

Securing Customary Land Rights in Sub-Saharan Africa

Learning from new approaches to land tenure reform

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By Lasse Krantz, PhD¹

1. Background

A majority of the poor in Sub-Saharan Africa live in rural areas and make a livelihood from agriculture and other land-based production activities. Secure tenure to land is thus of fundamental importance for these people. Yet even today very few of them have title to their land but get access to it through various informal customary tenure arrangements.² While research has since long shown that landholdings under such systems are not necessarily insecure (Bruce and Migot-Adholla 1994), with increased population pressure and commercialization of production there is a tendency for these customary tenure systems to disintegrate or to become manipulated by local elites (Peters 2004). Another factor relevant in this context is the escalating global demand for land for large-scale production of biofuels, food export crops, forest plantations, etc., which is particularly prevalent in Sub-Saharan Africa (Cotula 2012). In those countries where customary tenure is not recognized in statutory law, there is a clear risk that land held under this system is not respected when land concessions for such investment projects are being granted. And even when customary tenure rights are recognized in the national legislation, it may still be difficult for local people to defend their land rights against such outside claims simply because their holdings are not demarcated and registered, and therefore not identifiable on maps and in official cadastres.

There is today a growing awareness of the importance of providing local people with more secure rights to land as illustrated, for example, by the overall land policy guidelines adopted by African Heads of State in the context of the African Union (AU-ECA-AfDB Consortium 2010). Similarly, though at a global level, there are the Voluntary Guidelines on the Responsible Governance of Tenure adopted by the Committee on World Food Security in 2012, which also draw attention to the importance of providing especially poor rural women and men with more secure tenure to land and other natural resources (FAO 2012). Yet, one thing is to express the need for more secure tenure in principle, another is finding ways for how this could be realized in practice given the particular social, cultural, economic and political conditions that prevail in Sub-Saharan Africa.

The conventional approach for securing property rights to land is by establishing a system of private ownership through individual titling. This approach has been tried in several African countries over the years but with mixed results. Such individual privatization of land

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² It has been estimated that of the total land area of Sub-Saharan Africa, a maximum of 10 per cent is titled whereas about 77 per cent belong to the customary domain (Alden Wily 2011a, p.735).

ownership has often not led to the intended improvements in agricultural investments and productivity, but instead has had several negative social implications, e.g., marginalization of secondary rights holders to land, speculation and conflicts over land. Systematic individual titling has also proven very costly and demanding in terms of institutional capacity.³ Therefore, since the end of the 1990s, there has been a shift of thinking regarding land tenure policy in Africa paying attention also to the legal recognition and formalization of already existing customary rights and communal tenure systems (Toulmin and Quan 2000).⁴

The purpose of this paper is to describe and critically examine these newer alternative approaches to securitization of land rights in Sub-Saharan Africa with emphasis on certain challenges, which need to be tackled in order for these to have an inclusive and equitable outcome at the local level. The content of the paper is primarily based on a literature review though the challenges identified with these new approaches are based on observations from the author's own on-going research on the land tenure reform in Mozambique. Before discussing more concretely how this approach has been applied in practice, it is however necessary to dwell a bit more on what customary tenure actually stands for in Africa today, as well as on the theoretical debate that surrounds this concept.

2. Strengths and weaknesses of customary tenure systems

Customary tenure systems are inherently unique to the locality in which they operate and there may therefore be a lot of variation in the particularities of these systems depending on farming practices, settlement patterns, kinship and inheritance rules, socio-political organization, etc. (Bohannan 1963). Moreover, while the term "customary tenure" invokes the idea of traditional ways of organizing and managing rights to land and other resources from time immemorial, research has shown that many of the characteristic features of these systems are rather the result of measures imposed by the colonial powers than being endogenous to the African traditional culture and society per se. For example, the powerful role attributed to traditional leaders or chiefs in land allocation matters and the notion that customary land could not be held as property were both largely colonial inventions (Colson 1971; Lund 2000; Pottier 2005).

Despite the variation that African customary tenure systems exhibit locally they nevertheless often display a remarkable similarity in terms of basic organizing principles. The single most important characteristic is their "social embeddedness", i.e. that access rights to land are determined by one's membership and status in the social group controlling a particular territory (Colson 1971:194; Bruce and Migot-Adholla 1994:5). Usually such groups are kinship-based since at least leading family heads are often descendants of the same

³ There exists a large literature on the land titling programmes in Africa of the 1970s and the 1980s, where the Kenyan experience is particularly noteworthy (cf. Coldham 1978; Shipton 1988; Haugerud 1989; Atwood 1990).

⁴ Such a change of thinking also occurred within The World Bank, the leading proponent of individual land titling and privatization of land tenure relations in Africa, which now recognized that at least in some situations supporting the institutionalization of customary group rights to land might be a more socially advantageous and cost-effective solution than individual assignment of property rights (Deininger 2003: 29-31).

ancestors who first occupied the territory. While members belonging to lineages which reckon their descent to first occupants have stronger rights to land, as a rule cultural mechanisms exist also for others to become accepted as members of the community and thus - directly or indirectly- with rights to land. Typically, newcomers gain progressively stronger rights through intermarriage with one of the founding families or by being a responsible neighbour and investing socially in the local community (Cousins 2007; Freudenberger 2011).

However, within these parameters individual families and households usually enjoy fairly autonomous control over their own farmland. Such individual holdings are either obtained through an allocation of previously unoccupied land within the territory by the local chief or lineage head, or, which is more common today, by inheriting land from other family members in accordance with local norms and practices (Colson 1971:194-195; Bruce and Migot-Adholla 1994:5-6). A third route for acquiring land for own farming, which is especially common for those who do not belong to one of the founding lineages, is by marrying into the latter or through some kind of share-tenancy. Most customary systems allow the lending and leasing of individually held land though conditions are often more restrictive when the recipient is an incoming “stranger” (Lavigne Delville 2000; Chauveau et al. 2006).

Furthermore, outright selling of customary land is reportedly becoming more common in many rural localities although such transactions are still often confined to members of the same community or territorial group (Mathieu et al. 2003; Chimhowo and Woodhouse 2006; Amanor 2010).

Another characteristic feature of customary tenure systems is that access rights to resources found in a particular space are frequently overlapping, allowing multiple uses and users of these resources. For instance, it is common that fields cultivated by families are defined as individual property in the cropping season, but are opened up as grazing commons in the dry season or when laying fallow; the ownership of trees may be separate from the ownership of the land on which they grow, etc. Moreover, many customary systems are mixed tenure regimes comprising both individual and common property rights depending on the character of the resource in question. For instance, it is common that natural forests as well as water resources are open for use by every member of the community but under certain locally established rules and restrictions (Cousin 2000; Meinzen-Dick and Mwangi 2008; Alden Wily 2011a).

Access rights to land and other resources are typically determined by one’s status and position in the local social system. However, as has been pointed out by many scholars, rather than being regulated by precise rules such rights are often ambiguous and negotiable attesting to a certain flexibility in customary practices. Furthermore, tenure rules are not static but tend to adapt to change as conditions of production, population dynamics and other socio-economic factors evolve over time (Berry 1993; Lavigne Delville 2000; Platteau 2000).

Customary leaders are usually recruited among senior members of the founding lineages of the territory. Their power to allocate and adjudicate land might vary depending on local cultural rules but also as a result of the authority granted them by the overall political system. Still, they often serve a control function in overseeing that locally established norms for access and use rights to land are followed, resolving disputes over claims to land, regulating the use of common property resources, etc. (Okoth-Ogendo 1989; Lavigne Delville 2000; Cousins 2007).

Related to the shift in land tenure policy mentioned earlier, there has been a scholarly debate on the merits and demerits of building reforms on existing customary tenure systems in Africa. Those who tend to take a mainly positive view on the role of customary systems in this context usually emphasize the “social inclusiveness” of the latter, emphasizing that rights to land and other natural resources in these systems are derived from membership of a social unit rather than subject to exclusive ownership by particular individuals. This means that, at least in principle, these are rights to which all members of the unit are entitled, irrespective of whether the land is held individually or used collectively as a common property resource (Platteau 2000; Cousin 2007; Freudenberger 2011).

Another “positive” aspect mentioned in this context is that customary tenure rules tend to be flexible and thus open to negotiation. This in turn might be advantageous for those individuals and families whose social standing and status do not automatically give them rights to land and other communal resources but which they can nevertheless obtain through negotiations with customary leaders or other autochthonous members of the community (Berry 1993). By being deeply rooted in culturally accepted values and norms customary tenure systems are often also perceived as more legitimate by local people. Finally, there are cost-effective considerations such as that it might be cheaper for governments to build a system of land administration and management upon already locally established institutions and procedures for land allocation and control, which, moreover, are self-sustained by local people themselves (Bruce and Know 2009; Freudenberger 2011).

Those, on the other hand, who are more sceptical of customary tenure systems as a basis for policy reforms suggest that these systems are not as communal, socially harmonious or equal as their advocates seem to imply. For one thing, it is argued that the latter underestimate the commodification and individualization of rights to land that exist even within customary systems today. One indication of this is the proliferation of land transfers with a commodity flavour, e.g. land rentals and sales involving monetary payment, which have been observed by a number of researchers (Lund 2000; Woodhouse 2003; Daley 2005; Peters 2007). Also, trends towards what has been characterized as “informal formalization” of land transfers, i.e. various types of documentation and other means of recording land transfers, which, although not legally valid, nevertheless represent a deviation from the oral methods prevalent in more “traditional” customary practice (Mathieu et al. 2003).

Another aggravating circumstance mentioned in this context is the mounting competition and social conflict over land that can be observed as a result of population growth but also increasing land values as market integration and commercialization of local farming proceeds (Peters 2004). One manifestation of this is that rights to land in customary systems are becoming defined in increasingly narrow ways with “autochthonous” community members claiming exclusive rights to land at the expense of in-coming “strangers” - even if the latter have been living and farming land for generations in the area. Another is the increased prevalence of inter-generational conflicts when younger (male) family members feel they are deprived of their legitimate rights to land because the latter is sold or rented out to others by their fathers or other senior lineage members. Alternatively, they are denied independent rights to land by the senior generation with no other alternative than to remain as “slaves” within their own families or to leave the community altogether.⁵

To this could be added the differentiation in power and inequality that field research by anthropologists and others have revealed exist within customary tenure systems. For instance, many studies report on situations where chiefs or other traditional leaders use their power, including political connections outside the community, to seize control over community land for their own personal benefit (Peters 2012). It is also not uncommon that chiefs sell community land to outsiders as if it were their own private property (Amanor 2010). In this context, the observation by anthropologist Pauline Peters that the ambiguity of customary land rights may be “...a cloak for privilege and class as much as a space of action for the powerless” is particularly pertinent (Peters 2002: 56).

Finally, a particularly problematic aspect of customary tenure systems concerns women’s land rights. As a rule, in most customary systems women lack own independent rights to land but get access to it through their husbands or through other male members of their native lineage. At least, this is the norm in groups with a patrilineal descent system where women often move to live with their husbands’ families when marrying and which is the predominant pattern in most rural areas of Sub-Saharan Africa.⁶ As many studies have shown, this system may be especially problematic for women in case of a divorce or when the husband dies, when the land they have cultivated for their and their children’s sustenance may be reclaimed by the husband’s family. Although analysts differ a bit on their assessment of the manoeuvring space that women have for negotiating their rights in these situations, most agree that women’s land rights are extremely weak in customary systems and that this is a problem aggravated by the increasing scarcity and commercialization of land (Gray and Kevane 1999; Whitehead and Tsikata 2003).

⁵ Such inter-generational land conflicts have been observed by researchers especially in West Africa where in some cases they have been one of the contributing factors to the protracted civil-wars there in the 80s and the 90s (Chauveau and Richards 2008).

⁶ In matrilineal societies practicing matrilocality, things are a bit different because there a husband gets access to land through his wife’s rights to lineage land. Such systems are however relatively uncommon today, and, moreover, show a tendency of becoming “patrilinealized” over time.

The conclusion coming out from this more critical stance of customary tenure systems is that the latter are no guarantor of security for the poor and other vulnerable segments of the local community, and that policies which just aim at recognizing and formalizing customary rights at the level of the community as a means to protect these groups might miss the point. As a matter of fact, such a policy, at least if not accompanied by other measures, some argue might even be counterproductive by formally recognizing and legally endorsing a system of allegedly “customary” practices and positions of power at the local level, which, if anything, would only aggravate the lot of the poorest and most vulnerable members of the community.

When it comes to the more specific question of how to go about to improve women’s land rights, there are generally two positions: on the one hand, there are those who stress that this is an issue which the statutory legal system must handle by introducing laws and a judicial system more supportive of women’s land rights. Some even go as far as to argue in favour of titling and privatization of land since this would enable women to acquire land as independent owners. On the other hand, there are those who have less faith in this type of statutory solutions and who think that there is potential for improving women’s rights within customary systems even though this would require much advocacy as well educational and capacity building work at the local level.⁷

In the scholarly debate on customary tenure, it is difficult to discern clear policy recommendations. However, even those who are sceptical regarding customary tenure systems tend not to advocate a total replacement of customary tenure with fully fledged individual privatization. Instead, most seem to think that, if possible, the basic “communal” character of customary tenure system ought to be preserved but with greater security for the individuals’ land rights, including those of women. Moreover, decision-making and control over land and other related resources need to become more transparent and downward accountable (Cousin 2007). There are however few indications in this debate on how to achieve this in practice.

3. Formalization of customary rights in practice

A number of different models have over the last 10 to 15 years been attempted in the pursuit of formalizing customary land rights in Sub-Saharan Africa. These could be arranged along a continuum depending on at what level of aggregation the landholding subject is defined. At one extreme are those, which seek to formalize rights at the level of individuals or households. A case in point is Ethiopia, where, despite the fact that all land is state-owned, farmers in recent years have been provided with individual land certificates to give them at least some kind of secure tenure to their land. Since 2006, more than half of the country’s farm households have received such land certificates. Often it is just the household head, usually a man, who is the registered holder but it is not uncommon that both the

⁷ See Whitehead and Tsikata (2003) for a comprehensive discussion of these various positions.

husband and the wife are registered as co-holders (Rahmato 2009). A similar model of individual land registration is practiced in Rwanda, where over a period of just a few years almost 10 million plots have been registered in the name of individual holders, both men and women (Pritchard 2013).

In many respects land registration in these cases is not based on customary tenure rights in a strict sense of the meaning. In Ethiopia there is very little left of customary tenure systems after the collectivization and repeated redistributions of land during the socialist era, and in Rwanda the migratory movements associated with the genocide have fundamentally changed many a local tenure system. Furthermore, in Rwanda it is the explicit policy of the government through the land tenure regularization programme to eradicate customary tenure altogether. Nevertheless, these are included here because they are frequently mentioned as exemplary models of land rights formalization that other African countries could follow.

In both Ethiopia and Rwanda land certification could be seen as a simplified form of land titling, though, at least in the case of Ethiopia, it is not synonymous with private ownership since land can neither be sold nor used as collateral for loans there. The Rwandan version is more flexible in this regard. Research especially in Ethiopia has shown that this type of land certification has resulted in increased tenure security, which, in turn, has led to increased willingness to invest in one's farming with positive effects on both productivity and soil conservation (Deininger et al. 2008). One flaw of this approach is however that it focuses mainly on the formalization of individual landholdings, whereas other landed resources such as natural forests and pastures, which are used on a collective basis as common-property, are left out. Also, it only recognizes the head and possibly one wife of landholding households as qualified for certification, while the other wives in case of polygamous households are excluded like everyone else who lacked independent access to land at the time of registration. A third problematic issue, which this model shares with the classical privatization approach, is that it restricts the scope for redistributive circulation of land between generations beyond the heirs of the immediate family of the landholder. This, in combination with a rule that individual landholdings cannot be sub-divided into smaller plots than 0.5 hectares, is now beginning to lead to a problem of increased landlessness among the younger generation in some rural areas in Ethiopia (Bezu and Holden 2013).

Another model is that exemplified by the so-called Rural Land Plans/Maps (PFR - *plans fonciers ruraux*) experimented with in francophone West Africa. The PFR is similar to the land certification processes discussed above in that it also aims to formalize rights through registration. A difference however is that the latter seeks to register both individual and collective rights to agricultural land as well as to other natural resources within a given locality. Another difference is that PFRs are often applied in a social and cultural context where customary tenure systems are still quite strong (Chauveau 2003).

The purpose of the PFR approach is to identify and record customary rights *as they are in the field*, primary as well as secondary or derived rights. To that end a methodology of “mapping” existing rights is applied with participation of concerned rights holders. As rights are being identified the idea is then that these should be registered in a local “cadastre” and land certificates issued to the respective rights holders. Although the manner in which this approach has been implemented varies between the Ivory Coast, Benin and Burkina Faso, which are the West African countries where PFRs mostly have been practiced, they have experienced certain common difficulties and challenges, which are worth noting.

One difficult issue has been the complex nature of customary rights, which often consist of “bundles of rights” which can be held by different individuals or groups over the same space or resource.⁸ If this is not taken into consideration when rights are recorded and registered there is a risk that conflicts will erupt when some of the stakeholders feel that they have been deprived their previous legitimate rights of access to the resource in question. Another problem has been to assign rights to the correct owner given that in customary systems, land is often owned by family-groups or lineages with a lineage elder or senior family member acting as its custodian. Registering the land only in the name of the latter may lead to a situation where the other family members over time lose their rights to the land. Finally, there is the difficulty of designing a land administration system capable of incorporating this diversity of land rights. All this led to that in practice the PFR had to simplify its approach both in terms of what rights to register and who should be liable for such registration, in the end making it rather indistinguishable from other simplified titling processes.⁹

Yet another model is that which recognizes customary land rights in statutory law but which vests ownership over such land in traditional leaders on behalf of and in trust for their people. While this type of arrangement, which has a long history going back to the colonial period, is supposedly based on the idea that traditional leaders have a moral duty to administer land in the best interest of their community jurisdictions, the drawback is that it may also result in the former (mis)using their control over customary land for own personal enrichment. A well-known example of this is Ghana, where chiefs exercise almost exclusive control over “stool and skin land” - representing about 80 per cent of all land in the country – but often mostly for their own personal benefit. In fact, that chiefs have so much personal economic interests in customary land is today one of the biggest obstacles for achieving a more egalitarian and democratic land tenure system in Ghana (Ubink and Quan 2008).

A variant to this model is to vest control over customary land in an administrative body outside the local level over which traditional leaders have little or no control. This for instance is the idea with the institutionalized land boards functioning since the 1960s in

⁸ The concept of “bundles of rights” refers to the different rights of disposal that a stakeholder may have over a resource, e.g., cropping rights, transfer rights, transmission rights, withdrawal rights, which in customary systems are often disaggregated depending on the holder’s social position, gender, seniority, etc. See J-P. Colin (2008).

⁹ For a discussion of the experiences with PFR, see Lavigne Delville (2010).

Botswana as managers of the legally recognized tribal lands which constitute about 75 per cent of all land in the country. While initially traditional chiefs were permanent members of these boards together with representatives from local and central government, the former were eventually excluded due to their allegedly vested interests in decision-making. This, however, has also led to that these boards over the years have become detached from the local communities and villages whose interests they are supposed to defend, with loss of legitimacy and downward accountability as a result (Knight 2010).

Finally, at the other extreme is what could be labelled the community-based or “communal” model, which seeks to formalize customary rights at the level of entire villages or communities as collective landholding subjects. This is the model adopted in both the Tanzanian Village Land Act of 1999 and the Mozambican Land Law of 1997, which still constitute the legal basis for the tenure reforms under implementation in these two countries. The formalization process in these two cases starts with the identification and delimitation of the outer boundaries of the land area which the village or community in question considers itself the legitimate holder of, resulting in the case of Tanzania in the village being granted a “Village Land Certificate” to this area and in the case of Mozambique in a “Certificate of Delimitation” granted in the name of the community, both of which are mapped and registered in the official cadastre (Alden Wiley 2003; Norfolk and Tanner 2007). In legal terms, all members of the village/community are considered “co-owners” of this land, with the same possessory rights as well as rights to participate in decisions over its use. At the same time none of the laws prescribes in detail how land should be allocated and transferred within this collectively possessed area. This is instead left to the members to decide themselves based on local customary norms and practices – at least as long as the latter do not contradict other national laws or constitutionally sanctioned principles. While there is no requirement to register individual landholdings since these are “protected by customary law”, in both cases those who wish to formalize their rights to these landholdings can do so, in Tanzania by requesting a so called “customary right of occupancy” certificate (CCRO) and in Mozambique a “right of use and benefit” (DUAT) to the holding in question which is as close as you can get to a private ownership title.¹⁰

There are thus many similarities between these two cases. However, one difference that should be noted is that in Tanzania what constitutes a “village” in this context is fairly straightforward since villages existed as both territorial and political-administrative units before the advent of the Village Land Act. In the case of Mozambique, on the other hand, the “local community” as a landholding unit is a new concept invented by the Mozambican land law. Hence, in this case formalizing community land rights is not just a question of delimiting the land of existing and easily identifiable communities. What actually constitutes a relevant “community” in social, political and spatial terms in a particular locality must also be established which has sometimes proven not to be so easy.

¹⁰ In both Tanzania and Mozambique all land is still formally the property of the State.

Another difference is that in Tanzania governance of land within the village is in the hands of democratically elected village councils, accountable to a general Village Assembly. In Mozambique, on the other hand, the land law does not prescribe or specify any particular governance structure which in practice means that within the community land issues are normally handled by the traditional leadership structure where positions of authority are inherited according to kinship and lineage seniority rather than elected. This is not to say that land governance at the local level is therefore necessarily less fair and democratic in Mozambique. The point is rather that in comparison to Tanzania, land legislation in Mozambique in this respect is much more unspecified and open, leaving more room for powerful traditional leaders to further their own interests and those of their close kin and other associates in the management of the community's collective landholding (Knight 2010: 129-130).

Approximately 60 per cent of all rural villages in Tanzania had in 2010 got their land boundaries demarcated and registered, and it was expected that by 2013 almost all villages were going to be covered. However, less than 200 000 land parcels (out of about 25 million) within villages had been demarcated with certificates of customary occupation issued to their owners, indicating much less progress when it comes to individual titling (Byamugisha 2013: 82).¹¹ In Mozambique, the process is less advanced with only an estimated 10-15 per cent of all land delimited and registered as "community land". Demarcation of individual DUATs within delimited communities is practically non-existent. Instead, more emphasis has been put on demarcating land for joint titling of smaller groups of farmers organized into associations in these communities. This has very much been the strategy of NGOs and donor-supported programmes supporting the implementation of the land law in Mozambique (CARE-Mozambique 2013).

Unfortunately, there has not been much field-based research on the outcome of these reform processes in either Tanzania or Mozambique to date. It is therefore a bit difficult to tell what the experiences and lessons learned from this model have been at the local level. We shall come back to this issue in the concluding section.¹²

4. Individual vs. communal tenure

So what is the prevailing trend today in international policy discourse on land tenure reform in Africa: securing tenure rights at the level of individuals or at the level of some kind of traditional territorial groupings such as villages or communities? Judging from a recent book by Frank Byamugisha, lead land specialists in the Africa Region at the World Bank, the answer is in fact that both approaches are relevant. Due principally to the increasing demand for land and other natural resources for private investments, demarcating and

¹¹ This despite that in Tanzania main focus in the implementation of the Village Land Act has been precisely on the issuing of individual CCROs land titles (Fairly 2013).

¹² For at least the Tanzanian case two recent dissertations by respectively Fairly (2013) and Pedersen (2013) do however provide valuable empirical information and analysis in this respect.

registering communal rights to land is essential in order to protect local rural communities from being deprived of their land. The aim, he argues, should be to register all remaining communally owned land in most African countries over the next 10 years (Byamugisha 2013:7). At the same time, in order to boost productive investments in local farming as well as the development of a land market (both sales and rental markets), tenure security over individual lands also needs to be improved. In his view scaling-up registration of individually owned lands through systematic titling from the current 10 per cent to about 50 per cent of all rural lands in Africa should not be impossible given new low-cost technology for land surveying, mapping, etc. (ibid:7-10).

Yet, his account leaves some questions unanswered. For instance, it is not entirely clear what is meant with the concept “communal lands”, i.e. whether it just refers to the land to which community members have equal rights of access as a common-property resource (“the commons”), or if it in fact also includes those parts of the community land area to which individuals and families have some kind of customarily accepted private ownership rights. And this, in turn, has implications for how one should understand the relationship between the two recommended elements of tenure formalization: registration of communal rights and registration of individual rights. Are they entirely separate processes referring to different types of landholders in different geographical areas? Or are they in fact two consecutive steps in an integrated process of formalization of the customary land rights of members of the same community?

Another question mark refers to the impact of individual titling at the local level. While, as Byamugisha argues, it may be true that new low-cost technology makes systematic titling of large numbers of individual land parcels technically and economically more feasible in Africa today, as demonstrated by the examples of Ethiopia and Rwanda, he does not discuss what social implications this might have for, e.g. secondary rights holders or other vulnerable groups with less possibilities to claim ownership rights to the land they use within the community.¹³ Over time such privatization of individual landholdings may also result in increased landlessness at the local level when some in the younger generation are unable to inherit or buy land at the same time as they cannot find alternative employment outside the community, as seems to be an emerging tendency in some parts of Ethiopia today (Bezu and Holden 2013). Besides, there is also the issue of continuity of registration of land transactions over time, which has proven to be a serious problem in many previous titling reforms in Sub-Saharan Africa.

A more straightforward and pragmatic approach to this issue is advocated by prominent land tenure expert Liz Alden Wiley and is also the approach in the “Global Call to Action on Community Land and Resource Rights” that a group of leading international non-

¹³ As shown by a large number of studies this was a serious problem with the land titling reforms in Kenya and elsewhere in Africa during the 1970s and the 1980s. For references see footnote 2 above.

governmental organizations recently launched.¹⁴ Their starting-point is that it is above all rural people's rights to the collectively possessed and used "commons" that need protection in Africa. The reason being that these resources are often of particular importance for the livelihoods of the poor at the same time as it is precisely this type of land, e.g. off-farm woodlands and pastures, which are especially vulnerable to encroachment from the outside. The fact that such commons are by many African states still considered public lands only aggravates the problem (Alden Wiley 2011a).

Alden Wiley has estimated that of the whole "customary domain" in Africa, only about 10 per cent constitute cultivated land while the remaining 80 per cent are used as customary common property, principally forests and pastures (ibid:735). Few tenure reforms to date in Africa have however granted communities formal rights to the latter, and when this has occurred it has mostly been dealt with as a separate forest sector issue, for example as community forestry, rather than as land tenure reform issue. It is precisely on this point that Alden Wiley and likeminded scholars call for a fundamental change. In brief their argument is as follows: given the fact that most community lands in Africa include both individually held land and commons governed by the same integrated local system of community based (or "communal") land administration, the logical solution is to secure this entire area as a community-owned property and not just parts thereof. It would then be up to the community itself to decide under what rules and conditions individual ownership rights to land should be managed.¹⁵

There are many advantages with this approach. For instance, by focusing on the securitization of community lands as a first step one is able to cover quite extensive areas and populations in a relatively short period of time and at a limited cost. In other words, it is a cost-effective way of providing local rural populations with at least some basic tenure security over their customary territories, which is especially important in today's conjuncture of escalating global competition for land. Implementation is meant to be highly participatory with the demarcation of community land boundaries building on local people's own knowledge and agreements with neighbouring communities coupled with training in both legal and organizational matters. Hence, it is a process with a strong empowerment potential at the same time as it facilitates the resolution of possible inter-community land conflicts. Besides, it facilitates integrated and participatory land-use planning by putting all types of land, e.g. individual as well as commons, agricultural as well as forest land, under one and the same locally controlled land administration. Finally, by vesting ownership control over the land in the community it becomes possible for the latter to enter into business partnerships with outside investors for those parts of the community land

¹⁴ For further information on this recent initiative, see www.communitylandrights.org

¹⁵ A more theoretical elaboration of this approach is presented in Alden Wiley (2008). See also her more recent paper (Alden Wiley 2013). Basically the same approach is also recommended by land legal expert Rachael Knight in her comprehensive study on statutory recognition of customary land rights in Africa (Knight 2010).

resources, which the community members themselves do not need for their own production or subsistence.¹⁶

However, this approach also raises some difficult challenges, which need to be tackled. Firstly, defining “the community” is not unproblematic considering the often nested manner in which different levels of authority with corresponding jurisdictions over land is traditionally organized in many African rural societies. Establishing the appropriate level at which the landholding community should be defined is thus not always a simple and straightforward matter.¹⁷

Secondly, by legally stipulating that land within these communities should be allocated and governed according to customary norms and procedures, one runs the risk of allowing too much of free scope for traditional authorities and their associates in the local elite with possible detrimental effects for the land rights of less influential community members. In other words, the challenge is to find a way of counterbalancing the power of traditional leaders with some kind of more democratically constituted local governance structure to which the former should be accountable while still retaining a role as legitimate leaders (cf. Knight 2010:249-250)

A related challenge is how to resolve the paradox that while the approach builds on the principle that all community members should have the same legal rights to land as co-owners of the community holding, this is not how land ownership normally functions in most African rural communities. Instead ownership is usually vested in family groups or lineages with priority for those who descend from the founders of the community while others are seen as having less rights in this respect.

As explained earlier, a particularly problematic aspect of customary tenure systems concerns women’s often rather weak and subordinate rights to land in these systems, which risk becoming cemented when customary systems are given formal recognition in statutory law (Whitehead and Tsikata 2003). As a countermeasure several countries which otherwise have adopted such a communal approach in their land laws, e.g. Tanzania and Mozambique, have therefore at the same time introduced legislation granting women the same rights to own and inherit land as men. The outcome of such legal reforms has however been mixed. Part of the problem is that the issue of women’s rights to land is deeply embedded in kinship rules and systems of local socio-cultural and political organization and are therefore not easy to change. But another problem is also that it is often very difficult for poor rural women to claim their legal rights, either because they have no recourse to the formal judicial system or

¹⁶ In the international development debate there is today a growing interest in the question how rural communities and private sector investors can establish business partnerships of mutual benefit as an alternative to large-scale land grabbing. See for instance Vermeulen and Cotula (2010) as well as a FAO (2009). For a concrete example from South Africa, see Lahiff et al. (2013).

¹⁷ This is one of the problematic issues with the Communal Land Rights Act in South Africa according to Cousin (2008). As mentioned earlier (pp. 9-10) it is also an issue in the implementation of the Land Law in Mozambique.

simply because they might be reluctant to bring their case to court for fear of disrupting relationships with their kin and other neighbours in their home communities. The challenge thus remains of finding effective ways of strengthening women's land rights at the community level.¹⁸

A central tenet of the communal approach outlined above is that priority should be given to legal recognition and registration of the community as a collective landholding unit while a possible formalization of individual properties within this unit in the form of individual titling or otherwise is less urgent and could therefore be deferred to a later stage. Meanwhile the customary system would ensure the tenure security of individual community members. Yet this position might ignore the fact that, as pointed out in the scholarly debate referred to earlier, privatization and commoditization of land relations are already quite advanced in many African rural communities warranting some kind of formalization to secure also the rights to individual properties. Besides, for individual farmers to obtain credit or to enter into commercial transactions with external business partners, it is often necessary to have some kind of formal title to one's land. The challenge then is to design a system, which is capable of providing individuals and families with secure and verifiable rights to their land at the same time as the communitarian virtues of the local tenure system are preserved.

Variations of this approach can today be found in the land policies of several African countries. The most well-known cases are Tanzania and Mozambique whose on-going tenure reforms were briefly outlined in section 3 above. Other examples include the much-debated Communal Land Rights Act in South Africa and the recently approved new rural land law of Burkina Faso (Cousin 2007; Elbow n.d). Also Liberia has a new land policy, which grants rural communities quite far-reaching ownership rights to their communal lands, although it has not yet been put into law (Brandy and Marquard 2013). To that could be added that quite a number of African countries today recognize customary rights in their land legislation though implementation often lags behind in practice (Alden Wiley 2012).

5. Conclusion

Land rights issues have been on the development agenda for a long time but they have taken on increased importance in recent years due to emergent factors such as the escalating global competition for land. Nowhere is this more apparent than in Africa where more than 90 per cent of all land is unregistered and therefore vulnerable to these external pressures. Hence, the realisation of the importance of better securing local populations' rights to land in especially Sub-Saharan Africa. Conventional land titling in the way it is practiced in Europe and other western developed countries has however proven to be problematic when transplanted to an African rural context and there has therefore since some time been a search for more locally adapted approaches based on existing customary tenure systems. This paper discusses in particular one such approach based on the

¹⁸ For a more comprehensive discussion on this point, see Knight (2010: 253-258)

formalization of villages or communities as collective landholding units, which has attracted a growing interest in recent years. This approach avoids many of the difficulties faced by the individual land titling model, however, it also raises its own set of challenges which need to be tackled to have an inclusive and equitable outcome at the local level. Some of these positive aspects as well as challenges are identified in the paper.

Most research on tenure reforms in Africa has focused on the individual land titling approach. While in the past it was above all the land titling processes associated with the structural adjustment programmes in countries such as Kenya which were in focus, in more recent years interest has instead shifted to the Ethiopian and Rwandan cases, where, as explained earlier, emphasis is on simplified forms of certification and registration of individual landholdings. So far there has however been relatively little research on the outcome of the alternate “communal” approach discussed in this paper. One explanation for this is that even in countries with quite sophisticated land policies and legal frameworks along these lines, such as Tanzania and Mozambique, implementation has been rather slow and there has until recently not been much on the ground to investigate. This is however beginning to change with large donor-supported programmes in these and other African countries speeding up implementation. Thus, time is ripe for paying more research attention to the outcomes of these alternative approaches to tenure reforms so that the experiences and lessons learned can be made available to a broader audience and inform the preparation of similar reforms in other countries on the continent. It is the argument of this paper that a critical examination of how the challenges outlined above have been tackled in practices on the ground should be an essential ingredient of such a learning-research endeavour.

Bibliography

- Alden Wiley, L. (2003). *Community-based land tenure management. Questions and answers about Tanzania's new Village Land Act, 1999*, Issue Paper no. 120, IIED, London.
- Alden Wiley, L. (2008). Custom and commonage in Africa rethinking the orthodoxies, *Land Use Policy*, 25, pp. 43-52
- Alden Wiley, L. (2011a). The Law is to Blame: The Vulnerable Status of Common Property Rights in Sub-Saharan Africa, *Development and Change*, 42(3), pp. 733-757
- Alden Wiley, L. (2011b). *Customary Land Tenure in the Modern World, Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa*, Brief 1, RRI
- Alden Wiley, L. (2012). *Land Reform in Africa: A Reappraisal. Reviewing the Fate of Customary Tenure in Africa*, Brief. No.3, Rights and Resources Initiative, Washington DC.
- Alden Wiley, L. (2013). *Going Global: Securing Community Lands at Scale*, unpublished paper for ILC and RRI, lizaldenwiley@gmail.com
- Amanor, K.S. (2010). Family values, land sales and agricultural commodification in South-Eastern Ghana, *Africa*, 80(1), pp. 104-125.
- Atwood, D. (1990). Land Registration in Africa: The Impact on Agricultural Production, *World Development*, Vol 18, No.5, pp. 659-671
- AU-ECA-AfDB Consortium (2010). *Framework and Guidelines on Land Policy in Africa*, Addis Ababa
- Berry, S. (1993). *No condition is permanent, the social dynamics of agrarian change in sub-Saharan Africa*, University of Wisconsin Press, Madison.
- Bezu, S. and S. Holden (2013). *Land Access and Youth Livelihood Opportunities in Southern Ethiopia*, Centre for Land Tenure Studies Working Paper 11/13, UMB, Oslo
- Bohannon, P. (1963). "Land", "tenure" and "land-tenure", in D. Biebuyck. *African agrarian systems*, Oxford University Press for the International African Institute.
- Brandy, C.T.O. and P. Marquard, (2013). *The Evolution of Liberia's Land Rights Policy Statement*, paper presented at The Annual World Bank Conference on Land and Poverty, Washington DC.
- Bruce, J.W. and S. E. Migot-Adholla (eds), 1994. *Searching for Land Tenure Security in Africa*, the World Bank, Washington DC.
- Bruce, J.W. and A. Know (2009). Structures and Stratagems: Making Decentralization of Authority over Land in Africa Cost-Effective, *World Development*, Vol 37, No.8, pp. 1361-1369
- Byamugisha, F. K. (2013). *Securing Africa's Land for Shared Prosperity: A Program to Scale Up Reforms and Investments*, Africa Development Forum, The World Bank, Washington DC.
- CARE-Mozambique (2013). *Land Delimitation & Demarcation: Preparing communities for investment*, Terra Firma, Maputo.

Chauveau, J-P. (2003). *Rural land plans: Establishing relevant systems for identifying and recording customary rights*, IIED, Issue Paper no. 122

Chauveau, J.P. et al (2006). *Changes in land access and governance in West Africa: markets, social mediations and public policies*, Claims & IIED.

Chauveau, J-P. and P. Richards (2008). West African Insurgencies in Agrarian Perspective: Cote d'Ivoire and Sierra Leone compared, *Journal of Agrarian Change*, Vol. 8, No.4, pp.515-552

Chimhowo, A. and P. Woodhouse (2006). Customary vs. Private Property Rights? Dynamics and Trajectories of Vernacular Land Markets in Sub-Saharan Africa, *Journal of Agrarian Change*, Vol 6, no.3, July, pp. 346-371.

Coldham, S.F.r. (1978). The Effect of Registration of Title upon Customary Land Rights in Kenya, *Journal of African Law* 22:91-111.

Colin, J-P. (2008). Disentangling intra-kinship property rights in land: a contribution of economic ethnography to land economics in Africa, *Journal of Institutional Economics*, 4, pp. 231-254

Colson, E. (1971). The Impact of the Colonial Period on the Definition of Land Rights, in V. Turner (ed). *Colonialism in Africa 1870-1960*, Vol 3, Cambridge.

Cotula, L. (2012). The International Political Economy of the Global Land Rush: A critical appraisal of trends, scale, geography and drivers. *The Journal of Peasant Studies*, Vol 4, No.1, pp.649-680.

Cousin, B. (2000). Tenure and Common Property Resources in Africa, in Toulmin and Quan (eds).

Cousin, B. (2007). More than Socially Embedded: The Distinctive Character of "Communal" Tenure Regimes in South Africa and its Implications for Land Policy, *Journal of Agrarian Change*, Vol. 7, No.3, pp. 281-315

Cousin, B. (2008). Characterising "communal" tenure: nested systems and flexible boundaries, in Claassens, A. and B. Cousin (eds). *Land, Power and Custom*, LRC, Ohio University Press.

Daley, E. (2005). Land and social Change in a Tanzanian Village 2: Kinyanambo in the 1990s, *Journal of Agrarian Change*, 5(4), 526-72

Deininger, K. (2003). *Land Policies for Growth and Poverty Reduction*, The World Bank and Oxford University Press, pp. 29-31

Deininger K. et al. (2008). Rural Land Certification in Ethiopia: Process, Initial Impact, and Implications for Other African Countries, *World Development*, Vol. 36, No. 10, pp. 1786-1812

Elbow, K. (n.d). Burkina Faso's Ambitious Experiment in Participatory Land Tenure Reform, *Focus on Land in Africa Brief*.

Fairly, E. (2013). *Upholding Customary Land Rights Through Formalization? Evidence From Tanzania's Program of Land Reform*, PhD Dissertation, Minnesota University.

FAO (2009). From Land Grab to Win-Win: Seizing opportunities of international investments in agriculture, *Economic and Social Perspectives*, Policy Brief 4, June.

- FAO (2012). *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, FAO Rome.
- Freudenberger, M. S. (2011). *The Future of Customary Tenure*, USAID, Property Rights and Resource Governance Briefing Paper 8.
- Gray, L. and M. Kevane (1999). Diminished Access, Diverted Exclusion: Women and Land Tenure in Sub-Saharan Africa, *African Studies Review*, vol. 42, No.2, pp.15-39
- Haugerud, A. (1989). Land Tenure and Agrarian Change in Kenya, *Africa*, 59(1):61-90
- Knight, R.S. (2010). *Statutory recognition of customary land rights in Africa*, FAO Legislative Study 105, pp. 47-98.
- Lahiff, E. et al (2012). *Joint Ventures in Agriculture: Lessons from land reform projects in South Africa*, IIED and IFAD, London.
- Lavigne Delville, P. (2000). Harmonising Formal Law and Customary Land Rights in French-Speaking West Africa, in Toulmin and Quan (eds).
- Lavigne Delville, P. (2010). Registering and Administering Customary Land Rights: Can We deal with Complexity?, in Deininger, K. (ed). *Innovations in Land Rights Recognition, Administration and Governance*, World Bank/Global Land Tool Network/International Federation of Surveyors.
- Lund C. (2000). *African land tenure: Questioning basic assumptions*, Issue Paper no. 100, IIED, London
- Mathieu, P. et al. (2003). Monetary Land Transactions in Western Burkina Faso: Commoditisation, Papers and Ambiguities, in Benjaminsen T.A. and C. Lund (eds). *Securing Land Rights in Africa*, Frank Cass, London and Portland, Oregon.
- Meinzen-Dick R. and E. Mwangi (2008). Cutting the web of interests: Pitfalls of formalizing property rights, *Land Use Policy* 26, pp. 36-43
- Norfolk S. and C. Tanner (2007). *Improving Tenure Security for the Rural Poor: Mozambican Country Case Study*, LEP Working Paper No. 5, United National Food and Agriculture Organization, Rome.
- Okoth-Ogendo, H.W.O. (1989). Some Issues of Theory in the Study of Tenure Relations in African Agriculture, *Africa*, Vol 59, No.1, pp.6-17.
- Pedersen, H. R. (2013). *Access, Decentralisation and Local Governance of Land in Africa: The Implementation of Tanzania's New Wave Land Reform*, PhD Dissertation, Roskilde University.
- Peters, P.E. (2002). The Limits of Negotiability: Security, Equity and Class Formation in Africa's Land Systems, in Juul, K. and C. Lund (eds). *Negotiating Property in Africa*, Heineman, Portsmouth
- Peters, P.E. (2004). Inequality and Social Conflict over Land in Africa, *Journal of Agrarian Change*, Vol 4, No.3, pp. 269-314.
- Peters, P.E. (2007). *Challenges in Land Tenure and Land Reform in Africa: An Anthropological Perspective*, CID Working Paper no. 141, Center for International Development at Harvard University, USA.

Peters, P.E. (2012). *Conflicts over Land and Threats to Customary Tenure in Africa Today*, CID Working Paper No. 247.

Platteau, J-P. Does Africa Need Land Reform, in Toulmin and Quan (2000).

Pottier, J. (2005). "Customary Land Tenure" in sub-Saharan Africa Today: Meaning and contexts, in Huggins C. and J. Clover (eds). *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*, Institute for Security Studies, Pretoria.

Prichard, M.F (2013). Land, power and peace: Tenure formalization, agricultural reform, and livelihood insecurity in Rwanda, *Land Use Policy*, 30, pp. 186-196.

Rahmato, D. (2009). Land rights and tenure security: rural land registration in Ethiopia, in Ubink, Janine et al. (eds). *Legalising Land Rights: local practices, state responses and tenure security in Africa, Asia and Latin America*, Leiden, Leiden University Press.

Shipton, P. (1988). The Kenyan Land Tenure Reform: Misunderstandings in the Public Creation of Private Property, in Downs R.E. and P. Reyna (eds). *Land and Society in Contemporary Africa*. Hanover, University Press of New England.

Toulmin, C. and J. Quan (eds) (2000). *Evolving Land Rights, Policy and Tenure in Africa*, DFID/IIED/NRI, London.

Ubink, J.M. and J. Quan (2008). How to combine tradition and modernity? Regulating customary land management in Ghana, *Land Use Policy*, pp. 198-213.

Vermeulen S. and L. Cotula (2010). *Making the most of agricultural investments: A survey of business models that provide opportunities for smallholders*, FAO and IIED, London.

Whitehead A. and D. Tsikata (2003). Policy Discourses on Women's Land Rights in sub-Saharan Africa: The implications of the re-turn to the Customary, *Journal of Agrarian Change*, Vol. 3, Nos.1 and 2, pp. 67-112.

Woodhouse, P. (2003). African Enclosures: A Default Mode of Development, *World Development*, Vol 31, No. 10.