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HARMONIZING SECTORIAL POLICIES AND LAWS TO REDUCE GROWING CONFLICT ON LAND USE

INVITED PAPER¹

Many African countries have, over time, accumulated a multiplicity of sectoral policies and laws relating to land, its management and use without over-arching policies which rationalize, harmonize and clarify the otherwise uncoordinated approaches and complex interactions between these sectoral laws and policies.

Framework and Guidelines on Land Policy in Africa

I. The landscape of land use policies and laws

1. In the Africa region land use is addressed through a range of legal instruments including constitutional measures, sectoral policies and laws. National constitutions espouse principles intended to inform land use uniformly across sectors. Constitutions locate root title, articulate the rights of citizens to own property as well as the terms under which these rights may be exercised (tenure rights), while setting out the circumstances under which governments can expunge such rights.

¹ Invited paper by the AFWC20 bureau, Author: Sue Mbaya, independent consultant

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2. Land tenure laws articulate details of the terms under which land is held and used. Land acquisition legislation usually details the terms and conditions under which states can compulsorily acquire land and expunge the land rights of citizens in the interest of public purpose, land reform and agricultural initiatives. In response to widespread insecurity of tenure, some states have also promulgated land reform legislation.

3. Ideally, States classify and gazette land into various land use categories including rural, urban, forest lands, parks and mining, ideally in accordance with a land use plan. The land use principles articulated in constitutions are given effect in the laws of these respective sectors. Sadly, in many countries comprehensive land use plans to guide sectoral land use are outdated or missing, leaving land use to be determined by sectoral interest. Agricultural laws govern the use of land in the agricultural sector, setting out permitted and prohibited land uses by land category, permitted sizes of landholdings, among other considerations. Some agriculture sector laws also address tenure considerations in an effort to regulate the relationships of different categories of land users.

4. Similarly, certain mining sector laws regulate and facilitate the monitoring of mining operations and provide for compulsory acquisition of land associated with mineral interests. Physical planning laws guide land use for urban development in particular while forestry, biodiversity and environment related legislation similarly guides land use and regulates operations in the respective sectors.

II. Challenges with current approach to land use policies and laws

5. An observation of the Framework and Guidelines on Land Policy in Africa (F&G) is that the governance of land and land based resources (forests, fisheries, mining), is founded on numerous and often disjointed pieces of legislation that define the policy direction, the legal and institutional frameworks. These laws - their policy prescriptions, approach to resource tenure and provisions for administration - are frequently developed from the perspective of particular sectors and may therefore be informed by different priorities. For instance the focus of agricultural laws may be to facilitate expansion of agricultural activities, particularly in the context of large scale land based investments². This policy direction may be at odds with conservation and biodiversity laws and priorities, leading to conflict between sectors and individuals in these sectors.

6. With few exceptions, the body of law relating to land in countries in the region has failed to keep up with the fast pace of change in land use and demand. The body of law tends to be encumbered by outdated, inflexible provisions resulting in legal environments which are difficult to navigate. The situation is worsened by a focus on the formulation of new laws and policies, with little or inadequate focus on the repeal of outdated laws. Together with the lack of integration of sectoral laws, this results in laws which are contradictory and incoherent, leading to uncertainty and conflict.

7. Legal frameworks often do not provide adequate recognition to prevailing land use regimes. This is due to laws that fail to distinguish between property rights and access rights or laws that do not provide for overlapping claims to or land uses on the same land. Different groups of land users are therefore brought into conflict, for instance, sedentary cultivators with pastoral communities; cultivators with those wanting to harvest from trees and so on.

8. Approaches to land governance in the region increasingly reflect principles of good governance including participatory development of policies, the trend towards decentralization/devolution and gender related considerations. However, the pace of democratization of other land related tenure regimes including tree tenure and tenure over lands associated with minerals has been much slower. Similarly, the pace of reform towards harmonizing the provisions in land laws with

² See Mbaya, 2015 for examples, www.abcg.org/action/document/download?document_id=719

provisions in other sectoral laws has been slow. There is need for countries to adopt shared principles which inform sectoral laws and their implementation.

9. Highly sectoral approaches to land-related law-making have implications for administration of rights to land associated with various natural resources including forest and mining. This includes approaches to securing tenure for stakeholders, approaches to administration of tenure as well as approaches to the resolution of conflicts. Coordination between sectoral agencies has remained limited, contributing to resource based conflicts which are sometimes violent. In many countries the highly sectoral approach has resulted in multiple dispute resolution forums, with overlapping jurisdictions. In some cases this promotes the practice of forum shopping in which aggrieved parties approach multiple forums with the same grievance in search of the most favourable outcome, increasing the case load for dispute resolution institutions^{3, 4}.

10. In some cases sectoral laws take disparate approaches to resource governance. A critical difference lies in the extent of decentralization of land, forests and wildlife. While one resource may be governed by central government, in the same country, another resource may be governed in a decentralized manner. Generally, the progress in decentralizing governance of land has not been matched by similar trends in forests, and even less so with respect to wildlife resources. Given the interrelatedness in the exploitation of these resources, these differences in the law have grave implications for intersectoral coordination and prevention of conflicts.

11. Even within sectors there is a need for harmonization. For instance, the land rights of poor and marginalized groups in urban contexts have not received the same focus as tenure security of the poor and marginalized in rural / agricultural contexts.

III. Conflicting policies and laws as causes of growing conflict in land use

12. Overlapping sectoral laws tend to establish institutional mandates which are equally overlapping, vertically or horizontally also resulting in conflict. The existence of multiple, overlapping land laws also has implications for the ill-defined resource rights in land, overlapping institutional responsibilities and mandates. This presents challenges for the recognition of rights, their protection and enforcement and ultimately promotes the emergence of conflicts. There are prominent examples of such conflicts in policy.

13. Trends in land laws increasingly favour privatization or individualizing of land rights. Such provisions are potentially in conflict with communally held rights in other resources, such as forests. It is important for practice to recognize rights to land alongside local systems of individual and communal access to resources in land.

14. Laws which subjugate land rights to other resource rights result in conflict. Mining rights and sometimes forest rights are frequently prioritized over land rights resulting in conflict. However, good practice can be seen in some countries where mining laws require those pursuing mining operations to obtain prior written permission of landowners thereby reducing the likelihood of conflict.

15. In turbulent times there is a tendency to propel sectoral interests forward through pronouncements or statements which are given the force of policy or law. The legal standing of these pronouncements or statements is often uncertain and their impact on other sectors ill considered, resulting in conflict and confusion. This highlights the need for governments to ensure clearly articulate fundamental principles in the form of constitutional provisions and integrated national land

³ Amie Bensouda 2013, http://siteresources.worldbank.org/INT/LGA/Resources/Gambia_Full_Report.pdf as an example

⁴ Vlassenroot, 2012, http://www.ssrc.org/workspace/images/crm/new_publication_3/%7Bd60a3932-a65a-e211-8eac-001cc477ec84%7D.pdf.

policy to guide any sectoral policy, whether in the form of laws or pronouncements. Currently under 30 percent of African countries have articulated a comprehensive national land policy.⁵

IV. Opportunities for harmonizing land use policies and laws in Africa

16. Resource tenure laws in the region largely have their origins in the colonial era legal frameworks. In post-independence Africa, the vision and values which inform land use have changed. The trajectory of development and the role of land in development, has also changed. The imperative to recognize and make secure the rights and interests of citizens has become more prominent. Policy can no longer hold the rights of some groups as superior to those of others; nor the needs and priorities of some sectors over those of others. Recognition that land has significance beyond its productive function and growing awareness of environmental aspects are also among dynamics driving new land governance values and norms. In this regard, several opportunities emerge for countries to make the required changes in land related laws.

17. The Land Policy Initiative is now in the operational phase of implementing the African Union's F&G and its associated Declaration on Land Issues in Africa, for which there is political support among AU Member States. This has created a platform for advocating for comprehensive national land policies in countries where these do not exist.

18. The AU has developed Guiding Principles on Large Scale Land Based Investments. The Guiding Principles require Member States to ensure policy, legal and institutional frameworks which protect the land rights of communities from unplanned conversion; which promote investments implemented in a transparent manner; which are in line with national development objectives and which consider the concerns and interests of communities. The Guiding Principles therefore present countries with opportunities to review their land related laws in line with the guidance of the African Union to reduce conflicts associated with large scale land based investments.

19. The Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries, and Forests (VGGT) call for approaches to resource governance which recognize the interconnectedness of land-based resources, while also highlighting the importance of a simultaneous engagement with technical, social and political considerations. This includes respecting the tenure rights of women and other marginalized groups, meaningful devolution and giving voice to communities as well as mutual accountability based on coordination and transparency. A growing number of African governments are adopting the VGGT. The implementation of VGGT therefore emerges as an opportunity for countries to address harmonization considerations relating to land governance.

20. The advent of the Sustainable Development Goals (SDGs) has signaled a more integrated approach to development. Implementing the SDGs will require breaking down traditional silos for more effective, cross-sectoral governance. The SDGs therefore provide a unique opportunity to address the conflicting approaches to natural resource governance.

V. Points for consideration

21. Africa's prospects for sustainable growth during the 21st Century will continue to depend on the manner in which land and land-related resources are governed. These resources and the manner in which they are governed are under increasing pressure due to the region's growing population and the increasing complexity and interconnectedness of resource use regimes. A critical response to these challenges is improved resource governance. Critical entry points for countries are highlighted here for consideration by the Commission:

⁵ Land Policy Initiative, 2015 - https://www.iisd.org/pdf/2013/presentation_kagwanja_en.pdf

- Harmonize policies and laws which govern use of land, fisheries, forests and water in a manner that recognizes the interconnectedness of these resources and in a manner which acknowledges the gender aspects of their uses.
- Renew efforts to promote over-arching national land policy to guide sectoral policies and laws relating to land.
- Highlight the critical importance of land use along with the need for accurate, up to date integrated land use plans.