlements in urban and peri-urban areas</i>	<i>Gender</i>	<i>Decentralization and institutional development</i>	<i>Pastoralism</i>	<i>Dispute settlement</i>
↓ <b>DIMENSIONS</b>							
<b>National:</b> Central and local governments, national policies, national legislation, formal judicial and legal system.	Ambivalence at losing control; little cost/benefit analysis before reforms introduced. Very few gvts. have given up their ownership of the land. Control of land markets continues.	No clear picture: some states accept pluralist systems; some try to abolish customary tenure. Few states have attempted to develop a “common law” of tenure that fuses the best of the multiple systems.	Reluctance to accept and upgrade informal settlements; stress on “obeying the law”; city plans, infrastructure and development angled to formal sector.	Lip service paid to gender issues; laws enacted but rarely enforced. States shy away from attempting real reform of customary inheritance practices.	Gvts. unwilling to “let go” of a major national political and economic resource. Lip service paid to institutional reform and decentralization but little action.	Gvts. in the early years of independence pursued top-down bureaucratic developmental road in the interests of modernization and control. This policy still extant but other policies more supportive of pastoralism.	Gvts. moved swiftly to dismantle dual system of courts. Customary tenure still tends to be dealt with via administrative rather than judicial bodies. Too many appeals makes system too expensive for the poor.
<b>Social:</b> NGOs, CBOs, especially women’s groups. Residents in informal urban settlements, smallholder farmers; informal and non-recognized customary dispute settlement bodies and persons.	Gender and poverty issues not addressed or met by these policies. Too great a willingness to assume that a land market will benefit the poor but evidence shows growing gap between land-rich and land-poor in many countries.	Whatever the formal legal and administrative system, customary tenure and local practices are still very widely used at the grassroots and urban equivalent in informal settlements.	Most housing development takes place in the informal sector as formal rules and practices are too expensive and complex to comply with. CBOs and informal dispute settlement processes predominate. Formal laws not very helpful.	Women disadvantaged in obtaining land in rural areas. Customs and practices still limit women’s rights. Women more assertive in formal and urban sectors. NGOs working in this area face an uphill struggle from official indifference.	This seen as the key to more equitable and effective land administration and dispute settlement, although negative in terms of gender. Tensions exist in some countries between traditional and modern elected local land bodies.	NGOs in the forefront of new thinking on pastoralism which emphasizes importance of mobility and involvement of pastoralists in managing their own environment. Some gvts. now following this route.	Informal dispute settlement bodies exist in informal urban settlements. Evidence shows most people in rural areas prefer to settle disputes informally using traditional persons and fora.

The national dimension and the social dimension are self-evident. The former represents the formal top-down input into land administration and management such as policies, laws, public-sector political, judicial and administrative institutions, private-sector professions and their associations, banks and property developers. The latter largely represents the informal bottom-up input including NGOs and community-based organizations (CBOs), residents in the informal urban sector, smallholders and subsistence peasant farmers, the landless, informal land markets and dispute-settlement mechanisms. The social inputs are a mixture of legal, semi-legal and non-legal (in the formal sense). It is the interaction between the formal legal upper level and the informal not-so-legal lower level that, in practice, determines the success or failure of land administration and management in Africa. In addition, socio-cultural factors that cross the boundaries of national and social should not be ignored. I discuss them later (see page 27), particularly in relation to gender issues.

## **ISSUE 1: LAND MARKETS, INDIVIDUALIZED LAND TENURE AND LAND TITLING**

The main thrust of the policies and practices on this issue – and the driving force behind the Commission on Legal Empowerment of the Poor (CLEP) – is that the continuance of (a) state ownership of land and (b) customary tenure with its concomitants of unclear boundaries to land parcels, unclear rights as to who has what rights in the land parcel and little or no written evidence of land dispositions, results in land occupiers and users being unable to realize the full potential of their land. If land could be privatized and individualized, and plots titled with clear boundaries, clear sets of interests in the land (with some lesser interests eliminated or converted into money), then land could enter the formal regular open land market. Landowners would be able to borrow against their titles and invest in their land to increase its productivity; they could sell their land and get a better price because the buyer would know exactly what he or she was getting; and a rental market could also develop. As a result, this would benefit the poor whose principal capital asset is land that, at the moment, is too hedged about with state bureaucracy and unclear customary practices. Whether this case is made must be considered in the light of the four dimensions below.

### **Dimension 1: the international dimension**

There are three matters that need to be noted here: the “globalization” of agriculture; the policy prescriptions of the World Bank; and practices and policies of other funders of land tenure reform. Fortin (2005) has drawn attention to three aspects of the globalization of agriculture that have had adverse effects on smallholder agriculture and the rural poor in Africa besides which policies of land titling as an aid to improving the conditions of the poor could be argued to be rather irrelevant.

First, structural adjustment policies requiring liberalization, deregulation and privatization have removed many forms of state assistance to smallholders. Although these were often administered inefficiently and with varying degrees of corruption, they did provide price maintenance, a grain reserve and subsidized inputs such as fertilizers. Without this assistance, with little or no credit from newly privatized banks, and faced with subsidised imports of food from the EU and the USA, smallholder agriculture in Africa is less viable than it was.

Second, international trade policies, now increasingly enshrined in international law, have hit African producers of agricultural commodities. On the one hand, there has been a continuing decline in the terms of trade for agricultural commodities. This has been caused in part by

subsidized over-production of some commodities in the US and EU and their resultant dumping via “food aid” in Africa while, at the same time, high import controls have been imposed on produce from Africa and elsewhere.

Third, since the incorporation of agriculture into the WTO in 1996, three major international agreements now apply to agriculture: the Uruguay Round Agreement on Agriculture (URAA); the Sanitary and Phytosanitary Measures Agreement (SPS) and the Trade Related Intellectual Property Rights Agreement (TRIPs). The combined effect of these agreements has, in short, shifted regulatory power over agriculture from the national to the global level and set “increasingly rigorous and demanding rules and parameters of the international trade regime by countries in the North” (Fortin, 2005). Together with the growing dominance of multinational corporations (MNCs) in both seed and agricultural production, the increase in farm size as agricultural production has become more industrialized and the incorporation of agricultural production into commercial commodity chains, there has been a greater concentration of power in the buyers of products. This, in turn, has led to concentrations of suppliers that push out smallholders. Thus Fortin notes, quoting figures from Dolan and Humphrey (2001):

*In both Kenya and Zimbabwe, just a few private individuals and companies control the exports of [fresh fruit and vegetable] crops the majority of which is channelled to supermarkets. For example, up until 1992 in Kenya, some 75 percent of produce was sourced from smallholders, whereas by 1998, only 18 percent came from smallholders and instead “large-scale production units” dominated whose numbers have increased.*

The effect of this has been a growing exclusion of smallholders involved in export crops and an increased gap between rich and poor. Land capable of growing export crops becomes more valuable and as Berry (2001) noted, when land has become valuable, the powerful have pushed the weak off what land they have. Fortin notes:

*Colonial history provides a stark example of this. While dispossession of people from their land into “reserves” and the implementation of policies designed to discourage smallholder production were together successful in overcoming labour shortages so as to promote the export of agricultural commodities by colonial farmers, the legacy of these policies has been disastrous for the livelihoods of the rural population.*

Thus, international economic policies are having the effect of reproducing land policies and practices in Africa that may not be colonial (there are no overt policies to recreate reserves), but they are having a colonial effect. The most productive land is being acquired by the rich and powerful while the poor are relegated to the less productive land.

Turning now to the World Bank, from early in the post-colonial era, the World Bank played a major role in arguing for, and preparing to fund, the individualization and registration of tenure, the replacement of customary with statutory tenure and the growth of land markets. Its seminal *Land Reform: A Sector Policy Paper* (1975) was based on and derived from several reports such as *The Economic Development of Tanganyika* (1961) that were part of the *rite de passage* to independence for many countries. The 1975 paper provided a formal, coherent and global argument for the benefits of replacing customary tenure with a modern statutory system of registered title. Right up until the end of the twentieth century, this remained the World Bank’s policy on tenure (Deininger and Binswanger, 1999) despite World Bank-funded research suggesting that registration of title had little or no effect on economic development or on improving the lot of the poor (Bruce and Migot-Adholla, 1993). Only with the World Bank’s new *Land Policies for Growth and Poverty Reduction* (2003) has there been a clear acceptance of the centrality and importance of customary tenure in Africa and the need to work through customary tenure to bring about reforms rather than seeing reform as a process of replacing customary tenure. However, notwithstanding this recantation, the World Bank is still very

committed to individual tenure and formal registration of title (Whitehead and Tsikata, 2003) and remains, at best, agnostic about the economic and social benefits of communal tenure.

The World Bank and the donor community also have argued for, and been prepared to support, moves towards the privatization of land – the replacement of government-owned land with the citizenry limited to leases or rights of occupancy through freehold or absolute tenure. Indeed, land titling is seen as an important component of moves towards private land ownership and a free market in land. The contrast is between inefficient and rent-seeking government management of land via leasehold and the freedom that the citizens should have to determine what is in their own best interests via using the processes of the land market. Even pro-active regulation of land markets by public agencies, as opposed to reactive regulation via the use of the courts to challenge actions after the event, is weakly supported, at best.

Overall, despite much research and writing that draws attention to the need for caution with respect to the introduction of formal land markets and land titling, and the limited evidence that registered title is the primary concern of the rural poor with respect to security of tenure, the thrust of the international community has been in precisely that direction. In this respect, these policies chime in with the international economic policies noted above: formal land titling and formal land markets, together with formal “Western” land laws, facilitate the movement of the most productive land from the poor to the rich.

## **Dimension 2: the colonial dimension**

Okoth-Ogendo and I come from different perspectives, but we agree on this: colonial land policies and laws had and still have a fundamental and wholly deleterious effect on land rights in Africa. The basic principles of colonial land policies were twofold. First, the state assumed ownership of all land on the basis that it was either i) “vacant”, a concept still in use today (e.g. Organic Land Law, Rwanda, 2005) though nowhere defined with any precision, or ii) “occupied but not owned” since the indigenous inhabitants knew not of land ownership in the European sense of that term. Second, and following from the first principle, was the dual system of land management. This involved one set of rules and practices drawn from European legal systems for land in the “modern” sector (in East, Central and Southern Africa this meant effectively land owned by European settlers) and one set of rules based on something the colonial powers called “customary laws” which implied traditional and long-standing indigenous practices but in reality was as much a colonial construct as the imposed European law.

The “upper” circuit of land relations developed along European lines included formal registered titles, absolute or freehold individual ownership and long leases, with a paraphernalia of institutional support such as land registry offices, agricultural banks and other loan agencies, and agricultural support services. The “lower” circuit of land relations had none of the above. Instead, customary tenure and being on the land was subject to the power – it might be better to recognize it as “the whim” – of the state. With the exception of parts of anglophone West Africa and Buganda in East Africa, the indigenous inhabitants could not obtain ownership of the land nor, in many cases, were they permitted to grow cash crops or compete with the settler agricultural economy. This position was beginning to change in some states only at the very end of the colonial era.

A major anglophone colonial initiative must be noted because, in many respects, it set in train policies that have continued at both the international and national levels. This was the 1955 Report of the East African Royal Commission (EARC) which set out proposed new policies on land:

*Policy concerning the tenure and disposition of land should aim at the individualization of land ownership and mobility in the transfer of land which, without ignoring existing property rights, will enable access to land for economic use.*

*Land tenure law cannot simply be left to evolve under the impact of modern influences. A lead must be given by governments to meet the requirements of the progressive elements of society by applying a more satisfactory land tenure law.*

*... exclusive individual ownership of land must be registered ...*

*Individual rights of land ownership should be confirmed by a process of adjudication and registration.*

*Undesirable social and economic consequences may arise from the free negotiability of land titles. Government should have the power to impose restrictions when it is clearly in the general interests of the country to do so.*

These policies were more or less taken over by the World Bank in the 1960s and by some national governments, as will be discussed below.

### **Dimension 3: the national dimension**

The system of land relations that African states inherited at independence had a built-in bias against the rural poor. The rural poor were, for the most part, tenants at will of the state. Their land relations, *inter se*, were based on rules and practices that were not acknowledged to be law in the same way that the law applicable in the upper circuit of land relations was law. Nor were specialized institutions or loan agencies available to assist them in developing their land. In some cases, these were developed just before and after independence – produce marketing boards, subsidized fertilizers and the like – but as noted above, these were not always efficiently managed and, in any event, have been drastically cut back under policies of “liberalization”.

Perhaps most pertinent of all, the basic colonial system of state land ownership was maintained in most cases. Many authors have pointed out that “few if any, relinquished the states’ rights to land appropriated to establish and maintain colonial political sovereignty nor could they resist the appeal of the wide-ranging potential of political patronage” (Whitehead and Tsikata, 2003 referencing Mamdani, 1998; Shivji, 1998; Okoth-Ogendo, 2000, among others). Kenya had begun to go down the route recommended by the EARC, although this was an exception and more for political than economic reasons. Even in the twenty-first century, Uganda’s 1998 near revolutionary example – more or less abolishing public land and basing land relations on private land ownership while recognizing that customary tenure could be the basis of that private ownership – is the exception rather than the rule. Kenya proposed going the other way with its draft land policy recommending that freehold be converted to 99-year leases. South Africa drew back from conferring ownership of land on the rural poor in the former homelands and opted for a system that leaves considerable power with traditional rulers. In 1976, Nigeria opted to extend state ownership of land from the north of the country where it had always existed to the entire country. In many francophone countries, reforms in the first decade after independence declared that land held under customary tenure was part of the national domain and thus the exclusive property of the state (Delville, *et al*, 2002). This remains the position in many states and has been continued, for example, in Rwanda by its Organic Land Law of 2005.

In more recent years, the concept of “patrimony”, a variant of state ownership, has been developed in francophone countries. In discussing this development, Delville (1998) said: “the notion can both encompass and replace the ownership/State property duo... [It] does not challenge ownership *but aims at structuring its exercise by taking into account the utilization of land and resources by different groups of users...*” (italics in original).

The concept is unclear. It seems to be designed to disguise continued state ownership of land by holding out the illusion that the state owns the land on behalf of others, i.e. the citizenry. This would be the equivalent of the “trust”, a concept used in common and Roman-Dutch law when state ownership of land is provided by those systems. i.e. Tanzania and Lesotho where the President and the King respectively hold the nation’s land in trust for the nation.

Alongside the maintenance of state ownership of land however, the last decade-and-a-half has seen considerable movement towards land titling in many countries. This is on the basis of the model of adjudication and registration recommended by the EARC. It is, however, necessary to be aware of different approaches to this technique. There is a continuum from a formal centralized system at one end to a totally informal processes at the other. These informal processes are rarely accepted as giving rise to any acceptable rights by the state. Table 2 gives an overview of four approaches to the process.

**Table 2** *Adjudication and registration processes*

<b>Formal/central</b>	<b>Formal/local</b>	<b>Semi-formal/local</b>	<b>People-driven/alegal</b>
Central gvt. staffed; a formal legal framework and professional staff.	Local gvt staffed; a formal legal framework.	Local gvt, semi-skilled and traditional persons used; some formal legal framework.	People or CBO staffed; no formal legal framework.
Central gvt decisions on when, where and how.	Local authority decisions on when, where, how.	Participative approach to when, where, how.	People decide to sort out their “rights”.
Centrally appointed adjudication bodies with local and traditional persons; formal hearings. Boundaries formally and definitively demarcated.	Locally appointed adjudication bodies with input of local persons; formal hearings. Boundaries not necessarily demarcated definitively.	A variety of bodies and methods used to determine boundaries and rights; “walking the boundaries” favoured; more community acceptance than formal demarcation.	Various methods used to determine boundaries and rights; walking the boundaries.
Appeals determined centrally.	Appeals determined centrally.	Appeals to local judicial/semi-judicial body/traditional elders.	No formal appeals; negotiations to settle disputes.
Central registration of rights.	Local registration of rights but with some central involvement.	Local registration of rights.	Informal systems of recording rights.
Written documentation as the basis of decisions.	Written documentation as the basis of decisions.	Heavy use of oral information and evidence but often reduced to writing.	Heavy use of oral information and evidence, with negotiation, written documentation and maps.
Not applicable	Central supervision and intervention.	Some supervision from the centre.	Central reluctance to accept outcomes.
Tendency to ignore interests that cannot be classified in “European” legal forms. Aim is to convert customary tenure into formal “European” tenure.	Aim is to record customary rights and/or urban informal interests so as to give them greater security. Provides for upgrading from customary to “European” tenure.	Aim is to record customary rights and provide more secure tenure after period of upheaval of land rights; no necessary conversion to non-customary tenure.	Aim is to create better security of tenure to improve holding on to land in face of central land-grabbing. Legal support to come after the activities have taken place.
<b>Examples:</b>			
Kenya; Malawi; Zanzibar; some francophone countries	Tanzania; Uganda; francophone countries using the <i>Plan Foncier Rural</i> (PFR)	Ethiopia (Tigray and Amhara based on decentralized land laws); Somaliland Mozambique	Transitional states in Sudan: Southern Kordofan, Blue Nile

The more formal systems tend to be a continuation of systems developed in colonial times whereas the more participative approaches have been developed in the last decade. It is too early to assess the success or otherwise of this latter approach in providing more secure tenure for the rural poor or whether it will give rise to a more vibrant land market.

#### Dimension 4: the social dimension

There is an inevitable tension between the social dimension and the national and international dimensions with respect to titling. The former is largely unofficial and even, at times, alegal; the latter is by definition formal and legal. The social dimension calls into question many of the assumptions underlying formal titling programmes. These unavoidably simplify existing land rights and lead to a dissonance between the registered rights and interests and those on the ground. Eventually, recognition has to be accorded to the reality on the ground as has happened in Kenya (Platteau, 2000). The alternative is to classify most rural land occupiers as “squatters in their own country”, the famous comment by the Chief Justice of Tanzania in the 1992 case of *Akonaay v Attorney-General* in which the government argued that persons holding land under customary tenure were not entitled to compensation for the loss of their land during Operation Vijiji (villagization) because such persons had no rights in the land.

Formal titling has yet to give proper recognition to either communal rights or women’s rights in the land. At one end of the spectrum are those systems virtually unchanged from those of the colonial era when registered title was designed to *replace* communal rights with individual rights, such as in Sudan whose registration system dates from 1925. A Kenyan commentator pointed out that while the EARC recognized that ownership could be extended to customary associations of Africans, in practice, group tenure has been recognized as such only in exceptional cases. The institution used for this form of tenure has been the group ranch devised for the benefit of pastoralists and herders. But these group ranches have not worked well in part “because government policy has tended to emphasise individual rights and there is a prevalent view that group rights would eventually mature (*sic*) into individual ones” (Kameri-Mbote, 2002). In South Africa and Uganda where statutory associations have been set up to hold communal land, the legal framework has proven complex and expensive to operate.

It is significant that in Sudan, an attempt to give recognition to and register communal rights in the transitional states is following an as-yet alegal community registration. The same in Ethiopia, where a so-called “traditional” land registration and title certification process in Amhara Region has registered the boundaries of *kebeles* (Adenew and Abdi, 2005). Village boundaries have been registered in Tanzania where both the 1999 Village Land Act and the 2002 Forest Act provide for the recognition and registration of communal land and communal rights in land but, so far, these provisions have not been widely activated. This same is true with the community land delimitation process in Mozambique under its 1997 Land Law.

By far, the best overview of women’s land rights in Africa is provided by Whitehead and Tsikata (2003) and I shall have occasion to refer to this survey in other sections of this paper. The authors review several studies of the effect of registration on women’s land rights, quoting Lastarria-Cornhiel (1997) that “usually women lose access or cultivation rights while male household heads have strengthened their hold over land”. They also summarize from Mackenzie (1990, 1993, 1998) that in Kenya, land given to men on marriage but managed on a day-to-day basis by women was “registered in the name of the husband who thereby gained more exclusive rights over its disposal ... The strength of the claim that wives had to [obtain] land through marriage was implicitly diminished ... Registration and titling diminish women’s land access by encouraging a single registered owner ...”.

This particular problem can be overcome by providing that where land is to be registered, it must be registered in the names of both spouses as is being proposed in Rwanda. However, this is still a minority position. An additional factor, noted by Cotula (2002) and Kanji, *et al.* (2005), is that women are often either un- or underrepresented on land adjudication committees so that women’s rights are not supported during implementation of adjudication whatever the policy intentions might be.

More generally, given that titling is a necessarily formal legal process, the authors' comment on formal legal cultures is relevant here:

*Formal legal cultures and institutions are not themselves women-friendly, despite their supposed impartiality and neutrality. Studies of the ways in which statutory law operates in African states ... have shown very mixed outcomes for women ... Some of the gender bias in formal law arises ... from the construction of "lawyers" customary law ... Further bias arises from the ways in which discourses of custom are used within legal cultures and legal institutions...women's claims under modern legal systems in Africa are undermined when men argue that their positions are contrary to "custom". The language of custom...is being used politically in national-level discourse to undermine the legitimacy of women's claims within modern legal frameworks using a rights discourse.*

### **Issue 1: Conclusion**

Despite the enormous intellectual and financial resources being put into land titling and registration by the international community, and the efforts made by governments during the last decade or so, these conclusions made by Bruce and Migot-Adholla remain as valid today as when they were first advanced in 1994:

- the wisdom and cost-effectiveness of large-scale systematic programmes of compulsory titling for smallholders in rainfed agriculture is doubtful;
- efforts should be redirected to incremental changes in indigenous tenure systems; and
- titling should be focused on localities in particular need.

Among the titling deficiencies to be mentioned are: the well-publicized disadvantages that women have suffered from registration (that need to be addressed if any large-scale programmes are to be mounted); the non-use of the register when land transactions take place; and the lack of any clear and consistent correlation between increased productivity and titling. Above all is the fact that title registration is a completely irrelevant response to the real problems facing the rural poor in Africa today, namely the deleterious effect on their livelihoods caused by globalization of agriculture, dumping of agricultural produce on Africa by the USA and the EU, and the protectionism practiced by the USA and the EU against African agricultural produce.

That said, if registration is to proceed, clear lessons derived from many studies of registration processes must be considered –

- i process must be bottom-up, participative and transparent;
- ii women must be an integral part of the *process* of adjudication; only then will their interests in land be properly recorded and registered;
- iii adjudication of land and registration must be divorced from any programme of conversion of rights in customary to "European" or Western law;
- iv process should be demand-driven from localities rather than directed from the centre;
- v caution is needed in moving to costly high technology options for land registration as they are likely to create barriers for poor groups;
- vi institutions must be accountable to the local stakeholders in the process;
- vii the registration of communal tenure must be accepted as an integral part of any registration programme<sup>1</sup>.

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<sup>1</sup> see in particular, Kanji, *et al*, 2005

## ISSUE 2: PLURALISM

Pluralism refers to the dual system of land tenure that exists in all states in sub-Saharan Africa. This is a statutory system based, for the most part, on law derived from former colonial powers alongside the indigenous system that was, in turn, heavily influenced by the colonial experience. Reference to pluralism is unavoidable when discussing titling and registration but it is a sufficiently central issue in land tenure to warrant a section of its own. The fundamental issue is whether pluralism is desirable or unavoidable or whether the issue is in a sense misplaced. This calls into question whether continuing to think and talk in terms of pluralism in the sense of a dichotomy between statute and indigenous law is, in effect, continuing to think and talk in “colonial” terms rather than developing a new language and approach to reflect, albeit very belatedly, the post-colonial land situation.

### Dimension 1: the international dimension

This may be dealt with quite briefly as it was mentioned in connection with land titling. In the international dimension, the commitment to land titling is evident. The World Bank’s country studies of newly independent countries in Africa in the 1960s that led up to the 1975 *Land Reform: A Sector Policy Paper* were based on the premise that land titling would lead to, indeed would be designed to bring about, a wholesale conversion from customary tenure to statutory tenure based on Western notions of property rights supported by a Western-type land law. In the 1960s and 1970s, it was axiomatic that customary tenure was static and conservative, a blockage in the way of economic and social development.

In this respect, the World Bank and indeed various UN agencies uncritically took over the views of officials from ex-colonial powers, not too surprising considering these same officials had a tendency to resurface after independence in international agencies or in the aid departments of ex-colonial governments. It is interesting to compare the comments about customary tenure being “one of the greatest obstacles to agricultural progress” in *The Economic Development of Kenya, Report of a World Bank Mission* (1963) with the comments of the EARC that customary tenure is resistant to radical change, and that “a lead must be given by governments to meet the requirements of progressive elements in society by applying a more satisfactory tenure law” (1955). As noted earlier, it is only recently that the World Bank has altered its position and now accepts that customary tenure cannot be set aside but, rather, its legal recognition should be seen as the cornerstone of a land tenure system that should be developed to benefit the poor. The World Bank has bought into the evolutionary theory of land tenure (ETLT).

An even more dramatic example of the international acceptance of the central importance of customary tenure in bringing about social justice and peace is to be found in the Comprehensive Peace Agreement (CPA) which ended 22 years of civil war in Sudan. The parties agreed in the Wealth Sharing Agreement, signed January 2004 at Naivasha, Kenya, that the land issue should be a point of agreement of the three parties involved in the CPA, namely the national government, the Southern Sudan government and state governments and, *inter alia*, the following provision should apply to land matters:

*The Parties agree that a process be instituted to progressively develop and amend the relevant laws to incorporate customary laws and practices, local heritage and international trends and practices.*

The downgrading of customary tenure and the refusal to accept that persons could acquire and hold legally enforceable rights in land under customary tenure was one of the triggers of the civil war. With this provision of the CPA, it might be suggested that customary tenure has come in from the cold at the international level.

## **Dimension 2: the colonial dimension**

It was noted earlier that one of the two key aspects of colonial land policy was the dual system: an “upper” system based on legally defined rights of ownership in the land derived from imported European land laws, backed up by professionally qualified officers and supporting institutions; and a “lower” system in which land relations between the state and the indigenous majority were based on administrative discretions operated by general administrators for the indigenous majority and based on colonial constructs named “customary law” and “customary tenure”.

It is important to emphasise this point. The customary tenure upon which the colonial powers based their land management was a system of rules and practices that were, for the most part, of their own devising. Chanock (1985, 1991) has shown how the British developed a feudal model of customary tenure that “fitted British ways of thinking about state and society.” The colonial authorities adapted and used the institution of chieftaincy, endowing the institution with sets of powers quite different from those existing before. Chiefs were given more powers and the peasants less rights over land: the peasants’ rights to use land were made dependent on allegiance to chiefs but neither chiefs nor peasants were deemed to have the power to own or dispose of land. It was essential to the whole basis of colonial power that the indigenous population should not be considered as having the right to participate in a land market. Even in West Africa, where there was not the same need to deny the right of Africans to participate in a land market as there was no settler community requiring land, there was a reluctance to accept that Africans could or should be allowed to own land and deal with it (Phillips, 1989). Similar approaches to customary tenure were adopted by other colonial powers (Maunier, 1949).

Customary tenure cannot be divorced from customary law. It is important to appreciate that just as customary tenure was a colonial construct and not seen as conferring “true” rights on occupiers of land, so too customary law was classified as a second class legal system. The standard formulation used in British dependencies for the application of customary law was that it was to be applied or the courts were to be “guided by” customary law so far as it was applicable “and was not repugnant to justice and morality” or to “natural justice, equity and good conscience” – in both cases as determined by British administrative officials and judges. This was known as the “repugnancy clause”. The French, Belgian and Portuguese colonial position was to accord customary law even less of a role in the judicial system than the British (Maunier, 1949; Hailey, 1957). In francophone Africa, extent customary laws were applied by the courts only so far as they were not “*contraires aux principes de la civilisation française.*” In line with the dual system of customary law and tenure, there were dual systems of courts throughout Africa. Courts staffed by lawyers dealt with land disputes in the “upper” circuit of law while courts or “native” tribunals staffed by generalist administrative officers who were “advised” by assessors knowledgeable in customary law dealt with land disputes in the “lower” circuit of law.

## **Dimension 3: the national dimension**

The dual system of land tenure and law inherited at independence was one of the worst legacies of colonialism and has never been fully shaken off. On the one hand, independence provided the opportunity to modernize, develop and begin the process of catching up with the rest of the world. This meant setting aside the dual systems that had been used to hold back the indigenous population and developing a modern land tenure and legal system. On the other hand, independence allowed equal recognition to customary tenure and laws. The ambivalence about the role of customary law and tenure came through in the famous African Conference on Local

Courts and Customary Law held in Dar es Salaam, September 1963. Two brief quotations from the Record of the Proceedings give a flavour of the then thinking about the issue:

**Land Law:** *All countries ... are concerned to promote the full economic exploitation of their natural resources and in some instances customary systems of land tenure may stand in the way of such exploitation ...*

*... The unification of the customary and general laws relating to land was not an essential prerequisite for ... development, though it might be advisable to promote integration or at least harmonisation so as to eliminate conflicts. The unified or harmonised land law need not necessarily imply supersession of customary law in this field.*

**Responsibility for Development of Customary Law:** *It is held by some that the incorporation of the various legal systems in a single body of law will bring about the disappearance of customary law or hinder its future development. The other view is that provided the consolidated law contains the substance of the customary laws and adequate provisions are made ... for future social change, then transformation of indigenous law leads to its better preservation ...*

*There were good grounds for maintaining ... that the “repugnancy clause” ... should be discarded ...*

*... there was a basic conflict of views as to the responsibility of the development [of customary law].*

It is fair to say that these different positions have not changed in more than 40 years, either in general terms or in relation to customary tenure. Nor has the content of customary tenure changed:

*Many of the central tenets of African land tenure, such as the idea of communal ownership, the hierarchy of recognized interests in land (ownership, usufructory (sic) rights and so on) or the place of chiefs and elders, have been shown to have been largely created and sustained by colonial policy and passed on to post-colonial states (Whitehead and Tsikata, 2003).*

What has tended to happen is that first one then another position has been adopted by the same government. If any generalization may be offered, it is that in the early years of anglophone Africa's independence, there was a tendency to try to move away from customary law and tenure but this position has been reversed in the last 15 years or so. For instance, Tanzania has several times promulgated orders that either abolished customary tenure or certain rules of it or introduced codified rules of customary law. It was only with the passage of the Village Land Act 1999 and the Forest Act 2002 that full recognition was accorded to customary tenure. Uganda's Land Act 1998 recognizes customary tenure as being an equal foundation for ownership alongside freehold and *mailo*<sup>2</sup> tenure. Ghana's programme to reform and upgrade land administration is very firmly based on using the traditional roles of the chiefs. In Ethiopia, too, customary tenure forms the basis of the land law. On the other side, however it must be noted that a recent review of land policies in Lesotho (2000) recommended that customary tenure be abolished and replaced by a system of leases and, although it was not specifically stated, in the absence of customary law, these leases would be based on Roman-Dutch law.

In francophone Africa on the other hand, there has been a trend since the 1960s in the direction of either replacing customary tenure with a statutory system, e.g. Senegal, Niger, Burkina Faso, or keeping customary tenure as a second class system of tenure from which people may, as it were, escape by registering their title and moving to a statutory system as in Cameroon. Delville

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<sup>2</sup> a freehold system in Central Uganda

(2000) argues that the trend has been towards harmonization of rules between customary and statutory (civil code) laws, but the IIED study *Negotiating Access to Land in West Africa* (2002), of which Delville was a co-author, speaks of “abolition” in the case of Senegal, a “restrictive approach” to customary rights in Burkina Faso and attempts to “put an end to customary rights” in Cameroon – an attempt that did not succeed. Kelley (2002) also makes plain that the new Rural Code in Niger will, whatever its intention, drastically alter the customary approach to land rights within that country, replacing a flexible process with a body of immutable rules. The latest example of an abolitionist approach comes from Rwanda where the National Land Policy (2004) states:

*Customary land tenure as it exists in Rwanda has become obsolete and does not offer any economic advantage to the tenant or the state.*

*Customary land rights and land use rights legally granted by the competent authority should give to the beneficiary full rights of ownership through a long lease (emphasis added) which guarantees security of tenure...*

*In rural areas, the registration and the granting of the registration certificate for a 99-year long lease will follow strict rules established by the land law...*

The Organic Land Law (2005) is the first step down the road to substituting statutory for customary land law but, as with other countries that have gone down that road, there must be grave doubts as to whether customary tenure will disappear in response to its being “abolished”.

Although there is a separate head for the discussion of disputes and dispute settlement, it is necessary to draw attention to the impact of pluralism on dispute settlement. States inherited a dual system of courts at independence. Anglophone states quickly moved to develop a unified court system, at least as regards criminal jurisdiction, but there was more ambivalence over civil disputes and particularly land disputes. States in West Africa used the ordinary courts but states in East and Central Africa continued to direct cases on customary tenure towards specialist courts and tribunals as when Kenya established specialist Native Land Tribunals in 1991. More recently, general land law reforms have seen the establishment of specialist land courts and tribunals dealing with all land cases.

#### **Dimension 4: the social dimension**

Whatever the vacillations of governments over customary tenure, at the grassroots level, peasants have continued to hold their land under customary tenure and to settle their disputes with reference to the norms and practices of customary tenure. Attention is increasingly focused on the social embeddedness of land access. Continent-wide, socio-legal practices with respect to land and modes of gaining access to it are widely varied but have a general common characteristic of being created by use and negotiated. People access land via inheritance or a multitude of market processes such as selling, renting, pawning, pledging and loaning land. What is now more widely appreciated and understood is the dynamic and fluid nature of tenure relations and tenure claims and their solution within the indigenous systems of land management. It is as if the burden of colonial approaches and “scholarship” on land relations is being finally cast off and indigenous systems are being recognized and accepted as providing an appropriate foundation for the development of land tenure at the outset of the twenty-first century.

## Issue 2: Conclusion

Pluralism in land relations and their management is a legacy of colonialism. It is a matter of concern and regret that almost half a century after the commencement of the decade of decolonization in Africa, it is still the basis of so many systems and is still seen as a matter that needs to be discussed. The contrast with court systems is stark: very shortly after independence, governments set about unifying the dual system of courts and legal procedures but left the dual system of land relations in place. Where unification has been attempted, it has been on the basis that customary tenure gives way to statutory tenure or to put it another way, African systems and laws of tenure give way to “European” systems and laws. This has, hitherto, been the basis of land registration in anglophone countries and the basis of new land and rural codes in francophone countries. For instance, there is no suggestion in either the National Land Policy or the Organic Land Law in Rwanda that any new land law will be a blend of the rules and practices of customary tenure – regarded as obsolete – and non-customary tenure. Only those countries going it alone, such as Somaliland, or without a history of colonial rule, such as Ethiopia, seem to be developing an indigenous land law.

This is key to the future trajectory of land relations. Recall the suggestion contained in the Report of the African Conference on Local Courts and Customary Law that “it might be advisable to promote integration or at least harmonization [of land laws] so as to eliminate conflicts. The unified or harmonised land law need not necessarily imply supersession of customary law in this field” is one that governments should now act on. For too long, too many governments have continued to view and treat customary tenure in the same manner as colonial authorities did and as World Bank and many donors still do: as rules and practices that are second class, not really to be taken seriously as providing the foundations for a modern national and nationally acceptable, i.e. legitimate, system of land management.

There are two competing models for the future direction of land tenure reform in Africa. On the one hand, there is the globalization model – the pressure from international agencies, IFIs and donors to develop homogenized national land laws that follow a fairly standard approach based on an Anglo-American model, eschew indigenous rules and practices and are designed to facilitate foreign investment in the countries. On the other, there is the more challenging and difficult approach to develop indigenous land laws that will facilitate and assist national investment by citizens in their own land. Such laws would be based on indigenous land tenure systems.

There are some signs that policies and actions are beginning to follow the more rounded approach to thinking and writing about indigenous tenure practices. The Village Land Act together with the Forest Act of Tanzania give a much more central role to indigenous land rights than many other recent reforming land laws. The Land Act explicitly enjoins the courts “to create a common land law applicable in equal measure to all land”. Both the Village Land Act and the Land Act of Uganda create a simple system for the registration of customary tenure rights and interests. Proposed land laws for Southern Kordofan and Blue Nile, the two transitional states of Sudan, are based on the CPA and special protocol applicable to those states. The proposed laws are based on the analysis of the seminal decisions of *Mabo* and *Wik* in Australia and the *Richtersveld v Alexkor* in South Africa and designed to provide a solid legal basis to make customary tenure the foundational land law for those states. The commitment of the Government of Ghana to reform its system of land administration on the basis of traditional authorities is also a step in the right direction. Francophone countries that are developing new codes for pastoral land rights are also making much more use of customary tenure.

Perhaps most dramatically, given that 50 years ago Kenya led the way following the injunction of the EARC and began the process of converting customary tenure to registered statutory tenure based on English land law, the *Report of the Commission of Inquiry into the Land Law System of Kenya* (2002) heralds an about-face on that policy by proposing that:

*The broad principles of customary tenure should be recorded and incorporated into a framework law designed to facilitate the orderly evolution of customary land law;  
The framework law should address, inter alia, the following issues: ...  
a system for the documentation of customary land transactions which communities can operate and manage ...*

Given the very long period that the globalization model has had to prove itself (considering that the colonial interlude in Africa was but an early version of globalization), it would seem that the time is now well overdue for the indigenous model to be adopted.

### **ISSUE 3: INFORMAL SETTLEMENTS IN URBAN AND PERI-URBAN AREAS<sup>3</sup>**

For purposes of this paper, “informal settlements” are areas of housing and other buildings which consist of non-permanent structures, are often unsafe and fire hazards, do not comply with local building, public health or planning regulations, and are built on land which has generally been occupied or acquired by means other than formal legal ones. Their residents are generally poor. The majority of urban inhabitants in Africa live in informal settlements and must be included in any discussion of land tenure and the poor in Africa.

#### **Dimension 1: the international dimension**

Unlike the other issues discussed in this paper, the international dimension of this item has very clear focus and direction. It is based on the Habitat Agenda and the Global Plan of Action (GPA) which were the outcomes of the UN City Summit held June 1996 in Istanbul. They provide the international policy and legal context for any assessment of a country’s urban land management laws and policies. In the eyes of international lawyers, these documents are examples of “soft” international law which give rise to what might be called “quasi-legal obligations” because they cannot be enforced by any international law enforcement agency. Nevertheless, by agreeing to these documents, all governments represented at the City Summit put themselves under obligation – part legal, part moral – to review their policies, laws and practices in order to bring them in line with the principles enshrined in the so-called Istanbul Declaration on Human Settlements and The Habitat Agenda. Therefore, it is appropriate to set out the relevant provisions of both the Declaration and the Agenda that relate to land so that the international legal bench-marks against which the existing provisions of urban policies and laws in Africa may be assessed.

The Habitat Agenda is in three parts: Goals and Principles, Commitments and the GPA. Under Commitments, governments commit themselves to:

*Providing legal security of tenure and equal access to land to all people, including women and those living in poverty ...  
Ensuring transparent, comprehensive and accessible systems in transferring land rights and legal security of tenure ...*

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<sup>3</sup> For reasons which are not clear to the author, the UN agency charged with the responsibility for addressing the challenges of rapid urbanisation and its implications for economic and social development – UN-Habitat – has decided to return to the somewhat old fashioned and pejorative term “slum” to describe the informal settlements in which the majority of the world’s urban poor live. That term will not be used in this paper.

*Protecting all people from and providing legal protection and redress for forced evictions that are contrary to law, taking human rights into consideration, and when evictions are unavoidable, ensuring, as appropriate, that alternative suitable solutions are provided (para. 40).*

The GPA fleshes out the Commitments in a series of specific actions based on the strategy of “enablement, transparency and participation” which will in turn assist governments to establish, *inter alia*, legislative frameworks to enable the achievement of adequate shelter for all. Actions are proposed for ensuring access to land and security of tenure. While recognizing the existence of different systems of land tenure and national laws, paragraph 75 enjoins governments to:

*... strive to remove all possible obstacles that may hamper equitable access to land and ensure that equal rights of women and men related to land and property are protected under the law. The failure to adopt, at all levels, appropriate rural and urban land policies and land management practices remains a primary cause of inequity and poverty.*

Many specific actions are then proposed in respect of land. Among the most pertinent to the subject-matter of this paper, the following may be highlighted:

- *consider the adoption of innovative instruments for the efficient and sustainable assembly and delivery of land, including, where appropriate, land readjustment and consolidation;*
- *develop appropriate cadastral systems and streamline land registration procedures in order to facilitate the regularization of informal settlements, where appropriate, and simplify land transactions;*
- *develop land codes and legal frameworks that define the nature of land and real property and the rights that are formally recognized;*
- *support the development of land markets by means of effective legal frameworks, and develop flexible and varied mechanisms aimed at mobilising lands with diverse juridical status;*
- *review restrictive, exclusionary and costly legal and regulatory processes, planning systems, standards and development regulations;*
- *adopt an enabling legal and regulatory framework based on an enhanced knowledge, understanding and acceptance of existing practices and land delivery mechanisms so as to stimulate partnerships with the private business and community sectors, specifying recognized types of land tenure and prescribing procedures for the regularization of tenure, where needed;*
- *provide institutional support, accountability and transparency of land management, and accurate information on land ownership, land transactions and current and planned land use;*
- *review legal and regulatory frameworks, adjusting them to the principles and commitments of the Global Plan of Action;*
- *explore innovative arrangements to enhance security of tenure, other than full legalization which may be too costly and time-consuming in certain situations, including access to credit, as appropriate, in the absence of a conventional title to land;*
- *establish, where necessary, a comprehensive and detailed body of property law and property rights and enforce foreclosure laws to facilitate private sector participation (paras. 76, 77, 78, 79, 81).*

If one were to sum up the principal message of these provisions, it is that while a strategy of enablement is to be the preferred mechanism for providing access to land and ensuring security of tenure, the role of governments does not stop at enabling urban land markets to operate

efficiently and transparently, important though these matters are. Governments must also direct their attention to considerations of equity and social justice in the operation of land markets and must desist from actions that penalize people, especially the poor and disadvantaged, and lessen their opportunities to obtain and hold on to land.

The Habitat Agenda and the GPA were not confined solely to urban land issues so that their precepts would inform all aspects of land management. In practice, departments that governments have set up in ministries to focus on implementation of the Habitat Agenda and the GPA have tended to be located in ministries dealing with urban land and planning issues, so this paper follows that approach. It must be emphasised, however, that this is purely for convenience sake and does not imply any attempt to downgrade or confine these principles to only one aspect of land management.

### **Dimension 2: the colonial dimension (McAuslan, 2003)**

Concentrating on anglophone Africa, the principal concern here will be town planning, since in colonial times little effort was made to provide for Africans to live in towns. Much more effort was made to remove African residents from urban areas than to accommodate them, so urban tenure questions were not on the colonial agenda (Burton, 2005). In order to understand evolution during the last 50 years, and in particular since the 1960s, the historical legacy of town planning must be included. The driving force was segregation, not just in South Africa but throughout Africa, illustrated by Adeniyi (1981) in writing of Nigeria:

*The first systematic attempt at physical planning in Nigeria was provided by the Township Ordinance of 1917. ... One major feature of the township ordinance was the major emphasis on guidelines for the physical layout of the towns and cities, particularly in the "European" and Non-European reservations. The impact of these guidelines is still very evident in the physical layout of the GRA, and the grid-iron pattern of the layout of such towns as Kaduna, Jos, Minna, Enugu, Port Harcourt and also the new districts of most of our cities.*

In East Africa, town planning operated initially through public health laws that provided the formal *raison d'être* for segregation. Thus, Professor L.W. Simpson, a major protagonist of urban racial segregation throughout Eastern and Southern Africa in the early years of the twentieth century and the principal begetter of town planning in Kenya and Uganda wrote in a report on Nairobi in 1913 (Werlin, 1974) that:

*In the interests of each community and of the healthiness of the locality and country, it is absolutely essential that in every town and trade centre there should be well-defined and separate quarters for Europeans, Asiatics and Africans ...*

In 1915, he became Kampala's first town planner and offered the same advice to Uganda.

Thus, the formal absence of town and country planning legislation in East Africa did not inhibit, may indeed have facilitated, segregated urban development by allowing it to be justified on public health grounds and smuggled in via a variety of legal devices. In Nigeria, on the other hand, town planning legislation provided the legal basis for separate development but again with a public health justification. In each case, it is worth noting, further spurious justifications were wont to be put forward such as: it was in the interests of the native or the Indian as well, and it was not really a segregation of races but a segregation of "social standards".

With the 1947 Town and Country Planning Act heralding a new approach to town and country planning in the UK, the Colonial Office developed a model town and country planning law for the colonies that drew on both the 1932 and the 1947 Acts. Starting in the late 1940s, town and

country planning ordinances were promulgated in African (and Caribbean) countries, nearly all of them having the same general shape and content. Each territory adapted the basic law to suit its own particular circumstances – Tanganyika’s Ordinance, promulgated in 1956, was not the same as Nyasaland’s promulgated in 1948, Mauritius’s promulgated in 1954, or Uganda’s promulgated in 1951, being much more detailed in every matter, which was perhaps a reflection of what had been learned from the operation of those earlier laws.

By the early 1960s as countries in Africa became independent, an English-style planning law had become a part of many countries’ modernization package. Older approaches to town planning were assumed to have been left behind as they had been in the UK itself. The new independent governments and the elected urban local authorities could now address the problems of the majority of the urban population armed with the requisite planning tools.

### **Dimension 3: the national dimension (McAuslan, 2002, 2003)**

During the last two decades, there has been no shortage of criticism of the kind of urban planning system inherited by countries at independence or those introduced since independence but still based on the metropolitan model. They have contributed to the evolution and operation of planning systems that are negative rather than positive; socially divisive rather than integrational and egalitarian; authoritarian rather than democratic.

The message to planners from the laws was plain: control of development is more important than development, or the planning of same. Indeed, the preamble of many acts and ordinances referred to legislation “to make provision for *orderly* and progressive development” (italics added). Now, apply the message of orderliness to cities in Africa with vast areas of low-income housing, much of it in unauthorized urban settlements, located on land which does not belong to the occupier, self-built, unplanned, overcrowded and with a total lack of adequate or, indeed in many cases, any infrastructure.

To many planners, these areas of unauthorized settlements are contrary to what they have been told planning is all about: slum-clearance, relocation, re-development. That they are also illegal adds insult to injury. Naturally, therefore, the planners are concerned to apply the law, or if that is not immediately possible, then they are equally determined to hold the line, that is to set their face against “regularization”, a modish word for condoning illegality. In this, they are usually supported by politicians who are offended both by the sight of slums and by being told by foreign consultants that they should “accept” them and who are, in some cases, only too aware of the value such land would have if it were to be cleared of squatters. In the UK where the notion originated, development control had always been seen as the tool for assisting lawful development to take place at the right time and in the right place. In African cities, it is seen as the weapon to attack and demolish development that has occurred in the wrong place, using the wrong materials and is unlawful. Development control is, then, a planning system that is distinctly anti-poor.

One may go further. Behind arguments about the needs of public health providing the justification for segregation in colonial cities lay a deeper concern – the fear of the urban mob and the urban riot. Now this fear of the mob, of the urban poor, has remained until very recently a *leit motif* of urban governance in many African cities. The almost universal dislike of the informal sector with the sporadic sweeping away of informal commercial structures (King, 1996; Tripp, 1997); the removal of hawkers and their designation as vagrants; the harassment of informal transport systems; the assumption that unauthorized urban settlements are full of thieves, prostitutes and illegal activities; and the over zealous use of force by the police when confronted by large numbers of the urban poor all testify to this.

Another prevalent factor in many African cities is master plans made by consultancy firms from abroad working to the orders of the ministry's chief planner. These are not conducive to the development of a democratic input into plan-making. Too often they make ridiculous development proposals – one recent proposal was for a two-runway international airport capable of processing 50 million passengers a year, some six times the population of the country concerned – rather than focus on planning for the majority.

The principal criticisms of the diaspora of British planning law and practice throughout Africa is that it reinforced the authoritarianism and paternalism of the colonial and postcolonial state and, by directing attention to the formal-built environment, it helped cement the view that urban development consisted of two cities – the legal and the illegal, the former of which must be supported, the latter of which must be suppressed.

What this all adds up to is a system which if not designed then at least adapted to facilitate the exploitation of the urban poor. It is the poor who live in “illegal” structures, who squat and who cannot afford lawful connections to services. But the present system goes further in its facilitation of the exploitation of the poor. By being weighed so heavily towards those who have financial or political power, the system facilitates development of the exploitative relationship of landlords and tenants in the cities rather than development of owner occupiers. In such circumstances, the urban poor are forced into less and less salubrious accommodation with fewer and fewer rights. The fact that their accommodation does not measure up to legal public health standards triply disadvantages them: first, the inferior accommodation affects their health and welfare; second, at any point in time their landlord can evict them in the interests of “complying with the law”; and third, if their landlord falls foul of the authorities, demolition may follow, again “to comply with the law”.

As with other aspects of tenure, there is now definite movement away from continued implicit acceptance of colonial approaches to urban planning and development and towards a greater acceptance of the central role of the informal sector and of the consequent need, perhaps obligation, to address the issues of the urban poor and unauthorized and informal settlements by programmes of regularizing tenure, upgrading infrastructure and housing, developing programmes of micro-financing to provide small loans to informal entrepreneurs and working with community leaders, informal estate agents and land brokers who operate within the unofficial land markets.

In the last few years of the twentieth century, there were encouraging signs that urban planners and policy-makers had begun to bite the bullet and develop legal regimes that would provide security of tenure for the urban poor, thus meeting a key requirement of the Habitat Agenda. First, attention may be drawn to South Africa's path-breaking Development Facilitation Act 1995 that has now been repealed and replaced by provincial planning laws. At the commencement of the act, General Principles for Land Development were set out that applied to the actions of the state and all local government bodies throughout the country. These principles provided an inspiring vision of the desired urban future of South Africa and enshrined a new approach to planning law that could well be a model for planning and land development throughout Africa (see Box 1 ).

**Box 1** *Extracts from South Africa's Development Facilitation Act, 1995*

**General principles for land development (extracts)**

- (a) Policy, administrative practice and laws should provide for urban and rural land development and should facilitate the development of formal and informal, existing and new settlements.

- (c) Policy, administrative practice and laws should promote efficient and integrated land development in that they-
  - (iii) promote the availability of residential and employment opportunities in close proximity to or integrated with each other;
  - (v) promote a diverse combination of land uses, also at the level of individual erven [plots of land] or subdivisions of land;
- (d) Members of communities affected by land development should actively participate in the process of land development.
- (f) Policy, administrative practice and laws should encourage and optimise the contributions of all sectors of the economy (government and non-government) to land development ...
- (g) Laws, procedures and administrative practice relating to land development should-
  - (i) be clear and generally available to those likely to be affected thereby
  - (iii) be calculated to promote trust and acceptance on the part of those likely to be affected thereby; and
  - (iv) give further content to the fundamental rights set out in the Constitution.
- (i) Policy, administrative practice and laws should promote speedy land development.
- (j) Each proposed land development area should be judged on its own merits and no particular use of land, such as residential, commercial, conservational, industrial, community facility, mining, agricultural or public use, should in advance or in general be regarded as being less important or desirable than any other use of land.

Compared to the Development Facilitation Act, Kenya's Physical Planning Act enacted almost simultaneously, in 1996, is a very orthodox law reflecting somewhat old fashioned views. For South African planners, the challenge was to provide for informal settlements. Kenyan planners looked for solutions to "peri-urban slum settlements and the problems they pose". Fortunately, this legislative remit has not stopped the Kenyan government from joining UN-Habitat in developing a major programme of upgrading and regularization of Mathare Valley.

Tanzania, too, has come to terms with informal settlements and the desirability of programmes of upgrading and regularization, although still mixed with the example of planning by the bulldozer. Its 1995 National Land Policy and the 1999 Land Act accepted the need to provide titles and security to unauthorized urban settlements and its Land Regulations 2001 (Schemes of Regularization) provides one of the most comprehensive legal frameworks for programmes of regularization in Africa.

#### **Dimension 4: the social dimension**

As with reliance on customary tenure at the grassroots, whatever the policies and practices in the offices of local governments and ministries concerned with urban development may be, the great majority of urban residents in African cities live their lives in informal settlements and have developed a way of life and doing business that, in their eyes, is in no way "illegal".

This whole notion of "illegality" must be addressed. Illegality is the concept used by city governments as the basic justification for the demolition of informal settlements. Too many countries still approach issues of urban land management in these terms and it is distinctly unhelpful. Use of these terms and action taken in pursuance of them is much more of a socio-political than a legal matter, but the point needs to be made that policies and their implementation predicated on the basis that the majority of urban dwellers are in some way living "illegally" have not succeeded in dealing with the problems of urban land in the past and are very unlikely to succeed in the future.

There are, in fact, two intellectual problems to overcome in respect of notions of "illegal" land occupation and use. The first and most obvious is the basic principle, seized on by lawyers, administrators, politicians and landowners, that to tolerate the illegal occupation and use of land is contrary to all precepts of good government including adherence to the rule of law, protection of property, compliance with lawful authority. To them, it really should make no difference

whether the illegality is being perpetrated by a few people or by many, perhaps the majority of urban dwellers.

The counter-argument to this formalistic position is that the social context of “illegality” must be considered. For the vast majority of “illegal” occupants and users of land in the cities of the developing world, there is no alternative. The official legal system of land allocation and use is beyond their reach, either because they cannot afford it or because they lack the political influence and connections to obtain access to it. There is nothing contrary to the principles of good government or the rule of law to address the issues giving rise to illegality rather than attempting to “put an end” to the illegality by, in this case, such means as forcible removal, demolition, criminal charges, etc.

The second intellectual problem is this. Characterization of popular or informal settlements as illegal, unauthorized or slum leads those who use such terms to assume that the inhabitants of such settlements are, if not all criminals, then certainly living a pretty inferior lawless kind of existence that needs to be contained rather than encouraged. Nothing could be further from the truth, as increasing numbers of studies have shown.

First, informal settlements, even those that start as wholly illegal, do not exist in a Hobbesian state of nature; some system of ordering inter-personal relations in respect of tenurial issues and other matters quickly comes into being. Studies from around the world show that these “systems of ordering” are usually modelled on the official land laws of the state. Official documents are copied and used, contracts have to be in writing and dispute settlement processes model themselves on the formal system. An interesting study from Tanzania shows how this has slowly developed in the informal sector (Kombe, 2000).

Second, the institutions involved in such a system come from both inside and outside the informal settlement; those outside the settlement being part of the official formal system of governance. In practice, they may be: local government institutions as shown by Fernandes in his study of *favelas* in Belo Horizonte, Brazil (Fernandes, 1995) and as occurs in land-sharing operations in Bangkok; party officials as is the case in informal settlements in Lusaka and Dar es Salaam; organizations of lawyers, i.e. a legal aid society formally registered in accordance with governmental regulations such as the Legal Advice Centre in Nairobi or unofficial groups of lawyers willing to give their time free or for a fee to persons within the informal settlements as found in Bangalore, India; NGOs; or, in areas where customary law applies, those with authority over land and people within the customary system as found in Douala, Bamako and Accra.

Third, while there may be some, perhaps inevitable, reference to formal legal terminology, concepts, forms, etc., within the informal systems, their development and operation is eclectic and consumer-orientated. They aim to satisfy their clientele, keep the peace and uphold legitimate claims and interests to land and housing – legitimate within the informal settlement that is.

Fourth, assuming that some official involvement in ordering informal tenurial relations betokens official tolerance of the informal settlement, for whatever reason, a fair degree of security of tenure from external forces – eviction, demolition – is or may be obtained. Even security of tenure from internal forces – landlords – may be strengthened by the existence of official involvement.

These factors then lead to this fundamental point: acceptance of the reality of life in the informal settlements is a necessary prelude to addressing the social challenges arising therein. Concepts of legality and illegality obfuscate rather than illuminate.

### **Issue 3: Conclusions**

Five general themes seem to run through successful or, at least, not wholly unsuccessful attempts at informal tenure reform. First, in place of politico-bureaucratic decisions about land taken in secret, greater reliance is placed on open and market-orientated decisions. In this case, market orientated means more than decisions determined by price. It means decisions determined by criteria such as the facilitation of transactions, the perception of land being both an economic and a social asset, the desirability, perhaps the normality, of attempting to pay attention to the wishes of consumers and the irrelevance of personal factors – political, clientelism, favours, etc. – in determining who gets what.

Second, there is a clear move away from the centralized state-dominated approach to the development of more local systems of land allocations and use. Political factors in the decision-making process over land are, if not eliminated then reduced and subjected to more local involvement. Decisions are made by many individuals and organizations and not just by one centralized agency. Decentralization also helps bring the decision-making process closer to the people, and assists in its accountability.

Third, a notable feature of the more successful cases is the care taken by governments to consult with and take account of the views of the users of the system – land developers, residents' associations, customary title holders, squatters, etc. These consultative processes are not a mere formality.

A fourth general theme is that of flexibility in implementation. This covers a variety of matters. In Botswana, it refers to the willingness to develop new or adapt old forms of tenure to suit new urban needs. In Thailand, it refers to the willingness to adjust regulations to facilitate the better operation of the market, the concept of land sharing and negotiated settlements of land disputes, and the eclectic mixture of laws that make up the Thai legal framework of land management. In Trinidad and Tobago, it refers to the willingness of government to work with an NGO to develop more realistic standards of subdivision and development to cater to the urban poor and landless. This flexibility may be contrasted with the rigidity of centralized statutory urban planning systems – a particular deficiency in countries in anglophone Africa that adhere to variants of English town and country planning legislation and often treat the relevant laws as if they were cast in stone.

Fifth, as noted above, a strong characteristic of informal settlements is their reproduction, within their settlements, of basic elements of the formal legal systems that have, in a sense, rejected them. They have a legal system and, perhaps not surprisingly, it copies the only legal system that the inhabitants of the informal settlements know – the existing system. We can see two intersecting circuits of legality within the city – circuits of law and tenure, and statutory and indigenous systems of land tenure applying in rural areas. The task for urban policy-makers and managers is to try to bring these two circuits closer together and to develop a unified urban land law drawing on the best of both systems.

### **ISSUE 4: GENDER**

The issue of gender is both straightforward and complex. It is straightforward in that the issue can be simply stated by making a reality of the constantly repeated mantra that there should be no discrimination between men and women with respect to their access to land, occupation and use of land or land transactions. It is complex because the social, religious and political implications of bringing about that reality raise more concerns and generate more opposition (usually but not always covert) than any other issue discussed in this paper.

## Dimension 1: the international dimension

There is a rare unanimity on this issue at the international level. All UN agencies, IFIs and donors speak with one voice: gender equality with respect to rights to land must become the norm and is an essential part of any programme of land reform in Africa. The need to address gender issues has become more pressing in light of the HIV/AIDS epidemic. The extent of the problem is being constantly highlighted by senior officials of international agencies:

*In practically all of Africa, customary land laws discriminate against women, and generally, the political will to protect women land and property rights and interests is not there ... Governments have tended to pay lip service to women land and property rights, but in practice, most women have to fend for themselves (Anna Tibaijuka, Executive Director, UN-Habitat, 2004).*

*In Africa, women constitute 70% of the agricultural labour force and 90% of the labour for collecting firewood and water. They are largely rural dwellers ... The majority of these women ... do not own or control land and other natural resources. Indeed, many of them only gain access to land through a male relative. This means that women in Africa cannot participate and contribute adequately to development ... Yet if women, who comprise more than 50% of Africa's population lose out on development, African families lose and indeed the continent loses (Abdoullie Janneh, UN Under-Secretary-General and Executive Secretary of ECA, 2006).*

The 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ratified by most countries in Africa in some cases as much as 20 or more years ago specifically mandated State Parties to take all appropriate measures to eliminate discrimination against women in rural areas and in particular to ensure such women the right:

*To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes ...*

In the mid-1990s, the FAO reported that only five percent of the resources provided through extension services in Africa are available to women (FAO, 1990)<sup>4</sup>.

The World Bank is in no doubt that:

*Legal recognition of women's ability to have independent rights to land is thus a necessary, though by no means sufficient, first step towards increasing their control of assets (2003).*

One might suppose that with this impressive weight of opinion favouring effective and meaningful action at the international level, some such action would have been forthcoming. It has not been and in an impressive and hard-hitting paper, Nyamu-Musembi (2006) spells out why. Examining rule of law programmes funded by the international aid community led by the World Bank and USAID in particular, she makes the point that the overwhelming emphasis of the programmes has been in creating a suitable legal and institutional environment for the market to function better:

*The picture that emerges from this overview suggests that the prospects for achieving social justice and equity (including gender equity) through legal and institutional reforms are bleak, since the reforms have not been driven by a concern for social justice, let alone gender equity. The key regional financial institution, the African Development Bank, makes no reference to legal discrimination on the basis of gender, or to using law to challenge discriminatory exclusion of women. (ADB 2002) ...*

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<sup>4</sup> From Q&A with Marie Randriamamonjy, FAO, from *Report of the Global Consultation on Agricultural Extension, held in Rome, Italy, Dec 4-8, 1989*

*The World Bank's lending for the law and justice sector has not paid attention to gender equality. Such attention is to be found only in the Bank's research work. ...*

*One crucial observation made by gender justice advocates is that official discussion of gender and land tenure is often disconnected from discussion of broader processes of economic restructuring, for instance those affecting the financial services industry. Yet women's ability to access credit is connected to their ability to demonstrate secure interests in valuable land that they can put up as collateral. Financial sector reforms have not been co-ordinated with reform of land and family laws, yet from a gender analysis perspective the connection is obvious.*

*The overall climate in which the reforms are being promoted threatens to delegitimize the pursuit of any goals seen as incompatible with the core agenda of creating efficiently functioning legal institutions for the market ... in the absence of explicit commitment to social justice and redistribution, there have been few gains for gender equality.*

Words and actions are completely disconnected. With so little real commitment to reform by the international community (as opposed to fine words), it is no wonder that there has been an equivalent lack of real commitment to reform (laws) by national governments.

## **Dimension 2: the colonial dimension**

Colonial land policies and actions paid no attention to women's land and property rights. Buell's two-volume, 2 144-page look at *The Native Problem in Africa* (1928) has no references to women or women's land rights in its 50-page index. Lord Hailey's *An African Survey Revised 1956* (1957), a 1 676-page "study of problems in Africa south of the Sahara" has no reference in its 59 two-columned pages of index to women's land rights, in its two-and-a-half columns of references to landholding or in its 11 references to women (though there is a cross-reference to nurses). The EARC (1955) did not address the issue of women and land. Even Herskovits, a social anthropologist who claimed that his more than 30 years of research in Africa "brought me into the kind of relationship with Africans that revealed the underside of the colonial situation" had only two references to women in the 55-page index to his 500-page *The Human Factor in Changing Africa* (1962), neither of which referred to land. Consider this comment by Chanock (1991):

*The ambivalence of the colonial regime towards recognition of male rights in land was not a problem when it came to women: the customary regime of the colonial states did not accommodate at all the idea of women as landowners ... Claims by women, in the name of custom, were viewed with impatience as an impediment to the development process ... It was as Meek (1946) put it "a subject to which little attention has been paid."*

What might appear to be a sin of omission was in reality a sin of commission. As several commentators have pointed out, colonial legislation and policy exerted pressure on customary systems and so altered women's land rights. In the case of Uganda for instance, Bikaako and Ssenkumba (2003) argue that family heads assumed greater autonomy in decisions regarding land access, use and control "thus rendering women's user rights less permanent than before." All colonial powers favoured the generalization and penetration of individual property rights – a comment made by Logo and Bikie (2003) writing about Cameroon's experience of British, French and German colonization – and these, in turn, affected women's property rights. The registration of individual ownership under European systems of land law resulted in women's access and cultivation rights that could not always fit into a European mould being set aside. Whitehead and Tsikata (2003) point to many studies of land registration in Kenya (which started in the 1950s and has continued in the same manner since) that have shown that to be the case. In this, as in so much else, the colonial legacy on land relations to independent Africa was wholly adverse.

### **Dimension 3: the national dimension**

In Dimension 1, it was noted that there is unanimity within the international community on the importance of addressing the gender issue in land relations. It would however be a mistake to assume that this is a long-standing commitment. In the early years of international involvement with land issues, the international community adopted the colonial position as did national governments. Not one of the three World Bank reports on the Economic Development of Tanganyika (1961), Kenya (1962) and Uganda (1962) has any reference to women or gender issues. Unofficial though it was, Christodoulou's *The Unpromised Land* (1990), derived from a lifetime's experience working in agrarian reform with FAO and other UN agencies, has two references to women's role but neither touch on land rights. Delville's survey of *Rural Land Tenure, Renewable Resources and Development in Africa* (1998) focused on francophone West Africa and aimed to assist African policy-makers and aid agencies but had no specific section or discussion on gender issues.

Therefore, it is not surprising that neither national governments nor national discussions considered gender issues when addressing land reform questions in the early years of independence. Obol-Ochola's edited volume *Land Law Reform in East Africa* (1969) contains no papers on gender issues; James's *Land Tenure and Policy in Tanzania* (1971), a key text on land tenure reform likewise contained no discussion of gender issues. Even as late as 1996, two major studies of land issues completely neglected the gender factor: Van Zyl, Kirsten and Binswanger's *Agricultural Land Reform in South Africa*, a 621-page volume of 25 papers, contained just a third of a page on "the inclusion of women." Juma and Ojwang's *In Land We Trust: Environment, Private Property and Constitutional Change*, a 462-page volume of 14 papers, hailed as a landmark in the development of new environmental policy and a book that "policy-makers and scholars can only ignore at their peril," did not even manage that much.

It is fair to say that the gender issue on land matters at the national level only became of official concern in the mid- to late 1990s. The UN Fourth World Conference on Women in Beijing in 1995 was a key factor here, as were the many new constitutions in Africa in the early to mid-1990s that specifically outlawed gender discrimination. It is worthy of note and commendation that in the last decade or so, governments have produced many policies and laws on land reform that have included sections on women's land and property rights outlawing discrimination, requiring spousal consent to land transactions, providing for co-ownership of land used for livelihood purposes, and specifically including a percentage or a specific number of women on land administration bodies. Furthermore, this has been backed up by new laws on succession and inheritance – in many respects the key to increasing the opportunities for women to own land in their own right – and on the property rights of women on divorce.

As will be discussed in the next part of this section of the paper, there is still a large gap between the text of a law and practice on the ground. Even the text of a law has had to be fought for in some cases, but credit must be given to the fact that, as the 2003 World Bank report on land tenure noted on this issue, the important first step of law reform has been taken. Action now must follow the passage of the laws, but it is worth bearing in mind that governments are still coming to terms with attempting to overturn over a century of neglect and downright opposition to women's rights to land. They must do more but they start from a very unpropitious base and, as noted above, they have not received much practical support from the international community.

#### Dimension 4: the social dimension

That said, it is worth drawing attention to two efforts to provide practical solutions to women's land and property rights that have been attempted in Tanzania and Uganda. These efforts and the debates they generated cross the boundaries of the national and the social – pressures and arguments from grassroots and women's groups leading to national action via legislation. The debates are also something of a case study of the major difference of opinion on women land and property rights: reliance on legislation *versus* working through customary law. The ensuing discussion is based on Tsikata (2003)<sup>5</sup> and Shivji (1998) on Tanzania, and Tripp (2004) on Uganda.<sup>6</sup>

A key document in the reform process in Tanzania was the Report of the Presidential Commission on Land Matters that, in many respects, set the agenda for land reform in Tanzania. The Commission had shied away from addressing gender issues on the grounds that they were not part of the Commission's terms of reference and, in any event, involved succession questions more than land law questions. To the extent that the Commission did address the issues, it argued against using statutory reforms to bring about changes in the law and for an evolutionary approach with customary law being nudged in the right direction. Shivji (1998) argued that it was better to integrate the gender question within the larger issue of land tenure reform and that women would benefit from moving general traditions in a democratic direction from below rather than imposing change from above. Both the Commission's and Shivji's approach were criticised by women's groups. Professor Anna Tibaijuka, for instance, argued that the Commission was opting for the status quo on gender relations while arguing for extremely radical proposals on other aspects of land tenure reform (which were, incidentally, to be "imposed from above" by statutory reforms). A study commissioned specifically to collect the views of communities on gender issues found that women were enthusiastic about the possibility of land titling and about obtaining full land rights; they preferred using statutory courts which could hand down binding decisions as opposed to using traditional dispute settlement bodies and they argued for equal representation on decision-making and adjudication bodies. These findings rather contradicted the position of the Commission.

The Land Act and the Village Land Act did provide quite specific statutory reforms on gender issues: discrimination against women on land matters in customary law was outlawed; requirements for specific numbers of women to be on decision-making bodies in relation to land at the village level were provided for, as were specific and detailed provisions concerning non-discrimination in land transactions such as sale, mortgages and registration. Many women's groups considered the two acts a major step forward in providing for women land and property

<sup>5</sup> Tsikata's excellent paper on the reform of Tanzania's land laws might give the impression that the debates and actions on the reform were rushed through the National Assembly. In fact, it should be pointed out, there was considerable debate about the reforms based on specific drafts of the laws. The Presidential Commission on Land Matters chaired by Professor Shivji reported in November 1992. The National Land Policy was approved by the National Assembly in Tanzania in July 1995. I was asked by the Tanzanian government, through the British government, to assist in drafting of land law to implement the NLP in September 1995. I made a preliminary visit in November 1995 to be briefed on the task and give a lecture in the Faculty of Law in Dar es Salaam on the proposed work, commenced work in January 1996 with the assistance of a four person Tanzanian Support Group. Two workshops were held on the draft; one in March 1996 on the work-in-progress and one in late October 1996 on the whole draft. Many changes were made to the drafts in the light of those workshops. The National Land Forum met for the first time in April 1996. Discussions on the bills continued for two years, both within and outside government. The bills were brought to the National Assembly for first reading in November 1998 and passed in February 1999. I was involved in drafting the regulations and forms in 1999 and 2000. The Acts were brought into effect in May 2001.

<sup>6</sup> I should declare an interest in both cases: I was involved in drafting both the Land Act 1999 and the Village Land Act 1999 of Tanzania and the Land Act 1998 of Uganda which formed the basis of the debates and action on gender issues in both countries, see McAuslan (2003).

rights, but a general criticism by both Shivji and Manji (1998) was that the women's groups that took part in the debate on the land laws were basically unrepresentative, as they were middle class, urban and pandering to foreign and class interests, allowing their aid dependency to determine their stance.<sup>7</sup>

The Uganda reforms pitted women's groups against the government in a much more overt way. The Uganda Constitution of 1996 required that a land law to implement the basic principles of land relations provided for in the Constitution should be enacted two years to the day after the first meeting of the Parliament elected under the 1996 Constitution. The last date for the enactment of the Land Bill was 30 June 1998. During the debates on the bill in May and June, a specific amendment to the bill for joint ownership of land by husband and wife was moved by a woman MP. In circumstances that have never been fully explained, although the amendment was agreed to in principle by the National Assembly, in the very final stages of the passage of the bill through the National Assembly, the mover of the amendment was absent, the amendment was not, in the view of National Assembly officials, read into the record, was not therefore properly moved and so failed to become part of the Land Act. It was clear that there was considerable opposition to the clause from the President, many MPs and many senior officials in the political movement that was the President's political vehicle. The opposition was based on custom and tradition and a feeling that women would take advantage of the clause to commercialize marriage and destabilize the family.

Several attempts have been made to re-introduce the clause into the Land Act but none have been successful. It was only in 2004 that, during quite extensive changes to the act, provisions were introduced amending the rule requiring consent of spouses before any transactions takes place, providing that where a consent as required by the law has not been obtained for a transaction, then even an innocent purchaser for value loses out: the transaction is void and the only remedy for the purchaser is to claim any money or consideration back from the person who obtained that money or consideration without providing the necessary consents. This provision is justified by women's groups on the basis that it is only by such draconian measures that women's rights to land will be taken seriously.

Tripp shows that women in Uganda are adopting individual as well as collective strategies to assert their claims to land. They are buying land in their own names and are willing to challenge customary practices that deny them rights to land in both formal courts (which they prefer to less formal elected local council courts) and in local-level land management associations. Tripp sums up the position thus:

*Women's purchase of land, obtaining titles to land, taking claims to courts and organized collective protest around legislation ... demonstrate that the movement to resist customary practices is not only one of urban elite women ... Feminist lawyers and women's rights activists espouse a rights-based approach around land which also resonates deeply with the most basic concerns of rural women ... The women's movement is articulating a vision of land tenure and gender relations that challenge the fantasy that customary arrangements can adequately protect the welfare of women in the way that they are once said to have done.*

In many ways, this is very similar to the position women's groups are taking in Tanzania.

These two cases highlight a central dilemma that the gender issue in land relations raises. As highlighted in earlier sections of this paper, there is now a very clear move at the national and social levels, supported to a considerable extent at the international level, for a return to the

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<sup>7</sup> Tsikata notes that the same point could be made of all civil society advocacy including Shivji's NGO which was wholly funded by donors.

customary. This support recognizes that customary tenure has considerable strengths and that it has been misguided and counter-productive to advancing equitable and productive land relations to try to abolish customary tenure and replace it with statutory tenure based on European land laws and attitudes to land. The way forward is to build on customary tenure, not replace it. Arguably, the Presidential Commission in Tanzania was adopting this approach in its views on the way forward for women's property and land rights.

But African feminist lawyers and women's groups are generally out of step with this approach. Their starting point is that:

*the "customary" considered as social institutions, as social relations and as discourses are sites where, on the whole, men have more power than women ... It is precisely the inequalities in power relations in rural societies played out in a modern context that are the mechanism by which women lose claims to land as individualized proprietorship evolves ... This implies that rural customary cannot be left to muddle along without widening the gap between men's and women's land access. It is necessary self-consciously to manage change to produce greater gender justice with respect to resource allocation for rural women (Whitehead and Tsikata, 1998).*

In other words, the state needs to step in and via legislation bring about the changes that the customary alone will not. But, as we have seen "the tenets of the formal discourses of law and legality such as formal equality and individual rights do not sit easily within customary practices that are embedded in social relations." Introducing these principles and the formal mechanisms to apply them means going down the very road that both governments and donors are now forsaking. However, Tripp argues that the fact that women are prepared to go against mainstream development practitioners and agencies regarding customary practices and challenge those practices shows how seriously they regard them as impediments to their advancement.

Against this old-new approach, Whitehead and Tsikata point out:

*Women in Africa have many reasons to be disillusioned with the state. Many have a history of resisting women's demands and there is a poor record on women's participation in government and in politics at national and local levels. The main holders of national power do not need to use the language of custom to undermine gender justice and women's claims ...*

It seems that whichever way women's rightists go, they will be met by resistance. Whether they work through the customary or the statutory, they will be met by claims that they are undermining the social basis of the law and society and should in effect accept their lot. Alternatively, they are enjoined to work towards the general democratization of society on the basis that this will, in some not very clearly specified way, lead to their greater emancipation with respect to land rights. They may be forgiven for being sceptical about such advice as it costs the advisers nothing and postpones any real change in land relations indefinitely. It is the conclusion of Whitehead and Tsikata (2003):

*... the dangers we have identified in the turn to the customary suggest that we cannot turn out backs on the state as a source of equity for women in relation to land issues ... Rural African women will not find it easier to make claims within a climate of anti-state discourse. It is true that ... women find it difficult to get justice in male-dominated states, but the answer is democratic reform and state accountability ... not a flight into the customary. At a more detailed level, women's land claims need to be based on a nuanced and highly sensitive set of policy discourses and policy instruments – ones which reflect the social embeddedness of land claims, the frequent gender inequality in such relations and the rights to livelihood of African women.*

#### Issue 4: Conclusions

What the foregoing discussion has shown is that there are three interlinked approaches to addressing the issue of gender in land relations. The first is for women to use existing customary systems and institutions, both collectively and individually, to obtain access to land and the rights to hold on to the land that those systems and institutions already provide in theory but do not always concede in practice unless pressure in the form of women's groups push them to do so. A fair number of case studies show that this strategy can bring positive results but they would be spotty, difficult to generalize from and would leave the vast majority of women in their present disadvantageous position for the foreseeable future, with consequent disadvantages to society as a whole.

The second approach is to use the state. This involves using the formal processes of law reform. There are increasing numbers of models of legal provisions that can be adapted for use in different states and for different situations. Many states have begun to go down this route via changes to their Constitutions outlawing gender discrimination so it cannot be said with any degree of sincerity that this approach would undermine the social basis of the state. Furthermore, there are numerous international conventions dealing with women's rights – soft international law – that states have signed. To argue that states should meet their national and international obligations cannot be seen as being particularly radical or unrealistic.

This has developed into an approach that sees gender land relations as a human rights-based matter and as one requiring states to adopt wide-ranging reforms to education, the legal and economic systems and governance systems. Without wide publicity for the law, the re-education of traditional leaders, affirmative action on women's land rights, reform of other laws such as succession law, family law, mortgage and credit law and specific national monitoring and implementation bodies, women's land *rights* will remain unapplied (Mutangadura, 2004). No state has yet gone that far, though several states have taken some of those steps. However, is there anything in these proposals that would be likely to undermine society or harm the economy as some leaders have suggested?

The third approach is to use the market – purchase or rent land, register a title in one's own name and borrow money if necessary to get started. Evidence from Uganda (Tripp, 2004) shows that this is a tactic that women are increasingly turning to. The evidence from Tanzania, Kenya and South Africa shows that women are willing to go down this route. By using the market, women escape both the restrictions of the customary and the antipathy of governments to reform.

There does not appear to be any single or simple solution to the issue of women's property and land rights. Unfortunately, the evidence suggests that, without constant pressure from women themselves, neither governments nor the customary nor the international community will turn fine words into practical actions. Given that there is no dispute of the facts – “women constitute 70 percent of the agricultural labour force, that the majority of these women ... do not own or control land and other natural resources and that if women, who comprise more than 50 percent of Africa's population lose out on development, African families lose and indeed the continent loses” (Janneh, 2006) – it is a sad commentary on the triumph of prejudice over principle.

## ISSUE 5: DECENTRALIZATION AND INSTITUTIONAL DEVELOPMENT

This issue addresses most directly the governance question in land management: what institutional arrangements should be in place to ensure effective and equitable land management that benefits the poor; at what level should they operate and what steps should be taken to bring these arrangements about? What is happening with respect to these matters? Appropriate policies and laws are important first steps down this road, but they do little more than lay the groundwork. The sub-issues that have to be considered here include the balance between the elected, the appointed, the specialist or generalist, the traditional, and the professional input into land management.

Another way of putting this issue is: what is the balance between managerial efficiency and democracy? Where there is to be decentralization, what, if any, monitoring and or intervention arrangements should be put in place to enable the centre or some other level or institution to intervene to prevent local maladministration? Down to what level should decentralization go? What matters, if any, are most appropriately located at the centre and if there is to be a degree of central land administration, what checks and balances should be created at that level? Are there examples of successful decentralized or centralized land management from which lessons can be learned; alternatively, what pitfalls must be avoided at all costs? This section draws heavily on Alden Wily (2003), an excellent comprehensive overview of decentralization of land administration and land management in Africa, based on a survey of 20 states.

Two preliminary matters must be considered. First, what is meant by decentralization? The concept is usually considered to embrace three possibilities.

- Devolution – granting independent local units of government the authority for decision-making and delivery of public services with full financial responsibility for same though possibly with some financial assistance from the centre via financial transfers.
- Deconcentration – redistributing some public functions to field offices of central government and to local authorities but the latter remain under tight control of central government.
- Delegation – transferring powers to local units of government but these can be taken back at any time and may still be exercisable by the centre even after they have been delegated. This is an intermediary between devolution and deconcentration.

The three varieties of decentralization are very different and will have very different results. The principal difference and the principal concern of the centre in any programme of decentralization is the extent to which local units of governance can go their own way and develop their own policies as opposed to implementing the policies and programmes of central government in a fairly standard form. This will be considered in this section.

The second preliminary matter is the distinction between land administration and land management. Alden Wily states that land administration covers institutions and processes associated with land rights regulation and recording and registration of land rights. Land management refers to land use regulation – zoning, land ceiling regulation, conditions of use and environmental protection measures. While such a distinction is useful and follows the generally accepted distinction, Alden Wily goes on to make the point that the terms are often used interchangeably in Africa and her analysis of 20 countries shows that not merely are the terms used interchangeably but the same decentralized institutions often undertake both functions. Where there are distinctions, these will be noted. For the purposes of this paper, however, the term “land administration” will be used to cover both land administration and land management.

### **Dimension 1: the international dimension**

As with the gender issue, so here: there is something of a mismatch between words and actions at the international level. First, the same point may be made here that was made by Nyamu-Musembi in relation to gender: programmes of economic liberalization required by IFIs call for less government, not more, which decentralization often involves. In addition, they require actions and programmes by central government that reduce the scope for actions by lower units of government. So internationally mandated economic reforms had the effect, at least initially, of tightening central control over local government. Only when it was appreciated that market-led economic reforms might benefit from greater decentralization did it receive the support of the international community. Virtually all international agencies and bilateral donors favour and voice support for decentralized land administration and some donors have provided funds for the process.

On the other hand, aid and funding agreements for this purpose are concluded with national governments. Where national governments are committed by deeds as well as words to decentralization, then such funding routes are unproblematic. In cases such as the one in Uganda, where there was resistance to decentralization on the part of central government officials who stood to lose power and influence under the new Constitution and Land Act, there is a danger that aid programmes go nowhere (McAuslan, 2003). Only in very exceptional circumstances are aid funds disbursed directly to local units of governance. In Somaliland for instance, neither the EU which provides the funds nor UN-Habitat which disburses the funds for aid to urban management can officially deal with the government as they have to pretend that such an entity does not exist; they deal with and disburse funds direct to cities and other local government units. In Sudan, too, because of somewhat fraught relations between the Governments of Sudan and the USA and USA legislation restricting aid to Sudan, aid for land reform and administration to the two transitional states of Southern Kordofan and Blue Nile initially by-passed the government in Khartoum.

What these exceptional cases show is that it is possible to channel aid to local beneficiaries and reduce the risk of it being diverted by central governments. Where aid is to be provided for the implementation of decentralization, every effort should be made to ensure that the resources reach the intended units of local governance. This may require the establishment of a ring-fenced central government fund for decentralized activities into which donors can put their funds.

Another aspect of the mismatch is that of programmes. As this paper has shown, the World Bank and other agencies, despite being more willing to recognize the continuing importance of customary tenure and so of local systems of the management of customary tenure, are still very committed to programmes of title registration and to reining back over-regulation, as they see it, of land markets by land ceiling legislation and the need for consents to transactions. As an example of this latter commitment, it was World Bank pressure on the Government of Tanzania to concede to complaints from the banking sector on the new mortgage law – part of the Land Act 1999 – that led to a new mortgage law in 2004 – the Land (Amendment) Act – that reduced judicial and administrative regulation of the banks' power to take possession and sell off the land of loan defaulters (World Bank, 2003).

Title registration of the kind favoured by the World Bank is a national activity. The World Bank is singled out here because, in many respects, it has set the pace on this. There may be deconcentration of offices, as is standard all over the world where title registration exists, but the law, the regulations and the practices are all national. Given the purpose of title registration – to provide a nationally accessible data base of uniform information about who has what rights over what land – it could not be otherwise. But a national system of title registration is bound to limit the scope of local land administration. As we will see, some states have bypassed a

national system of title registration by establishing local simplified systems for the registration of customary title and transactions but this means moving back toward a dual system of land administration. Similarly, with the regulation of land markets, reduction of the scope or content of national rules has not always been carried through to local rules. Governments have been left with the very difficult task of reconciling international pressure for a national system of land administration to facilitate foreign investment with local pressure for local land administration to facilitate the security of local land ownership.

### **Dimension 2: the colonial dimension**

As with so much of the practice of land relations in Africa, the colonial legacy of land administration has influenced practice in independent Africa. Central government officials administered statutory tenure, while powers pertaining to the administration of customary tenure were delegated to district officers and traditional authorities. The ownership of land held under customary tenure had been acquired by the colonial authorities as a fundamental part of the exercise of colonial power. The scope of the powers that could be exercised by both administrative officers, who were themselves part of central government, and traditional authorities such as chiefs was heavily circumscribed by central government legislation and administrative directives.

So the two-tier system of land administration both mirrored and enforced the two-tier system of land relations: i) private rights in land protected by law *for the upper tier of land relations* – in East and Southern Africa mainly a settler tier and ii) no-rights in land, at best permits to occupy land at the unrestricted discretion of administrators, *for the lower tier of land relations*. Where private rights of ownership were conceded to Africans, the same approach was taken to those occupying the transformed land under customary tenure. They were assumed to be tenants on the land at the will of the landlord and constant difficulties ensued between the parties – the new owners assumed they had the unrestricted rights of freehold or absolute ownership while their “tenants” continued to act as if customary rights and obligations existed under which they had a good deal of security of tenure. This has been a particular problem in Buganda in Uganda. This Gordian knot had not been resolved by the end of the colonial era. More generally however, while the two-tier system of land administration continued to the end of the colonial era, the policy was to end it by ending the two-tier system of land tenure through programmes of adjudication and registration of customary tenure and its conversion into statutory systems based on European law.

### **Dimension 3: the national dimension**

This was the policy inherited at independence: end the dual or two-tier system of land administration by ending the dual or two-tier system of land tenure. Although the mechanisms were different, the policies were largely the same throughout independent Africa. Private ownership of land was accepted for the few and held out as a possibility for the many if they converted their land tenure to the statutory system. In practice, tenancy at will on state-owned land administered by the central government was the lot of the many. Land as a primary national resource had to be administered and managed from the centre and local interests had to give way to national programmes. Botswana was one of the few exceptions to this approach, devolving the administration of customary tenure to Native Land Boards by the Native Land Act of 1968. Nor was there international pressure to decentralize: from the 1960s to the mid-1980s, both practice and theory at the international level welcomed and supported strong national governments executing national programmes financed by international donors and IFIs. Local land administration went the way of many local levels of governance; if it existed at all, it was kept under tight administrative and financial control by central government and was little more than deconcentration.

Thinking at the international level began to change in the mid-1980s. National programmes executed by national public entities and national governments did not seem to be working. African economies were regressing, the poor were getting poorer. A major international programme directed at urban governance issues was the first to have devolution of power over land management to local units of government as one of its central themes. The programme, the tripartite Urban Management Programme of UN-Habitat, the World Bank and UNDP, commenced in 1986 (McAuslan, 1997) and has had knock-on effects on land management generally. The Habitat Agenda of 1996 played a major role in moving thinking and action towards decentralization. Many governments in Africa set up Habitat Agenda units in ministries concerned with local governments and land. What might have started as a concern for urban land quickly spilled over into rural land.

It would be incorrect to see moves towards decentralization as the only result of international pressure and agreements. From the early to mid-1990s, there have been many national moves towards, and reports on, land administration decentralization that have inspired others. Two of the most seminal were the report of the Tanzanian Presidential Commission on Land Matters (1994) which influenced Zimbabwe and to some extent Kenya, and the South African Green and White Papers on Land Policy (1994, 1995). A table by Alden Wily, giving an overview of land reforms in 23 countries since the 1990s, finds 20 of the 23 countries have laws and policies that support decentralized land administration. The issue that must be considered now is exactly what these moves amount to. The ensuing discussion follows the order in Alden Wily.

First to what institutions is land administration being devolved, what is the locus of these institutions and what is the nature of the devolution? The following Table 3 is a summary of table 4 from Alden Wily.

**Table 3** *Character and Location of Decentralized Land Administration*<sup>8</sup>

Number of countries	22 – includes seven countries where proposals were in policies or laws not yet officially approved
Government unit of decentralization	3 : Government 4 : Government and Traditional Authority 1 : Government and community 6 : Local government 5 : Autonomous with/without Traditional Authority 3 : Community and community/Traditional Authority
Type of decentralization	4 : Deconcentrated 12 : Devolved 6 : Mixed
Extent of empowerment	3 : Low 9 : Medium 9 : High 1 : Mixed
Number of levels involved at local level	9 : one level 12 : two levels 1 : three levels
Province, region	7
District, commune	14
Sub-district	3 (1 with chief)
Village	13 (5 with chief)

Source: Alden Wily, 2003

<sup>8</sup> Alden Wily's first column is "Countries" which this table leaves out as it is just concerned to summarize that table. She lists Tigray ET and Amhara ET and Zanzibar as separate countries. It is the case that all those units of government have their own land laws and land administration and in the case of the Federal State of Ethiopia, different states within the Federal State are developing their own laws. The 21 countries noted here include the two federal states of Ethiopia (which are different from each other) but excludes Zanzibar since despite the fact that it has its own system of land administration, the United Republic of Tanzania is not a federation and the "country" is Tanzania.

Well more than half the units of decentralization are located in local government or are autonomous but based locally, as is the case with Tribal Land Boards in Botswana. Namibia has Communal Land Boards based on the Botswana model and Uganda's District Land Boards certainly took account of the Botswana experience. It is not yet clear how Rwanda's district and below-district land authorities will work. Tanzania and Ethiopia are the most advanced of the countries that base their lowest tier local authority land administration on villages.

Accountability, in terms of whether local bodies are accountable to local communities, is also an important issue. If local bodies are elected, one can presume at least that measure of accountability. If they are not elected or are only partially elected, then there is much less local accountability. Tanzania's village councils report quarterly to their electorate on their handling of village land and several matters need electorate approval. Several other countries had proposals in 2003 for similar accountability that often coincided with those local bodies that were to be elected. Bodies that are not elected tend not to be accountable to the local electorate. Botswana is, quite rightly, held up as a model of decentralized land administration but, regrettably, on this matter, it must be faulted. No downward accountability is provided for in the law and the countries whose autonomous land boards draw from the Botswana model follow that.

What are the functions of local land administration bodies? Alden Wily notes that the recording of rights via adjudication and documentation (local registration) is "in all cases an important function of local level institutions and arguably the *raison d'être* for their establishment" but other than that function, it is impossible to generalize. Many allocate land or advise the minister on land allocation. Some manage community land resources and other natural resources. Some prepare land use plans or even, as in the Amhara regional land authority in Ethiopia, develop environmental impact assessment procedures. Nearly all of them have the function of advising the minister or a central land administration body, where one exists, on customary tenure. However, some of them are the first level of dispute settlement – a matter that is addressed in more detail in a later section of this paper (see page 46).

Finally, a comment on matters that do not seem to be devolved to local level agencies: land ceilings and access to land by non-citizens. Fixing the ceilings on land holdings tends to be done at central government level, although local-level decision-making on whether to approve land transactions may consider whether the seller will retain enough land to provide for his or her family. Similarly, most countries designate a central government agency to make decisions about whether to permit a non-citizen to acquire land and, if so, what interest and for how long that interest may be acquired but there may be inputs from the local level.

Another matter is expropriation or compulsory land acquisition. In all countries, this is a central government function with basic rules of the possible purposes of expropriation and the measure of compensation set in the Constitution. Most land acquisition laws are very old and still reflect colonial practices that did not and so still do not, embrace any notion of consultation with, or listening to, representations from those persons whose land was or is to be acquired. Where the World Bank is to be involved in financing of public development, practice usually departs from the strict letter of the law since the World Bank's guidelines require some involvement with the local community and project-affected persons (PAPs) before acquisition takes place – the financing of the Lesotho Highlands Water Project is a case in point – but this is one area where national governments have almost universally and most regrettably failed to alter their laws and practices to involve local communities and PAPs. A major study of land acquisition laws and practices commissioned by the World Bank from the FAO in 2003 (with which the author of this paper was involved) was completed, but for some reason never published. It would have provided a useful guide to governments for the updating of their laws and practices.

#### **Dimension 4: the social dimension**

Hitherto, the social dimension has focused on lower level institutions and civil society but, in terms of decentralization, there is something of a quandary. Decentralization crosses the boundary of the national and the social. The national dimension focused on what in effect was the social dimension: the devolution of functions to lower levels of governance. Ideally, this dimension now should focus on how these lower levels are working in practice and their relationship with civil society and its institutions. However, as Alden Wily has noted in her study, devolution is a very new policy and the actual practice of devolution newer still. Although this point was made in a study published in 2003, the point is still valid. Too little is known about what is happening at local levels for it to be possible to make any generalizations about the practice. One broad issue may however be discussed, again based on Alden Wily.

A general matter considered by Alden Wily is whether the establishment of local-level land administration has had a beneficial effect on the interests of vulnerable groups – women and children in particular. As noted in the previous section on gender issues, women’s groups and feminist lawyers and authors have considerable scepticism about reliance on customary tenure as the way forward to gender equality and equity. The same scepticism is to be found with respect to relying on local-level institutions to manage land. Many devolution laws require that such bodies have a specific number of women as members. Alden Wily notes that eight of 11 laws examined required improved or equal representation. Other laws require spousal consent to transactions. However, there is evidence that greater gender equality in membership is being subverted by such actions as fixing meetings at a time when women cannot attend. It is too early to say whether the consent provisions will be effective. Again, there is anecdotal evidence that consent assumes equality of spouses with respect to land management that is not often present, at least in rural areas. So the jury is still out on whether localizing land management will, of itself, bring about greater gender equity.

With respect to children and, in particular, orphans the evidence is more encouraging. Governments are facing up to children’s and orphans’ land rights in the context of the HIV/AIDS pandemic and making specific provision in new land and succession laws for their rights to be protected. Not all these laws place decisions about children’s rights at the local level. However, in eight of the nine laws considered by Alden Wily, she found that where decisions about land allocations, land transactions or land disputes are located at local level, children’s rights and interests are to be considered. For example, in Rwanda, due to both the 1994 genocide and the effects of HIV/AIDS, many orphans have land claims and rights. Thus, specific provisions have been proposed to regulate the new state lease introduced by the Organic Land Law to deal with the duties of guardians with respect to orphans’ land rights and to ensure that these duties will be policed by local-level land management institutions.

#### **Issue 5: Conclusions**

Based on the author’s knowledge and involvement (with respect to some countries), he would agree with Alden Wily’s general conclusion that the facts are positive. Decentralization is quite widespread, both with regard to the countries that are going down that route and with regard to the functions of land administration that are being decentralized. It is too early to say whether decentralization is a success nor would it be fair to point to one or two examples of “failure” and argue from them that the “experiment” is a failure. First, what would count as failure? There is too little experience to make such a judgement. Second, we are dealing now with hundreds, if not thousands, of local-level administrations. Tanzania alone has more than 8 000 villages which now have powers of management over land. It would be remarkable if there were not some villages where things were going awry.

Decentralization of land administration cannot be divorced from the general decentralization of governmental functions which has been a trend in Africa for some time now. In part, this is an aspect of the trend towards greater democratization of governance in Africa and, to that extent, it is to be welcomed. Alden Wily criticizes the current approach to decentralization as being insufficiently democratic. There was too little consultation with, or participatory planning by, communities in designing the new systems and determining what powers they would have, and there was too little discretion left to communities to shape or reshape their own systems. But the best can be the enemy of the good. When governments are making a step change in their modes of land management, it might not be helpful to chastise them for not going even further. Better to suggest that governments should learn from each other's experiences and be prepared to make further incremental changes over time.

In part, however, decentralization is an aspect of a retreat from government argued for by IFIs in the 1980s in the first naïve flush of enthusiasm for the liberalization of African economies. Functions were decentralized. However, the decisions were not always backed up with funds to carry out the functions, so local-level governance institutions started off at a disadvantage. Rather than loading even more functions on these institutions or giving them greater powers to decide themselves what they should do and how they should do it, it might be better to concentrate on ensuring that they are properly funded and, if the funding is coming from local sources such as fees and charges for services, that the funding is collected, properly accounted for and applied to improving the services provided. Sometimes the rather dull business of getting the bureaucracy right is more important than the more exciting exercise of tackling the "democratic deficit". For what its worth, this seems to be the view of the Government of Rwanda which has invited DFID to assist in improving its local land administration systems.

In sum, judging by the plethora of policies and laws that have been adopted in the last decade and a half, decentralization has gotten off to a good start and, once established, it is likely that it will be possible to strengthen it. The only route to take is one that focuses on making decentralization a success: efficient, effective, economical and equitable. The new decentralization is very much an African initiative with the colonial experience completely sloughed off. It might have drawn ideas from elsewhere – it would be rather short-sighted not to have done so – and international efforts might have nudged governments in the direction of decentralization, but it is not a foreign import. That is the most important ingredient for its hoped-for success.

## **ISSUE 6: PASTORALISM**

Pastoralism is generally considered to pose almost insurmountable problems for land use. Those countries where pastoralism is a major form of land tenure must deal with disputes between pastoralists and sedentary farmers, cross-border disputes between states, fundamentally different life-styles and even conceptions of right and wrong. Disputes between pastoralists and sedentary farmers appear to spill over into violence much more readily than disputes between sedentary farmers *inter se*, and the violence can degenerate into tribal conflicts, near civil war or worse. Three of the worst examples of civil conflicts in Africa – Rwanda, Somalia and Sudan – involve and involved, *inter alia*, conflicts between pastoralists and sedentary farmers that, in turn, often involve and involved land.

In addressing the issue of pastoralism, this section ventures into a minefield where strong views are held – by governments, by pastoralists themselves and by commentators. An attempt will be made to set out and consider the views and actions taken to implement them while recognizing that any conclusions are likely to offend one or more of the main protagonists. This is a debate that has gone

on ever since the colonial penetration of Africa in the late nineteenth century and does not appear to be any closer to resolution. Fortunately for the author, there is some excellent recent writing on the debates and recent actions in the field, and these will be extensively drawn on.

### **Dimension 1: the international dimension**

The international community has had an enormous influence on policies and actions for pastoralism and, some would argue, a more baneful influence here than in almost any other aspect of land tenure. A major international trigger of influence was Hardin's *Tragedy of the Commons* which according to Fratkin (1997) "played an enormous role in environmental studies and development policies." Hardin's thesis is well known but this very brief summary was taken from Fratkin:

*Each man is locked into a system which compels him to increase his herd without limit – in a world that is limited. Ruin is the destination towards which all men rush, each pursuing his own interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all (Hardin).*

To summarize Fratkin's comments on Hardin, he notes that some environmentalists saw pastoral mismanagement leading to desertification and argued for the dismantling of common property regimes. This thesis, according to Fratkin, provided a rationalization for World Bank programmes that called for sweeping privatization of land and commercialization of livestock production.

Privatization of the commons was strongly advocated not just by the World Bank but by other major funders such as the United States, Japan and the EU:

*Large scale assistance was provided ... as fixed term interventions, usually of highly capitalised infrastructural inputs ... planned by outside experts for implementation by national government officers ...*

*These ... interventions, ostensibly for economic development and for improving range management and livestock have been uniformly negative and frequently disastrous.*

Fratkin quotes Swift (1991) as follows:

*The record of this type of policy in Africa has been dismal ... Land degradation has not been halted and has sometimes increased, livestock productivity has not grown, though economic inequality has and vulnerability to food insecurity and loss of tenure rights has increased ... Some [donors] now argue for a policy of benign neglect towards dry areas on the grounds that little can be done there.*

The international community however did not adopt such a policy. The World Bank has modified its policies to more "integrated natural resource management" which per Fratkin "attempts to involve local pastoralists in the implementation process." In many respects, the running in the international level in practice has been taken up by major Western NGOs working with pastoral communities and developing pastoralist organizations.

At the policy level, Hardin's thesis has been increasingly attacked both by social scientists and natural scientists as Fratkin shows. The former have pointed out that common tenure systems in dry regions do regulate access to users and sanction abusers and have mechanisms in place to control mismanagement. They also point out that bore holes and irrigation projects promote overcrowding on the commons and conflict between pastoralists *inter se* and with sedentary farmers. Natural scientists have concluded that the southward advance of the Sahara desert could be attributed to large climatic disruptions such as El Niño. These criticisms were largely

ignored in the 1970s and 1980s, the high point of large-scale international interventions into pastoralism: the “truth” that pastoralists were responsible for environmental degradation was regarded as so fundamental that no evidence was necessary to prove it.

The thinking at the international level on the ecology of savannah rangelands has been summed up by Scoones and Graham (1994):

- 1. They are non-equilibrium environments. Livestock numbers and vegetation status are determined by external factors such as rainfall. Grazing has a limited effect on pasture productivity in the long run ...*
- 2. The ability to move around with your animals is vital, since different areas have different things to offer and this varies over time.*
- 3. African pastoralists usually do not have single objectives for their herds. So if planners use a mechanistic approach, based on a single objective – for example boosting meat production by limiting animal numbers to a particular pasture (ranching) – it is unlikely to work for pastoralists.*

The way forward is now flexible planning and adaptive management. Uncertainty is an important part of life. One cannot hope to acquire all the information necessary before starting a project so one adopts a strategy of starting a project with some information, gathering more as one goes on, feeding it into the project and adapting to the new information as one acquires it through the life of the project. A project on pastoralism in other words should operate as pastoralists do.

## **Dimension 2: the colonial dimension**

The colonial period was unquestionably more destructive of pastoralism than the international input has been. To begin with, the land pastoralists used was regarded as “waste and unoccupied land” and therefore available for settlement by colonists. Pastoralists were pushed off their land. When they objected (citing perhaps an agreement made with the colonial government that if they vacated some of their land, they would be left with the rest, which was later broken by the government they had made the agreement with), they found that the law was interpreted by the colonial courts in such a way that what they thought was an agreement was no agreement at all and could quite lawfully be disregarded by the government. The infamous Kenyan case of *Ol le Njogo v Attorney-General* in 1914 involving the Maasai is the worst example of this (Hughes, 2006). The Kenyan Land Commission (1933) rubbed salt into the wound of that decision when it said that the Maasai had, in fact, been treated unduly generously since they were a decadent and dying race who, but for the advent of the British, would have faced disaster.

The international boundaries created by colonial powers which divided communities and tribes quite arbitrarily had a particularly deleterious effect on pastoralists. In West Africa, for instance, pastoralists used land which now forms part of Niger, Burkina Faso, Benin, Mali and Nigeria. In anglophone East Africa, the Maasai were wont to use land now divided between Kenya and Tanzania. This too had the effect of reducing the amount of land available for pastoralists’ mobility.

Colonial policy towards pastoralists was one of benign neglect for many years but ultimately developed into small-scale efforts to improve water supplies, improve breeds and establish fixed and rotational grazing. This foreshadowed the origin of the large-scale efforts of the international community in the first two decades of the era of independence in the 1960s and 1970s. The policies of individualization of tenure and registration advanced by colonial powers also failed to address the tenure arrangements of pastoralists.

### **Dimension 3: the national dimension**

On the whole, pastoralists were little involved in the political ferment that led up to independence. In the commitment to modernization and development, they were seen as being particularly in need of modernization and development. There was unquestionably a congruence of interests between governments and the international community in introducing new approaches to pastoralism that aimed to wean pastoralists away from their outmoded ways. Tanzania provides a good example. To quote Fratkin:

*In Tanzania, the socialist policy of ujamaa villagization was unsuccessful among the Maasai but the Nyerere government did create “livestock villages” controlling grazing and water resources. The USAID and the World Bank funded the Maasai Livestock and Range Management Project between 1969 and 1979 [with a] \$23 million budget ... The project did not result in any substantial increase in livestock sales ... and the water and road development contributed to large numbers of immigrant farmers ... Forced onto marginal lands or concentrated near bore holes, pastures quickly became overgrazed. Predicting disaster, USAID finally terminated the project.*

Niamir-Fuller (2005) notes that similar policies were tried and failed in francophone West Africa: “Under-funded efforts were made to create official transhumance routes, with permits and supervised cross-border movements, watering points and quarantine stations.” She notes that even after new approaches were adopted in the 1980s, they were based on a blueprint approach, with guidelines only discussed with pastoralists and others after they had been created.

In the early years of independence, only Botswana developed a successful land policy for cultivators and stock keepers. Agro-pastoralism was based on communal land use and tenure. It was the predominant production system in Botswana, supporting large numbers of people in the rural areas for whom there were no viable economic alternatives. It made effective use of a variable environment by mitigating the negative aspects of unreliable rainfall as well as exploiting low land costs (Adams, *et al.*, 2005). Land administration in Botswana was decentralized to land boards that protected communal grazing by allocating separate land for arable cultivation to applicants. A Tribal Land Grazing Policy, introduced in 1975, aimed for progressive privatization of rangeland through the development of private bore holes.

The early years of this policy did not unduly detract from communal grazing land, as there was enough grazing land for all. However, in recent years, this policy has begun to fray at the edges. Ranchers in private ranches are not meant to use the communal grazing lands which remain available for poorer herders who cannot afford to go private. But what is happening is that private ranchers overstock their ranches, causing depletion of the grazing on the ranches at which point the ranchers put their cattle on to the communal pastures. Small pastoralists have protested at this practice of “dual grazing” in vain.

The wave of reforms in land tenure and management from the 1990s onwards has not left pastoralism untouched. In her review of governance and land relations in Africa, Alden Wily (2003) considered policies for their attention to pastoralism in 11 countries and found only two whose policies paid no attention to pastoralism. In the case of Ethiopia, the rights of pastoralists are guaranteed by the Constitution but none of the other countries surveyed had gone that far. We can however consider two contrasting cases of developing pastoralism policy and law on the basis of two excellent case studies. They clearly demonstrate that the arguments rehearsed at the international level have by no means been resolved at the national level. The first case study of Tanzania will be considered in the national dimension as it is principally concerned with national policies; the second of Guinea will be considered in the social dimension as it looks at how pastoralists are adapting to a new legal and policy regime.

The Tanzanian Village Land Act made considerable efforts, as Alden Wily reports, to cater to the needs of pastoralists. Pastoralists may be granted customary land rights, village land is defined as including grazing land, and two or more villages may make agreements on the joint management of lands. This may well assist pastoralists in shared seasonal grazing areas. The assumption behind these provisions was that pastoralists may be in villages but there was no compulsion for them to be there or to adopt more sedentary ways. That phase of Tanzania's land policies was over.

However, the recent case study by Mattee and Shem (2006) suggests a rather different scenario. They quote somewhat negative statements by the new president: "our people must change from being nomadic cattle herders to being modern livestock keepers ... We have to do away with archaic ways of livestock farming ... ." This suggests a return to the policies of the 1960s as does the proposed Range Management Act 2005 (the author's paper was completed and submitted for publication before knowing whether the bill was enacted) that provides for the Minister of Livestock Development to establish range development areas (RDAs), create district rangeland management coordinating committees to, *inter alia*, declare the number of authorized livestock units within an RDA, and adopt regulations to provide for the protection, regulation and improvement of the RDAs. Mattee and Shem have this to say on the bill:

*The proposed Act is essentially supporting the establishment of ranches but under a different name. The provisions within this Act betray the same misconceptions held by government of pastoralism as a backward, unproductive and environmentally damaging livelihood system. The proposed Act seeks to modernise pastoralism by limiting livestock husbandry to specific areas in which forage, water and other inputs are provided and livestock movement and numbers are strictly controlled. It is a "ranchers" vision of livestock production in Tanzania which seeks to control, through technical means the major factors of livestock production: access to forage and water. Such a vision, however, fails to accommodate the highly dispersed and unpredictable nature of natural resources in Tanzania.*

The authors go on to draw attention to other recently enacted or proposed policies and laws that are likely to affect pastoralism adversely, particularly the Wildlife Policy of 1998 that "facilitates the further marginalization of pastoralists by encouraging more land to be brought under wildlife conservation at the expense of pastoral activities," and the proposed National Livestock Policy that continues the tradition of:

*... top down planning approaches based on the belief that giving titles to pastoral villages will improve both livestock productivity, reduce resource conflicts with cultivators and conserve the environment. However this will not be beneficial to the majority of pastoralists unless the land is communally owned and managed by established, legitimate and representative local institutions ...*

With respect to this last point, it must be pointed out there is nothing in the 1999 Village Land Act that would prevent such local and representative institutions from determining to own and manage the land communally, namely the Village Council.

The authors draw attention to possible developments that may benefit pastoralists, particularly decentralization of more government powers to local government and the 2004 National Strategy for Growth and Reduction of Poverty that acknowledges the wisdom and necessity of protecting the pastoral livelihood system. However, they conclude that most of the policies and laws they reviewed are not supportive of pastoralism. The elimination of mobility is a key policy. From a technical and bureaucratic point of view, this makes sense as it is easier to oversee and monitor what is happening in the sector. However, it endangers pastoralists and prevents them from "taking advantage of the spatial and temporal variation of pasture and water

availability ... which will make [them] more vulnerable to environmental shocks.” They also note that many of the policies advocating the protection of pastoralists’ rights have not been given legal force while the expansion of wildlife conservation areas and the commodification of land are being given legal force that will work against the interests of pastoralists.

It is a sobering conclusion but one that is backed up by a very careful and detailed analysis of the evidence. If one were to suggest any single reason why the Government of Tanzania apparently wants to ignore the wealth of evidence that its chosen policies have been tried in the past and failed and that other policies recognizing the environmental and economic benefits of mobility for pastoralists can be developed and have a much better record of success, it lies in the authors’ comment that the policies being adopted make a lot of sense “from the technical and bureaucratic point of view.” The policies are designed by officials and aim at control and regulation. There has always been tension in Tanzania between the government and pastoralists who have always been seen as not sufficiently willing to conform. It is easier and cheaper to plan and provide veterinarian, health, social and educational services for people who live in one place than for people who roam the countryside. Why should special and expensive provisions be made for a relatively small group of people who will not conform to normal standards of order and regularity and whose way of life disrupts those who are willing to conform?

#### **Dimension 4: the social dimension**

Is there an alternative way of providing for pastoralism that recognizes the values of the traditional pastoralist way of life not only as a cultural phenomenon that should be preserved as a part of the cultures of Africa but as a viable and positive social and economic input into a national economy? Several countries in francophone West Africa – Niger, Guinea, Mauritania, Mali and Burkina Faso to name them in the order in which they developed their approaches – think the answer to this question is “yes.” Touré’s 2004 study of the development and operation of policies and laws on pastoralism in Guinea shows what can be done when not aiming for central regulation and control.

Touré summarizes the new legislation in Guinea and other countries:

*It has introduced some interesting innovations, such as:*

- *Recognition of the economic importance of livestock rearing;*
- *Reinstatement of pastoralism as a productive use of land;*
- *Preservation of pastoral mobility;*
- *Opportunities for herders to gain access to strategic resources required to develop their activities;*
- *Taking account of customary procedures in natural resource management;*
- *Reinstating endogenous mechanisms for conflict arbitration and resolution ...*

*The major innovations introduced by the Code Pastoral include: (i) legally guaranteed rights of pastoral use (particularly grazing rights) and rights to use harvested fields (crop residues); (ii) greater security for transhumance; (iii) requiring rural development and land management projects to take account of specific problems and needs of livestock rearing; (iv) recognition of local government prerogatives regarding the protection of transhumance routes and development of common pastures; and (v) defined procedures for locally negotiated conflict settlement.*

Touré draws attention to some defects of the code. Although there was some consultation on the development of the code, the process left much to be desired in terms of stakeholder participation. Yet stakeholder participation is a vital element for getting herder communities to understand the law and begin to adjust their behaviour to comply with a law that gives them

several distinct benefits. The code contains within it “two contradictory logics: preservation of the principles of shared access on the one hand and privatization of grazing land on the other.” The arrangements for the latter challenge the right to graze common pastoral lands and the rules underpinning them.

One of the successes of the code has been the development and use of the transhumance committees. The committees consist of representatives of both herders and farmers, a representative of the local rural council and an official from the central government service responsible for rural development. They have reduced conflicts, and “provide a forum where the modalities for receiving transhumant herders into reception areas can be negotiated.” One of the keys to their success is that they operate at “a level which is appropriate to the management of pastoral rangelands.” They are supervised by local administrative authorities but lack full decision-making powers. They can propose, but on many matters, local administration decides.

Touré gives a measured overview of the code and its operation. His work involved interviews with many stakeholders so his assessment of their views on the code is highly significant:

*There seems to be general agreement that without the Code Pastoral transhumance would have been severely hampered or at least subject to highly restrictive conditions, particularly in terms of financial costs. Different user groups are changing their strategies so that they can maximise the benefits derived from implementation of the code and minimise its negative effects on their interests.*

*[but]*

*... grassroots appropriation of the Code Pastoral is essential if [it] is to be applied effectively ... Herders' organizations need to be more aware of and engage with the issues ...*

On one key issue, there is a convergence of views between the centralists represented by the policies of Tanzania and the localists represented by Touré’s analysis: there is a need for pastoralists to become more involved with the processes of government. Even where policies and laws are geared to meet their key concerns, they have to engage to obtain the benefits of them. *A fortiori*, where policies and laws are being developed that do not meet their needs and concerns, they have to engage with government to get their points across.

## **Issue 6: Conclusion**

The two case studies discussed in Dimensions 3 and 4 (see page 40 and page 42) show that there are still strongly held divergent views on how to “deal with” pastoralism. Those who note that, in practice, pastoralists the world over are “settling down at a rapid rate, both to take up farming or to live in or near towns” (Fratkin, 1997) argue that the best way forward is to encourage that trend by a judicious mixture of incentives and regulatory pressure to move towards a ranchers’ approach to pastoralism with its concomitant, the privatization of grazing land. On the other side are those who argue that mobility is the key to the future of pastoralism and that mobility is good for arid and semi-arid non-equilibrium environments typical to large areas of Africa. These areas support large numbers of people and animals that contribute a great deal to national economies. Policies should, therefore, be designed to ensure continued mobility and also flexibility. Blueprint planning will not work (Scoones and Graham, 1994). Central to mobility and flexibility is to recognize that what pastoralists need is access rights to the land and water resources of others (as was developed in the case of Guinea). This is at least as important as tenure rights to their own land. In the author’s view, Fratkin’s conclusions, after surveying an enormous range of literature reviewing the experiences of pastoralists and the effect of development projects on pastoralism around the world, are a fair summary of the more appropriate policies that should be adopted:

*For pastoral populations to continue to live off their herds ... several changes in development policy must occur. First and foremost, herders must have rights to pasture and water, rights that may include communal, village-based or cooperative tenure guaranteed by law. Mongolia's success in revitalising its livestock system is due not just to the individual privatization of their herds but to national policies guaranteeing shared resources, access to markets and access to veterinary care. Conversely the greatest impediment to Maasai or Barabaig pastoralism in Africa is the enclosure, privatization and fencing of grazing lands that exclude former owners from their traditional lands. Recognition of customary land tenure is essential to the continuance of pastoralism in most parts of the world.*

*Another development should include the recognition by international development donors [and it might be added national governments] that pastoral livestock management in arid lands is productive, rational, and an essential way of utilizing scarce and patchy resources. Pastoral strategies of herd diversity, pastoral mobility and residential flexibility offer a means to convert patchy, seasonal and scarce vegetation into calories and protein for human consumption in arid or marginal lands.*

*Finally, pastoralists need better access to credit and savings institutions ...*

## **ISSUE 7: DISPUTE SETTLEMENT**

One of the more depressing statistics about land tenure in Africa, quoted in country after country, is the enormous number of land disputes that remain unresolved. Alden Wily found a backlog of 26 000 land cases in Ghana and comparable backlogs in Kenya and Lesotho. This is the principal reason for categorizing dispute settlement as a specific issue that needs to be addressed in any overview of land tenure issues and the poor in Africa. At first sight, this may appear to be the kind of issue that a lawyer would pick out as important. In reality, dispute settlement is an issue with profound social, economic and political ramifications. In many respects, and evidence from field work supports this, peasants are more concerned with the effect land disputes have on their tenure security than they are about title registration. Putting it another way, they judge the usefulness of title registration by its likely impact on settling land disputes rather than on whether it will facilitate obtaining a loan from a bank.

The seriousness of the problem of unresolved land disputes may be gauged by events in Uganda. The Land Act, applying the principles enshrined in the 1996 Constitution, provided for a dedicated system of land tribunals with more than 1 000 at subcounty level and more than 50 at the level. The act forbade the regular courts and the local council courts to continue hearing land cases. However, a lack of resources and of judicial enthusiasm about the new system led to a total absence of any form of judicial body to deal with land cases. People began taking the law into their own hands and police statistics reported a sharp rise in murders directly connected to land disputes.

So the comfortable notion that people will sort out their own land problems peaceably in their own way, often pedalled in response to concerns about the lack of formal systems of dispute settlement on land issues, is not so much a comfortable notion as a comfortable fiction. It should not be taken seriously as a policy option on the matter.

### **Dimension 1: the international dimension**

Nyamu-Musembi's analysis of internationally funded rule-of-law programmes in Africa and their deficiencies when considered in the context of gender issues has already been considered, but it is also relevant here too. She finds that programmes have concentrated overwhelmingly on reform of commercial dispute settlement and the establishment of dedicated commercial courts (in very well appointed and refurbished premises). However, they have left the rest of the judicial system, where women are likely to be involved, as a poor relation of the commercial judicial system. This applies with similar force to the courts that deal with land disputes affecting common people.

Despite the statistics quoted above, few if any internationally funded programmes have focused on the need to establish a dedicated system of land courts or to improve the existing systems of land dispute settlement. The principal reason is, alas, rather obvious. Commercial disputes are much more likely to involve international litigants, MNCs particularly, than are land disputes and one of the principal aims of rule of law programmes is to improve the climate for international and foreign private investment in Africa. This is in spite of the fact that there is not much evidence that foreign investors pay much attention to the efficiency or otherwise of judicial systems in countries in which they are minded to invest (Perry-Kessaris, 2003).

Even rule of law programmes that bow in the direction of access to justice for the poor never specifically focus on land issues even though the poor, especially poor women, would benefit enormously from easier access to land dispute settlement fora. Similarly, donor-funded land administration projects also seem to leave out dispute settlement. A possible alternative reason for avoiding land dispute settlement is the belief that it is too political and contentious, unlike commercial law or general legal aid programmes. Land disputes can be political, but so can land administration and commercial disputes. The first reason noted seems the more likely one. So the international community, while concerned about the importance of efficiency and effectiveness in dispute settlement in general, has avoided getting entangled in land disputes.

### **Dimension 2: the colonial dimension**

As with land administration, the judicial system was a dual system established by colonial authorities. One part consisted of courts staffed by professional lawyers following both colonial laws imported from the colonial power and statutes promulgated locally for the settler or metropolitan-looking economic system. The other part had courts staffed by chiefs and by administrative officers who applied some statute law, usually the criminal law and customary law applying to the indigenous population. In eastern and southern anglophone Africa, land disputes involving customary tenure were dealt with by traditional authorities, initially in traditional dispute-settlement fora or, as time went on, in statutory "native courts" or "native tribunals" with appeal to a higher "court" that was, in fact, a body staffed by a senior administrative officer "advised" by assessors who were senior chiefs. The colonial administrative input into the settlement of customary land disputes was one of the key ways in which the colonial authorities shaped customary tenure to fit their own preconceptions of what it ought to be. On the rare occasions that the judicial system proper had to consider a case dealing with customary tenure, the courts could usually be relied upon to follow the administrative line. The case of *Ol le Njogo v Attorney-General* decided in the East African Court of Appeal in 1914 is the most notorious example (see page 39).

In anglophone West Africa, the colonial system of courts became engaged in dealing with issues of customary tenure at a very early stage in the colonial era and several cases went all the way to the highest court in the British colonial judicial system – the Judicial Committee of the

Privy Council (JCPC). The decisions of that court had a significant effect on the development of customary tenure in anglophone Africa. With the notorious exception of *In re Southern Rhodesia*, decided in 1919, the JCPC heard no cases dealing with customary tenure from Eastern or Southern Africa (and very few on non-customary land issues) during the colonial era. To all intents and purposes, with respect to anglophone Africa, disputes involving customary tenure were kept away from the regular courts in Eastern and Southern Africa during colonial times but became a regular feature of judicial decisions in West Africa.

### **Dimension 3: the national dimension**

In general, governments moved quickly to dismantle the dual system of dispute settlement inherited at independence in anglophone Africa and to create a unified, formal judicial system. However with respect to land disputes, this was not always the case. There was recognition that an important part of customary tenure was its dispute settlement mechanisms and no useful purpose would be served by attempting to abolish those while retaining customary tenure. In countries that from time to time attempted to abolish customary tenure, it followed that customary dispute settlement mechanisms were also abolished. But, just as customary tenure remained stubbornly in existence despite its abolition, so too did customary or informal dispute settlement mechanisms. Some countries ultimately accepted this and re-introduced the formal judicial system bodies that applied customary law to settle disputes about customary tenure, despite its formal abolition.

A good example of this comes from Kenya. The whole thrust of the programme of adjudication and registration of title that started in Kenya in the 1950s was to replace customary tenure with individualized tenure governed by a law based on English land and registration law. Customary tenure officially no longer applied to registered land. However in 1991, the government enacted a law that established tribunals whose remit was to handle land disputes arising under customary law, even in registered land.

It would be fair to say that there has been no consistent policy on land dispute settlement in African states in the era of independence. There has been oscillation between dealing with them as part of the regular judicial system and, in effect, maintaining the dual system by providing a separate system for customary tenure disputes, even if there is a final appeal to the highest court in the country. As part of the general reform movement on land tenure that has been a feature of land management for the last decade-and-a-half, there has been considerable reform of dispute settlement as well, summarized in Alden Wily (2003) and highlighted here.

As a generalization, there would appear to be three main elements to the reforms. The first level is a formal recognition of local-level dispute settlement using customary forms and stressing what is referred to as alternative dispute resolution (ADR) that includes mediation, negotiation and conciliation. The principal difference between dispute settlement in customary systems and in formal Western systems is that, in the latter, issues are narrowed down for a formal hearing and end with a winner and a loser. In the former, the aim is to restore social equilibrium within the community and try to negotiate a settlement that gives something to each side. Even countries that are establishing dispute settlement mechanisms at the lowest levels of government, so that they are formally part of the state system of government and dispute settlement, are providing that these bodies will use ADR as the principal means of resolving disputes. This has been a feature of the development of dispute settlement mechanisms in Niger's *Code Pastoral* for handling disputes between pastoralists and sedentary farmers. This is a positive step towards integrating dispute settlement into customary tenure, rather than seeing it as something separate, and into the devolved system of the management of land. These disputes may be characterized as neighbour disputes.

The second level cannot be regarded so favourably. This is development of a hierarchy of tribunals and other formal decision-making bodies dealing with customary tenure issues that are part of the administrative system and not part of the judicial system. Of the 17 countries surveyed by Alden Wily, half were going down that route while some others were developing a mixed system of starting with some kind of tribunal or board appointed by a minister and then ultimately moving on to the regular judicial system. The Tanzanian case is instructive. Despite the strong criticism voiced of the existing tribunal system by the Presidential Commission in its report in 1992, the National Land Policy opted for a continuation of an administrative tribunal system to deal with disputes arising on village land reflecting the views of the peasants. The drafters of the new land laws provided for a system of dedicated land courts dealing with all land disputes with village land disputes starting in village land councils. That chapter of the Land Bill was removed at the last moment in 1998 and only in 2002 was a separate Land Disputes Courts Act passed that provided for a separate tribunal system for customary tenure disputes leading up to a Land Court which is part of the regular judicial system with an onward appeal to the Court of Appeal.

What is not clear from this development is the reason for it. On the one hand there may be a view (although not clearly articulated) that regular courts cannot handle customary land disputes because the judges do not understand the law, and the procedures of the courts, as noted above, are not conducive to restoring the social harmony disrupted by a dispute. Whatever might have been the case in colonial times, this is not a very strong argument now. First, the judges in the formal courts are overwhelmingly nationals of the countries and as knowledgeable of customary tenure as those appointed to tribunals by ministers, possibly more so. Second, it is perfectly possible to adapt judicial procedures to ADR and, in many countries, this is being done for all types of civil disputes. Equally, the substantive powers of the courts can be geared to applying the rules of customary tenure to disputes. Third, as we saw when reviewing gender issues, women tend to prefer formal judicial bodies to handle land cases where they are involved.

An alternative explanation for this trend is the reluctance of governments to “let go”. Land is the crucial resource in all African states; to give up control completely on disputes – that is on the fundamental questions of who is entitled to what kind of rights over what land in the event of a dispute – is a step too far for some governments. Devolution can be hedged with reservations, and, in the final analysis, can be withdrawn. But once the function of settling disputes is handed over to the courts, it is much more difficult to take it back. Thus, when a general reform is underway, it is best not to go down that route at all. Frankly, this is a throwback to colonial approaches to customary tenure. Persons owning and occupying land under customary tenure have as much right to have their disputes heard and decided by an independent judicial system as persons owning and occupying land under a statutory system of land law. Now, judges are more than capable of handling such cases than judges in anglophone West Africa have been for well over 50 years. This is especially important where administrative disputes between land occupiers and government occur with respect to land held under customary tenure with the government as the ultimate land owner.

An unfortunate by-product of re-establishing or continuing with an administrative tribunal system for customary tenure dispute settlement is that the appeal system tends to be much longer and therefore slower and more expensive for customary tenure holders than for statutory tenure holders. The formal judicial system has a first hearing, with one possibly two (to a Supreme Court) appeals. The tribunal system starts with a village-level (or equivalent) hearing, proceeds to a tribunal, then an appeal tribunal and only crosses over into the formal court system with two more appeals. It does not make much sense for the poorest landowners – those owning or occupying land under customary tenure – to be faced with the most expensive

dispute settlement process. In disputes between poor and wealthy customary land holders, the balance weighs heavily against the poor.

The third feature is that countries are beginning to move in the direction of creating a dedicated system of dispute settlement bodies to handle land disputes. In some countries, this may be only at relatively lower levels of the judicial system or, as noted above, a tribunal system closely tied to government. In other countries – Tanzania is an example here with a Land Division of the High Court – a special division of a higher court is established to deal with all land cases. This certainly has the capacity, if adequately funded and staffed, to begin the process both of tackling the backlog of cases. It also can tackle the equally important task of contributing to creating a unified land law out of customary and statutory land law, something few countries have but all countries need.

#### **Dimension 4: the social dimension**

With the social dimension, two matters may be raised. First, there is the matter of practices in customary land disputes settlement and, second, what, if any, efforts are made by governments and others to provide financial assistance to the poor to help them contest cases in the courts? The first matter can only be discussed in the most general terms as this is not a paper on customary dispute settlement. Generally, the evidence seems to be that people prefer to try to settle disputes at local level in informal and customary systems, but are not averse to “forum shopping” where this might prove advantageous (Rose, 1992). Work in Rwanda on a DFID project to which the author is contributing has shown that disputes are settled within a family context if possible. The study on pastoralism in Guinea discussed earlier showed that many of the local transhumance committees had been successful in sorting out conflicts between pastoralists and sedentary farmers and in some respects had gone further. The point is worth quoting:

*The report evaluating the activities of the TRH [Transhumance Development Project] highlights the positive results achieved by the transhumance committees. They have not only helped reduce conflicts but have also encouraged protagonists to play an active role in seeking solutions to their differences. In many cases, the protagonists have been able to resolve the conflicts themselves, without having to ask the administration or support organisations to arbitrate ... (Touré, 2004)*

This, it may be noted, is one of the functions of the local adjudication committees set up to sort out disputes about titles and rights to land in a land titling programme. The institution is there as a last resort to be used when the parties are unable to reach agreement among themselves.

On the second point, governments have generally not been able to afford to establish legal aid and advice schemes even though there are occasional references to such services in constitutions and other laws. The provision of such aid and advice has tended to be left to NGOs that may be partly funded by governments or others such as university law faculties where staff and students hold “legal aid camps” in villages and urban informal settlements to assist residents with legal problems. The path-breaking victory of the Richtersveld community in the case of *Richtersveld v Alexkor* (2004) in South Africa on the community’s right to seek restoration of its land under land restoration legislation was largely achieved by a legal aid NGO partly funded by the South African government (which was the real loser in the case).

It is worthwhile to draw attention to some significant but clearly widely disregarded paragraphs from the GPA of the Habitat Agenda on this matter. Governments were enjoined to (and agreed to):

- *provide access to effective judicial and administrative channels for affected individuals and groups so that they can challenge or seek redress from decisions and actions that are socially and environmentally harmful or violate human rights ...;*

- *broaden the procedural right of individuals and civil society organizations to take legal action on behalf of affected communities or groups that do not have the resources or skills to take action themselves;*
- *facilitate access to ... legal services by people living in poverty and other low-income groups through the provision of such facilities as legal aid and free legal advice centres.*

Whatever system of dispute settlement is established, it can provide a real service only if people are assisted when necessary to use it to protect their rights. This is particularly important where, as noted earlier, those owning and occupying land under customary tenure are often burdened with the most expensive and time-consuming formal system of dispute settlement.

## **Issue 7: Conclusions**

In an ideal world, dispute settlement would be a rather peripheral part of considering the land tenure issues of the poor. But as noted repeatedly in this section, land disputes are a major issue for everyone in most countries in Africa, not just for poor. This section has concentrated on dispute settlement at the customary level but it is worth commenting that, in relation to land titling and its supposed advantages for obtaining loans on the security of those titles, one of the principal concerns of banks and housing finance companies is the difficulties and delays involved in dealing with defaulters owing to the inefficiencies of judicial systems. So whether looked at from the point of view of equity for the poor consumer or from the point of view of efficiency for the wealthier consumer, dispute settlement should be and remain high on government agendas.

Increasingly, the preferred route would seem to be developing a dedicated system of land dispute- settlement bodies. This would go from the lowest village level, using well recognized and accepted customary institutions and procedures, up to establishing a special division of the principal first instance court in the country. To be effective, this must be a system of independent courts available to everyone and funded with adequate resources, and every effort should be made to apply ADR throughout the system to resolve disputes.

## **GENERAL CONCLUSIONS**

This is, first and foremost, a discussion paper so any conclusion should contribute to discussion and not close off avenues. Still less should the author attempt to set out the solutions to the challenges raised in the paper. Within these limitations, however, it is worth highlighting some general points that have emerged from the seven issues discussed.

At the international level, there is and always has been a dichotomy between words and actions. Over the last 40 years or so, most actions have been consistently in favour of market-based solutions in areas such as title registration, codification and unification of laws, regularizing informal urban settlements, coming to terms with pastoralism or creating more efficient systems of dispute settlement. Thus, issues that could be brought within a market-friendly formula may have featured in international policy statements and internationally funded research but they have not featured so readily in action in areas such as gender issues, land disputes and development of national land laws based on customary tenure.

Furthermore, I would argue that the market-led approach is not designed primarily for the benefit of national development but for the benefit of globalization. Foreign direct investment in African agriculture will only benefit the poor by their being available for work on the large commercially

run estates that will replace “inefficient” smallholder agriculture. It is not possible to argue that the effect of the rules of international trade created under the auspices of the WTO are likely to benefit the rural poor in Africa, either now or in the future. They could, however, benefit large-scale producers. A thriving land market with few controls, a system of registered titles, a land law recognizably Western in format and content, ranches, efficient dispute settlement mechanisms for commercial cases (including land sales and mortgages) – these are the very essence of an international market in land and are driving much international input into land systems in Africa.

What comes through this survey is the longevity of the colonial impact. There can be no real quarrel with the proposition that the colonial impact on land relations in Africa was uniformly and wholly adverse. What is striking however is how much of the colonial legacy lives on. The dual system of land laws and dispute settlement infects all aspects of land management and land relations, not just in matters of formal administration but in attitudes. The systems the poor live by – customary tenure, informal tenure in unauthorized urban developments, pastoralism – were never regarded as being part of the system of government in colonial times. The same with women. When it came to land, they were, in a sense, outside government and so they have remained. It is only in the last few years that there is evidence that the colonial legacy is at last being set aside and solutions to challenges based wholly on considerations and policies grounded in the realities of life and land in Africa are being developed. Even so, as we have seen from the paper, there are still several areas where what may be called colonial attitudes towards the poor continue to affect land policies and their formulation. Policies are still too often made for people not with them.

The national level then is buffeted by the international and the colonial. For much of the era of independence, land policies in many countries were a continuation of colonial land policies. Few countries followed Tanzania’s path and came forward with a coherent national land policy in the first two or so decades of independence. And without detracting from Tanzania’s land policy of the 1960s and 1970s, it must be said that what was regarded as one of the more radical steps, the abolition of freehold tenure, only affected one percent of the land.

The thrust of land management in the early years of independence tended to follow, albeit in a more low key way, the route that Tanzania took: continued or increased governmental control over and ownership of land. As the main source of wealth creation, both nationally and personally, governments generally were not willing to see the development of unrestricted land markets or too much private-sector land development. The peasants were certainly not to be left to their own devices. They were expected to grow primary produce that state marketing boards would market for them and they were required to subsidize the urban standard of living of the elite and the small working class in doing so. Land and agricultural policies were certainly not geared to bettering the lot of the rural poor.

From this perspective, policy developments of the last few years are very much to be welcomed, whether they were adopted as a result of international pressure, a renewal of democracy or a greater national awareness of the need to develop truly national policies. The commitment to decentralization has been a major step forward in allowing the citizens to manage their own land affairs. The new approach to land registration – the involvement of the community and local institutions, local and simple registration systems – can help protect the tenure rights of the poor as shown by Kanji, *et al.* (2005). States are also showing a greater willingness to tackle urban poverty by regularizing informal urban tenure and accepting or even developing modes of financing and the informal economy. There also are welcome signs that states are beginning to think about creating a national land law blending the best of customary and Western law. This establishment of a genuinely national land law can be both a shield and a sword against unregulated globalization. Progress, at least as regards law, can be shown with respect to

women's land and property rights although the Executive Director of UN-Habitat is right to point out that when it comes to implementation, women are too often left to fight their own battles.

There are matters that are still a cause for concern. It is right to note that a return to customary systems is not necessarily going to benefit women. Some think it will not benefit them at all and the notion of customary is being used deliberately to hold back women. The attempt to abolish customary tenure by law is still seen as viable policy option by some governments but there is no reason to suppose that this will be any more successful in the twenty-first century than it was in the twentieth. It will however cause considerable disruption for the rural poor. Nor is it by any means certain that the battle for recognition of communal tenure as viable and economically efficient and its continuation, particularly by and for pastoralists, has been won. Lastly, the continuation by many states of an administration-orientated dispute settlement system for customary tenure is no longer justifiable, if it ever was. In many respects, it is the last relic of colonialism in land management.

Lastly, the social level. There can be little doubt that the social level has both benefited from and been a major contributor to the new approach to land policies and land management. Major national NGOs now focus on land issues in many countries and are powerful factors in land reform. There can be little doubt that several NGOs in Uganda had very significant input in the land law reform process that culminated in the Land Act 1998 and have continued to have an impact on women's land rights in the law. NGOs, both national and international, have played an important role in re-thinking policies and actions on pastoralism. NGOs based in informal settlements play a role in managing land and settling disputes.

The social level is not just NGOs. It embraces the voice and the actions of the ordinary person. Decentralization has helped the rural poor find a voice and take action. What is significant, but little remarked upon, is that the action that the poor are prepared to take is to go to court to assert their rights and, in many cases, they succeed. This is one of the benefits of a more law-based land management process. The people learn that they have rights and they are prepared to assert them. This may not be comfortable for administrators, but it makes for a more transparent and honest process of land management. Also, at the social level, is the greater recognition and acceptance of the customary norms the rural poor live by which can be of benefit to the whole society.

There are two competing models of governance and development on offer in and for Africa with respect to land relations and policies designed to benefit the poor. One is to adopt the agenda of the international community and its IFIs and donors: make the land available for international investment and development via free and open land markets and homogenized national land laws and reap the benefits of globalization. Such an agenda downplays issues of security of tenure for the poor, decentralized land management and women's rights to land.

The other model is to develop national agendas to ensure that national considerations are at the forefront of land management. This is not meant to repel globalization for that would be impractical, but to give primacy of place to the land concerns of the poor, both women and men who are now the majority of land holders in all countries in Africa and are likely to be for considerable time to come. It is their land rights that need to be secured, their conflicts and disputes over land that need to be settled and not left to fester, and their productive use of land that need to be developed by appropriate forms and institutions of finance. In short, this amounts to a partnership between governments and their citizens for land management in Africa in the twenty-first century. The goal is to ensure that globalization, first and foremost, benefits the nation and the citizenry so far as it affects land use and development. The developments that have been charted in this paper suggest that this is not an unrealistic approach. The outlines are largely in place. The issue now is how to continue them.

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