LAND IS A VALUABLE COMMODITY: REFLECTIONS ON CUSTOMARY LAND RIGHTS

AND

LAND REFORMS IN AFRICA

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

Introduction.

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

Of Land, Ownership and Property Rights

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

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[2] Locke, Treatise of Government.

[3] Downs and Reyns: ..Land and Society in Contemporary Africa". 1988; Downs and Reyns also report that in Kenya, ..one-tenth of a percent of the country's farms occupy 14 percent of the arable land; 2.4 percent of the farms occupy 32 percent of the land. 1n the country as a whole, 54 percent of the holdings contain less than one hectare, and 30 percent under half a hectare; at the other end several hundred holdings exceed one thousand hectares and some exceed twenty thousand." see also: Martin Adams, Sipho Sibanda and Stephen Turner *"land Tenure Reform and Rural LIvelihoods in Southern Africa*, in Evolving Land Rights, Policy and Tenore in Africa, Edited by Camilla Toulmin and Julian Quan.

past colonial policies, which dispossessed the Black population of their land on the defeat of Chief Lobengula, as well as Mugabe's own misdirected distribution of purchased land for white farmers after independence, to benefit the wealthy and privileged class, a la Kenya.

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

The Idea of Individual Property

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

"The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner.[6] In a similar vain Monique Caveriviere and Marc Debene in their book "Le Droit foncier Senegalais" assert of les systemes coutumiers": " La notion d'exclusivite consubstantielle au droit de propriete etait inconnue.

"[1995] T.L.R. 80

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

[6] [1921] 2 A.C. 399, see also "Le Droit Foncier S n galais" by Moniqe Caveriviere and Marc Debene.

Il est d'usage d'insister sur le choc des cultures que traduisit notamment I'introduction de la propriete fonciere individuelle."[7]

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

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

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

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

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

In this sense 'property' is defined as "the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it." [10] This definition, however, is not quite borne out by a reading of some of the works of the philosophers of the time. For example, the notion of the right to 'property' resulting from

one's labor, as propounded by Locke in the extract at the head of this paper, in his First Treatise on Government, had two limitations: -

[7] Le *Droit fonder* Senegalais: Monique Caveriviere and Marc Debene, paragraph 36.
s [1955] T.L.R. 80
[9] Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly Resolution 217 (III) on 10 December 1948.
[10] Black's Law Dictionary.

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

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

Article 13
Every citizen shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14
The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

Colonial Land Policies

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

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

In Tanzania, just as in all other former British Colonies and, indeed, all former colonies in Africa, land and rights in land were inseparable from the policy and political objectives pursued upon colonization. In order to acquire full sovereignty over a given territory, it became necessary to devise the concept of binding treaties and agreements with supposed 'Kings', where possible, for conveyance of sovereignty over a given territory, by grant or conquest. This conveyance had the effect of ceding control over all 'unoccupied' lands to the Crown as 'Crown Land' under the British and, in the former French territories, a similar effect was achieved by application of Article 539 of the Code Civil, which provides, most succinctly: "Tous les biens vacants et sans maitre, et ceux des personnes qui decedent sans heritiers, ou dont les successions sont abandonnees, appartiennent au domaine public". Apparently, only registered land was considered 'owned', and land held under customary law was declared 'vacant et sans maftre'. The effects of these concepts were to permit the colonial administration to grant titles to large tracts of land for commercial agriculture and other uses to settlers or entrepreneurs, to generate revenue. The idea of 'individual' property to land other than by title from the Crown became a problem as land occupied by 'natives' became desirable for further appropriation. In introducing the concept of 'eminent domain', with its attendant requirement for just compensation, the question arose whether having acquired sovereignty over the territory, the occupation by the natives had such value as was worth compensating in the same way as individual 'property rights'.

The Privy Council addressed this question squarely in 1921, in a case arising from Nigeria concerning the status of the territory of Lagos. [12] The Privy Council held that the idea of 'estates' in fee simple, being the most comprehensive estate in land recognized by the law in England, is not recognized outside of England, and thus the Crown having acquired the root title purportedly by grant or conquest from the putative ruler. Accordingly, all other subordinate rights in property did not qualify as individual "ownership" in the Austinian sense; that is,

ownership, which is "indefinite in point of use, unrestricted in point of disposition and unlimited in point of duration". In some areas, however, chiefs whose function

[11] See also Sakiriyawo Oshodi v. Moriamo Dakolo and Others (1930) A.C. 667
[12] Amodu Tijani v. The Secretary. Southern Nigeria [1921] 2 A.C. 399

traditionally was to ensure that adequate land was left available for common use: open land for grazing, forests for gathering firewood and rivers for water, were taken to be vested with property rights, which were recognized by issuance of forms of title deeds.13 Peasant farmers that had tilled the land for generations became tenants at will overnight, on the land they claimed as their own by descent from time immemorial. The balance of the land was declared 'Crown Land', for future allocation and titling, while customary holders on such land were treated as tenants of the crown. This misconception of customary Jand rights, allowed the colonial administrations to reduce the compassable value of any rights in land held by the 'natives' on 'crown land'. Compensation being limited to crops and structures erected on land, without regard to the potential value of the land to the individual, his family and future generations who would be deprived of the land, through any sale or grant.

On attaining independence, succeeding Governments have found it convenient to hold on to the legacy of the colonial land administration, in view of the obvious benefits to the elite in Government. But, unfortunately, these benefits are known to have been abused in some countries and Land Reforms which begun with the best of intentions got to be used to benefit a few such as the elites, the wealthy and those who wield political power. In Tanzania, for example, it has proved difficult for the Government to accept to surrender the fiction of retaining the root title vesting in the President, as successor to the Crown, a convenience that permitted the Government to introduce experimental land management structures that failed to respect the rights of individual owners or to adequately compensate them. I cannot help but reproduce a classic quotation of comments attributed to a Commissioner of Lands in Kenya in 1933 and a Chief Native Commissioner on this issue: Commissioner of Lands: "In the early days of European immigration. the theory appears to have been followed that provided adequate arrangements were made for the natives who happen to be on land, and compensation was paid for disturbance and any loss of crops, the Government was fully entitled to regard the land concerned as available for alienation". Chief Native Commissioner: "The whole fallacy of such a theory appears to be contained in the word 'adequate'. There can be no adequate arrangement for a man evicted from the only spot on earth where he has the right to *live."*[14]

African Concept of Land Ownership

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

[13] Chiefs in Buganda became beneficiaries of large areas of land they administered on behalf of the Kabaka, as personal property, under individual 'mailo' land tenure, which is equivalent to freehold
[14] Downs and Reyna: "Land and Society in Contemporary Africa": 1988.

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

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

On the other hand, the status of the villager of whom we speak, may depend on what has occurred between the time when his/her forefathers first carved out this land for themselves and their successors and the present, and the country where he/she lives. If in a country that adopted a policy of replacing customary tenure with titling, perhaps by a stroke of the pen, the land he/she occupies, long ago fell within the title deeds of a prosperous African farmer who obtained it during the land purchase and re-

sale of the land previously owned by White farmers. He/she is, perhaps, still classified as a squatter. If the land was in the area previously designated as a Native Reserve, where customary tenure was preserved until recent changes in Government policy, ushering in titling and registration of land, it is possible that our villager now faces eviction, because a wealthy, politically connected person succeeded to lay claim to his/her entire property and will be registered

as the individual owner. However, our village may be lucky that his/her son is a lecturer at Nairobi University and is now able to obtain the title to the land as the eldest son of his recently deceased father. Having acquired the title, however, he proceeds to sell parts of the property eventually dispossessing his sisters and leaving little for his own mother to feed herself. On the rest of the land, he sought to obtain a large loan to develop a dairy farm on the property, which is in danger of repossession by the bank for failing to pay the outstanding installments, because of a recent severe drought left his entire herd without water or fodder, resulting in the elimination of half of the herd It is also possible that our villager comes from a country where chiefs and sub-chiefs were handed out vast lands as rewards for their royalty to the colonial administration, in fee simple. The land on which he/she was born has been in the family since time immemorial. Legend has it that it was allocated to his/her great grandfather by the mythical god of his/her tribe. The family fell on bad times at the tum of the twentieth century when the white man came. Suddenly, the land was said to belong to the village chief, to whom the family paid tithe, that had become so exorbitant that his/her great grandfather joined the peasant rebellion to fight for the rights of the common man. In the days past every peasant had his/her cultivated plot, with rights to hunt in the village forest, draw water from the village stream and graze in the open lands adjoining the village. Needing more land, the chief was always there to show the applicant appropriate land for the proposed use, to plant eucalyptus trees for building or for cultivation of food crops. A pot of beer was usually enough to cheer up the chief, in which all other villages partook to rejoice in our villager's good fortune to get more land, without immigrating elsewhere to clear virgin forests. All this changed, because the chief acquired

title to the land and started resettling strangers to increase his rent. Over time, with the chief or his successors selling land to increase revenue, our villager is today a tenant-at-will on a seven acre land, paying tithe to a newcomer that threatens to evict him/her unless, as provided under a recent Land Reform law, he/she can buy "himself/herself out.

These may appear fictional examples, but they are true renditions of the plight of the African peasant in many countries, in the face of changing land policies and legislative reforms. In former French colonies of West and Central Africa, customary tenure was first ignored in the hope that matriculation of land under the Civil Code would eventually bring about its natural death. This, however, did not happen as few Africans opted for matriculation, which would result to opting out of their customs and practices. Although in some countries such as in the Congo, the abolition of customary law was continued and is now incorporated in the Congolese Constitution, most other countries have restored the efficacy of customary tenure and are experimenting with mixed results to formalize the institutional framework for its operation. In Senegal, for example customary land tenure was the basis of the Land Reforms of 1964, aimed to usher in rural development. However, the bundling up of customary rights were into community rights, under politicized community institutions which control its administration, has reduced the benefits of the reforms, as increasingly the privileged classes take advantage of the system to amass large areas of land and some poorer peasants are dispossessed of their land for nonuse. In Cote d'Ivoire, customary rights are being registered to providence evidence of ownership and in Niger, arrangements are being made to grant individual and group negotiable certificates of customary land tenure It is conceded that in open savannah areas, group cultivation is the norm, and individual families do not carve out self-contained areas for individual cultivation and habitation. In such areas people live in a homestead consisting of several families and cultivate in fields away from the homestead. However, while it is common for several families to join together to open new fields and to harvest jointly, each family will always have an identifiable plot or plots known to belong to them. In case of shifting agriculture, these plots are used for grazing when fallow and cultivated during the rainy seasons. It would be very wrong to interpret such land use as 'communal' and I have doubts whether they fit the description of 'corporate' property assigned to them by Kwamena Bentsi-Enchill. [15] The bundling up of customary rights, to the exclusion of individual or

group customary titles, for management by bureaucratic institutions, with the discretionary power to allocate land and also dispossess land holders for nonuse, as was done in Senegal, would not be a true rendition of customary tenure. By Decret 64-574 adopted on 30 July 1964, it was provided that "les droits fanciers traditionnels ne soot pas reconnus comme droits de propriete. Le terres object de tenures coutumieres ne sont pas -en principe- susceptibles d'etre immatriculees a la demande de leurs possesseurs."[16]

Overlapping Customary Interests in Land.

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

Once the overlapping interests in land existing under customary tenure are recognized, one can appreciate why modem titling arrangements have resulted in untold hardship for various levels of beneficiaries over land registered as individual property in the name either of the primary owner or his customary heir. Such registration has the effect of extinguishing all other claims and interests, thus rendering whole generations landless without other resources for sustenance. It is not uncommon that once such property has been titled to the heir or primary owner, it will be sold or mortgaged to defeat all other competing claims. Since attempts to subdivide the land into separate plots to satisfy the individual interests in the land would only result in fragmentation into uneconomically viable units, the registration

and certification of the whole land, while recognizing the competing interests, is the best option in the circumstances. In order to meet the economic efficiency objectives of creating a credit market, the certificate of customary tenure should be capable of being mortgaged, or even sold, but only with the consent of all the registered beneficiaries. It has been contended that such a scheme will complicate land marketing, but equity cannot be sacrificed to achieve expediency. [17]

15 "The Traditional Legal Systems of Africa", International Encyclopedia of Comparative Law, Vol. VI Chapter 2.
16 Caveriviere and Debene, Supra at paragraph 71. (essentially, the law put an end to individual titling of customary land, except for existing titles on developed land)

17 For a list of arguments against individualization, titling and registration, see page 116 of the Report of the Presidential Commission of Inquiry into Land Matters, Vol. I: Land Policy and Land Tenure Structure"Land Tenure Systems and Agrarian Law Reforms: policies, purposes, aims and objectives.

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

Asia

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

Latin America

In Latin America, the reforms were aimed at the transfer of excessive land from large-scale landowners to the peasant farmers. In Mexico, the programme of land redistribution was born out of the peasant rebelling of 1917, which resulted in a constitutional amendment to protect peasant farmers from wealthylandowners. Article 27 provided: "The ownership of the lands and waters comprised within the limits of the national territory is vested originally in the Nation, which has had, and has the right to transmit thereof to private persons, thereby constituting private property." Having thus defined the source and limits of private property, Article 27 went on to give the government the mandate and the requisite authority to expropriate

land (with indemnification) from large landholders and to give it to eligible agrarian communities. All transfers of indigenous property made by previous regimes were declared void: only those owners who had held less than fifty hectares for more than ten years were to be exempt from this restitutionary provision. Article 27 also limited the ability of foreigners, churches, charities, corporations, and banks to own land. Status, not contract, was the foundation of land tenure in revolutionary Mexico. Article 27 of the Constitution, nicknamed Zapata's dream', was jealously defended by successive governments until 1992, when it was amended, to introduce land-market reforms.

Africa

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

Kenya

Kenya is perhaps the first African country south of the Sahara to have adopted a clear, though mistaken, policy on land access, management and control. The policy first introduced by the colonial administration is based on implementation of a comprehensive program of registration and titling throughout the country. Apart from being expensive and time consuming, it has been criticized as having failed to achieve its original objectives of establishing a credit and land market. Driven by a desire to stimulate economic growth among the indigenous Africans and to promote large scale settler farms, the colonial administration, as early as 1949, advocated "to devise a means of providing a better title to land in the native

Land Units", partly to provide security for agricultural credit.18This was followed by the famous Swynnerton plan, which was devised partly in response to the Mau Mau emergency, to establish a middle class. The plan was expected to create a stable class of relatively wealthy yeoman farmers, who the

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

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

In the past government policy has been to maintain the tribal system of tenure so that all the people have had bits of land and to protect the African from borrowing money against the security of his land... In future, if these recommendations are accepted, former government policy will be reversed and able, energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and a landless class. This is a normal step in the evolution of a country." (Swynnerton 1954:10)[2].[0] The arguments advanced in the Swynnerton report, and which have since driven the pursuit of 'individualization' of land tenure, in Kenya, are:

Security of Tenure: Individual ownership and the 'pride of ownership' are often thought to give farmers incentives to invest in their holdings. 'Communal' tenure is thought to discourage long-term planning and investment in land. The title would encourage farmers to use fertilizers, dig wells and carry out irrigation without fear that the land might be re-allocated to other farmers. Facilitation of credit. It is argued that land titles give farmers and other rural people something to mortgage as collateral for loans. Dispute reduction. Possession of title deeds cuts down costly litigation, particularly in densely settled or extensively farmed land.

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

Other African Countries

Recent Land Reforms have taken place in Uganda (Uganda Land Act 16 of 1998), Tanzania (Land Act and Village Land Act, 1999) and Mozambique, (Land Law of 1997). In West Africa, Senegal has undertaken, perhaps, the most thorough reforms since independence by the promulgation of Loi *6446*

of 17 June 1964. Major reforms have also been undertaken in Cote d'Ivoire, Cameroon, Niger and Burkina Fasso. It is safe to say that in most of the Land Reforms mentioned, the Governments were content to establish institutional arrangements for allocation, adjudication and management of land. Faced with the obvious failure to eradicate customary tenure, undertaken in Kenya and Cote d'Ivoire, in order to institute a land market based on individual tenure, the land laws enacted in Uganda, Mozambique, Tanzania, Niger and Senegal make provision for continued occupation and use of land in accordance with

[19] Swynnerton 1954:8; East Africa royal Commission 1955:5346: Downs and Reyna:98
[20] Land and Society in Contemporary Africa: R.E.Downs and S.P. Reyna, at p.98.

customary tenure, but under varied administrative regimes. In Uganda, Senegal and Mozambique, new institutions are created for allocation of land and verification of land claims. Provision is made in Uganda and Mozambique for acquisition of individual or group title over customary land, which in Uganda is called the "Certificates of Customary Tenure". The following comments have been made recently on the new institutional arrangements established for land management.:

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

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

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

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

21 Case Study Boxes on Land Reform in Uganda, Tanzania, Mozambique and South Africa -iied.
22 Camilla Toulmin: Decentralisation and Land Tenure: in Evolving Land Rights, Policy and Tenure in Africa, at p.229.
23 Camilla Toulmin, supra.

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

"The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the state and in the peoples of Ethiopia and shall not be subject to sale or to other means of exchange; Ethiopian peasants have right to obtain land without payment and the protection against eviction from their possession. The implementation of this provision shall be specified by law. Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law."

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

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

Since then subsequent legislation has been introduced to rationalize the institutions administering land.[25] In Article 1 of the 1993 ordinance, the objective of the reforms is stated as the assurance of the security of rural farmers by recognition of their rights and a preference of development by the rural population. In

this regard, Article 4 provides that all the rural natural resources form part of the common heritage of the

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

25 Ordinance No. 93-015 of 2 March 1993

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

Social, Political and Equity Aspects of Land

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

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

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

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

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

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

Property Rights and Democracy

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

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

[28] See also the Report of the Presidential Commission of Inquiry into Land Matters, Vol. I, at Pl56.

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

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

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

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

management of land resources in the rural areas. However, reports from actual operations of such committees seem to suggest that land allocation has not been fair and equitable. In many cases the wealthy and politically connected have succeeded to amass land beyond their immediate needs, through wielding influence and in some cases corruption. In other cases, rights to land are often asserted by individuals who do not actually own the land, to the exclusion of others. Similar problems have been recorded in the process of Land Reform in Cote d'Ivoire and Niger by Camilla Toulmin and Julian Quan. For the process of land reform to be successful, a process of democratization and good governance must be promoted, and specific rules must be set up to curb the discretion of those entrusted with land management. The national land laws should be followed by detailed regulations specifying the criteria for identifying claimants to land, the extent of land that may be registered in their names and use to which particular lands should be devoted, and over what period of time unused land may held before being re distributed to others in need. Once such rules and regulations have been adopted through a process of consultation and debate, at the local and national level, any variances to them should only be granted after consultation and consent by the communities concerned. In fact, this is what prevails in many towns in developed countries where the process of titling exists. In my town, Westwood, any extension to a house beyond a given perimeter, within a given area of land, requires the consent by neighbors and must be approved by the town council.

Conclusion

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

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

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

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

The titling of land inherited from the colonial period uses the Torrens system of land registration. It is incorporated in most African laws and continues to form the basis of current schemes for issuance of land titles. The Torrens system was meant to be a simplification of the English tenure system and was first devised for use in Australia.[31] It actually does not represent the system of real property under English Law, which in former British colonies, is the prevling substantive law governing land.

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

The titling system, once adopted, extinguishes all other competing legal forms for holding and managing land. The land title is conclusive proof that the holder is the absolute owner of the land specified in the

title. Short of fraud, the title deed is indefeasible in any dispute over ownership of the land. If there are any other valid interests in land, these must be registered as liens, otherwise they are unenforceable.

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

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

While collective or group rights, as recognized in the land reforms in South Africa, Mozambique, Uganda, Tanzania, Niger and other countries, are important, they may not be the solution in the long term as society develops and demands for more individualized rights grow. The experience in Madagascar, where group titles were first instituted, shows that some individuals who registered the group lands in their names as trustees for communities or families, subsequently sold the property as if they were individual owners.

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

It seems that sophisticated legal mechanisms would have to be devised, such as establishing trust and other legally binding agreements to govern the regime of group rights. Also, while it may be convenient now to hold land as a collective, in future years such arrangement may not be the most productive use of the land and undoing the collective could prove difficult.

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