

The Law and Land Grabbing: Friend or Foe?¹

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Abstract

This paper reflects upon the role of law in the contemporary surge in global large-scale land acquisitions. Its point of reference is the land security of several billion rural poor who by tradition own and depend upon untitled lands, mainly designated as state property in national land laws. Most of these lands are off-farm assets such as forests and rangelands, traditionally held by rural communities on a collective basis. A premise of this paper is that these commons, on grounds of scale alone, are a key target of large-scale acquisitions, notwithstanding the preference of investors for more fertile and accessible sites. From a legal standpoint, the status of these presumed empty lands brings contradictions between customary and statutory law most starkly to the fore.

First, to locate the current land rush correctly and to better appreciate its force, this paper shows how, while in ways unique, in other ways the rush is only the most recent of periodic surges characterising ever-expanding capitalism, and which has been global in its footprint for several centuries. Thus far these rushes have relied upon cost-free land takings from the poor at scale for their kick-start, in a process which Marxian historiography describes as the most primitive means of wealth creation.

This paper explores the way in which state land enables but is also a victim of this process, and a result of which is ambivalent legal norms. It is suggested that the contemporary rush could ultimately prove more legal friend than foe to majority rights than has been the case in the past. This is because the rush occurs in an environment of such advancing popular communication, emergent mass empowerment, and small but significant new platforms of pro-majority land law, that opportunities to coerce modification in classical dispossessory paths of economic growth exist.

To examine this, the central legal paradigm undermined in land rushes is reviewed, if and how agrarian populations may secure lands communally, and with comparable levels of protection given to statutory individual ('private') property. Although this is an issue throughout the agrarian world, the paper makes Sub Saharan Africa the focus as a region where the tenure security of up to 90 percent of rural Africans is directly affected by the

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outcome. It is observed that for new treatment of collective tenure to enter the canons of tenure law, its forms need to be posed in forward-looking than backward-looking ways, less as historic rights than as a form of landholding that is logical given the resources involved, and offer an obvious direction for democratically devolved tenure and government in the 21st century. Advocates and communities also need to look afresh at the structure of community-based law and at the altering formation of agrarian community itself. Without such changes, community-derived property rights at scale may indeed be large-scale casualties.

Key Words: land rush, customary rights, collective entitlement, capitalist transformation

I INTRODUCTION

The objectives of this analysis are multiple: to locate the current land rush as a predictable surge in a long history of expanding capitalist transformation to better understand its inevitability and force; to trace the role of law in generating a core feature of such surges - attrition in the security of majority unregistered land rights; to trace the fate of the most affected construct within indigenous land relations - the holding of lands in common; and to examine how far legal opportunities for this are being curtailed or promoted as consequence of the current land rush.

Suppression rather than extinction

Within the discussion, a crucial aspect of land rushes is illustrated and which requires note; that despite the alarm they generate, rushes have rarely proved lasting or complete in their capture of local lands by large-scale land enterprise. Nor do they, or the contextual political and economic transformations from which they descend, appear to successfully extinguish local land rights in their entirety. For example, despite a century of harshly suppressive land law in South Africa, Zimbabwe and Namibia, customary land claims have ultimately proved sufficiently resilient to require expensive compensation and restitution schemes.² These well-known cases also illustrate the inextricable relationship of land and property rights with socio-economic and political rights, locating the issue firmly in the sphere of governance. The fact that remedies in those cases are still far from delivered after two decades also reminds us of the tenacity of contrary dispossessory norms and that pro-majority tenure reforms are difficult to secure in practice.

A subtle transformation in rights themselves underwrites these battles over land and associated wealth and power, and which broadly play out as contestation between people and the state, mirrored in contradictions between state and people's law (customary law, best understood in 2013 as community-derived and sustained law). For large-scale capture of lands tends to trigger not only resistance and politicisation, but also reactive, expedient reconstruction of those interests to make it decreasingly easy for capital-shaped notions of property rights to reject. While this principally requires a buy-in by communities into notions of land as a disposable commodity, and associated individualisation, it also prompts shifts in the meaning of property as not necessarily being so fungible, of being able to exist with all incidents of private property except tradability. This most affects lands such as off-farm forests and rangelands which are neither easily nor wisely necessarily individualised or tradable, and yet remain a primary capital asset of agrarian communities worldwide, and which can be put to effective income-generating use accordingly, their many other values aside. How modern tenure law handles those generally off-farm assets is the area where

² For South Africa: <http://www.plaas.org.za/blog/unworkable-land-reform-project-designs-offer-inappropriate-farming-models-rural-dwellers> and <http://www.plaas.org.za/plaas-publication/farm-workers-%26dwellers> and <http://www.plaas.org.za/plaas-publication/FC03>; for Zimbabwe: <http://www.plaas.org.za/plaas-publication/ldpi-20>; Scoones et al; 2010; for Namibia: http://www.lac.org.na/projects/lead/Pdf/livelihoods_report_a.pdf and <https://www.bon.com.na/CMSTemplates/Bon/Files/bon.com.na/d2/d2d1748a-1e9f-4b9a-8291-94c8589e52d7.pdf>

most contention and alteration is being experienced today, along with shifts in the understanding of communities as legal persons, competent to hold such assets collectively.

The global land rush enters the fray in the midst of such transitions. Therefore, while the initial impact (or fear of impact) of the current rush is wrongful but legal dispossession or poor rural communities at scale, there is countering potential for populations to challenge and refashion this path. Their success would not so much halt the land rush as coerce shifts in its *modus operandi* to modify its dispossessory effects. Key indicators to keep watch upon will be how far legal classification of lands as state properties rises or declines as a proportion of total country areas in favour of acknowledged community owned lands; how far industrial land developments evolve on the basis of leasing directly from communities, rather than from governments, and how far newly acknowledged community landowners are included as shareholders in commercial land developments where their lands are being used. Even a limited shift towards these innovations would mark an important turning point towards more popularly inclusive routes of land-based growth. Whichever way, the direction of modern land law on these matters is crucial. And certainly, the land rush story is far from concluded.

The global land rush

Given the immensity of commentary on the current rush, only brief observations are made here. First, it remains unclear if the rush is gathering pace or receding. This is despite expensive initiatives to track its scope,³ high levels of mainly adverse publicity,⁴ gathering international advisories cautioning investors - and host governments,⁵ salutary examples of failures reminiscent of botched mega-schemes of earlier decades,⁶ and mounting protest and complaints, such as presented to the Round Table for Sustainable Oil Palm.⁷ This suggests the rush is less malleable than pro-poor development advocacy might like, and that the trend continues to secure traction with national governments and local commercial sectors. It also hints that more communities than presumed a couple of years past are willing to trade lands for (the promise of) jobs and related opportunities to get off the farm.

It is also noticeable (although barely a topic in the bountiful literature) that the rush has not (yet) triggered a surge in land prices, host governments apparently still content to lease out their lands (or more correctly, the lands of their people) for paltry amounts. A similar failure of land market development afflicts the costs of securing water, minerals, oil and timber by investor concessions (Allan, 2013). Market failure turns out to be characteristic of land rushes and a sure sign of their support. However, in the new climate of environmental

³ Anseeuw, Alden Wily et al., 2012 and Anseeuw, Boche et al. 2012. and also refer to the Land Matrix Project and Portal: <http://landportal.info/landmatrix/get-the-detail#analytical-report>

⁴ As collated by Palmer, 2012.

http://www.mokoro.co.uk/files/13/file/select_bibliog_2_books_journal_articles_tvvideoradioclips_biofuels_land_rightsinafrica_globallandgrabbing_oct_2012.pdf

⁵ Especially the FAO Voluntary Guidelines: <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>. Also refer The Munden Project, 2012 on financial risks of insecure tenure from an investment perspective.

⁶ See Ramaswamy, 2013 for recent failures of mega-schemes in Ethiopia and Hopma, 2013 on failure of Jordanian investments in Sudan.

⁷ <http://www.reuters.com/article/2013/03/22/us-editor-liberia-veroleum-palmoil-idUSBRE92L0Y520130322>

awareness, shifts in the pricing of extractive rights could help slow rampant capture of local rights, if gathering adherence to EITI principles are indicative (EITI, 2013).

Meanwhile the rush itself is better appreciated each year as a more amorphous and complex event than seemed the case when a wave of agricultural land buying followed the price hikes of 2006-08. Its reach is now accepted as encompassing concessions for extraction of hydrocarbons, timber, water, and for carbon sequestration posing as conservation (“the green grab”); less one-way in north/south orientation; and more global in its reach than early attention to Africa and Asia suggested (Borras, Kay et al., 2012). Although somewhat opportunistic, links are also now being made with the lows and highs in a continuing process of land concentration in Europe (TNI et al., 2013).

Analysis has also become decreasingly ahistorical, locating the rush as less novel event than surge in a well-established process of capital-led land and resource takings at scale (Lee Peluso and Lund, 2011, Alden Wily, 2012b, Woertz, 2013, Corson and MacDonald, 2012), its take-off less discretely logged as prompted by the oil and food supply scares of 2006-08. Academic debate accordingly revives and engages political economy approaches to agrarian change (Neocosmos, 2008, Berstein, 2010, Patnaik and Moyo, 2011). New themes are regularly being introduced from labour dynamics (Li, 2011) to food regime change (McMichael, 2013) and governance (Lund and Lee Peluso (eds.) *passim*).

Through all this there is recurrent interest in how far the current rush is exceptional or an old game with new players. While claims of exceptionality mount (added to here in a small way), these could be more optimistic than realistic, a coping strategy of deeper acknowledgement that the rush is integral to longstanding social transformation and difficult to derail, and yet despite its familiarity, difficult to grasp – perhaps explaining the plethora of case studies and periodic catch-up analysis to bring analytical order to what is actually occurring (Borras, Franco and Wang, 2013).

II PAST LAND RUSHES AND THE LAW

Why does land law matter in the current land rush? Land law is an issue simply because national legislation around the agrarian world share a dominant position (there are exceptions) that lands not formally titled through state registration regimes are thereby unowned lands, at most lawfully occupied and/or used by local populations. Such lands are variously classified as the personal property of governments, as state or national lands, or as public lands, implying lands empty of owners so held in trust by the state. In all classes governments are availed preeminent powers of disposition.

This makes real or virtual squatters of rural populations to the extent that they too claim these lands. While some do so on the basis of state allocation such as through past resettlement and land grant schemes, the vast majority claim these lands on the basis of customary rights, and the larger portion of who continue to hold and use those lands and resources under persisting community-based regimes (‘customary’ or ‘indigenous’ tenure)

(Alden Wily, 2011a). It is these lands that are being prominently handed over to investors or speculators through sale, lease or concession.

Nor are affected lands few. In this respect it is well to remember only 11 percent of the world's land surface is cultivated, the greater resource being off-farm lands, and over which, state law aside, thousands of communities sustain community-based tenure and governance norms. Such precious assets could comprise 8.5 billion ha, excluding waters, foreshores and extreme deserts.⁸

As Sub Saharan Africa is the example to be used here, these figures are illustrative: the 46 mainland and island states of the region comprise a landmass of 2.35 billion hectares (again excluding waters). Less than 10 percent of this area is privately titled and accordingly outside the customary sector.⁹ Cities and towns absorb another one percent of land area (Angel et al., 2010). Of the remaining 2.1 billion hectares, only eight percent is permanent farmland (168 million ha). This leaves 1.93 billion hectares of forestlands, rangelands¹⁰ and wetlands. Some 320 million hectares of this has been withdrawn from community jurisdiction as gazetted national parks and reserves, a process which normally extinguishes customary rights. An unknown part of the remainder is genuinely unowned, in the sense of being beyond the historical or present jurisdiction of any one rural community. This still leaves a potential 1.6 billion hectares of contradictory customary-statutory claim, a longstanding condition, which the land rush now brings into clearer contestation.

A significant portion of these lands was already leased out prior to the current land rush, mainly under extractive concession to oil, gas, and especially timber and mining companies.¹¹ In Cameroon and Gabon, for example, half of the country areas were already subject to logging and concessions in 2005, frequently overlaid by concessions for exploratory or extractive mining (Alden Wily, 2012c). This is now the case in a number of other African states, including Liberia, as exemplified later. Millions of people live within these lands, depend upon them for livelihood, and claim them as historically and contemporarily their property, the national law status of these lands as (unowned) public lands notwithstanding.

Below, I will briefly illustrate how these conditions have deep origins in legal norms derived from Europe (and in which colonialism was the principal but not sole mediator); that this dispossession was inseparable from modern state formation, and this in turn integral to expansion of capitalist relations and resulting concentration of landholding, wealth and class formation, and in which land rushes are a familiar accelerator.

⁸ Details in Alden Wily, 2013 drawing on resource classification from FAOSTAT and World Resources Institute.

⁹ Mainly absorbed by the 'white' farms of South Africa, Zimbabwe and Namibia, with 27% of Kenya also under private title, and now most of Rwanda (Alden Wily, 2013).

¹⁰ Including grasslands, shrublands, and bushlands.

¹¹ A concession differs from a lease only in that there is an element of partnership with the state, expressed in royalties and other product-related fees. In theory a concession is for one product only such as timber but in practice concessionaires obtain exclusive control of the concession area.

Establishing dispossessory legal principles

Although reception of Portuguese, German, Belgium and French civil law codes in Africa could be as easily tracked in this regard, and are strikingly similar, I will focus upon those expressed in English common law, as the received law in 18 colonial and post-colonial polities. As preface, we may begin with the feudal maturation of common law in England (North et al., 2009). This evolved over several centuries as integral to post-indigenous state creation launched by Norman conquest in 1066. Land possession was restructured as a lien or gift of the new state, separating possession (*seisen*) by commoners from legal title awarded to elites in return for military and financial support. Land taxes in turn provided the core of state revenue and its survival. By 1436 nearly half of England's lands were controlled by 51 barons, inextricably bound to the state, precisely because their land assets were dependent upon sustained state recognition of their tenure (ibid; 106-07).¹²

In due course English kings would pursue offshore the same land-capturing colonialism its indigenous populations endured. To do this legally by 1600 was important for this was also the era in which the legal profession was coming into its own as the glue keeping the fragile marriage of the Kingdoms of England and Wales, then Scotland together, and giving a fillip to reforms designed to bring the jurisdiction of diverse local courts into a centralized, consistent, post-medieval *common* law. Its authority to dictate what was lawful was an attribute sought by its advocates – and demanded by fractious new parliaments, for whom law making was their prime source of power. Elsewhere I have examined a couple of landmark cases where law was accordingly manufactured to legitimise mass dispossession (Alden Wily, 2012b), and which I will cursorily summarise.

Dispossessing the Irish, 1608

The first was the Tanistry Case, engineered for hearing by the Kings Bench in London in 1608 (Dorsett, 2002). The intention was to make it legal (and morally right) for the King of England to sweep up Irish lands, requiring proof that these were not already owned. The purpose, it bears noting, was to enable the King to give vast lands to favoured subjects to create commercial plantations (retaining ultimate title), from which he could secure taxes, and at the same time ensure their (Protestant) loyalty.

In fact, Irish clans not only considered themselves very much to be landowners but had also regulated this tenure for centuries through written customary law (*Brehon*). In what must have been desperation, Davies for King's defence seized upon the custom of tanistry as proof that this regime did not produce real property. Tanistry bound clans and family owners to publicly elect heirs in order to avoid lands falling into the hands of possibly incompetent eldest sons. This, Davies argued, was barbaric, for "as law must serve public good, and public good requires certain ownership of land", election demoralizes the expectations of the eldest son who would have no cause to invest in the estate (ibid., 9-13).

¹² Neocosmos, op cit., provides helpful analysis of how presumed pre-capitalist feudal landed property becomes capitalist or private property in the theses of Marx and Lenin.

Nor, Davies argued, did election meet the test of reasonableness required by the new English common law; it was obvious that the oldest son was *naturally* the most worthy man of blood and surname, and the English practice of primogeniture superior to the barbaric Irish practice of election. *Ergo*, the Irish couldn't possibly own the land in a manner acceptable to 'modern' English law. A massive land grab ensued, the King granting Irish lands to 100,000 new Scottish and English between 1608 and 1641 (Morrissey, 2004). Needless to say, this made tenants and serfs of the Irish on their own customary lands, triggering centuries of rebellion and bloodshed, not entirely resolved till the present.

Dispossessing American Indians, 1823

A subsequent landmark case in the Anglophone world was that of *Johnson and Graham's Lessee v. William M'Intosh*, heard by the American Supreme Court in 1823 (US, 1823). This was also engineered to establish that indigenous populations did not own the lands they occupied and used, again to facilitate state-supported land takings at scale. The test case was to invalidate purchase of 43,000 square miles of land by private investors by proving that American Indians had illegally sold that tract. With echoes of Davies' argument in 1608, Marshall established that property only devolves on the instructions of English law; English law says the King owns original title, and as descendant of the British Crown, only the new American States could lawfully sell or grant those lands. Indians held "a mere right of usufruct and habitation, without power of alienation" (ibid: para. 569).

In any event, Marshall argued, in a new twist, Indians could not have been real owners as they were not cultivators, neither settling nor developing the land in visible ways; they therefore could not have acquired "proprietary interest in the vast tracts of territory which they wandered over... they had no individual rights to land" (ibid: para. 570). This had philosophical support; although John Stuart Mills was yet to develop his defining thesis on property (1859), John Locke (1689) had already established the notion that property only comes about by the will of the state. Adam Smith (1776) had also helpfully established that property only comes into being by man's labour, not that this applies to large land acquirers.

Yet more dubiously, Chief Justice Marshall argued that Indian lands were vacant as Indians having fled from bloody wars ahead of colonial agriculturalists, "leaving the soil no longer occupied" (ibid: para. 591). This was an early expression of the empty lands thesis that would be useful until the present. Finally, Marshall observed (by then also a familiar theme), Indians were heathens and savages and the force used to acquire title by conquest therefore "finds some excuse in the character and habits of the people" (ibid: para. 589).

The courts of the Spanish, Portuguese, Belgians, Dutch and French were no less skilled than the English in creating law to support massive capture of lands all around the globe.¹³ For example, the Declaration of the Rights of Man (1789) and the subsequent influential Napoleonic Civil Code (1804) consolidated the notion of property as existing only by state dictate and issue of title, meaning that real property owners in France remained few and the

¹³ The influence of the French (and derivative Swiss) civil codes upon Middle Eastern law is often forgotten in the focus upon Asia, Africa and Latin America.

peasantry, despite titular liberation in other respects, still deprived of recognition of their rights as of equivalent force and effect.

Dispossessing Africans, 1885

Therefore, by the time fourteen plenipotentiaries of European states (including America, Russia, and Ottoman Empire) met in Berlin in 1884-85 to divvy up Africa into preferential trading zones, they were practised in legal justification that the lands and resources they wanted were unowned. Accordingly, the international law arising out of Berlin, the General Act of the Berlin Conference on West Africa, 26 February 1885, only required the signatories to establish sufficient authority “to protect existing rights”, meaning their own rights, not those of natives (Article 35). Africans were not entirely forgotten; the Powers (as they referred to themselves) were to hold a watching brief over their moral wellbeing “to bring home to them the blessings of civilization” (Article 6).

While initially the Powers had no intention to create expensive colonies (this was already problematic in other continents), the necessity for this emerged almost immediately as the free access and trade agreements collapsed, each Power competing to control the African market for disposing the cotton, copper, and other manufactures lying unsold in depressed Europe, to control coffee, tea, fruit, and sugar production to feed their own expanding middle classes, to protect expanding rubber, oil palm and sisal plantations from angry Africans, and to secure for themselves the gold, copper, ivory, and other riches of the continent (Hobsbawn, 1997 (1987): 62-67).

Proof that Africa was unowned became a crucial task in lawfully capturing African lands, not least to forestall reaction at home by religious and humanist activists who had recently forced the ending of the slave trade. Solutions were delivered in tens of sovereignty-cum-property laws enacted for colonies between 1895 and 1914 (Alden Wily, 2011d). Predictably, these established European heads of state as the ultimate owners of all local resources and only from whose hands acknowledged real property could derive. This could occur by registration of documents of approved past purchases from natives (applicable within existing coastal enclave or mission areas) or through new land grants to European settlers and traders. While British and German administrations favoured issue of entitlement in absolute or long lease titles to individuals, the French and Belgians found it easier to allocate millions of hectares of their new hinterland territories to consortia of home companies, requiring them to perform policing or tax collection duties on their behalf. By 1900, more than seventy percent of modern Gabon and the Republic of Congo were divided into forty-two French company concessions (Gray, 2002: 142). Most laws did permit Africans to secure lands also, but through such onerous routes and with such limitations that few took up this opportunity (Alden Wily, 2011d).

A century of consolidated dispossession: 1890-1990

The road to the theft of African lands was not smooth. Up and down the continent land takings and associated coercion of labour for European enterprise met with protests,

boycotts of European goods, refusal to sell food to European traders and mission stations, and rebellions (Alden Wily, 2012c for Gabon, Werner 1993 for Namibia and Iliffe, 1969 for Tanganyika). On occasion, local elites with longstanding relations with European traders as themselves former slave, rubber, or gold traders, found ways to play the colonizers at their own legal game. This was most successful in coastal Ghana during the 1890s, experienced chiefs uniquely securing timber and gold-rich areas as their own, not Crown property (Amanor, 2009). It was almost as successful in respect of Lagos Island through legal challenges to the Colony of Southern Nigeria in 1912 and 1915.¹⁴ This culminated in a Privy Council ruling in London in 1921 that natives should be compensated when their settled lands were taken for public purposes, but stopped short of applying this to unoccupied lands.¹⁵ This reinforces off-farm lands as wastelands, empty of owners.

As 20th century demands that colonial administrations not just pay for themselves but make a profit for the home country, land takings multiplied, with new rushes after both World Wars, expanding settler occupation in Anglophone and Lusophone Africa, and French company capture in Francophone and Belgian Africa. Takings at scale for public-private enterprise gathered pace after 1946 for mega-projects such as launched by the Niger Basin Authority to green the desert, by the British Ministry of Food to grow groundnuts in Tanganyika, or for equally un-lasting sesame and sorghum schemes in Sudan (Verhoven, 2013). International agribusiness was a main beneficiary, including oil palm companies in Ghana, Firestone rubber in Liberia, Brooke Bond and Del Monte tea and fruit conglomerates in Kenya, and ranching schemes in South Africa (Amanor, 2008, Kanyinga et al., 2008, Alden Wily, 2007, Potts, 2013).

All this land taking through the 20th century was complemented by state capture of all waters, foreshores, beaches, oils, minerals, marshlands and often forests, woodlands and rangelands, even though at home in Europe (and America) private ownership usually encompassed rights above and below the soil, and also, in civil law, permitted small waters to be owned (Alden Wily, 2013). These grabs were reinforced from the 1940s by a wave of green grabbing in the form of gazetted forest reserves for state capture of lucrative hardwoods, then cleared for replanting of (then) even more lucrative exotic species (Fairhead and Leach, 1996, Kelly, 2012, Corson and MacDonald, op cit.). This was revitalised after Independence in the 1960s, reservation not reconstructed as necessary for conservation until the 1980s. The Rio Declaration (1992) triggered a further wave of capture of some of the most valuable community lands as Terrestrial Protected Areas, now numbering 320 in Sub Saharan Africa, absorbing millions of hectares.

The coerced commodity production on peasant farms that accompanied much of the above through the 20th century was just as provocative, and through the necessity to also pay hut taxes drove a great deal of migration, displacement and land loss (Bryceson, 1980). Latter-day colonial policies during the 1950s compounded mass insecurity, in declared aims and emergent titling programmes to suppress family and communal tenure in favour of

¹⁴ *Oduntan Onisiwo v. The Attorney General of Southern Nigeria* (2.N.L.R. 77 [1912] and *Attorney General of Southern Nigeria v. Holt* (2.N.L.R. 1; [1915], A.C. 599).

¹⁵ *Amodu Tijani v. The Secretary, Southern Provinces*, 11 July 1921.

individualization and associated policies to hasten concentration into landed and landless classes to provide the labour needed for new waves of commercial land enterprise and hoped for urban industrialisation.¹⁶ As independence loomed, European capitals also hastened to position themselves as key beneficiaries of raw materials and commodities, such as they intended in the 1880s, exemplified in the determination of De Gaulle to refashion the French colonies into a French Federation.

Such strategies were not rejected by emerging African elites allied with the colonial administrations, so much as raised their ire at being excluded from the rewards of large-scale land capture still awarded Europeans. African society had rarely been equitable and with origins often in slave and commodity trading families or chiefdoms, elites had gained immensely from the encouragement given to mission schools through the century, and had been routinely co-opted in regional guards or as local administrators in the *Indigenat* or British Indirect Rule regimes from the 1920s. By the late 1950s, the separation of elite land interests from the poorer majority were ripe for renewed legal entrenchment (Bayart, 2010 (1989), Chabal and Daloz, 1999, Kanyinga et al., op cit., Kanyongolo, 2008, Amanor, 2008).

This helps explain why so few new African nations (roughly 40 independent states were created between 1956 and 1975) did not take independence as opportunity to liberate their people's land rights from introduced European norms, and instead confirmed and even expanded lawful dispossession of their own citizens through denial of customary land interests as due protection as property (Alden Wily, 2010). By the 1980s a plethora of semi-autonomous government agencies were additionally beneficiaries of vast acreages of presumed unowned public lands, usually run by associates of politicians and civil servants, and who have been as frequently the leading beneficiaries of lands when these parastatals eventually began to be dismantled during the 1990s (Mwaura, 2007). Meanwhile, the average size of peasant farms also plummeted, involuntary farm landlessness rising by 1990s to South Asian levels of the 1970s (Jayne and Muyanga, 2012). In Kenya for example, three percent of the population then and now control at least 20 percent of the land.

As illustrated below in the case of Tanzania, post-colonial land law continued to ease paths of eviction and dispossession. Where affected communities protested loss of their lands, new legislation was introduced to remove doubts as to the legality of land takings. In Sudan, for example, this was accomplished by the Unregistered Land Act, 1970, to allow five million hectares of Nuba and Funj lands to be legally allocated to elite Sudanese and Middle Eastern investors, prompting these populations to join Southern Sudanese in their war with Khartoum (1984-2002). The upshot for these and other affected rural populations across the continent was that had even less legal security in 1990 than they had possessed in 1890, and the risk of losing land in practice had grown exponentially.

¹⁶ The Report of the East African Commission of Inquiry into Land Tenure (1955) was echoed in Francophone country studies on tenure in 1958-60.

III AFRICAN LAND REFORM AND THE LAND RUSH

A wave of land reform has slowly crept across the continent since 1990. This has been unlike the redistributive farmland reforms of the 20th century in Asia and Latin America in that in Africa, reformism has focused on three other issues: (i) mechanisms for more effective land administration, tending towards devolved processes; (ii) the status of majority rural customary land rights; and (iii) (often contradictory) strategies to make untitled land more freely available to local and foreign investors (Alden Wily, 2006, 2011d). While political democratization, ending of civil wars, and the final demise of white rule in Southern Africa have been made shapers of policies, initial drivers to launch tenure reform in the first instance have commonly been to comply with the structural adjustment demands imposed by international financial institutions to free up land availability for investors, local and international.

As a consequence, new land policies and laws have rarely delivered a cohesive or radical new vision of land rights, tending rather to adopt dual strategies and the vain hope, as the recent Liberian National Tenure Policy puts it, that “the principles of economic growth and tenure security are not in conflict with one another but are complementary” (GoL, 2013: 4). This results in frequent limitation in the liberation of customary land rights as acknowledged property. As elaborated later, it additionally leads most new tenure legislation to provide ambivalent and awkward mechanisms for collective entitlement, and as problematic routes for the most part through which individuals within the customary sector may alienate their private estates (houses and farms) from community-derived jurisdiction or collective tenure. This amply illustrates the fact that battles between state and society as to rightful landowners of untitled lands is as deeply mirrored in conflicting ambitions within communities themselves.

In broader summary, the results of reformism for community-derived land rights have been mixed. Six states (Mozambique, Uganda, Tanzania, Burkina Faso, South Sudan, Madagascar)¹⁷ have adjusted laws to award customary rights equivalent force and effect as real property rights, irrespective of whether or not these were surveyed and registered, and/or held by individuals, families or communities. Ghana and Botswana had undertaken this much earlier. Imperfections in all eight cases abound (Alden Wily, 2011a). Another twelve states (Kenya, South Africa, Liberia, Namibia, Senegal, Benin, Sierra Leone, Angola, Nigeria, Malawi, Gambia, Togo) have done so in more proscribed manner, or have promises and plans in progress, in the form of new policies and new laws.¹⁸

This still leaves most African states as having taken no or very limited steps towards liberating their citizens’ land interests from a century of dispossessory legislation and policies. Some of these have in fact taken alternative routes, such as through extinguishing customary land rights altogether (Eritrea, Ethiopia, Rwanda). Some do acknowledge in policies or laws that certain customary holdings could be acknowledged as real property but limit this to homesteads and/or offer routes that require extinction of the customary right in

¹⁷ Alden Wily, 2011d and 2013 for details.

¹⁸ As above.

favour of applying to purchase (their own) untitled lands, or similar routes discouraging to customary majorities.¹⁹ The most resistant to tenure reform (political pledges to reform aside) are mainly Congo Basin and Sahelian States, such as Cameroon, Gabon, Central African Republic, Mali, Mauritania and Sudan. Zimbabwe also falls in this category having ironically liberated lands held by white farmers while forcefully retaining a situation in which communal lands remain vested in the President, with absolute powers of disposition. Sudan, another example, continues to fail to meet restitution commitments agreed in the 2005 Comprehensive Peace Agreement following the 24 year long North-South War.²⁰

Meantime, it may be cursorily observed that no African country has yet seen fit to liberate state capture of all waters, beaches, foreshores, minerals and oils with restitution of possibilities for communities to recover relevant local assets in the future, such changes as there have been uniformly in the direction of availing affected communities social services or other such facilities, termed benefit-sharing, remote from resource-sharing. Nor, notable exceptions (South Africa, Tanzania) are communities yet permitted to become owners of protected areas, sustaining the convenient fiction that valuable resources require state ownership to be conserved.

The overall result is that a small proportion of African customary lands are secured in principle or practice. Even accounting for promised changes in Kenya, in process of preparing a Community Lands Bill, only 220 million hectares on the sub continent are (to one degree or another) recognised as customary *property*, just over ten percent of all untitled African lands (Alden Wily, 2013). Among these, the most substantial and firmly secured lands are those categorised as Village Lands in Tanzania, extending over 69 percent of the total country area, a case elaborated later.

The role of the land rush in tenure reform

Early in 2010 I began to express concern that the land rush was putting a halt to fragile moves towards pro-poor tenure reform cursorily described above (Alden Wily, 2010, 2011 *passim*, 2012 *passim*). There was (and still is) substantive evidence of this in the slow-down of production of promised new national land policies where these have been pledged by sitting commissions, or by failure to entrench new policies in new law. Cases in point include The Gambia, Nigeria, Sierra Leone, Swaziland, Zambia, Malawi, Botswana, DRC, Cameroon and Mauritania. In other cases, shortfall accountable at least in part to the land rush is where laws turn out to be significantly less people friendly than originally posed (e.g. Lesotho (2010) and Burundi (2011)).

It is also the case that some of those countries which did produce reformist pro-majority land law since 1990 have sought since to renege on provisions precisely to ease investor access further. Amendments, attempts to amend, and reinterpretation of articles have been used. In Ethiopia, for example, enablement for communities to secure off-farm lands under collective title (2005) has been reinterpreted as excluding the major resource in key regional

¹⁹ As above.

²⁰ As above.

states, pastoral lands, and increasingly, all off-farm lands. In Tanzania, contradictory definition of unoccupied and unused village lands in the two land laws of 1999 are being used to justify land takings along with much reduced compensation to communities. In Mozambique there was a clear attempt in 2012 to limit the size of area which a community may delimit and receive formal entitlement. In Uganda, legal provision of national and local government rights to valuable lands has been used to take community rangelands on this basis, including defeat of a legal challenge against this. The new South Sudan administration has also justified deals with investors for vast lands on grounds that the law does permit it to declare investment areas, with ambivalent requirement for local consent.

On the other hand, the land rush is generating such increasing local reaction, that subordination of majority rural rights shows signs of becoming less easy. This may prove to be the case even in the most recalcitrant of cases, such as in Cameroon and Gabon, both governed by leaders considered among “the world’s worst living dictators”.²¹ The surge in mining and timber concessions (mainly to China) and fewer but very large leases to American, European and Malaysian rubber and oil palm developers is prompting a sharp rise in civil society mobilisation and politicisation around land rights, along with substantial reprimand by international NGOs (GMTMD, 2013, Richards, 2013). If only for political reasons, those governments may later, if not sooner, feel bound to modify their land laws, much as across the other side of the world, Indonesia is being forced to do.²²

The case is similar to one degree or another or all African states at this time. In Namibia, for example, popular reaction against accumulating capture of local grazing lands by elites (often from the capital) has boiled over in demands for the Communal Lands Reform Act, 2002 to be revisited. In Kenya, rewrite of a rejected Community Lands Bill of 2011 is stretching constitutional provisions to their limit, including proposals to facilitate restitution of forest and wildlife reserves. In Senegal, having failed to secure support for a law favouring investor interests, a redraft of new land law is underway. Meantime, despite the rush, Benin (2007) and Burkina Faso (2009) managed to see through fairly radical new land laws into enactment, protecting majority rural land interests, explicitly inclusive of valuable but vulnerable off-farm commons.

In short, it is not clear that the land rush will succeed in capturing large lands in the untitled sector, and/or sustain this in the longer term. A longer-term perspective may be necessary. To example the case thus far, a snapshot of land law change in Liberia and Tanzania over the last century is provided below.

LIBERIA

Liberia is exceptional as the only African state to have an American colonial history, strictly speaking in the form of state-backed colonization societies formed in America following the

²¹ As declared by D. Wallechinsky (2006), *The World’s 20 Worst Living Dictators*, Harpers Perennial, New York.

²² Reference is made here to the landmark decision of Indonesia’s Constitutional Court in May 2013 (Nomor 35/PUU-X2012, Mahkamah Konstitusi Republik Indonesia) invalidating the Indonesian governments claim to 40 million hectares of forestland claimed under customary tenure (*adat*).

liberation of African slaves, with the aim of returning volunteers to Africa. As was the case with merchant and mission enterprises in coastal Africa at the time, these societies formally purchased lands along the coast of what is now Liberia during 1820 and 1847 from local chiefdoms, signalling awareness that these lands were African property (Alden Wily, 2007). It was not until the expansion of the Republic of Liberia (1847) into hinterlands after 1885 to limit 1880s-90s land grabs from Britain to the north (Sierra Leone) and from France from the south (Cote d'Ivoire) that the question arose as to whether Liberia should pay for these vast new territories inland. The Supreme Court eventually put an end to contentious debate within the Monrovia government as to the status and rights of Aborigines in these hinterlands (as they were called) in 1920, by ruling that it had been "unnecessary to seek or secure the willing consent of uncivilised people as through (their subordination) Aborigines gained civilisation" (ibid: 78, citing Chief Justice Dossen).

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Hinterland chiefs were less compliant and within three years they had secured a law for the Hinterland which enabled the "right and title for an adequate area for farming and other enterprises essential to the necessities of the tribe ..." to be retained (Suehn Conference of Hinterland Chiefs, 1923, entering into Regulations variously retained until 1949). Additionally, these areas could be converted into "a formal communal holding upon application ... surveyed at the expense of the tribe concerned". Further, "should the tribe become sufficiently advanced in the arts of civilization, it may petition Government for a division of the land into family holdings" of 25 acres each, held under fee simple (Article 66, Hinterland Law, 1949).

Between 1924 and 1968 thirteen Hinterland chiefdoms secured nearly one million hectares under communal Aboriginal Title Deeds (ibid: 117). Other either did not know of the opportunity, were insufficiently organised and solvent to take advantage of this, or were simply confident that Monrovia would not infringe upon their lands, even without deeds, as the same Regulation had additionally pledged. This more or less lasted until the land rush generated by the Open Door Policy announced by President Tubman in 1944; between 1951 and 1961 this resulted in massive transfer of customary lands to foreign mining (iron ore), rubber and lumbering companies and a good deal less compensatory employment than promised, engendering the term "growth without development", reflecting unparalleled growth but incoming accruing almost exclusively to foreign companies and Americo-Liberian elites.²³

The Hinterland Law was quietly modified in 1956 in support of the policy, reducing the "right and title" of customary owners to "the use of as much public land in the area as required for farming and other enterprises essential to tribal necessities" (The Aborigines Law, Section 270, Title 1 Liberian Code of Laws, 1956-58; my italics). This was confirmed by revisions to the longstanding Public Lands Act and by enactment of a new Land Registration Act in 1974.

²³ The term first coined by in *Growth without Development: An Economic Survey of Liberia*, Evanston, Ill.; Northwestern University Press, by R. Clower, F. Dalton, M. Harwitz and A. Walters, 1966.

These established that individuals and communities in the Hinterland could acquire formal ownership only by buying (their own lands) from the State, now the titular owner.

The value of pre-existing Aborigines Deeds was also thrown into doubt by the gazettelement of 1.35 million ha of prime forestlands as National Forests in 1960-61, extinguishing customary rights with no compensation. Land and resource grievances contributed to civil war (1983-2003), reaching a nadir in 2000 with new forest law enacted by the Charles Taylor administration which bluntly declared that all forest resources were Republic property; these cover nearly 60 percent of the country and accordingly roughly 60 percent of all community lands.

Cancellation of all concessions was an obligatory pledge for Ellen Johnson Sirleaf to attain the Presidency in 2005, with production of a new Forest Act in 2006 and a Community Rights Law in Respect of Forest Lands in 2009. The latter acknowledges that forest resources on community lands belong to communities (Section 2.2). As important, the law defines community land as “An area over which a community traditionally extends its proprietorship and jurisdiction, and is recognised as such by neighbouring communities” (Articles 1 & 2.2).

Nevertheless, reissue of private concessions restarted promptly, so that today over half the country is leased for oil palm and rubber plantations or to lumbering and mining developments.²⁴ Popular protest has been active, targeted especially to grants of 440,000 ha to Malaysian and American oil palm companies (Siakor, 2012, Green Advocates and FPP, 2012) and to comparable deals to mining giants Chevron Petroleum and BHP. Audits have shown that only two of 68 contracts are even lawful (Valdamis, 2013). This has coerced some retraction in Government protection of deals it has authorised including suspension of another set of unlawfully acquired Private Use Permits for timber extraction involving 2.5 million ha (23 percent of the country area). As in the 1950s, many of the beneficiaries are local and even community elites (GoL, 2012). Civil society, most notably the Sustainable Development Institute in Monrovia, has not been shy to investigate and document cases, bringing home reality that local leaders within poor communities are not immune from taking advantage of poor governance of the law (SDI, 2012).

While allegations of nepotism and corruption plague Sirleaf’s administration, Liberia, like Cameroon and many other states in the region publicly committed to tenure reform. Liberia has pursued this most actively, with production of a draft National Land Tenure Policy, to be approved by end May 2013 (GoL, 2013). The Policy aims, inter alia, to put into law protection of customary rights as Private Land rights, whether recorded or not, and lays particular emphasis upon the identification of community land areas by rural communities to confirm these rights within community-based governance regimes. This would return citizen land rights and localised land governance to broadly the situation they were in between 1923-1956. However, the Policy also pledges to make land available to commercial land investors, and additionally, opens the door for private customary landholders to sell their land in the open market place, threatening major attrition in community lands. So far

²⁴ The National Land Commission acknowledged in January 2013 that 57.5% of the country area is under concession (13.8 million ha) (AFP, 21 January 2013).

in drafts, the Policy also lacks sufficiently protective procedures of discovery prior to state sale of lands presumed to be unowned public lands. Pressures from international investors and allied local elites and shareholders for ample access to land may yet see further modifications. Even with last-minute improvements engineered in post-Policy legal drafting, it seems likely that pro-poor application will be constrained. Nevertheless, civil society and small but significant pockets of support in the Administration, equally suggest that this in turn will meet with reaction and probably legal amendments over time.²⁵

TANZANIA

In highland Tanganyika, German settlement following the Berlin Act in 1855 was so rapacious that the British Government, also land grabbing to the north (Kenya) forced the drawing up of a Delimitation Treaty, 1888. This, together with fierce resistance by coastal Arab and indigenous inland communities to land grabbing by European profiteers forced Germany to declare a militarily-backed protectorate over Tanganyika, Burundi and Ruanda in 1891. By 1896 and 1903 Berlin was trying to halt the profiteering itself, requiring Germans to show cultivation of half the lands they had acquired through one means or another to qualify for freehold entitlement (Henderson, 1965). Forced labour for plantations, road building and railways and imposition of hut taxes added to local grievance, flight and rebellion, including at Maji Maji where 75,000 Africans were killed between 1905 and 1907 for refusing to grow cotton for Germany. Conciliatory plans by the liberal Governor Rechenberg (1906-12) to enable natives to produce cash crops on their own land were rejected by the new plantation sector as reducing the forced labour they needed to support the home economy. More compliant and rewarded chiefs were also appointed to serve the Administration's objectives (Raum, 1965).

On the defeat of Germany in World War I, Tanganyika was handed over to Britain as a mandated territory, Ruanda and Burundi hived off and attached to the Belgian Congo Free State (1920). London immediately issued an Order in Council declaring that existing German-issued freeholds were intact, that the British Crown was owner of all untitled lands, and empowering its new Governor to issue only leaseholds (termed Rights of Occupancy) to new settlers (Land Ordinance, 1923). The League of Nations disputed this development as contrary to the mandate, which was to protect natives, not to colonise the territory (Chidzero, 1961). After five years of debate, the Land Ordinance was grudgingly modified, with redefinition of a Right of Occupancy to include "the title of a native community lawfully using or occupying land in accordance with native law and custom", to be known as a Deemed Right of Occupancy (1928).

In practice there was no equivalency between formally Granted and Deemed rights, Africans continuing to be evicted at will to make way for new waves of settlers and investor schemes between 1930 and 1958. One of the more notorious was the short-lived groundnut scheme (1947-51) which set out to convert five million acres into food and oil production for post-

²⁵ <http://eiti.org/countries> (accessed 1st May 2013).

War Europe, failing, but in the process denuding one million acres of local community lands (Bryceson, op cit.).

Protests at land taking continued with major actions in 1937, 1946, 1953 and 1955 as land taking enterprise such as Uluguru and Sukumaland Schemes took more and more customary property. By the 1950's Tanganyikan farmers were "more ready to resist than they had been in 1905 ... and better organized" (Cliffe, 1972: 13). One dispute eventually came before the Trusteeship Council of the League of Nations (1952), which failed to prove that this was not a strictly internal affair (Mesaki, 2013), and resulting in a meagre amendment of the Land Ordinance in 1954 to the effect that more consultation prior to resettlement was required. Nevertheless, this Meru Land Case was helped catalyse local demands for independence, formation of the first African political parties, and placement of land tenure centre-stage on the emerging agenda of the KANU party led by Julius Nyerere (Nyerere, 1966). Evictions continued for a host of schemes, and in addition for extractive forest and wildlife reserves under a new Public Lands (Preserved Areas) Ordinance, 1954.

Nationalization characterised post-Independence (1961) law, the ultimate title of all land in the country vested in the President as Public Land. Nyerere argued that government was the rightful inheritor of pre-colonial communal tribal tenure, serving in effect as the new super-tribe. Freeholds were abolished in 1963, converted to 99-year leaseholds, in turn converted into Granted Rights of Occupancy in 1969 with limited powers to sell or sub-let. Additional laws were enacted to stamp out landlordism and land commoditisation and concentration, visibly active from the 1950s in most fertile areas (Feldman, 1974).

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In practice, community based tenure steadily evolved in the 1970s and 1980s through radical new rural settlement and development policies which restructured scattered hamlets as formal villages with public services and their own governments, entrenched in The Villages and Ujamaa Villages (Designation, Registration and Administration) Act, 1975 and the Local Government (District Authorities) Act, 1982. New agricultural policy (1985, 1987) directed the Ministry of Lands to issue Village Land Titles to elected village governments, instructed them to in turn issue leaseholds to individual members of the community for their homesteads. Over 600 of 8,219 village governments received such deeds before the strategy was undermined as lacking legal backing (*Daily News*, 8 July 1988).

In the meantime, a contrary policy of land taking afflicted more and more communities, Government forcefully using its ultimate landlord powers aided by enactment of the Rural Lands (Planning and Utilization) Act, 1973. During the 1980s a series of Orders were passed under this law, extinguishing customary rights over large areas to make way for burgeoning state agribusinesses, or to hand over to related investor schemes such as the Canadian Government-backed wheat schemes of Mbulu, or to privatised seed bean and sisal developments, reminiscent of colonial large-scale land schemes of the 1910s, 1930s and 1950s. Those evicted again began to take their grievances to court.

In response the Regulation of Land Tenure (Established Villages) Act, 1992 was enacted, extinguishing all customary rights throughout the country. This was justified as necessary to remove the confusion as to the status of customary lands left when homesteaders had moved into aggregated villages during the 1970s (Maina, 2007). Critics were not slow to declare the law a poorly veiled attempt to rob the population of their lands to hand out to investors, such as the IMF and facilitating World Bank were adamant had to be a condition of further loans to the debt-ridden Government.

The hasty passage of the law was not coincidental. It was designed to counteract the recommendations of a major land investigation commission, reporting to the President at the same time (URT, 1992). The Commission urged the President to surrender ultimate title, vesting this directly in village communities and to vest title over non-village lands including parks and reserves in an autonomous National Land Commission (ibid: 143-150). Civil society support for the Commission report was substantial. In October 1993, the High Court, responding to claims against evictions for state-private schemes, ruled the Land Tenure Act of 1992 unconstitutional. This was upheld following appeal by the Deputy Attorney General in 1994.²⁶ Judge Nyalali of the Court of Appeal based his ruling upon a reinterpretation of the Land Ordinance, 1923, still in force, arguing that its intentions had always been to protect native land rights -

“We have considered this momentous issue with the judicial care it deserves. We realize that if the Deputy Attorney-General is correct, then most of the inhabitants of Tanzania mainland are no better than squatters in their own country” (Judgement, 1994, *Attorney-General versus Lohay Akonaay and Another*, reported in [1995] 2 LRC 399).

During debates for new policy in 1995, Government conceded support for customary rights as property interests but stood firm against surrender of its ultimate title, although allowing caveat that this would be held henceforth on a trustee basis for the nation. Most other recommendations of the Commission were adopted as National Land Policy, 1995 (MLHUD, 1995). Meanwhile neighbouring Uganda picked up the baton and abolished state tenure in its new post-civil war Constitution of 1995.

One of the most important new strategies was to reverse gathering political intention by the post-Nyerere Administration of Tanzania to recentralise governance away from ever-more autonomous village governments. Instead, the 1995 Land Policy declared that village governments would be the lawful land managers of all land matters including issue of customary title within the domains over which they respectively presided.

Additionally, the Policy and eventual Village Land Act, 1999 counteracted rising government practice from the 1980s of recognising a village land area as limited to settlements and farms, excluding the community’s often expansive off-farm lands. Options were laid out through which a community could delimit its territory, including written negotiation and agreement by neighbouring communities (Section 7). Practically, no-man’s lands between

²⁶ *Lohay Akonaay and Another v. The Hon. Attorney-General*, High Court of Tanzania at Arusha, Miscellaneous Civil Cause No. 1 of 1993 (Unreported) and Court of Appeal of Tanzania, Civil Appeal No. 31 of 1994, reported in [1995] 2 LRC 399.

villages, claimable by the State, disappeared. The law reinforced inclusion of communal lands by requiring that these be identified and described in a Register of Communal Village Land (section 13) prior to allocation of individual title to villages for their homesteads (Alden Wily, 2003).

Loopholes remain through which Government and investors since have engineered takings of off-farm lands since. One, mentioned earlier, is liability that remoter woodlands and rangelands can be defined as “unoccupied and unutilised village lands”, defined inconsistently by one of the land laws of 1999 as General Land (Government Land). Even without this, communities have been persuaded with promises of jobs and services to surrender off-farm lands to Government for re-issue to investors (Chachage, 2010). By 2009, President Kikwete, as chair of a major business sector organization, published a new farming policy (*Kilimo Kwanza Resolution*, 2009) including a main objective to amend the Village Land Act, 1999 to more directly free up land for investors. This has not yet met support in the Parliament, and may not, given growing public dismay at continuing evictions in service of public interest which turns out to be mainly private. These range from removing peri-urban communities for housing developments (LRRRI, 2010) to green grabs in the form of Controlled Hunting Areas overlaid on village lands, to a series of semi-coerced surrender of village lands to private companies for large-scale tree planting for companies to earn carbon credits and timber plantations (Maliasili Initiatives, 2012, Noe, 2013).

Enactment of the Land Use Planning Act, 2007, has inadvertently contributed to concern by laying down such complicated planning requirements for villages, that issue of Certificates of Village Land (CVL) has come almost to a halt; without this village governments are practically but not lawfully designated as land managers. By 2011, only 812 of 12,000+ villages had received their CVL.

The Land Use Planning Act, 2007 also eases the path through which Government may remove lands from a village, for planning purposes. This added to provisions from a 2004 amendment of the Land Act, 1999 making it legal for investors who acquire village lands through Government to sub-lease and even sell on their lease. This has made speculative acquisitions easier, investors selling on the land for profit should their enterprises fail. Cases of this began to appear by 2010, in which villages who had been encouraged to surrender off-farm lands in return for social agreements that jobs and services would be provided, lost both lands and these benefits when failing companies sold on the land to other companies with whom the communities have no such deals (Redfern, 2011).

At the time of writing (May 2013), public wariness against legal changes is at an all time high following announcement of the Minister of Natural Resources and Tourism that 1,500 sq. km of village land belonging to pastoralists will be gazetted as a Controlled Hunting Area for lease to a Dubai hunting company, with which leading politicians have long had links (Maliasili Initiatives, op cit.).

The reaction of affected pastoralists was so strong that the Minister felt compelled to publish a two-page defence in local and regional press, claiming he was hurt that

Government's generosity in allowing the 70,000 pastoralists affected to retain 2,500 sq. km was not appreciated (*The East African*, April 20-26, 2013: 30-31). His position replays the Lockean thesis that citizens only secure rights to land on the say-so of the State. This contradicts the terms of the Village Land Act, suggesting that even a decade down the line that the implications of the Village Land Act are not well-absorbed or accepted by some officials and politicians. Press and public reaction was swift and sharp. The most effective appears to have been the return of sack-loads of CCM Party cards (CCM being the ruling party, the former KANU, and which has been in power since Independence). This caused the Prime Minister to recall the decision to gazette the Controlled Hunting Area "for further consultations" (*Tanzania Daily News*, 20 April, 2013). Opposition parties have been quick to support the villagers, adding to political anxiety.²⁷ However, benefits to leading persons could see the decision stand. This would be difficult to implement in a lasting manner, not least given inevitable recognition by Tanzanians in other parts of the country that their own lands could also be at risk from such a precedent.

IV CONCLUSIONS

Above sections illustrate the way in which law both helps and hinders fulfilment of majority rights, in immediate or evolving ways. They also show that the law is imprecise in that there may be less change than reinterpretation to meet strategic ends, whether pro-poor or pro-elite. It is also apparent that the 1890-1990 century saw legal provision for majority land security began better than it ended. Support for land rights on untitled lands plummeted with each phase of state-endorsed land grabbing, and up to the present eats away at laws that purport to provide remedy. While the current rush exacerbates contestation, it does so in a context that has longer origins of social transformation, within which there are advances and setbacks, with rarely complete resolution as to the real safety of majority customary tenure.

We may also see that public protest is not new. Yet, there is a fair chance that civil society could prove more successful today in its claims than enjoyed by past generations. Reasons for this would include that affected persons are being heard in a more supportive international environment, and one that connects more directly with them than the case in the past. Communities are also better linked among themselves and with national and public forums through freer press and ever-expanding mobile phone and internet access. They are also better equipped educationally to argue their case in legal and political terms. With advancing democratization they also have firmer political voice, including the potential to bring down governments. Finally, the boundaries of what constitutes property is steadily escaping the confines of received laws, which seemed for much of the 20th century to be irrevocably dependent upon state-given and state-law bound entitlement.

This does not mean that the conflict of interest that underwrites social transformation and plays out broadly along rich and poor lines is dissolving. On the contrary, land rushes expectedly widen the divide. This is so much so that, as illustrated above, governments who

²⁷ Peter Msigwa, Opposition Representative for Natural Resources, May 3rd 2013 "Hotuba ya mesemaji mkuu wa kambi rasmi ya upinani mhe", Dodoma.

introduced protective measures before the current rush show signs of regretting their benevolence. The fact that they are experiencing difficulty securing reversals or modifications in reform says more about the maturation of the state, including steady separation of executive and judicial powers and more obligatory distance between state and private interests, than a *faux* lessening of conflict of interest in modes of economic growth. Management of the conflict through compromise rather than hope that pressures will lessen, seems the more reliable strategy.

Progress on compromise strategies is however quite limited. For example, there is not much sign of movement, urged for some years by this author and others (Alden Wily, 2007), towards paths of economic growth which enable and require commercial land users to lease directly from traditional owners, and to oblige companies and parastatals to offer significant shareholding in their commercial enterprises to those landowners. More positively, pursuit of the legal grounds upon which this might become necessary does seem to be accelerating. I will focus briefly below, on the most important development in this regard, the right of communities to secure all or part of their lands in common, as a private owner holding the asset in undivided shares.

Legal Constructs for Collective Property

Broadly, there are two routes through which community-derived land rights may be secured; legal declamation or facilitated delimitation and entitlement.

Declamation or Delimitation

The former is superior in that through assent of the appropriate law, millions of rural landholders in a country can move overnight from being permissive occupants of unowned/state lands to being legal owners, without proof of title in registered documentation. This occurred in Botswana in 1968, in Uganda by constitutional provision in 1995, in Tanzania in 1999, and in Burkina Faso and South Sudan in 2009. Untitled landholders in South Africa also secured constitutional acknowledgement of their untitled property interests, entrenched in the Interim Protection of Land Rights Act, 1996.

For this kind of blanket legal declamation to be effective, individuals, families and communities holding unregistered community-derived rights need to be aware of the new legal protection and be availed easy and cheap paths to defend those rights. The law also needs to subject applications for private title to untitled lands to a rigorous procedure of discovery, to be sure that these lands are not already owned customarily. Given the passage of time, restitution of land or cash compensation is also needed to resolve many longstanding abuses of land taking power. In many laws not all these conditions are met.

Domain or Right-Based Delimitation

Moreover, advantageous as declamation is, delimitation on the ground is necessary to refine and double-lock in principle rights. This in turn can occur on a case-by-case basis or through

sweeping definition of vast domains within which customary rights are protected. The domain model builds under colonial practices of setting aside native reserves, particularly adopted in Anglophone colonies. Some tenure reforms in Africa have reconstructed these into as, for example, the *former* homelands in South Africa, tribal lands in Botswana, communal lands in Namibia, village lands in Tanzania or *gestions des terroirs* in Senegal. The domain approach – at least in theory - makes it less necessary for each customary landholder (individual, family or community) to specifically identify and secure its parcels. In application, this may not be the case, such as in respect of rangelands in Namibia, Botswana and Zimbabwe, which may be leased to private persons or enterprises and without the specific permission of villages who claim these areas as their local commons. Permission may be required, but to a remote tribal-wide land board, and which in practice reports upwards to central Government more than to its constituent communities.

Cases where the domain model does work well are Sierra Leone, Ghana, Togo, Burkina Faso and Benin, and especially Tanzania. In the last case this is specifically due to each and every village community operating an elected government with full land powers, and which cannot easily, or legally, be sidestepped. In Sierra Leone and Ghana (and also Zambia), the fact that this authority is vested in chiefs does not necessarily advance accountability to community members, with sales of customary land by chiefs (lawfully or otherwise) quite widespread. It is also helpful in the Tanzanian land law paradigm that no non-member of the village may acquire land directly; this may only be accomplished through Government first acquiring that land from the village (and which needs its permission) and then leasing it to the applicant. While legal shortcomings have been remarked above, communities arguably feel more protected in village lands in Tanzania than they may feel, for example, in Mozambique, Angola and Uganda in the absence of empowered village-level land authority and associated historical development of community land areas. Practically speaking, customary landholders in such states need to identify and physically delimit their lands, to secure the same level of protection.

Creating Domains for Tenure Security

Not surprisingly, a quick route for this is first to identify the overall community land area and bring this under a single collective entitlement. This is the approach being followed by some communities in a number of African countries, usually with INGO or NGO assistance; this has been undertaken in a range of cases in South Africa (with help of the Communal Properties Association Act, 1996), in Mozambique, with now around 320 of 3,000 communities securing formal entitlements for community lands, and more recently undertaken in Madagascar, Angola, Kenya, Uganda and Liberia. Needless to say, the pressure of large-scale land acquisitions encourages this further, with community land delimitation also being adopted in some countries precisely to coerce new policy and legal provisions; the case in Sudan, Cameroon, Democratic Republic of Congo, Ghana, Malawi, and Gabon.

Differences exist in how easy delimitation of collectively owned lands is to undertake. Broadly, this is least easy where a community must form an alternative legal entity in order to be a legal person. This was the model adopted in South Africa by the Communal Property

Associations Act, 1996, and adopted into the Uganda Land Act, 1998. The former saw minor uptake due to the complexities and costs involved, while no Ugandan community has yet seen fit to create a Communal Land Association for this purpose. More practical approaches are found in the laws of Tanzania, Burkina Faso, Benin and South Sudan where first, a community exists by name as a legal person, and second, in the process of formalising customary rights may register these as owned by individuals, families, groups of the whole community. Moreover, this process in all three countries is to be performed at community level, using community-controlled land registers.

The Old Conundrum: Communal or Individual Rights

These developments bring to the fore necessary decision as to what legal forms collective entitlement should take. A *first* option is issue of collective title for the entire community land area, most immediately suitable to hunter-gatherers and pastoralists. This has most in common with Native Title as adopted in especially Latin America and Australasia to meet the demands of indigenous peoples (resulting in 20% of Australia, 15% of Bolivia, 13% of Brazil, 5% of New Zealand and 3.4% of The Philippines now under native title).

A *second* option is for the community to secure collective root title out of which individual and family usufructs are maintained, including those held effectively in perpetuity. A *third* option is for the community to seek collective entitlement only for those off-farm lands which it owns and wants to continue owning collectively, enabling individuals to secure private entitlement for their homesteads. A *fourth* approach is for a community to eschew any level of collective entitlement altogether, settling for entrenchment of community-based jurisdiction over all holdings within the traditional domain, to be administered on the basis of custom, or more accurately, modern-day community norms. This tends to appeal where little to no common lands remain but where communities prefer to use traditional rather than state laws to regulate their land relations, including to whom a villager may transfer his lands, without outraged social sanction.

Not all new land laws in Arica provide easily for these choices, best articulated in legislation in Tanzania, Burkina Faso and Benin, and in other ways practised in Ghana in the form of customary freehold entitlements. Other new laws tend to make the choice for communities, equating customary land with an all-inclusive single collective title, the case for example in Mozambique and Angola. Alternatively, even best practice laws may weaken and confuse routes of formalization by offering both statutory and customary routes of formalisation, the latter competing poorly with well-established statutory entitlements. This is the case in Uganda, and more so in Namibia and Botswana where such choices increasing divide rich and poor, especially in respect of securing formalized rights to off-farm lands, effectively limited individualized statutory entitlements.

The Underlying Conundrum: Commoditisation

Decisions around the above tend to also impinge profoundly upon the central conundrum for many officials and indeed, community members, as to whether acknowledgement of

customary rights as real property interests means that the law must legalise outright sale of those interests as autonomous commodities? This has been debated in the making of new land laws in most African states, with not always certain resolve, and continues to be an issue in current tenure debates in Kenya, Liberia and Namibia (and likely elsewhere). The reiterated concern is that this opens the way to wanton attrition in community lands, including distress sales by poor families. While chiefs in Ghana, Sierra Leone, Zambia and Malawi may limit this, they may also be party to unwarranted sales of non-privatised community lands intended for later generations.

Protection of rights from undue sales is probably best achieved in Tanzania, reminding us once again of the integral links between effective support for customary rights and developed community-based governance. This is because effectively limitations derive largely through a combination of active institutional governance within communities, legal strictures against transfers without the village government's permission, the outlawing of sales to most outsiders (NGOs or churches operating in the village are an exception) without Government first acquiring the land, and a legal condition that each community must ensure that every household has land to live on (Alden Wily, 2003).

As observed earlier, there is some pressure external to communities but probably also within communities to remove these limitations. The rapidly changing nature of rural communities, often with large numbers of absentee, educated younger members, and profoundly linked to urban areas in terms of livelihood and other supports, tends to make debates around commoditisation heated, accelerated by the presumptions many make that investors are queuing up to buy their lands for large prices. Such incentives could be just as responsible today as a burgeoning sense of land injustice, for growing demand in so more corners of the continent for acknowledgement of customary rights as private property interests.

Final Word

The main ideas that this paper has sought to illustrate are *first*, reminder of the old truth that national law is an instrument of state, and is constructed and interpreted in the image of its policies, and that as these alter, interpretation of the law also alters; *second*, that land rushes characterise expanding capitalism, and with history behind us, can be expected to not only repeat themselves from time to time, but to also impact negatively upon institutionally and legally weaker majority agrarian land interests; and *third*, that each land rush has its distinctions, and in the current rush, this includes both a (partially) altered legal environment for majority land rights in the selected example region, Sub Saharan Africa, and a fast-altering socio-political environment, with a stronger possibility of more protective legal remedy eventually emerging.

Fourth, this paper has also attempted to show that a crucial legal tenure shift is towards heightened demand and some delivery of customary security approaches which at last look beyond the farm, tackling the tenure of lands that have customarily been usually collectively owned at extended family and especially community level. This is a new ambition of land

reform, and accelerated, if not originally prompted, by the land rush. Main debates and distinctions among country strategies thus far have been around how accessibly this is provided for. Resistance against legal routes of collective entitlement can also be anticipated as this extends to a degree that interferes with persisting landlordist ambitions of Governments. This is already being felt in countries where legal regimes best secure untitled customary lands in general. How far provisions for securitisation in principle and on-the-ground delimitation and entitlement of community lands in particular will multiply will be a main indicator within five to ten years as to how far land law is proving more friend than foe to majority rural poor, in the face of the contemporary land rush. In this regard, politics and politicisation through struggling but expanding devolutionary democratisation will be key.

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