

ESSAYS IN AFRICAN LAND LAW

Robert Home (editor)

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Essays in African land law

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PREFACE

Anglia Ruskin University has a growing number of students – both undergraduate and postgraduate – from the African continent, and UK students of African descent, and is proud to promote research that may aid African development. Professor Home has long experience of research on land issues in Africa. Since joining the University in 2002 he has managed a research project for DFID on land titling, which resulted in the book *Demystifying the Mystery of Capital* (2004), and undertaken research and professional consultancies in several African countries. He was invited by the University of Pretoria to edit these two books on African land law, as part of a publishing project on the rule of law sponsored by the World Bank, and the University is pleased to be associated with the undertaking.

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ACRONYMS AND ABBREVIATIONS

AALS	Affirmative Action Loan Scheme
ACHPR	African Commission on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
AU	African Union
AUBP	African Union Border Programme
BLCC	Bakweri Land Claims Committee
CBD	Convention on Biological Diversity
CBO	Community-Based Organizations
CDC	Cameroon Development Cooperation
CEFRD	Convention on the Elimination of all Forms of Racial Discrimination
CEMIRIDE	Centre for Minority Rights Development
CLEP	Commission for the Legal Empowerment of the Poor
CRC	Convention on the Rights of the Child
DFID	Department for International Development
DRC	Democratic Republic of Congo
EAC	East African Community
EDPRS	Economic Development and Poverty Reduction Strategy
EEBC	Eritrea-Ethiopia Boundary Commission
FLTS	Flexible Land Tenure System
FPIC	free prior informed consent
GIS	Geographic Information System
GLTN	Global Campaign on Secure Tenure and the Global Land Tools Network
HIV	Human Immunodeficiency Virus
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICSID	Settlement of Investment Disputes
ILO	International Labour Organisation
LAC	Legal Assistance Centre
LPA	Liberal Peace Agenda
LRO	Land Right Office
LRP	Land Reform Programme
LTO	Land Titles Ordinance
MCC	Mogadishu City Charter
MDG	Millennium Development Goals
MINITERE	Ministry of Land, Environment, Forestry, Water and Natural Resources
NGO	Non-Governmental Organisations
NHAG	Namibia Housing Action Group
NIE	New Institutional Economics
OAU	Organisation of African Unity
OHSIP	Oshakati Human Settlement Improvement Project
OLL	Organic Land Law
OTC	Oshakati Town Council
OVCs	Orphans and Vulnerable Children
SADC	Southern African Development Community
SDFN	Shack Dweller Federation of Namibia
SERAC	Center and the Center for Economic and Social Rights
SFT	Settlement Fund Trustee
SG	Surveyor General
SWA	South West Africa
SWAPO	South West Africa People's Organisation
T&CPA	Town and Country Planning Act
TCCF	Technical Committee on Commercial Farmland
TLA	Tribal Land Act
UK	United Kingdom
ULML	Urban Land Management Law

UN	United Nations
UNDP	United Nations Development Programme
UNDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

EDITOR'S INTRODUCTION

The importance of land law for the rule of law in Africa can hardly be questioned. Population pressures and competition over access to land and resources generate much conflict, complicated by the historical legacy of colonial laws and land-grabbing, and by post-independence land law reforms. The international development agencies increasingly fund projects related to land law, policy and administration, with the Food and Agriculture Organisation (FAO) and Habitat each maintaining specialist land tenure units, and the AU and SADC formulating land policy frameworks.

This book on themes in African land law is one of a pair, the other presenting local case studies. It is not so easy to achieve an overview, nor to find specialist writers in the field. Land law has traditionally been regarded as a difficult subject to teach, and specialists are fewer in the law departments of African universities than one might expect. A quick scan of the index to fifty years of the *Journal of African Law* reveals less than one article a year with 'land' in the title, the most popular topics being the Nigerian Land Use Decree and tribal tenure in Botswana. Africa is less well served than other continents by specialist property law networks, and less represented at international academic conferences in the field. While Stellenbosch University in South Africa has a programme training academic land law specialists, that is an isolated initiative. The search for contributors to these books produced more non-Africans and those of the African diaspora than Africans working in their home country. Nor is African land law the exclusive preserve of lawyers, so other professions have represented, such as land surveyors, land economists and planners, as well as those working in NGOs. The list of authors thus includes a Cameroonian based in the USA, two Ghanaians and a Zimbabwean in UK academia, and within Africa a Tanzanian in Botswana and a Zambian in Namibia. With much research coming from outside the continent, non-African authors include three British, one French (geographer), one French-Canadian, one Texan (geographer), and one Dutch (land surveyor).

The two books attempt a balanced regional and thematic coverage. The table below presents basic statistics on the countries discussed, giving some pointers to their diversity, in population size, land area and population density, but a dozen countries from a continent that has over fifty inevitably means omissions.

Table 1: Basic statistics by country

Source: 2008-2010 official statistics

Country	Area (000 sq.km.)	Population (million)	Density per sq.km	GDP per capita per annum US\$000
Botswana	581.7	1.9	3.4	14.1
Cameroon	475.4	18.9	39.7	2.1
Ghana	238.5	23.8	99.9	1.6
Kenya	580.4	39.0	67.2	1.7
Liberia	111.4	3.9	35.5	0.4
Namibia	825.4	2.1	2.5	6.6
Nigeria	923.8	154.7	167.5	2.3
Rwanda	26.3	10.7	401.4	1.1
Senegal	196.7	13.7	69.7	1.8
Somalia	637.7	9.4	6.7	0.6
Tanzania	945.2	43.8	46.3	1.4
Zimbabwe	390.8	12.5	26	0.4

Chapter one (by John Donaldson) addresses the legal basis for national boundaries in Africa. The Cairo Declaration of the OAU in 1964 confirmed the existing colonially drawn boundaries, interpreted through the *uti possidetis* and intangibility principles. The limitations of treaty wording and survey methods meant that many boundaries were unclear, and took not much account of local environmental and social realities. Terms such as ‘thereabouts’ in boundary treaties had freed the colonising powers to interpret the territorial extent of African political entities as best suited their interests, and few boundaries were a tangible reality on the ground. The presence of mineral concession areas and white settler estates affected the methodology used to define boundaries, with the DRC/Northern Rhodesia boundary an example of costly and precise delimitation because of the valuable mineral assets at stake. Donaldson argues for greater geographical clarity to avoid future disputes, as population density rises and pressure on land grows. Neighbouring states, however, may be understandably reluctant to embark upon boundary definition programmes that may provoke the very disputes they are intended to avoid – under what one might call the ‘let sleeping dogs lie’ principle.

Chapter two (by Jeremie Gilbert and Valerie Couillard) brings the viewpoints of a geographer and lawyer respectively, and their experience with the Forest Peoples Programme, to the topic of indigenous peoples’ land rights, which have emerged as a significant human rights issue with the UN Declaration on the Rights of Indigenous Peoples in 2007. The ACHPR has instituted a working party on the subject, with a somewhat different approach from the ‘first inhabitants’ approach followed in other parts of the world, and the historical context shows how international legal rules were designed by colonial powers, linking their self-defined civilising mission with the later doctrine of trusteeship. The authors explore the impact of the Endorois case, where the ACHPR in 2009 upheld local community rights against displacement by the government of Kenya for a nature reserve. At present few African countries recognise even the

existence of indigenous peoples on their territories, a situation that creates much potential for future disputes and human rights challenges.

Chapter three (by Ambe Njoh) presents a narrative of one such dispute, the long-running Bakweri land rights case in Cameroon, which was unique in having three different colonial masters – the Germans, British and French. The Bakweri were displaced from their ancestral lands for German plantation estates, which were taken over after the Second World War by the Cameroons Development Corporation, and successive governments have maintained their control. A committee to pursue the return of the Bakweri lands, encouraged by the Mabo case in Australia and others in the 1990s, took their claim successfully to the ACHPR in 2002. While less publicised than other indigenous minority land claims, the Bakweri case has implications beyond national frontiers. Postcolonial states have proved even less tolerant of customary entitlements than their colonial predecessors, and the Government of Cameroon has not complied with the judgment, showing a disregard for the rule of law in the form of the treaty which it had itself signed. One can, however, understand its reluctance to embark upon sorting out the unholy mess: one can turn fish into fish soup, but it is harder to turn the fish soup back into fish.

Chapter four (by Siraj Sait) explores how the ‘grand narrative’ of African land law generally overlooks Islamic land law, a developed land tenure framework which potentially applies to over a third of the continent. No country with significant Muslim populations is without the influence of Islamic land laws or principles, official or informal, however varied or mutated. As Islamic land law evolved in Africa, it often interlocked with customary, colonial and statutory systems, applying distinctive concepts that are still discernible today. He discusses country case studies of Kenya, Tanzania, Nigeria and Senegal.

Chapter five (by Ben Chigara) explores the possibility of a jurisprudence in Africa that actually draws upon indigenous African principles. Comparative law, and the theory of legal transplants, can be seen at work in the jurisprudence of the European Courts of Justice and Human Rights, where different legal traditions have to be interpreted together - so why not in African regional courts? He examines the Mike Campbell case, where the SADC court supported a narrow protection of private property rights (specifically the rights of white commercial farmers) against confiscation by the Zimbabwean state without compensation, but failed to acknowledge the longer historical perspective, in that the land had originally been confiscated without compensation from the indigenous population by white settler interests. Chigara argues that the principle of *humwe* (a Shona word but with equivalents in many African languages) should be accorded recognition in the jurisprudence of the AU and regional courts of justice.

Chapter six (by Oludayo Amokaye) explores the important relationship between land and mineral resources, both of which Africa has in abundance. In oil-rich Nigeria, the colonial government’s control of land in Northern Nigeria was extended to the whole country by the Land Use Decree of 1978, and facilitated compulsory acquisition of land from communal or individual owners for re-allocation to licensed mineral prospecting companies. After discussing the relevance of theories of

economic efficiency and distributive justice, he argues that the 1999 constitution does not guarantee fair and adequate compensation, and that the compensatory regimes are complex, inefficient and unsatisfactory.

Chapter seven (by Robert Home) explores the idea of a pro-poor land law from a historian's perspective, locating African land law within the context of colonial intervention. A situation of legal pluralism was created through the ideology of the dual mandate, which distinguished between individual property rights for settler interests and urban areas, and customary tenure in the so-called African reserves in the rural areas with poorer soils. He examines who are the stake-holders in land law, the postcolonial rise of human rights law, and Hernando de Soto's advocacy of property rights as a route to the legal empowerment of the poor.

The next two chapters, eight (by three women lawyers – Leah Onyango, Anne Omollo and Elizabeth Were) and nine (by three NGO workers – George Anang'a, Awuor Oluoch and Colleta Otieno), deal with property rights as they affect two vulnerable groups – women and orphans. Kenya's colonial history established two sets of laws: one for land occupied by 'natives' under largely unwritten customary and communal rules, the other for land occupied by settlers, borrowed heavily from British law, and emphasising individual rights. Women's access to property under customary law often relegates them to a subordinate position to men, and makes unmarried women and widows especially vulnerable. For those children orphaned by HIV/AIDS and other causes, one of the biggest challenges are laws that disempower them in inheriting their parents' properties, as family members may exploit their guardian role.

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The financial support of the World Bank made possible two author workshops, creating the opportunity for many of them to meet in person for the first time, and build a group commitment to the enterprise. The first was held at Kisumu (Kenya) in May 2010, the second at Birkbeck College (London) in July 2010. I owe a special debt of thanks to two people: Serges Kanga, who steered the project and workshops, and Rory O'Hara, who was independent facilitator at both workshops. In no particular order, I also thank the following: Andre van der Walt, whose invitation to visit Stellenbosch University in 2008 indirectly led me to the project; Danie Brand and Christof Heyns of Pretoria University, who master-minded it; those who helped organise the Kisumu workshop (Bob Awuor of the African Community Development Foundation, Dan Kaseje and Rose Olayo of Great Lakes University Kisumu); Patrick McAuslan for offering a Birkbeck Collage venue for the second workshop; the independent chapter reviewers (Diane Dumashie and Ambreena Manji); the sub-editor, Oliver Fuo; and Tom Mortimer (my head of department at Anglia Ruskin University), Hilary Lim (University of East London), and Tatiana Beloborodova, who encouraged me throughout.

Robert Home

London

September 2011

PERCEPTIONS OF LEGAL AND GEOGRAPHIC CLARITY: DEFINING INTERNATIONAL LAND BOUNDARIES IN AFRICA

John W Donaldson

1 Introduction

In 1905 King Victor Emmanuel III of Italy was approached by the British and Portuguese governments to arbitrate their disputed boundary between the British claimed territory of North-West Rhodesia (now western Zambia) and Portuguese West Africa (Angola). The boundary had been originally defined in an 1891 Anglo-Portuguese treaty as the western limit of Barotseland (Lozi) kingdom, since the Lozi Litunga (or king), Lewanika, had agreed to be under the British sphere of influence.¹ In preparation for the case, British officials undertook research in areas west of the upper Zambezi river, interviewing local leaders and taking evidence concerning the influence of local chiefs who paid tribute to Litunga Lewanika, or recognised him as their paramount chief. After reviewing the evidence presented by both sides and assessing the respective territorial claims, King Emmanuel simply placed the boundary between the British and Portuguese territories north of the Kwando river along three lines of latitude and longitude, admitting:

Concerning delimitation of the territory over which King Lewanika reigned as paramount chief, all precise delimitation is impossible due to the lack of separating geographic features, the imperfect knowledge of the area, because of the notorious instability of tribes and their frequent intermingling (circumstances that were admitted also by the Marquis of Salisbury and the Marquis of Lansdowne), it is necessary, where natural lines are lacking, to have recourse to lines of geographic convention.²

The Barotseland arbitration encapsulates the abrupt clash of politico-territorial models that marked European imperialism in Africa.

¹ For overview of the case, see Royal Geographical Society 'The Barotse Boundary Award' (1905) 26 *Geographical Journal* 201 - 204.

² UN 'Award of 30 May 1905: The Barotseland Boundary Case (Great Britain, Portugal)' (1905) XI *Reports of International Arbitral Awards* 69.

Kopytoff explains that precolonial African political entities were usually separated by frontier zones of varying widths. This spatial arrangement was an essential characteristic of political organisation across much of precolonial Africa, as those individuals or groups that were cast out of core areas were then able to form new political organisations within the frontier zones.³ A fixed linear boundary separating equal political entities would have eliminated such frontier zones, and were not required on the less densely populated African landscape. In the case of large expansionist empires both in Africa and elsewhere, the limits of imperial territory would not have been viewed in a modern sense as the division of two legally equal states, but rather as the limit of the empire's influence, beyond which was simply people and territory that had not yet been brought under imperial influence. The division of land at the village and familial scale was certainly nothing new in precolonial Africa where space within homesteads was strictly ordered. Ancient Egyptians even developed sophisticated techniques for land survey and registration. But while the division of political territory was not new to precolonial Africa, Mbembe suggests that this division was facilitated by 'boundaries capable of infinite extension and abrupt contraction.'⁴

Despite popularised notions of European diplomats drawing lines across small scale maps of Africa, the intersection between nineteenth century imperialism and precolonial African political geography was more complex and nuanced particularly in relation to boundary-making. While imperial interests certainly took precedent over those of the precolonial African states, as the Barotseland arbitration reveals there were some attempts by colonial powers to determine boundaries based on the indigenous political states. Shaw challenges the idea that the European imperial powers considered the African continent to be *terra nullius* (land without sovereign) since the predominate method for acquiring title to territory was through acquisition agreements made with local rulers, indicating that European agents must have recognised some degree of legal sovereignty.⁵

In the cases of African territory acquired by European imperial powers through treaties with indigenous political leaders (rather than through conquest), it is overly simplistic to assert that those African leaders had no concept of what their agreements with the imperial powers implied. Many saw it as an opportunity to increase their own power over neighbouring groups, securing political allegiance to a powerful ally or beneficial commercial arrangement.⁶ However, most pre-imperial African leaders would have had little idea what the treaties they agreed with European

³ I Kopytoff *The African frontier* (1987) 10.

⁴ A Mbembe 'At the edge of the world' (2000) 12 *Public Culture* 263 - 264.

⁵ MN Shaw *Title to territory in Africa* (1986) 36 - 38.

⁶ GN Uzoigwe 'European partition and conquest in Africa' in AA Boahen (ed) *General history of Africa VII* (1985) 31 - 33.

representatives might mean in the longer term. This is not to mention the serious legal questions that would be raised concerning the validity of those agreements, the legal capacity of European officials presenting the agreements, any coercive activity, ambivalent wording of documents and inherent prejudice towards written documentation, all of which have been exposed by McEwen.⁷

Aside from their dubious legality, the so-called treaties agreed with local African political leaders were (often deliberately) vague on the geographic extent of those political entities.⁸ This gave the European colonial powers *carte blanche* (quite literally) to interpret the geographic extent of territory ceded by local political leaders as they saw fit. In some cases, the extent of territory controlled by local leaders mentioned in these treaties was left vague or was simply dictated by the European agent concluding the agreement. For example, the extent of Chief Kawinga's territory in part of what is now Malawi as defined in a 15 June 1891 agreement, was determined by John Buchanan of the British South Africa Company, acting as vice consul of Nyassaland.⁹ Take this remarkable statement opening the 3 December 1886 agreement between Great Britain and Zanzibar that defined the limits of the Sultan's dominions:

I am instructed by Her Majesty's Government to communicate to your Highness the particulars of an Agreement which has been entered into between the Governments of Great Britain and Germany for the purposes of delimitating the extent of the territory which they are prepared to recognise as under your Highness' sovereignty.¹⁰

Another example, from an area of north-eastern Zambia, is the 30 September 1890 definition of Kasembe's territory, in an agreement with a representative of the British South Africa Company:

Boundaries thus defined: 'Bounded on the west by Lake Moero and the Luapula River; on the south by latitude 10° 30' (or thereabouts); on the north by the Kalongwizi River and by latitude 9° 20' (or thereabouts); on the east by east longitude 30° (or thereabouts).'¹¹

Left deliberately vague, with terms such as 'thereabouts' or using geographical terms unlikely to have been familiar to African leaders, the European imperial powers gave themselves the privilege of interpreting the territorial extent of African political entities as best suited their interests.

⁷ AC McEwen *International boundaries of East Africa* (1971) 12 - 16. See also A Allott, 'Boundaries and the law in Africa' in CG Widstrand (ed) *African Boundary Problems* (1969).

⁸ McEwen (n 7 above) 16.

⁹ E Hertslet *The Map of Africa by Treaty* (1909) 189.

¹⁰ Hertslet (n 9 above) 754.

¹¹ Hertslet (n 9 above) 189.

Just as the definition of land provides the constitutive aspect of a title deed, so an international boundary provides the definition of territory as the foundation of state sovereignty, from which subsequent land rights flow.¹² Colonial administrations tended to hold that precolonial African conceptions of communal land rights ‘implied a lack of advancement; an “early” stage’ and were therefore more easily expropriated,¹³ just as the division of territorial polities by zonal frontiers was considered at the time of the initial territorial division of Africa to indicate more primitive political development.¹⁴ Chanock reviews the recommendations of the British colonial administrator Lord Hailey who in 1938 encouraged demarcation of communal land and ‘knew that some form of survey was the essential pre-condition to the definition of any form of title.’¹⁵ Chanock notes that ‘the administrative resources of the colonial regimes in Africa were generally not up to the kind of survey required to give indefeasible title.’¹⁶

While purporting to bring stability to the political landscape of Africa through the imposition of fixed boundaries,¹⁷ the legacy of boundary definition across Africa is filled with geographic ambiguities, since colonial administrations never provided any consistency in the definition of inter or intra-colonial boundaries. Instead of inheriting clearly defined territorial spaces at independence, post-independent African governments were left with international boundaries subject to wide range of definitions. African governments have been slow to address the clarity of boundary definition, sometimes leaving the difficult task of interpreting the ambiguous definitions left by colonial administrations to the International Court of Justice. The problems of geographic interpretation are, however, just as relevant for land rights below the state level, where boundary disputes are just as prevalent, and often just as violent, as those between neighbouring states. According to Unruth:

¹² Shaw indicates that ‘sovereignty itself, with its retinue of legal rights and duties, is founded upon the fact of territory. Without territory a legal person cannot be a state.’ MN Shaw *International law, fourth edition* (1997) 331.

¹³ M Chanock ‘A peculiar sharpness’ (1991) 32 *The Journal of African History* 70.

¹⁴ See especially: AP Brigham ‘Principles in the determination of boundaries’ (1919) 7 *Geographical Review* 201 - 219. The historical distillation from frontier zones to linear boundaries has also been reviewed by numerous international lawyers and political geographers in a variety of contexts outside Africa. See especially JW Donaldson *Marking territory* (PhD thesis, Durham University, 2010) 47 - 57; SB Jones ‘Boundary concepts in the setting of place and time’ (1959) 49 *Annals of the Association of American Geographers* 241 - 255; LKD Kristof ‘The nature of frontiers and boundaries’ (1959) 49 *Annals of the Association of American Geographers* 269 - 282; JG Ruggie ‘Territoriality and beyond’ (1993) 47 *International Organization* 139 - 174.

¹⁵ Chanock (n 13 above) 74.

¹⁶ Chanock (n 13 above) 74.

¹⁷ Although focusing on the Hausa in northern Nigeria and Niger as distinct cultural and political entities, Miles did find, contrary to the general assertion that the division of West Africa by colonial boundaries was an ‘unmitigated evil,’ that ‘Among the people most directly affected – the borderline Hausa – there is rather a continued appreciation that the partition heralded an end to the incessant warfare waged between surrounding and encroaching kingdoms.’ WFS Miles *Hausaland divided* (1994) 75.

Effective boundary demarcation is a large and confusing problem, not only for countries (and subunits), but also for concessions, individual deed holders, tribal lands, and state and public lands. In a number of cases how much land exists in the various countries and concessions is unknown. In others, mistaken numbers are used to calculate such areas ... The overall situation is that sub-national boundaries exist in severe disarray.¹⁸

The primary role of any land boundary is to prevent conflict, but this depends upon the respect given to it by the neighbouring parties (whoever they might be). In order to be respected, a boundary requires both recognised legal validity and clearly identifiable geographic position. Clear definition of international boundaries, just like the clear definition of a land plot, does not lead inevitably to the physical isolation of that geographic area (through fencing, barriers or walls), or the termination of existing cross-border administrative regimes.¹⁹ Nor does it presume a homogeneity of rights within each neighbouring geographic area, as rights may be shared or managed cooperatively.²⁰ These are subsequent political decisions concerned with how the boundary operates after it has been established.

This chapter will suggest that, given the constitutive role played by boundaries in land and territorial rights, a lack of geographic clarity in their definition actually undermines the legal validity of that title, by leaving areas open to overlapping claims and creating the opportunity for dispute. The chapter will first explore that relationship between the legal continuity of inherited title to territory and its geographic definition in relation to international boundaries in Africa, by critically assessing the geographic assumptions imbedded in the *uti possidetis* doctrine and in the often misinterpreted 'intangibility' principle most famously expressed in the 1964 Cairo Declaration of the OAU. It will then examine some of the inconsistencies in colonial boundary-making practices that continue to cause disputes at a variety of social, political and geographic levels across Africa's international boundaries, disputes that frequently expose other underlying tensions between neighbouring states. The inconsistent boundary-making methodology used by colonial administrations was often linked to issues of land use and economic value. In this regard, geographic clarity of title through well-defined boundaries has often been used as a tool by powerful actors for securing more durable land rights that

¹⁸ JD Unruth 'Land rights in post-war Liberia' (2009) 26 *Land Use Policy* 428.

¹⁹ Ratner recalls that the Burkina Faso-Mali judgment called for cross-border authority to be discounted if in conflict with the 'clear line of title but suggests that the ICJ 'does not make clear how to handle such *de jure* cross-border authority.' SR Ratner 'Drawing a better line' (1996) 90 *American Journal of International Law* 607.

²⁰ Witness the sharing of managerial responsibilities in the transboundary parks across southern Africa or the unitisation agreement between Equatorial Guinea and Nigeria over the Ekanga/Zafiro oil field that straddles their maritime boundary. Less well-known (and less transparent) are the informal arrangements dealing with mineral deposits that straddle international land boundaries, such as the copper concession areas along the DRC-Zambia boundary.

are less likely to be disputed. While land survey and boundary demarcation may be considered 'technical' exercises,²¹ the lesson to be drawn from international boundary practice is that geographic clarity should be seen as functionally equivalent to legal validity in order for boundaries to fulfil their primary role in the prevention of disputes.

2 *Uti possidetis* and the intangibility principle

Since 1957, the beginning of formal de-colonisation in Africa, the ICJ has adjudged eight international land boundary disputes (excluding maritime boundary and island sovereignty disputes), of which no less than five have been located in Africa.²² These are as follows: Burkina Faso/Mali 1983 - 1986,²³ Libya/Chad 1990 - 1994,²⁴ *Cameroon v Nigeria* 1994 - 2002,²⁵ Botswana/Namibia 1996 - 1999²⁶ and Benin/Niger 2002 - 2005.²⁷ Three international arbitrations since 1957 dealing directly with questions of land boundary definition have involved at least one African state: Egypt-Israel 1988,²⁸ Eritrea-Ethiopia 2002 - 2008²⁹ and the Abyei arbitration (Sudan) 2009.³⁰

Since the 1986 judgment in the Burkina Faso/Mali case, the resolution of international boundary disputes in Africa has been dominated by one overriding international legal principle, originally known by the Latin maxim, *uti possidetis ita possidetis*.³¹ The short-hand term '*uti possidetis*' is now used in international law as reference to a very specific interpretation of that original Latin maxim. Lalonde explains that two differing interpretations were debated by early jurists: *uti possidetis de facto* and *uti possidetis juris*.³² The former refers to recognition of the *de facto* possession

²¹ JW Donaldson & A Williams 'Delimitation and demarcation' (2008) 13 *Geopolitics* 687 - 690.

²² A ninth case (also from Africa) concerning a land boundary dispute between Burkina Faso and Niger was submitted to the ICJ in July 2010.

²³ *Frontier Dispute (Burkina Faso/Mali)* ICJ (22 December 1986) (1986) ICJ Reports 1986.

²⁴ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* ICJ (4 February 1994) (1994) ICJ Reports 1994.

²⁵ *Land and Maritime Boundary Between (Cameroon v Nigeria with Equatorial Guinea intervening)* ICJ (10 October 2002) (2002) ICJ Reports 2002.

²⁶ *Dispute over Kasikili/Sedudu Island (Botswana/Namibia)* ICJ (13 December 1999) (1999) ICJ Reports 1999.

²⁷ *Frontier Dispute (Benin/Niger)* ICJ (12 July 2005) (2005) ICJ Reports 2005.

²⁸ *Award in the Dispute Concerning Certain Boundary Pillars between the Arab Republic of Egypt and the State of Israel* Arbitral Tribunal (29 September 1988) (1988).

²⁹ *Decision on the delimitation of the border between Eritrea and Ethiopia* Eritrea-Ethiopia Boundary Commission (EEBC) (13 April 2002) (2002).

³⁰ *Final Award of Abyei Arbitration (Government of Sudan/Sudan People's Liberation Movement-Army)* Arbitral Tribunal (22 July 2009) (2009).

³¹ The term is loosely translated 'as you possess so you shall possess'. Indicating that the merits of boundary cases are often over-shadowed by the confirmation or non-confirmation of international legal norms, Ratner suggests that 'the ICJ's pronouncement on the contours of *uti possidetis* in the Burkina Faso/Mali case are now the primary source for that rule ...'. SR Ratner 'Land feuds and their solutions' (2006) 100 *American Journal of International Law* 814.

³² S Lalonde *Determining boundaries in a conflicted world* (2002) 30 - 32.

of territory and latter to the possession of territory through recognised legal title (*juris*). International law has developed to give deference to the later over the former so that the term *uti possidetis* now refers to *uti possidetis juris*. In its judgment in the Burkina Faso-Mali *Frontier* case, the ICJ asserted that *uti possidetis* was a general principle of international law, characterised by the 'pre-eminence accorded to legal title over effective possession as a basis of sovereignty.'³³ *Uti possidetis* was described by the Chamber as follows:

It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.³⁴

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitation between different administrative divisions or colonies of the same sovereign.³⁵

The Chamber admitted that *uti possidetis* could be in tension with another general principle of international law, that of self determination.³⁶ It was adamant that *uti possidetis* provided the most stable territorial platform for the peaceful succession of sovereignty to post-independence governments in Africa.

... the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by so much sacrifice.³⁷

The subject of *uti possidetis* as a legal principle in post-independence Africa has generated much discussion among international legal scholars, in debates about the macro-geography of post-independence Africa, role of pre-colonial polities/identities and legitimacy of colonial territorial title.³⁸ This chapter does not repeat the analyses, nor does it purport to address the tension between *uti possidetis* and self determination. Instead, it will explore how the nature of *uti possidetis* is imbued with geographic assumptions about the definition of territorial title relating to localised/micro-territorial boundary definition.

³³ *Burkina Faso/Mali* (n 23 above) para 23.

³⁴ *Burkina Faso/Mali* (n 23 above) para 20.

³⁵ *Burkina Faso/Mali* (n 23 above) para 23.

³⁶ See *Burkina Faso/Mali* (n 23 above) para 25.

³⁷ *Burkina Faso/Mali* (n 23 above) para 26.

³⁸ Wa Mutua, M 'Why redraw the map of Africa' (1994-95) 16 *Michigan Journal of International Law* 1113 - 1176; B Davidson *Black Man's Burden* (1992); I Griffiths *The African inheritance* (1995); A Asiwaju (ed) *Partitioned Africans 1884-1984* (1985); J Klabber & R Lefeber 'Africa possidetis' in C Brolmann *et al* (eds) *Peoples and minorities in international law* (1993).

With its emphasis on continuity and stability, *uti possidetis* observes the legal consistency of inherited boundary agreements, but in doing so it presumes that all inter and intra-colonial boundaries had reached a single common degree of geographic clarity at independence. The reality of that territorial inheritance was however much more haphazard. Some inter and intra-colonial boundaries in Africa were clearly marked on the ground and accurately documented, while others were left more geographically ambiguous, unmarked on the ground and poorly described. Independent African governments have been slow to address such ambiguities. Over forty years after the 1964 Cairo Assembly, where the post-independence African leaders pledged to respect their inherited colonial boundary agreements, the African Union constituted a Border Programme (AUBP) with the express aim of encouraging African governments to clearly delimit and demarcate their boundaries by 2012.³⁹ In its constitutive document, the AUBP estimated that (subject to a thorough inventory) less than a quarter of African boundaries 'have been delimited and demarcated.'⁴⁰ Various issues have been cited by African governments for the lack of attention to international boundary definition, most commonly lack of financial resources, and lack of attention from what the neighbouring state. These are reasonable problems, but not insurmountable, given adequate political will on both sides to reach an amicable and mutually beneficial boundary definition that is free of ambiguities.

At the second assembly of the OAU in Cairo in July 1964, all but two heads of state of independent African states agreed what has been subsequently referred to as the Cairo Declaration.⁴¹ Perhaps its most famous and controversial clause was Resolution 16/1, cited widely in the Burkina Faso-Mali judgment and referred to as the definitive 'border arrangement for Africa.'⁴² It is often used to describe the functional impact of *uti possidetis*, even though the term itself is notably absent from the text.

AHG/Res. 16(1)

Considering that border problems constitute a grave and permanent factor of dissention;

Conscious of the existence of extra-African manoeuvres aimed at dividing African States;

³⁹ *Declaration on the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in Charge of Border Issues held in Addis Ababa, 7 June 2007* African Union (AU) (2007).

⁴⁰ As above art 2(a).

⁴¹ The Cairo Assembly of Heads of State was boycotted by King Hassan of Morocco as a result of a boundary dispute with Algeria, and by the leader of Somalia as a result of Somalia's continuing claims to ethnic Somali areas in Ethiopia and Kenya. See especially S Touval 'The Organization of African Unity and African borders' (1967) 21 *International Organization* 102 - 127.

⁴² Ratner (n 31 above) 824.

Considering further that the borders of African States, on the day of their independence, constitute a tangible reality;

Recalling the establishment in the course of the Second Ordinary Session of the Council of the Committee of Eleven charged with studying further measures for strengthening African Unity;

Recognising the imperious necessity of settling, by peaceful means and within a strictly African framework, all disputes between African States;

Recalling further that all member states have pledged, under article IV of the Charter of African Unity, to respect scrupulously all principles laid down in paragraph 3 of article III of the Charter of the Organization of African Unity:

(1) SOLEMNLY REAFFIRMS the strict respect by all member states of the Organization for the principles laid down in paragraph 3 of article III of the Charter of the Organization of African Unity;

(2) SOLEMNLY DECLARES that all member states pledge themselves to respect the borders existing on their achievement of national independence.⁴³

The second operative paragraph, whereby the members of the OAU agree to respect the borders inherited at independence, was used by the ICJ to describe the acceptance of *uti possidetis* as a legal principle by post-independence African states. Often overlooked is the very specific wording used in the third sentence of the preamble which indicates that 'the borders of African States, on the day of their independence, constitute a tangible reality.' A powerfully explicit phrase, but did all of the boundaries between the newly independent African states really 'constitute a tangible reality' at their respective dates of independence?

Lalonde's major study of *uti possidetis* in relation to boundary determination, makes an interesting comparison between the de-colonisation processes in Latin American and Africa. She suggests that, at de-colonisation in Latin America, the first question was which former colonial administrative units would become independent states, followed by 'how would those boundaries be determined?'⁴⁴ In other words: 'For Latin American republics, it was not simply a question of maintaining the territorial status quo but of actually creating the territorial *status quo*.'⁴⁵ The ambiguity of both political and territorial distinctions at the moment of de-colonisation led to many years of conflict between the emerging Latin American states during the early to mid 19th century.

In the African context, Lalonde suggests the process was different since the political distinction between colonial administrations was clearer. 'Devolution occurred within the territorial limits as defined by the metropolitan powers, which were at liberty to adjust boundaries and

⁴³ Resolutions adopted by the first ordinary session of the assembly of heads of state and government held in Cairo 17-21 July 1964 (Cairo Declaration) Organization of African Unity (1964) AHG/Res 16(1).

⁴⁴ Lalonde (n 44 above) 121 - 22.

⁴⁵ n 44 above, 122.

transfer territory right up to the date of independence.⁴⁶ Lalonde believes that the colonial boundaries across Africa were ‘defined with much greater precision than the Spanish administrative lines.’⁴⁷ She concludes that the concept of *uti possidetis* for Latin American states provided entitlement to boundaries of the former Spanish administrative divisions ‘at law’ while ‘the newly independent African states, for their part, merely agreed to accept those boundaries, in fact, that existed at the date of independence.’⁴⁸ This may explain why the Cairo declaration specifically avoids the term *uti possidetis*. Lalonde hints at the variety of boundary definitions existing across Africa at the moment of de-colonisation, by suggesting that:

Those boundaries that had been established and clearly demarcated were, following independence, protected according to general principles of international law. Those boundaries that had been unsettled during the colonial period remained unsettled.⁴⁹

While most boundaries inherited by African states at independence were defined arguably with greater geographic precision than the vague limits of Spanish colonial administration in Latin America before 1810, it should not be concluded that all African boundaries constituted a ‘tangible reality’ at independence. The only distinction Lalonde makes between settled and unsettled boundaries does not begin to indicate the many ways that boundaries were defined in colonial boundary agreements and inherited at independence. The term ‘tangible reality’ suggests that a boundary can be recognised on the physical landscape. Implying that one knows precisely when he/she passing across the static, fixed and linear limit of one state jurisdiction into another. This could take the form of a river, or a series of boundary pillars, but the importance is that the extent of legal title is clearly known to those within the border landscape.

A boundary may be depicted on a map but that does not that make it a ‘tangible reality.’ A boundary may be defined in a legally binding text with greater or lesser precision, but that also does not make it a ‘tangible reality.’ Did the African leaders at the 1964 Cairo assembly believe or assume that their state boundaries constituted tangible realities? Was this phrase used consciously to deflect attention away from inadequate boundary definition that may have led to more disputes? Whatever the case, the statement in the Cairo declaration belies consistent definition of boundaries across the continent, and the reality was a much more haphazard territorial inheritance.

⁴⁶ n 44 above, 122.

⁴⁷ n 44 above, 123.

⁴⁸ n 44 above, 122.

⁴⁹ n 44 above, 122.

3 Inconsistent definition

Lalonde, while distinguishing between 'settled' and 'unsettled' boundaries, admits that some African boundary sections were not 'settled' at the time of independence, but does not make clear if 'settled' refers to a verbal, cartographical or tangible boundary definition. Taking the phrase 'tangible reality' as a measure, few boundary sections across Africa would have been a reality on the border landscapes at the time of independence. Some boundary sections were accurately surveyed and/or relatively clear on the ground. The section of the DRC-Zambia boundary along the Congo-Zambezi watershed had been demarcated with painstaking precision between 1927 and 1933, and an irregular maintenance regime ensured that much of this section was clearly visible at Congolese and Zambia independence in 1960 and 1964 respectively.⁵⁰ The Kenya-Ethiopia boundary was also demarcated clearly and documented with geographic precision in the 1950s and 1960s, although the agreement itself was not ratified until 1970 after long negotiations over transboundary grazing rights.⁵¹

Those international boundary sections that follow large rivers (such as the Zambezi, Ruvumu, Congo, Ubangi) also would have been readily apparent on the border landscape at independence.⁵² However, much of Africa's international boundary sections are defined along small rivers and streams, many of which may not contain water for parts of the year and may move dramatically from year to year.⁵³ For some imperial governments, rivers and streams made a sound, cost-effective substitute for expensive boundary pillars.⁵⁴ For example, the 1912-15 Anglo-Portuguese boundary commission revised the northern section of the Angola-Northern Rhodesia boundary from the 24° E meridian to follow a complex series of local streams as a substitute for more expensive overland

⁵⁰ Donaldson (n 14 above) 184 - 187.

⁵¹ 9 June 1970 Ethiopia-Kenya border treaty in I Brownlie *African Boundaries* (1979) 791 - 822.

⁵² Along several of these river sections, the colonial agreements did not specify where the boundary line ran within the rivers themselves, as was the case along the lengthy sections of DRC-Congo boundary section along the Congo and Ubangi rivers on either side of Stanley Pool. However, as an unmistakable landmark such large rivers form a visible division between neighbouring jurisdictions on the ground.

⁵³ See the International River Boundaries Database, International Boundaries Research Unit, Durham University. <http://www.dur.ac.uk/ibru/resources/irbd> (accessed 30 July 2010).

⁵⁴ JW Donaldson 'Pillars and perspective: demarcation of the Belgian Congo-Northern Rhodesia boundary' (2008) 34 *Journal of Historical Geography* 485. When suggesting to the German government in 1908 that portions of the Nigeria-Kamerun boundary should be adjusted to follow natural features, Sir WE Goschen argued: 'The selection of natural features such as streams and rivers has many advantages, not the least of which is that far fewer boundary pillars are required.' National Archives (Kew) file FO 404/403B *Letter from WE Goschen to von Schoen 2 December 1908* 9.

demarcation.⁵⁵ Although depicted as distinct blue lines on boundary mapping, many of these small streams may not be as distinct on the ground, being subject to seasonal rainfall.⁵⁶

The devolved nature of British colonial administration meant that some of the intra-colonial boundaries were described with a degree of clarity in administrative records and maps, such as the 1926 Order in Council defining much of the Kenya-Uganda boundary⁵⁷ or the 1930 provisional administrative line between Sudan and Uganda. However, in many cases the British intra-colonial boundaries were never, or perhaps only crudely, demarcated on the ground. Due to the changing nature of French colonial administrative 'cercles' most intra-French colonial boundaries had no clear description either in administrative texts or maps, and most were never demarcated on the ground. There were some initiatives by the colonial governments to finalise agreements over disputed boundary sections as de-colonisation gained momentum in the late 1950s. British and Belgian officials hastened negotiations over the long disputed section of the Belgian Congo-Northern Rhodesia boundary between Lakes Mweru and Tanganyika in an ultimately unsuccessful attempt to resolve the dispute before Congolese independence in 1960.⁵⁸

For the most part, however, huge lengths of colonial boundaries across Africa were not even close to being 'tangible realities' on the physical landscapes at the respective dates of independence. Many were simply roughly surveyed, with the understanding that they would be marked on the ground with greater precision at a later date. This was the case along the watershed between the Congo and Nile rivers that forms much of Sudan's boundaries with neighbouring Central Africa Republic and the DRC, partially surveyed in the early 1920s but never marked on the ground.⁵⁹ The quality and accuracy of the mapping used to define boundaries in the early colonial period was sometimes poor, even though it may have been attached to a treaty as the legally binding definition.⁶⁰ In addition, the coverage of large scale, accurate topographic mapping undertaken under late colonial administrations varied widely across Africa at independence.

⁵⁵ See Instructions for the boundary commission National Archives of Zambia file NRA 1/1/7 6004 *Memorandum from War Office to Secretary of State (Colonial Office) 14 November 1912* (1912). See also Office of the Geographer, United States Department of State 'No 119 Angola-Zambia Boundary' (1972) *International Boundary Study* 4.

⁵⁶ JW Donaldson 'Where rivers and boundaries meet' (2009) 11 *Water Policy* 629 - 644.

⁵⁷ Brownlie (n 51 above) 943 - 945.

⁵⁸ See especially the correspondence related to negotiations over the Pedicle Road treaty in the NA (Kew) files CO 1015/1396, CO 1015/1397, CO 1015/2180 and CO 1015/2181.

⁵⁹ Brownlie (n 51 above) 628 - 636.

⁶⁰ The 1900 Abyssinian-Italian agreement that defined much of the Eritrea-Ethiopia boundary included a map that was referred to as the valid depiction of the boundary. This map was little more than a crude sketch map only roughly showing the courses of rivers and stream, as well as the positions of a handful of towns and villages. EEBC (n 29 above) map 5 32.

Some boundary sections may have been demarcated in the late 19th and early 20th centuries, but the fairly crude and impermanent marks were unlikely to still be visible at the time of independence. The lengthy overland section of the Ethiopia Sudan boundary between what is now the tripoint with Eritrea and the Baro River was marked on the ground in 1903 with just 36 pillars, many of which disappeared soon after they were erected.⁶¹ From blazed trees and iron telegraph poles to concrete pyramids and cleared tracks, there was no consistency in the methodology of demarcation used by colonial officials. The OAU heads of state could hardly have addressed every possible boundary situation in the Cairo declaration, but used a phrase as explicit as 'tangible reality', when the reality was much less clear.

One explanation for the wide disparity in boundary definition is the influence of economic resources on colonial boundary policy. Research into the history of colonial boundary practices in southern Africa reveals that the presence of mineral concession areas and white-owned farming had a dramatic impact on the methodology used to define inter and intra-colonial boundaries.⁶² The most egregious example was the boundary between Belgian Congo and Northern Rhodesia, first delimited by an Anglo-Congolese agreement in 1894. The lengthy section of the boundary along the Congo-Zambezi watershed was first marked on the ground by an Anglo-Belgian boundary commission (1911 - 14), defining 800 km of the boundary with just 46 pillars, an average of 15 miles between boundary marks.⁶³ Located in a plateau region, much of the watershed itself is indistinct on the ground and the rudimentary demarcation left large sections of the boundary unclear between the boundary pillars. When huge copper deposits in the Katanga/Copperbelt regions became commercially exploited in the 1920s, mining companies demanded that the boundary along the watershed be accurately marked so that there would be a clear division between Belgian and Rhodesian concession areas.⁶⁴ A second Anglo-Belgian boundary commission (1927 - 1933) established auxiliary boundary pillars along the watershed section every 500 metres and dug a half metre deep ditch that quite literally etched the boundary on the ground, in the most expensive colonial boundary programme in Africa, leaving no ambiguities as to the course of the boundary in these areas of valuable mining concessions.

There are other examples such as the current Mozambique – Zimbabwe boundary (formerly Portuguese East Africa-Rhodesia), where

⁶¹ TH Al-Nur 'The Sudan-Ethiopia boundary' unpublished PhD thesis, University of Durham, 1971 116. As of late 2009, this boundary is currently being reviewed and possibly demarcated jointly by Ethiopia and Sudan.

⁶² This is only hinted in JRV Prescott & G Triggs *International Frontiers and Boundaries* (2008), but is explored in more depth in Donaldson (n 54 above).

⁶³ NA of (Zambia) file RC 609 *Memorandum by Fairweather 30 September 1924* (1924) 2.

⁶⁴ Donaldson (n 14 above) 143 - 150.

mining and white farming interests prompted clear definition.⁶⁵ However, for the majority of border areas where there was nothing of economic interest to the colonial governments, boundary definition was left in varying degrees of ambiguity. The influence of economic resources on boundary definition reflects many postcolonial critiques of colonial policy that was focused exclusively on the resources of the land rather than administration of populations. According to Mbembe: 'The colonial space had its space, its shape, its borders. It had its geological make up and its climates. It had its resources, its soils, its minerals, its animal and plant species, its empty lands. In short, it had its qualities.'⁶⁶ Early definitions left over from the initial round of territorial delimitation during the so called 'scramble' of the late 19th century were retained, including imprecise textual descriptions and inaccurate – often wildly inaccurate – mapping. Although under *uti possidetis* the inter and intra-colonial agreements and administrative records were considered legally valid in defining the territory of independent African states, in no way could many of these early boundary definitions be considered to be 'tangible realities' in the landscape. The approach by the colonial administrations, linking boundary definition with land use, left inconsistencies imbedded in the boundary treaties which in turn became the 'root of title' for post-independence African states.⁶⁷ The vague language, and in many cases poor cartographic depiction of many boundaries, left open to interpretation on the human and physical landscape ambiguities that continue to cause conflict and confusion across the continent.

4 Consequences of poor definition

On 6 May 1998 in the village of Badme located in the border region between Eritrea and Ethiopia, an argument between local troops from both sides led to shots being fired. Although the exact sequence of events on that day is disputed, the lack of an agreed and defined limit to the neighbouring jurisdictions created confusion and overlapping claims, eventually precipitating a full scale conflict lasting two years and claiming some 70,000 lives.⁶⁸ There have been numerous conflicts in post-independence Africa related to secessionist movements and large-scale geopolitical tensions between neighbouring states, often involving large territorial claims, such as the attempted secessions of Katanga in DRC and Biafra in Nigeria during the mid-1960s, or Somalia's long-standing claims to areas of eastern Ethiopia. These conflicts have concerned boundary definition on a macro-geographical level. Many other minor disputes continue to

⁶⁵ P Warhurst 'A troubled frontier 1898 - 1906' (1978) 77 *African Affairs* 214. See also Donaldson (n 14 above) 175 - 177.

⁶⁶ A Mbembe *On the Postcolony* (2001) 32.

⁶⁷ Prescott & Triggs (n 62 above) 170.

⁶⁸ M Plaut 'The conflict and its aftermath' in D Jacquin-Berdal & M Plaut (eds) *Unfinished Business* (2004) 87 - 89.

arise as a direct result of imprecisely defined boundaries. In most of these situations, the neighbouring states agree that a boundary does exist between them and may even agree on the actual instrument that defines the boundary, but dispute the position of the boundary on the ground. The Eritrea-Ethiopia example indicates that such seemingly minor disputes can quickly escalate into large-scale conflict.

Minor disputes continue to arise as a direct result of unclear boundary definition. Although not reaching the intensity of the Eritrea-Ethiopia war, some have resulted in direct conflict. In 2008, Eritrean forces entrenched positions on the Doumeriah peninsula, along the eastern terminus of their land boundary with Djibouti disputing the definition of the undemarcated boundary.⁶⁹ Guinean troops still occupy the village of Yenga on the Sierra Leonean bank of the Makona river. Although an Anglo-French treaty placed the boundary in this section along the Sierra Leone bank of the river, Guinea and its French advisors claim that the term bank referred to a series of hills several kilometres away from the normal bank of the Makona.⁷⁰ Confusion over the status of Misingo island in Lake Victoria led to a diplomatic row between Kenya and Uganda, with rioters in Kenya attempting to sabotage the railway line to Uganda.

Imprecise and poorly defined international boundaries can create overlapping claims, both by neighbouring authorities, and by local populations. In addition to their dispute over the southern half of their boundary in Lake Albert and the status of Rukwanzi island, the DRC and Uganda also contest an overland section of their boundary in the Nebbi district where Uganda claims that Congolese police are building a post within Ugandan territory near the Goli crossing point.⁷¹ The installation of a mobile phone mast along a section of the boundary between southern Sudan and Uganda has prompted local claims and counter-claims to lands either side of the undemarcated boundary.⁷²

Not only does the imprecise definition of international boundaries leave open the possibility of conflict due to overlapping territorial claims, other aspects of border management may be affected. Those who have

⁶⁹ Eritrean troops were withdrawn in June 2010 and the two states agreed to have the prime minister of Qatar act as mediator for further negotiations on settlement of the boundary dispute. 'Djibouti and Eritrea agree to boundary mediation with Qatar' *International Boundaries Research Unit, Boundary News*, 10 June 2010. http://www.dur.ac.uk/ibru/news/boundary_news (accessed 28 June 2010).

⁷⁰ 'The Fate of Yenga Still Indecisive' *AllAfrica* 6 February 2006; 'Sierra Leone, Guinean delegations meet, agree on disputed border territory' *BBC Monitoring Africa* 15 November 2002. Personal discussion with Sierra Leone appointed expert, Martin Pratt.

⁷¹ 'Uganda: Tension said high along border with DR Congo over police post' *BBC Monitoring Africa* 8 June 2009; 'Uganda, DRC in new border dispute' *Xinhua News Agency* 8 June 2009.

⁷² 'Uganda-Sudan border dispute – is there still room for customary boundaries?' Dradenya Amazia, *AFNWS (AllAfrica)* 5 January 2010; 'Museveni, Kiir inspect disputed border area' D Amazia and C Ocowun, *AFNWS (AllAfrica)* 25 November 2009.

travelled across many of Africa's international boundaries will know that border crossing points are sometimes separated by several kilometres. If the boundary is not clearly identifiable between these checkpoints, a 'no man's land' may exist, an area of indistinct jurisdiction. Local arrangements may address the administration of infrastructure and activity within these 'no man's lands,' but unless formalised and respected create the possibility for confusion and potential dispute. The AUBP recognised the risks posed by such poorly defined border areas:

(2) We underscore the relevance of the African Union Border Programme, based on the need:

(a) to address the persistence of the border delimitation and demarcation issue: Subject to an inventory to be undertaken, it is estimated that less than a quarter of African borders have been delimited and demarcated. This situation is fraught with risks, as the lack of delimitation and demarcation gives rise to 'undefined zones', within which the application of national sovereignty poses problems, and constitutes a real obstacle to the deepening of the integration process.

The wide separation of border checkpoints poses more practical challenge for trans-border flows such as long delays for hauliers and travellers having to pass through two uncoordinated sets of regulations. In March 2010, Rwanda opened its first one-stop border checkpoint with neighbouring Tanzania at the Rusumo border post, in an effort to speed up cross-border traffic and to reduce costs by sharing infrastructure.⁷³ The EAC has promoted the establishment of one-stop border checkpoints among its member states to encourage and facilitate cross border trade, particularly important for a regional organisation with three land-locked states.⁷⁴ Although a one-stop checkpoint may be situated entirely within the territory of one state, it is unlikely that such bilateral cooperation could be formalised where a boundary is unclear or poorly defined.

5 Is the 'intangibility' principle working?

Although the ICJ in the *Burkina Faso/Mali* case drew important conclusions about *uti possidetis*, the two parties did not use the term when submitting their dispute, but asked the Chamber to adjudge the dispute based on the 'principle of the intangibility of frontiers inherited from colonisation.'⁷⁵ In English, this term 'intangibility' literally means that

⁷³ 'Rwanda-Tanzania border passing eased' *afrol News.com* 26 March 2010.

⁷⁴ The EAC has even drawn up a proposed bill comprehensively outlining the recommended regulations and codes of practice for one-stop border posts. The EAC *Proposed One Stop Border Posts Bill, 27 May 2010*. PDF version available at <http://www.eac.int> (accessed 29 June 2010).

⁷⁵ *Special Agreement between the Government of the Republic of Upper Volta and the Government of the Republic of Mali for the submission to a Chamber of the International Court of Justice of the Frontier Dispute between the Two States* ICJ (20 October 1983) (1983) General List No 69 Introduction.

something is imperceptible, vague, ethereal or without materiality. In practical terms, given the unclear nature of many international boundaries inherited by African states at independence, its use in a legal sense (in relation to *uti possidetis*) is intended to convey that the definition of boundaries cannot be 'touched' unilaterally by one neighbouring state or another.⁷⁶ Although the principles of intangibility and *uti possidetis* are often used interchangeably, Lalonde distinguishes between the two, suggesting that, unlike *uti possidetis*, 'the intangibility principle is limited to the juridical consequences flowing from a situation already in existence and does not formulate any presuppositions as to the title at the root of delimitation.'⁷⁷ In other words, boundary treaties must presume that the two authors of the treaty hold valid sovereignty over the territory being delimited, and acceptance of the intangibility does not directly indicate acceptance of the original acquisition of territorial title.

Although acceptance of boundary treaties implies that the original authors did hold recognised title to territory, use of the term 'intangibility' is symbolic for African states in not directly recognising the validity of the original title, while at the same time ensuring states' territorial integrity. Application of the term is intended to ensure that more powerful states do not take advantage of the ambiguity of boundary treaties by claiming territory through 'effective' occupation. This was the core legal reasoning behind the Burkina Faso-Mali boundary decision and has been reiterated in subsequent boundary judgments⁷⁸ whereby legal title trumps effective occupation.

As the number of African land boundary cases suggests, third party adjudication has proved a popular route for African states unwilling to interpret the ambiguities of their inherited boundary instruments bilaterally. The decisions of the ICJ and international tribunals in boundary cases have had to negotiate this tension between the legality of a boundary treaty and the relative geographic clarity of the line described.⁷⁹

On the one hand, the courts and tribunals must respect the legal validity of the original boundary treaties, which are usually accepted explicitly by the parties when a dispute is submitted to adjudication/arbitration. From a legal perspective, to suggest that a boundary treaty did not completely define the course of a boundary challenges the very stability of the title, suggesting that there are areas open to appropriation and

⁷⁶ Boundary may be legally changed under international law without the express consent of a neighbour state through acquiescence and estoppel, but this is difficult to prove in an international boundary dispute.

⁷⁷ Lalonde (n 32 above) 152.

⁷⁸ Including the Cameroon-Nigeria decision, see: *Cameroon v Nigeria* (n 25 above) para 223.

⁷⁹ EEBC (n 29 above) is a prime example: <http://www.pca-cpa.org/upload/files/EEBC-3.pdf> (accessed 29 June 2010). See also Opinion of Judge Mohammed Shahabudeen' in *Libya/Chad* (n 24 above) 44 - 50.

possibly even encouraging a 'land rush' to occupy border areas. In its 1925 advisory opinion in the request for Interpretation of the Treaty of Lausanne, the Permanent Court of Justice decided: 'It is natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier.'⁸⁰

On the other hand, the vagueness of these boundary treaties requires interpretation, which has often formed the crux of disputes submitted to third party adjudication and arbitration.⁸¹ In all African boundary cases and arbitrations, the parties have asked that this interpretation be confined to a specific date (the so-called 'critical date'), usually either the date of independence or the date of the applicable boundary treaties.⁸² The key verdict in the *Cameroon v Nigeria* case was that subsequent acts of administration, particularly in relation to the Bakassi peninsula, failed to supplant the original title delimited by the colonial instruments. This was also made explicit in the 2005 *Benin/Niger* decision:

since the effect of the *uti possidetis* principle is to freeze the territorial title, the examination of documents posterior to independence cannot lead to any modification of the 'photograph of territory' at the critical date unless, of course, such documents clearly express the Parties' agreement to such a change.⁸³

Although two states could submit a boundary dispute to an international court or tribunal and request that an older boundary definition be modified to recognise the current administrative situation on the ground,⁸⁴ African states have so far been reluctant to grant a third party that kind of flexibility.⁸⁵

⁸⁰ *Interpretation of article 3, paragraph 2 of the Treaty of Lausanne* Permanent Court of International Justice 21 November 1925 Series B12 20.

⁸¹ See especially EEBC (n 29 above) para 3.4. In summarising Nigeria's counter-claims concerning the central sectors of the land boundary with Cameroon, the ICJ noted that Nigeria had argued that both parties agreed the four colonial agreements legally delimited the central sector of their boundary. However, Nigeria argued 'that uncertainties as to the interpretation and application of these instruments, and established local agreements in certain areas, mean that the actual course of the boundary cannot be definitively specified merely by reference to those instruments.' *Cameroon v Nigeria* (n 25 above) 23.

⁸² EEBC (n 29 above) para 3.5.

⁸³ *Benin/Niger* (n 27 above) para 26.

⁸⁴ One notable example was the special arbitral tribunal in the Guatemala-Honduras boundary case that was directly allowed to modify the boundary line of 1821 'as deemed advisable' and fix any compensation. FC Fischer 'The Arbitration of the Guatemala-Honduran boundary dispute' (1933) 27 *The American Journal of International Law* 414 - 415.

⁸⁵ In the *Burkina Faso/Mali* case as to whether or not equity should be involved in the interpretation of the boundary agreements, the Chamber of the ICJ stated categorically: 'It is clear that the Chamber cannot decide *ex aequo et bono* in this case. Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective

One intransigent point between Eritrea and Ethiopia following the 2002 decision of the EEBC was how much variation of the line could be made to address practicalities in the landscape during the demarcation process. Eritrea argued that the decision had to be marked on the ground in strict accordance with the 2002 decision, while Ethiopia argued that there were bound to be some problems implementing the decision on the ground that would require minor revisions.⁸⁶ Reflecting on his experience with the 2000 Iraq-Kuwait boundary demarcation commission, Klabbbers notes candidly that:

It is repeatedly stated that the Commission was called on to perform a technical and not a political task, and that it was not supposed to reallocate territory; indeed, repetitions of this statement are so abundant that one cannot help but form the impression that what is actually occurring is some kind of exorcism: if we claim often enough that we are not reallocating territory, then perhaps we will not be seen to be reallocating territory. Although the Commission repeatedly claimed to be performing a mere technical task, it could not escape the necessity of relying heavily on considerations of equity ...⁸⁷

6 Changing the starting point

The reliance on third party settlement suggests that continued reference to the 'intangibility principle' may be dissuading African governments from clarifying their international boundaries through bilateral dialogue. The lack of attention to defining more clearly the ambiguous and inconsistent boundaries inherited at independence suggests that this term has been taken far too literally, and may be providing African governments with political coverage for choosing not to engage with neighbouring states.⁸⁸ Simply because two neighbouring states accept that a hundred year-old colonial instrument delimits their boundary does not ensure that disputes will not arise over interpretation of that agreement. As Anthony Allott states succinctly: 'It is one thing, however, to declare respect for the border;

interests, it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *praeter legem*. On the other hand, it will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes.' *Burkina Faso/Mali* (n 23 above) para 28.

⁸⁶ Although not explicitly stated, the possible political motivation for Ethiopia's position was that the line could be altered around Badme at the demarcation phase. See the *Request for Interpretation, Correction and Consultation* Submitted by the Federal Democratic Republic of Ethiopia, 13 May 2002 and the subsequent Decision of the EEBC regarding this request on 24 June 2002. <http://www.pca-cpa.org/upload/files/Decision24June2002.pdf> (accessed 29 June 2010).

⁸⁷ J Klabbbers 'No more shifting lines?' (1994) 43 *International and Comparative Law Quarterly* 908 - 910.

⁸⁸ The lack of commitment to boundary definition may also indicate of deeper problems of lack of adequate governance, as Jackson and Rosberg have argued that for post-colonial African governments 'their sovereignty derives more from right than from fact' indicating a prioritisation of juridical over empirical statehood. RH Jackson and C Rosberg 'Sovereignty and underdevelopment' (1986) 24 *Journal of Modern African Studies* 2 - 4.

it is another thing to determine where it runs.⁸⁹ Nor does the principle of intangibility prevent states from further clarifying, or even changing the position of their boundary, as long as they do so by agreement. If a colonial boundary is vague or unclear, it is not simply the right but surely the responsibility of neighbouring states to address that lack of clarity, otherwise the stability of their respective territorial titles is undermined by the possibility of overlapping territorial claims.

With international courts and tribunals usually handicapped by the application submitted to them by neighbouring states for resolution, and with African governments reluctant (until recently)⁹⁰ to make a concerted effort to address the geographic clarity of their international boundaries, it is perhaps time to reconsider the underlying legal tenets. In his masterful review of *uti possidetis*, Ratner suggests that perhaps post-independence governments should return to the original meaning of *uti possidetis* which he describes as the exercise:

to preserve the *status quo* only until states can resolve their competing claims, rather than apply the gloss from decolonisation whereby states effectively presumed independence-day lines to be permanent.⁹¹

Uti possidetis certainly does not prevent states from modifying their boundaries by agreement, but the popular use of the term ‘intangibility’ with regards to African boundaries may have encouraged governments to take an overly literal interpretation of the concept, reinforcing the geographic assumptions imbedded in the 1964 Cairo Declaration. Taking this original meaning of *uti possidetis* as a starting point, rather than a more restrictive sense of ‘intangibility,’ Ratner suggests:

The most immediate consequence of this starting point is an admittedly heavy burden on decision makers, whether national diplomats or international commissions or courts: to deal directly with the location of international borders, rather than retreat behind the simple, but anachronistic, decolonisation form of *uti possidetis*. To date, states, courts and scholars have agreed on the unexceptionable proposition that there is no universal rule for arriving at an ideal line to divide territory – whether by adopting linguistic boundaries, natural frontiers or *uti possidetis*. But rather than looking for the ideal line, we must set more modest goals.⁹²

Ratner’s key point is that *uti possidetis* should be seen as the starting point

⁸⁹ A Allott ‘Boundaries and the law in Africa’ in WG Widstrand (ed) *African Boundary Problems* (1969) 17.

⁹⁰ A number of declarations and initiatives law legal proposed to the OAU and the African Union to promote clarification of African boundaries dating back to 1981. See ‘Summary Note on the African Union Border Programme and its Implementation Modalities’ *Conference of African ministries in charge of border issues*, 4 - 7 June 2007 (2007) African Union BP/EXP/2 (II), paras 6 - 11.

⁹¹ Ratner (n 19 above) 617.

⁹² Ratner (n 19 above) 618.

rather than the end point for the definition of boundaries.⁹³ Many post-independence African governments have simply stated that their international boundaries are defined by unclear and outdated colonial instruments, rather than undertake the difficult political and technical work of addressing the many ambiguities embedded in those boundary definitions. This may result in modifying the line, but, given the deep ambiguities of many original colonial instruments, it may be impossible for either side to discern exactly how much is 'gained' or 'lost.' Removing the ambiguities would provide greater stability to the respective titles by removing the possibility of overlapping territorial claims and resultant disputes.

7 Conclusion

As the history of the DRC-Zambia boundary indicates, colonial administrations in Africa tended to clarify boundaries with precision when the land involved was of demonstrable economic 'value.' Colonial administrations in Africa had different procedures for land registry within their territories, dependent on the nature of the activity taking place on a specific area of land. The inconsistency of inter-colonial boundary practices illustrates that land in colonial Africa was often viewed subjectively by colonial administrations according to its relative economic value. In this respect, defining boundaries with geographic clarity was a subjective tool, used largely when it suited the interests (often economic) of the colonial administrations.

Although several current international land boundary disputes in Africa involve an economic element (such as oil practices in Lake Albert), many others have arisen in areas with no significant 'economic' interests. There were no disputed mineral or oil resources involved along the disputed sections of the Burkina Faso/Mali boundary. Although it does attract a modest amount of tourist interest, Kasikili-Sedudu Island is submerged by the Chobe river throughout the flooding season. There are no known valuable resources around the village of Badme or on the Doumeirah peninsula.⁹⁴ With such a variety of tensions channelled into boundary disputes, it seems important that African governments should define their international boundaries objectively, along the full course, in order to eliminate any ambiguities that could provoke a dispute.

⁹³ It is worthwhile noting that the Canada-USA International Boundary Commission updates information about the boundary on an annual basis. It is subject to numerous treaties and depicted on 256 official boundary maps <http://www.internationalboundarycommission.org/products.html> (accessed 29 June 2010) Compare this with the single map attached to the 1900 Abyssinian-Italian boundary agreement that defined much of the central section of the Eritrea-Ethiopia boundary. EEBC (n 29 above) paras 4.8 - 4.9.

⁹⁴ The position of the land boundary terminus on Ras Doumeirah may change after sovereignty claims over Doumeirah Island and the subsequent maritime boundary, but it is unclear if any mineral or hydrocarbon deposits are involved in the maritime area.

In a recent article an experienced official from the British Land Registry, Charlie Beeden, provided some informal thoughts about private land boundary disputes which are remarkably applicable to international boundaries. Drawing on his years dealing with private boundary disputes in the UK, Beeden concludes that: 'Boundary disputes are about territory, ownership, principle and saving face – to many people more precious than money.'⁹⁵ He suggests that boundary disputes are often the result of underlying personal issues between two neighbours 'until a boundary irregularity provides a convenient outlet.'⁹⁶ As with the ambiguities in colonial boundary treaties, Beeden notes that these irregularities are often created when in reviewing the private land deeds, 'the title deed provides the definitive extent, but the interpretation of this on the ground all too often fails.' Beeden suggests that the resolution of a private property boundary dispute should involve a coordinated approach, with both solicitors (lawyers) and surveyors assessing the boundary situation on-site:

If a solicitor who has never been on site cannot be fully knowledgeable about it, it is also true that a surveyor who knows the site is unlikely to have all the legal expertise the dispute requires. Consequently, I believe that a site visit by a team of lawyer and surveyor (representing the crucial ingredients of resolution), preferably acting in a joint capacity, offers the best chance of a speedy and lasting solution.⁹⁷

Although focused on private land registration, Beeden's recognition that law and geography are the 'crucial ingredients' to resolving a boundary dispute also applies to international boundaries. Unfortunately, a literal interpretation of the intangibility principle by diplomats and international lawyers often discounts the geographical element in boundary definition as simply technical matters of survey and demarcation.

The interpretation of the negotiated location on the ground and laying down the infrastructure for the administration of the boundary are often too readily relegated in importance as mere technical matters, only to re-emerge as issues of major political importance, the settlement of which is essential to avoiding conflict.⁹⁸

Ratner's suggestion for reinterpreting *uti possidetis* can be interpreted as encouraging a de-mystification of boundaries, to encourage states to see boundaries as an administrative responsibility rather than a diplomatic contest. Once engaged in an international boundary dispute, there is an almost instinctive Hegelian response from neighbouring governments, whereby territory becomes a contest with a zero-sum result. Although certainly preferable to conflict, the resolution of African international

⁹⁵ C Beeden 'War or Peace?' *The Land Journal* (2010) 18.

⁹⁶ Beeden (n 95 above) 18.

⁹⁷ Beeden (n 95 above) 19.

⁹⁸ R Adler 'Geographic information in delimitation, demarcation and management of international land boundaries' (2001) 3 *IBRU Boundary and Territory Briefing* 3.

boundary disputes through third party adjudication and arbitration has tended to reinforce a confrontational approach that Gathii described in the context of the 1999 Botswana-Namibia judgment of the ICJ as 'geographical Hegelianism.'⁹⁹ This in turn tends to encourage governments to view boundaries from a small-scale perspective, where all the nuances of the line on the ground become generalised and local border issues become absorbed into national discourses.

The division of land by fixed and linear boundaries was linked with the commodification of property and developed in a densely-populated Europe as a replacement for the multiplicity of land tenure rights that had marked the feudal system. The European positivism of the nineteenth century,¹⁰⁰ which formed the basis of modern international law, is rooted in the notion of exclusive sovereign equality, which *prima facie* suggests that boundaries divide neighbouring states who hold homogeneity of legal rights and responsibilities. Exclusive sovereignty now appears as more of a myth that has never existed, even in Europe, indicating that states/political entities had always been restrained to some extent by political alliances or other agreements. In addition, boundaries themselves do not necessarily dictate a total exclusivity of rights on either side, as there are numerous ways of sharing specific territorial rights, the importance being that they are undertaken by agreement.

While certainly linked with the commodification of land, the drawing of boundaries is primarily an administrative exercise in the resolution and prevention of disputes. Whether dividing adjacent private property plots, a private property plot from a communal area, a nature reserve from a mining concession, one administrative district from another or the territorial sovereignty of two neighbouring states, legal boundaries are inherently an attempt to eliminate the potential for overlapping claims and confusion over the spatial extent of rights that could give rise to dispute and conflict. Neighbouring states or land holders are unlikely to share rights in an area of overlapping claims until a boundary is determined. The frontier zones that divided precolonial Africa states may have been misunderstood and abruptly severed by the modernist boundaries imposed by the European colonial powers, but as population density rises and the pressures on land increases, peripheral zones of ill-defined jurisdiction cause confusion and dispute in post-independence Africa.

This chapter has tried to emphasise that the clear geographic definition of boundaries must accompany the legal validity of territorial title in order

⁹⁹ JT Gathii 'Geographical Hegelianism in territorial disputes involving non-European land relations' (2002) 15 *Leiden Journal of International Law* 581.

¹⁰⁰ Shaw asserts that the imperial division of the African continent occurred at 'the high point of the exclusivity concept of the State in international law as fostered by nineteenth century positivism' dominated by 'the view that the organised tribes of peoples of non-European lands had no sovereign right over their territories and thus no sovereign title by means of effective occupation', Shaw (n 5 above) 32.

for a boundary to fulfil its primary function in preventing disputes. The colonial period saw the inconsistent imposition of modern boundaries in a subjective manner, whereby geographic clarity was wielded as a tool only to be used by and for more powerful actors. The key lesson is that geographic clarity should no longer be considered simply a technical exercise reserved for specific land use. Instead clear geographic definition of land, on the ground at local scale, should be considered an integral aspect of defining boundaries objectively to provide more secure titles that are less likely to cause future disputes.

Robert Home

1 Introduction: The paradox of a ‘pro-poor land law’

‘Buy land, they aren’t making it any more.’¹ Land is essential for shelter and for getting a living, and claims to land can generate violent conflict and power struggles within and between states. Private property rights, particularly the right to exclude others, create a form of monopoly over this basic and finite resource, and people derive much of their sense of personal, communal and even religious identity from the land.²

Unlike laws of persons and economic relations, land law is tied to a physical reality on the ground – immovable property. It regulates social relations, and the relation between the state and its citizens, in matters of land. In recent years the pre-fix ‘pro-poor’ has frequently appeared in the strategies and policies of major development agencies, which desire to make their policies more inclusive, and also reflects the expansion of human rights law from individual to collective responsibilities.

What might a pro-poor land law comprise? If poverty means not being able to meet one’s basic human needs, which include land for shelter and a livelihood, then a pro-poor land law would seek especially to guarantee legal access to land for the poor. Where would such land come from? If one can discount making it (‘they aren’t making it any more’), then it will either have to be redistributed from the ‘haves’ (either the state or private individuals) to the ‘have-nots’, or allocated from the shrinking category of land unclaimed by anyone (because it is unusable, ‘waste’ or ‘dead’ land). The ‘haves’ can be expected to resist such a redistribution, and they are

¹ Attributed to the American humorist Mark Twain.

² A Abramson & D Theodossopoulos (eds) *Land, law and environment* (2000); E Kallipein & P Zeleza *Sacred spaces and public quarrels* (1999); B Derman *et al* (2007) (eds) *Conflicts over land and water in Africa*.

generally those who control the law-making process. So, who will champion pro-poor land law? This is the paradox inherent in the very idea of a pro-poor land law, which makes it highly political, complex and difficult.³

When it is plentiful relative to population, land (or the lack of it) should not be a cause of poverty, although power relations may create that lack. John Iliffe's history of the African poor identifies a 'great transition which has dominated the history of the poor in every continent': from land-rich poverty, where labour is scarce and the poor are generally those who lack access to labour, to land-scarce poverty, where the poor lack viable land-holdings, cannot sell their labour, and increasingly have to migrate to where they hope to obtain a livelihood, usually in towns.⁴ Sub-Saharan Africa would not seem to have any absolute land shortage (it has a fifth of the world's population, and a fifth of its land area), but its colonial history has created land shortage in various ways: the confiscation of much of the good land and mineral resources by white settler immigrants and foreign capital (especially in eastern and southern Africa); state control of urban and unused land; and the creation of illegality and exclusion for most of the African population by segregatory regulations over land tenure and land use.

Against this historical context, Africa's recent and unprecedented demographic surge poses great challenges to land law and management for national and local jurisdictions that are ill-equipped to meet them. Over the 20th century the continent's population rose nearly ten-fold, and now approaches a billion, as a result of falling mortality and rising birth rates, medical advances and improved food production. The population of Kenya, for example, has grown by five times since independence in 1965, and added a million people a year in the first decade of the 21st century, placing great strains on the environment, economy and society.

Rapid population growth carries with it risks of destabilisation and civil conflict, which have been measured by the US-based NGO, Population Action International. Of the regions of the world it places much of sub-Saharan Africa at particularly high risk, and identifies certain key demographic stress factors.⁵ First is the so-called 'youth bulge', when young adults (particularly young adult males) comprise 40% or more of the adult population; this predictably leads to social unrest, war and terrorism when linked to poverty, corruption and mass unemployment. A second stress factor is rapid urban growth, defined as more than 4% urban population growth per annum. A third is a decline in available cropland

³ B Davy 'The poor and the land' (2009) 80 *Town Planning Review* 227.

⁴ J Iliffe *The African poor* (1987) 4. His final chapter ('The transformation of poverty in southern Africa') relates this new pattern of poverty to apartheid policy, and the consequent forced evictions.

⁵ R Cincotta *et al* *The security demographic* (2003). See www.populationaction.org.

and fresh water, measured in cropland hectares per person and renewable fresh water in cubic metres per person. A final stress factor is HIV-AIDS, measured by the proportion of reproductive-age population living with the condition; this is particularly severe in sub-Saharan Africa, which has an estimated 11 million AIDS orphans.

The importance of the legal regulatory framework for the interaction of people, land and the state is now recognised in most sub-Saharan African countries, as well as by regional bodies such as SADC and the AU.⁶ Many government commissions have considered the problems, and many new land laws been passed, some seeking land nationalisation, but more usually state registration of individual and communal land titles. Yet the problems of the landless poor and unplanned urban growth get worse. How a pro-poor law and management of land might develop is the theme of this chapter, explored through an examination of the sources of land law and law-making, the key players or stake-holders, and what such a law might comprise.

2 Legal pluralism and the sources of land law in Africa

Law textbooks usually start by summarising the sources of the law, but for a book on African land law this is no straight-forward matter. Not only are there over fifty different nation states in sub-Saharan Africa, but they are typically jurisdictions where more than one legal order can be said to exist. Legal centralism asserts that there should be but one legal order: the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. Legal pluralism, however, is the reality: 'a fixture of the colonial experience ... characterising at the present day the larger part of all of the world's national legal systems'.⁷ Legal pluralism complicates the continuing struggle of state and society over their respective roles and entitlements.

Every legal system embraces a mixture of elements, which may be more or less integrated or merely co-exist. The so-called 'mixed' legal system of the Republic of South Africa (RSA), for example, combines the legal orders of two successive colonial powers, the Roman-Dutch tradition from the Dutch, and the common law tradition from the British (who succeeded them after 1796), in addition to the so-called African customary

⁶ SADC *Establishing the SADC Land Reform Support Facility and inception activities* (2007); AU *Draft Framework and Guidelines on Land Policy in Africa* (2009).

⁷ J Griffiths 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 6. HP Glenn *Legal traditions of the world* (2000); B de Sousa Santos 'The law of the oppressed' 12 *Law and Society Review* (1977) 5; P Karsten *Between law and custom* (2002).

laws.⁸ Multiple attachments and identities are key attributes of complex modern cultures (as recognised in the concept of transculturality),⁹ and legal systems reflect this wider reality.

Pluralism exists not only within national jurisdictions, but also within the legal academy. Traditional legal scholarship ('black letter law') co-exists alongside other discourses such as socio-legal studies, critical legal studies, and empirical legal studies.¹⁰ African law and legal pluralism have each emerged as distinctive areas which can sustain their own separate academic journals, and the Law Department in London's School of Oriental and African Studies has existed for over fifty years with a commitment to comparative legal studies.¹¹ The cross-disciplinary perspective engendered by including law within the social sciences in universities has stimulated new areas of academic investigation, such as comparative legal cultures, critical legal geography, legal history, legal anthropology, and laws of the postcolonial, all of which will figure at some point in this chapter. Thus the various sources of land law come with distinctive legal cultures and traditions. It is of course European colonialism in Africa that casts the longest shadow, and indeed African land law can be regarded as its creature.

2.1 The legacy of the colonial dual system

The contradictory and self-serving nature of British colonialism in Africa, which lawyers sought to regulate, was encapsulated a century ago by Lugard, the principal ideologue of indirect rule and the dual mandate:

The British role here is to bring to the country the gains of civilisation by applied science (whether in the development of material resources, or the eradication of disease, etc.), with as little interference as possible with Native customs and modes of thought.¹²

Utilitarianism provided much of the ideological underpinning, and legal codes devised by the British for their Indian 'empire' were later transplanted into Africa, since the 'authoritarian and transformative character of law in the utilitarian rendition was perfectly suited to colonial

⁸ MJ Chanock *The making of South African legal culture 1902-1936* (2001); R Zimmermann & D Visser (eds) *Southern cross* (1996).

⁹ W Welsch 'Transculturality' in M Featherstone & S Lash (eds) *Spaces of culture* (1999) 194.

¹⁰ T Becher & PR Trowler *Academic tribes and territories* (2001); R Cotterrell *Law's communities* (1995); W Mansell et al *A critical introduction to law* (1999).

¹¹ *Journal of African Law* and *Journal of Legal Pluralism*; I Edge (ed) *Comparative Law in Global Perspective* (2000).

¹² FD Lugard *Revision of instructions to political officers* (1919) 9. He was writing on Nigeria (Britain's largest African colony), where he was Governor-General until 1918. He developed his thinking in *The dual mandate in tropical Africa* (reprint 1965), which influenced the League of Nations trusteeship approach in the 1920s.

rule'.¹³ When Europeans colonised overseas they took the best land into their control, and the land laws and regulations which they devised came to define the respective realms of colonisers and colonised.

The dual mandate, as summarised above by Lugard, required a strategy of separate development, most famously articulated in apartheid South Africa.¹⁴ The European colonisers separated the legal order applying to their towns and estates from the wider territory where customary land tenure was maintained. African 'native reserves' or 'tribal trust land' were demarcated, managed by colonial officials and local leaders with little of the involvement of lawyers or judiciary that a doctrine of legal centralism might lead one to expect. This dual system for whites and Africans was complicated by further intermediate social categories such as Lugard's distinction between 'native foreigners' and 'non-native foreigners', and the immigrant racial groups (notably Indians to East and South Africa, and the Cape Coloureds in South Africa), whose aspirations the colonial powers sometimes encouraged, yet at other times discouraged in the interests of protecting the 'natives'.¹⁵

Recent theories of colonialism and postcolonialism have provided a basis for interrogating these themes of duality and exclusion and the tensions between coloniser and colonised (the 'subaltern' other).¹⁶ Academic geographers, and historians have critically examined the place of differentiated territorial jurisdictions in regulating social relationships, and how colonial legal regulatory systems shaped landscapes through spatial boundary-marking and discriminating between the land claims of different social groups.¹⁷

2.2 The protection of private property rights

The new nation-states of sub-Saharan Africa after decolonisation inherited land law through constitutions and statute law, sometimes framed as a unified land code, with a complex web of secondary laws and regulations. The Privy Council sitting in London held that a single common law applied to all jurisdictions in the Commonwealth, except where

¹³ P Fitzpatrick *Modernism and the grounds of law* (2001) 147; E Stokes *The english utilitarians and India* (1959).

¹⁴ S Dubow *Racial segregation and the origins of apartheid in South Africa 1919-36* (1989); M Robertson 'Dividing the Land' in C Murray & C O'Regan (eds) *No place to rest* (1990) 122. As many as a hundred different laws were enforced apartheid in South Africa.

¹⁵ A Chua *World on fire* (2003) explores the conflicts around the world created by the economic dominance of immigrant communities.

¹⁶ E Darian-Smith & P Fitzpatrick (eds) *Laws of the postcolonial* (1999); MA Hasian *Colonial legacies in postcolonial contexts* (2004); P Williams & L Chrisman (eds) *Colonial discourse and postcolonial theory* (1994).

¹⁷ ND Blomley *et al* (eds) *The legal geographies reader* (2001); RK Home *Of planting and planning* (1997); S Kedar 'On the legal geography of ethnocratic settler states' 5 *Current Legal Issues* (2002) 401; B Yeoh (2000) 'Historical geographies of the colonised world' in B Graham & C Nash *Modern historical geographies* (2000) 146.

specifically varied, and English common law was the so-called 'received' law in Africa, although it has been jokingly called appropriate for Africa only in the sense that one might say 'he received a blow on the head'.¹⁸

The colonial legal order, as far as the colonisers themselves were concerned, was imbued with the concept of more or less absolute and exclusive private property rights, with its philosophical basis deriving from John Locke.¹⁹ Land rights (the so-called 'bundle of rights' beloved of land lawyers) could be either freehold ownership (not time-limited, although sometimes conferred for 999 years, effectively the same thing), or leasehold (a fixed-period right). Most colonial legislatures had the power to expropriate and regulate property, subject to review under the principle of repugnancy (ie repugnant to English common law).²⁰

At independence the new constitutions of states in sub-Saharan Africa guaranteed private property rights, but such rights were constrained by various statutory provisions, such as land use planning; compulsory acquisition by the state was allowed in the public interest, and with appropriate compensation paid. Post-independence states, such as socialist India and the former white settler colonies in East and South Africa, might aspire to a more equitable 'pro-poor' distribution of land ownership, but found themselves frustrated by these constitutional guarantees of private property rights.²¹ The postcolonial state has, however, extended its control over land use and ownership through local authorities and parastatal bodies (such as utilities), while recent neo-liberal policies have facilitated the large-scale privatisation of state land to foreign individuals and companies, a trend justified in the interests of open markets and international capital.²²

The rights of private land-owners to exclude others resulted in the sanctioning of powers over where Africans were and were not allowed to stay. A notorious example was the South African pass laws, designed to manage the supply of mine labour, and to control access to racially segregated areas and settler property.²³ Rural-urban migrants thus risked eviction if settled on land without permission from the state or private landowners; their temporary structures reflected not only their poverty and limited access to building materials, but also the ever-present threat of demolition and eviction. Thus present-day official disapproval and

¹⁸ J Cottrell at 6th Commonwealth Law Conference 1980, quoted in N Tobi *Sources of Nigerian law* (1996) 19.

¹⁹ CB Macpherson *The theory of possessive individualism* (1962). Locke argued that an individual's labour could secure him an ownership right over land, unconstrained by feudal 'superior' interests. Hegel later argued that property embodies the personality, so that making claims to external things is part of the development of a personality.

²⁰ T Allen *The right to property in Commonwealth jurisdictions* (2000) 83.

²¹ L Ntsebeza 'Land redistribution in South Africa' in L Ntsebeza & R Hall (2007) (ed) *The land question in South Africa* 107.

²² LS Cotula *et al Land grab or development opportunity?* (2008).

²³ D Hindson *Pass controls and the urban African proletariat in South Africa* (1987).

harassment of the poor, who are problematised as squatters and slum-dwellers, has deep roots in the colonial experience, and has only begun to moderate in recent years. The colonial state not only protected freehold property rights for white corporations and settlers, but claimed all apparently vacant or unused land for itself as 'public land', so that occupiers without express approval could be designated as squatters, even in the land of their birth, and subject to eviction (or 'summary ejection', to use the common law term).

Colonial land confiscation denied indigenous peoples' use rights: hunting and gathering, even unfenced farming, was not considered to change the character of the land enough to establish a claim to ownership. For Africans to prove occupation in court three considerations were typically applied: the nature of the claimants' economic system (agriculture leaves a permanent record, while pastoralism and hunting/gathering show only an ephemeral attachment to land), the exclusion of other groups, and length of continuous occupation (with evidence of continuous separate identity). As late as 1986 a white South African judge could opine that:

whites own land by law, whether they are industrious or not, while non-whites must demonstrate their worthiness to own land through their labour.²⁴

2.3 Customary law

The idea of legal pluralism recognises that alongside and within the hegemonic national legal order other systems of law may exist. They may serve a homogeneous social group, be based upon oral traditions and supported by communal sanctions, and concentrate on protecting shared values and communal peace rather than individual rights. Such systems of law have been variously labelled as tribal, customary, indigenous, aboriginal, native, or chthonic.²⁵

Colonial administrators employed social anthropologists to survey tribal land tenure systems, sometimes developing them as codes of law. A conservative structural-functionalist theoretical approach was often applied to justify segregationist policies.²⁶ Customary land tenure was territorially distinguished under the dual mandate system, and was often

²⁴ TW Bennett 'Historic land claims in South Africa' in GE Van Maanen & AJ van der Walt *Property law on the threshold of the 21st century* (1996) 526.

²⁵ 'Chthonic meaning in harmony with the earth' Glenn (n 7 above) chapter 3.

²⁶ Such studies include L & P Bohannon *The Tiv of Central Nigeria* (1969); JL Comaroff & S Roberts *Rules and processes* (1981); PC Lloyd *Yoruba land law* (1962); CK Meek *Land law and custom in the colonies* (1968); AI Richards *Land, labour, and diet in Northern Rhodesia* (1939); I Schapera *Native land tenure in the Bechuanaland Protectorate* (1943). In 1950 the British Colonial Office compiled a *Bibliography of published sources relating to African land tenure*. For a more recent text on customary land law, GR Woodman *Customary land law in the Ghanaian Courts* (1996). For urban anthropology, see P Mayer *Townsmen or tribesmen* (1961).

misinterpreted and undermined by the colonial judiciary, manipulated by administrators, and overlooked in legislation.²⁷ The evolutionary theory of land rights viewed customary tenure as a vestige of the past bound for extinction by an inevitable historical process 'towards a greater concentration of rights in the individual and a corresponding loss of control by the community as a whole'.²⁸

After the First World War the League of Nations (advised by Lugard) placed a fiduciary duty – the trusteeship principle – upon colonial administrations towards indigenous peoples because of their peculiar vulnerability; customary land rights were to be safeguarded in specially designated 'native reserves'. A series of Privy Council cases in the 1920s held that customary land tenure did not confer ownership upon the occupiers of the land, and thereby denied those living in such areas the opportunity to create private property rights.²⁹

In a postcolonial and pluralist world customary or communal land practices are now being revived and reconstituted. Tribal or customary land tenure fulfilled an important welfare function, and served as a reservoir of cheap, unserviced land in peri-urban areas, an important common property resource, and indeed a defence against the penetrative forces of globalisation and capitalism. Individualised land tenure is increasingly being questioned for its negative impacts upon the excluded poor, and the legal protection of communal land tenure is being reinforced. Indigenous groups are increasingly pursuing legal challenges and human rights arguments to reassert their land claims, emboldened by the Australian Mabo case.³⁰ New legal forms are seeking to reclaim communal philosophical and value systems, examples being co-operative land in South Africa, the social tenure domain model, and common pool resource management.³¹

²⁷ MJ Chanock *Law, Custom and social Order* (1985); WD Hammond-Tooke *Imperfect interpreters* (1997).

²⁸ JR Simpson *Land registration* (1976) 225. K Mantena 'Law and "Tradition"' in M Lobban & A Lewis (eds) *Law and history* (2004) 159; JP Platteau 'The evolutionary theory of land rights as applied to Sub-Saharan Africa' (1996) 27 *Development and Change* 29.

²⁹ T Allen (n 20 above) 147.

³⁰ In a large literature on Mabo, S Motha & C Perrin 'Deposing sovereignty after Mabo' (2002) 13 *Law and Critique*; PH Russell *Recognizing aboriginal title* (2005); MA Stephenson & S Ratnapala *Mabo* (1993). For a South African case, TM Chan 'The Richtersveld challenge: South Africa finally adopts aboriginal title' in R Hitchcock & D Vinding (eds) *Indigenous people's rights in Southern Africa* (2004) 114; M Barry 'Now another thing must happen' 20 *South African Journal of Human Rights* (2004) 355. Most land cases reported in the *Commonwealth Law Bulletin* in the last twenty years relate to indigenous people's land rights.

³¹ C Lemmen *The social tenure domain model* (2010); C Ng'ong'ola 'Land problems in some peri-urban villages in Botswana' (1992) 36 *Journal of African Law* (1992) 140; M Torhonen & D Goodwin 'Would a registry map hang comfortably in a round mud hut?' in R Dixon-Gough & R Mansberger (eds) *Transactions in international land management* (2002) 139.

2.4 Human rights and pro-poor law

The scope of human rights law has widened in the past two decades, as economic, social and cultural rights have attracted a broader and more grassroots constituency than the traditional human rights movement. It now offers a framework for holding institutions (both state and non-state) accountable for their role in creating and sustaining poverty in a world of fast-growing population, poverty and marginalisation.³² A universal right to adequate housing was affirmed by the UN Committee on Economic, Social & Cultural Rights in 1992, which was subsequently included in the African Charter on Human and Peoples' Rights.³³

A number of aspects are recognised in such a right to housing: legal security, availability of services, affordability, habitability, accessibility, location, and cultural adequacy. Even the expanded approach to human rights does not include any express right of access to land, nor is the state required to provide a home for all. It can, however, do much to assist its citizens, by providing plots on state land for home-ownership by the poor, offering low-interest loans, and withholding from summary forced evictions (such as occurred frequently in RSA under apartheid laws).³⁴

Where land is the primary means of generating a livelihood, and the main element in household wealth, the way land rights are defined has far-reaching social and economic effects. The UN-Habitat Global Campaign for Secure Tenure encourages the progressive regularisation of unauthorised and informal settlements, through changes in legal frameworks, policies and standards. If full land titling is becoming perceived as too complex and expensive, then incremental tenure regularisation can be linked to the physical upgrading of plots and infrastructure. Insecurity of title is a major obstacle to improving housing conditions in informal settlements (formerly labelled squatter or slum areas), and many developing countries now provide for the progressive regularisation of land tenure.³⁵

A 'pro-poor' state is encouraged to develop effective relationships with poor people: assessing the poverty impact of public policies, strengthening

³² C Jochnick 'The human rights challenge to global poverty' in W Van Genugten & C Perez-Bustillo (eds) *The poverty of rights* (2001) 159; J Cottrell 'Third generation rights and social action litigation' in S Adelman & S Paliwala (eds) *Law and crisis in the third world* (1994) 102.

³³ Article 11(1) of ICESCR refers to an adequate standard of living, including adequate food, clothing and housing. Implied rights to food and housing/shelter were confirmed in a decision by the African Commission on Human and People's Rights concerning the Ogoni people and oil extraction activities in Nigeria: *SERAC and another v Nigeria* (2001) AHRLR 60.

³⁴ COHRE *Legal resources for housing rights* (2000); UN-HABITAT *The rights to adequate housing* (2009); UN-HABITAT *Forced evictions: Towards solutions?* (2007).

³⁵ The Brazilian constitution, for example, provides for regularisation of possessory title through the right of *usucapio*, derived from Roman law: R Nunes *Usucapiao* (2002).

poor people's assets and capabilities, correcting gender inequity and children's vulnerability, and protecting poor people's rights. The concept of a pro-poor state has been incorporated into the UN Millennium Development Goals, and land, while not specifically referred to, is a cross-cutting theme in them. Improving security of tenure for the world's poor, for example through such UN-driven initiatives as the Global Campaign on Secure Tenure and the Global Land Tools Network (GLTN), is linked to Target 11 of MDG 7 (improving the lives of slum dwellers).

Among the poor, women are often particularly disadvantaged and vulnerable, holding fewer assets and less access to resources. In many African countries the proportion of female-headed households has grown, as a result of such factors as male migration, deaths of males in conflicts, unpartnered adolescent fertility and family disruption.³⁶ Notwithstanding the constitutional guarantees of women's property rights in many jurisdictions, property settlements, for example after divorce or death of spouse, often result in the disinheritance and impoverishment of women. International bodies, such as the Huairou Commission, the Housing and Land Rights Network, and the GLTN, are promoting women's property rights, but there is little systematic information or methodology for devising better legal instruments (the so-called 'gendered land tools') other than a general support for flexible tenure types.³⁷

2.5 De Soto, property and the legal empowerment of the poor

The strongest theory-based argument for a pro-poor land law comes from the Peruvian economist Hernando de Soto. The connection of insecure land tenure with poverty and social exclusion has long been recognised by many international agencies (notably the World Bank), who identify a framework of secure, transparent and enforceable property rights as a critical precondition for investment, economic growth and poverty alleviation. The linkage between land titling and development stayed, however, a largely closed discourse within the communities of development policy-makers, until de Soto produced a more flamboyant, 'magic bullet', view of property rights in his best-selling book, *The mystery of capital*.³⁸

De Soto claimed that, unless recognised by a formal legal system, the property held by the world's poor is merely so much 'dead capital', locking them in the 'grubby basement of the pre-capitalist world'.³⁹ With his striking image of the bell-jar, he sees formal property rights as concentrated among the colonial and postcolonial elites, who enjoy the economic

³⁶ IFAD 'The issue of poverty among female-headed households in Africa' (2008) at www.ifad.org/gender/learning/challenges/women (visited 22 April 2010).

³⁷ LM Munyoni (ed) 2003 *Women and land in Africa* (2003).

³⁸ H de Soto *The mystery of capital* (2000).

³⁹ De Soto (n 38 above) 55.

benefits of the law and globalisation, and are usually located physically in cities, while the mass of the population are stuck in poverty, often physically marginalised in the peri-urban areas.

Inspired by the work of de Soto, the high-level international Commission for the Legal Empowerment of the Poor (CLEP) was created, with de Soto a member, and reported in 2008. While criticised for a neo-liberal economic ideology, it was based upon a conviction that legal recognition and democratisation of property rights provide a sense of identity, dignity, and belonging, and it made 'secure and accessible property rights' one of its four so-called 'pillars' for the legal empowerment of the poor.⁴⁰

De Soto's argument is contested by some. He is criticised for reinforcing a narrative of inferiority in the South by treating poverty as a specific phenomenon of the South, and for not recognising the effect of neo-liberal economic reforms in increasing poverty.⁴¹ Integrating plural and informal property rights into one unified system under state control, as he advocates, may facilitate the spread of global capitalism and open land markets, and has become an accepted goal for many nation states, encouraged by donor agencies, but the process is not without risk or resistance. His optimistic language conceals the likelihood that such a system – converting oral into written, informal into formal, local into national – will not be uniformly benign, neutral, or free from power relationships and exploitation. Informal systems may resist integration, preserving local community values and defending themselves against the penetrative forces of global capitalism and the modern nation state. Identification with land can be a vital component in retaining cultural identity, and the deliberate with-holding of land from state land-titling processes may be a means of preserving family and community cohesion and continuity.

De Soto is promoting formal property systems at a time when the dominance of individualised land tenure in the policy prescriptions of donor agencies is increasingly seen as having negative consequences for the poor, and the process of integration and codification has its practical difficulties and costs. Part of de Soto's achievement, however, has been to help lift the threat of demolition and eviction from the poor, who are treated more as settlers or homesteaders rather than squatters, and restore to them a greater measure of human dignity.

⁴⁰ CLEP *Making the law work for everyone* (2008); D Banik *Rights and legal empowerment in eradicating poverty* (2008).

⁴¹ A Gilbert 'On the "Mystery of capital and the myth" of Hernando de Soto' (2002) 24 *International Development Planning Review* 1; RK Home 'Land titling and urban development' (2003) 2 *Journal of Commonwealth Law and Legal Education* 73.

3 The players and stake-holders in land law

Land law in Africa not only operates under conditions of legal pluralism, but with many players or stake-holders, at national, local and global levels, whose interactions have been explored through actor network theory.⁴² The concept of the separation of powers distinguishes between the legislative, judicial and executive functions of the state; legal and bureaucratic cultures pervade all three, and many actors have a stake, particularly international development agencies and civil society, as this section now explores.

3.1 Legal culture, law-making and the judiciary

The concept of the rule of law originated as a defence against totalitarianism and a path toward democracy, and is increasingly seen as critical for economic, political and social development. The underpinning theory is still subject to debate, particularly the extent to which the legal order could or should respond to the aspirations of the community and be 'pro-poor'.⁴³ Both the UN and World Bank are committed to rule of law activities at nation state level, such as strengthening the constitution and institutions of justice, governance, security and human rights.⁴⁴

De Soto from his perspective on pro-poor property rights has attacked lawyers and legal culture for in-built conservatism, adherence to traditional processes, and sabotaging opportunities for poverty reduction: 'their knee-jerk reaction to extralegal behaviour and to large-scale change is generally hostile'.⁴⁵ The very concept of pro-poor law is in itself a challenge to legal culture and how lawyers are educated. Even the existence of a pro-poor constitution, in post-apartheid RSA, does not guarantee pro-poor judgments in its constitutional court.⁴⁶ Much of the research on poverty and land law has been undertaken by other disciplines, hence the title of McAuslan's book on the role of law in development *Bringing the law back in*.⁴⁷

⁴² A Manji *The politics of land reform in Africa* (2006).

⁴³ P Nonet & P Selznick *Law and society in transition* (1978). These authors identified three modes of legal order, of which responsive law was one, the others being repressive law (relying heavily on coercion to maintain order) and autonomous law (emphasising regularity and predictability).

⁴⁴ United Nations *UN approach to rule of law assistance* (2008)

⁴⁵ De Soto (n 38 above) 210.

⁴⁶ T Roux 'Pro-poor court, anti-poor outcomes' (2004) *South African Journal of Human Rights* 511; J Dugard & T Roux 'The record of the South African Constitutional Court in providing an institutional voice for the poor' in R Gargarella *et al* (eds) *Courts and social transformation in the new democracies* (2006) 107; S Gloppen *et al* (eds) *Democratization and the judiciary* (2004).

⁴⁷ P McAuslan *Bringing the law back in* (2003).

The national legal systems and cultures of sub-Saharan Africa reflect their colonial backgrounds. Different colonial powers imported their own systems, and some nation states have a legacy of two or more overlaid colonial legal orders: Cameroon, for example, had German, French and British colonial masters at different times. The recent constitution of Namibia (the former German South-West Africa) still draws from German approaches to property, even though Germany ceased being the colonial master in 1918, and South African law applies both Roman-Dutch and British approaches to property, creating much legal complexity.⁴⁸

The high hopes of the law and development movement, which sought to involve law in the processes of modernisation during the early post-independence period, have now faded, for various reasons. Dependency theory exposed the structural nature of under-development, and the critical legal theory movement exposed the power relationships underlying law. A Weberian culture of patrimonialism was reflected in the emergence of post-colonial new elites, which are widely perceived as corrupt, and pro-poor in rhetoric but not reality. The formal legal system, the main focus of liberal legalism, only reached a small section of the population, and had little relevance to customary land tenure, while reform through negotiated and legally constituted processes could achieve little. Critiques of legal culture in developing countries have asserted:

Generations of South lawyering elites (which provide a common law South archetype of excellence in lawyering) acquire specialist legal knowledges through Anglo-American circuits of “higher” legal education. Versatile in dominant North common law discourse, they bring their formative, and formidable, knowledges of comparative precedent in the course of argumentation at home. They thus remain the carriers of contemporary metropolitan common law to South legislation and adjudication.⁴⁹

The blind and hegemonic push for uniformity around a non-African standard simply increases resentments which have been simmering since colonial times. We are dealing with a people who have grown suspicious of the purveyors of “modernisation”, which in their minds translates into “Westernisation”, a process not characterised in the past by too much respect for the African viewpoint.⁵⁰

In the years since independence many African countries have engaged, usually through special commissions of inquiry, in review of their complex inherited land laws, and passed new laws, often with foreign assistance

⁴⁸ SD Girvin ‘The architects of the mixed legal system’ in R Zimmermann & D Visser (eds) *Southern cross* (1996) 96; MJ Chanock *The making of South African legal culture 1902-1936* (2001).

⁴⁹ U Baxi ‘Global development and impoverishment’ in P Cane & M Tushnet *Oxford handbook of legal studies* (2003) 455.

⁵⁰ RT Nhlapo in B Ajibola & D van Zyl (eds) *The judiciary in Africa* (1998) 88.

influencing the outcome.⁵¹ Among such law reforms have been: the military government of Nigeria nationalising land in its 1977 Land Use Decree; Uganda reforming its feudal *mailo* land tenure with its 1998 Land Act; Lesotho applying a British model to its land law in 1979; Botswana passing a Tribal Land Act in 1968; and Tanzania retreating from socialism with various new land laws in 1990-93. Perhaps the most comprehensive approach was in RSA, where many reforming land laws after 1994 dismantled apartheid and attempted a transformative approach, embedded in its new constitution.⁵²

The challenges of land law reform, especially land redistribution in southern Africa, require no less than a transformation in legal thinking. The concept of transformative constitutionalism appeared in post-1994 RSA, offering an approach to transformation through law-grounded processes.⁵³ Zimbabwean academics have sought to justify land redistribution through a *humwe* doctrine of consent, sanctioning a 'rejection of private property rights that were forcibly or immorally instituted under the shield of colonialism', and drawing also upon the post-Mabo recognition that pre-existing indigenous land rights are not extinguished and can be revived.⁵⁴

Land law reform also needs to be applied on the ground, recognising the complexities of local situations. Special courts and tribunals, hybrid forms of judicial administration, can be created alongside the main court system to deal with the intricacies and factual evidence involved in land disputes. Such 'transplanted forms of bureaucracy' are usually held close to where the disputes arise, and are expected to be quicker and cheaper than the courts, addressing factual rather than legal issues, with determinations made by professionals in land matters. They have potential to innovate, help protect the poor from arbitrary eviction, and allow the recognition of local communal rights, but have also been criticised for arbitrary decisions deviating from prior understandings of the law, even (in one author's view) to the point of absurdity.⁵⁵

⁵¹ A Manji 'Land reform in the shadow of the state' (2001) 22 *Third World Quarterly* 327; RJC Young *Post-colonialism* (2003) 45.

⁵² McAuslan (n 46 above) 384 has an appendix listing basic information on statutory land laws in mainland Commonwealth Africa.

⁵³ K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 146 – 188, discussed in AJ Van Der Walt *Property in the margins* (2009).

⁵⁴ B Chigara *Land reform policy* (2004) 31.

⁵⁵ RP Werbner 'The quasi-judicial and the experience of the absurd' in Werbner (ed) *Land reform in the making* (1982) 131. Examples of such tribunals include the Land Claims Court in South Africa, customary land courts in Botswana and Ghana, and land tribunals in Kenya, Uganda and Tanzania.

3.2 Land governance in practice

Land administration in the modern nation-state involves an array of agencies, bureaucracies with specialist staff that undertake myriad tasks: surveying and subdividing the land, preparing and examining plans and legal documents, keeping and amending records, valuing property and updating valuation lists, managing property, executing enforcements and evictions, and handling appeals and disputes. Many of these functions have been professionalised, and two key ‘professions of the land’ are those of land surveying and planning.

The land surveyor undertakes cadastral surveys within a state-guaranteed land registration system. Such a system claims to offer four advantages: the so-called ‘continuous finality of the register’, an unambiguous brief definition of the land, easier conveyancing, and an official certificate of title.⁵⁶ Such documentation builds a public memory that permits society to engage in activities such as: identifying and gaining access to information about individuals, their assets, their titles, rights, charges and obligations; establishing the limits of liability for businesses; knowing an asset’s previous economic situation; assuring protection of third parties; and quantifying and valuing assets and rights. Many postcolonial governments have, however, come to recognise the costs and limitations of state land registration, and recent innovatory approaches have attempted to combine effective records with local community control, bringing land registration closer to the people on the ground. One alternative to formal registration of individual rights is the registration of collective or common property rights, potentially a simpler, cheaper and more equitable process.⁵⁷

The land use planner seeks to regulate development and use of land, and to provide a framework for future spatial development and environmental protection. It was colonial town planners who largely implemented the dual system on the ground, and its extreme form in apartheid South Africa of segregated townships and the Group Areas Act. The so-called Stallard doctrine regarded towns as European cultural creations, restricting African access to those whose labour was needed, and forcing Africans to live in ‘locations’ or the inappropriately named ‘townships’ (racially segregated housing on the edge of town, actually usually outside the city limits).⁵⁸ As rural impoverishment grew, those tribal or communal lands that were near urban areas became places where

⁵⁶ JR Simpson *Land law and registration* (1976) 163; E Dowson & VLO Sheppard *Land registration* (1956); PF Dale *Cadastral surveys within the commonwealth* (1976).

⁵⁷ A Durand-Lasserve & L Royston (eds) *Holding their ground* (2002); P McAuslan *Urban land and shelter for the poor* (1985); Payne G (ed) *Land, rights and innovation* (2002); C Toulmin & J Quan (eds) *Evolving land rights, policy and tenure in Africa* (2000).

⁵⁸ JB Robinson *The power of apartheid* (1996) 21; E Mutale *The management of urban development in Zambia* (2004).

Africans could settle in unregulated, unserviced settlements and gain access to urban employment opportunities. When apartheid state power was no longer able to manage these peri-urban areas, the 'squatter camps' were relabelled as 'informal settlements', designated for upgrading rather than clearance – 'here to stay'.⁵⁹

As well as surveying and planning, the state undertakes other functions of land governance, State lands must be managed in their various forms (for example local government estates, national parks, heritage areas and security facilities); valuers (both public and private) appraise property for taxation and securitisation purposes; environmental agencies protect the natural environment, manage water resources and promote sustainable development of wild-life habitats. These various professions of the land have much power and influence, in addition to the lawyers and legislators, and are supported by international knowledge networks.⁶⁰

Unfortunately the implementation capacity of land governance is often inadequate to the tasks, contributing to the so-called 'failing state', increasing rather than reducing tenure insecurity and conflicts over land, and seeming remote and irrelevant to the everyday lives of the poor.⁶¹ The reality on the ground in Tanzania, for example, was that:

The peasants were pushed about by high-handed petty bureaucrats, their land was seized without compensation, the urban poor were by a legal sleight of hand deprived of the land on which they might have lived for years, they received no or derisory compensation and no alternative land on which to build another house.⁶²

A review of cadastral systems found that only 1 per cent of sub-Saharan Africa was covered by any kind of cadastral survey. The postcolonial state is disengaging from the direct provision of housing and infrastructure, and mass titling becoming more difficult to achieve. Eviction is, however, increasingly seen as a bad option, which does not resolve the problems and carries a high cost, both locally and internationally.

3.3 International development agencies

Above the nation-state, land policy is influenced by an array of international and regional agencies, with a multiplicity of programmes, initiatives and associated networks, and these have been the main champions of a pro-poor approach to land. While the World Bank charter does not allow the pursuit of political reform, its governance agenda

⁵⁹ D Hindson & J McCarthy (eds) *Here to stay* (1994).

⁶⁰ These include the International Federation of Surveyors (FIG), and the Commonwealth Associations of Surveyors and Land Economists (CASLE) and Planners (CAP).

⁶¹ B Derman *et al* *Conflicts over land and water in Africa* (2007)

⁶² McAuslan (n above 47) 48.

includes an explicit democratic and political element. It has for over a decade advocated free-market land policies, which have been pre-conditions for programmes in SSA, and in 2009 launched a new Urban and Local Government Strategy.⁶³ Increasingly these agencies co-ordinate their efforts: the annual Land Policy conference of the World Bank in 2010 was organised jointly by the World Bank, UN-HABITAT (concerned with human settlements), FIG (representing the surveying profession internationally) and the International Fund for Agricultural Development (an off-shoot of FAO). The agencies sponsor capacity-building in land management, thus linking land law with the wider aspects of good governance.⁶⁴

Two initiatives from UN-Habitat directly concern land law in Africa: the Global Campaign for Secure Tenure and the Global Land Tools Network (GLTN). Land titling programmes have been applied to reduce poverty and upgrade slums, by promoting an incremental approach to property certification for housing plots, zoning and planning, service provision and improvement of infrastructure. The GLTN, launched at the 2006 World Urban Forum, seeks to formulate legal instruments for land tenure that can be innovative, pro-poor, affordable and scalable. Examples are land readjustment (a method of pooling ownerships for planned development) and the social domain tenure model.⁶⁵

These are not the only international initiatives that are relevant to land law. The advent of the MDGs after 2000 has been accompanied by the UN Millennium Campaign, aiming to hold governments accountable for their achievement. The so-called Pinheiro Principles (approved by the UNCHR in 2005) concerned those displaced by wars, political upheaval and natural disasters.⁶⁶ Regional groupings, such as SADC and the EAC, are increasingly concerned with land and land management.

3.4 Agencies of civil society

Civil society is a term applied to a wide range of non-governmental organisations such as registered charities, development organisations, community groups, women's organisations, faith-based organisations, professional associations, trades unions, business associations, coalitions and advocacy groups, varying in their degree of formality, autonomy and

⁶³ K Deininger *Land policies for growth and poverty reduction* (2003); World Bank *Systems of cities* (2009) 11, emphasised that SSA had most of the countries furthest from achieving the MDG target on slums.

⁶⁴ J Faundez 'Legal technical assistance' in J Faundez (ed) *Good government and law* (1997) 1.

⁶⁵ C Fourie 'Land readjustment for peri-urban customary tenure' in R Home & H Lim (eds) *Demystifying the mystery of capital* (2004) 31; RK Home 'Land readjustment as a method of development land assembly' (2007) 78 *Town Planning Review* 459; C Lemmen *The social tenure domain model* (2010).

⁶⁶ PS Pinheiro (2007) *Housing and property restitution for refugees and displaced persons*.

power.⁶⁷ The philosopher Hegel first identified civil society as a separate realm, a 'system of needs' with its inherent conflicts and inequalities. In the 1990s NGOs and new social movements emerged on a global scale in what has been called the 'NGO revolution'.⁶⁸ They became sources of resistance to globalisation, concerned with the impact and conceptual power of the international aid system. The shallow penetration of society by weak state institutions, and pressures for states to shrink, created a larger realm of unoccupied political space in Africa than elsewhere, and expanded the role for civil society at the expense of politically derived state institutions.⁶⁹ The formulation of the MDGs, and the subsequent Millennium Campaign, has provided a new focus for NGOs (and more particularly CSOs) to press their governments for greater accountability, transparency and the legal empowerment of the poor.

At the local level, new-style community-based organisations (CBOs), empowered by links with international NGO coalitions, are developing new styles of land rights advocacy and dispute resolution.⁷⁰ CBOs may seek to protect their communities against the forces of globalisation by keeping control of land use and allocation without recourse to the integrated property system offered by the state. Informal property rules devised in squatter settlements may provide the poor with practical recourse to protect their possessory title. Such institutions can be seen as subaltern forms of legality, using traditional indigenous law as a 'contact zone' between the global and the local. Generally, however, the poor are understandably pre-occupied with day-to-day existence, rather than engaged with time-consuming solidarity activity, while outside elites may manipulate processes for their own advantage.

Land for housing may be provided through community self-help movements, who buy and subdivide land for sale to their members, using collective funds raised through subscription. Incremental tenure upgrading can include such measures as: registering all plots and occupiers, providing basic services, resolving land disputes, and allocating property rights to recognised claimants. A community may keep its own registers of rights, applying hybrid law through some form of local court or tribunal, and indeed maintain its boundaries against outside forces by such practices as beating the bounds, where the whole community turns out to re-assert

⁶⁷ M Edwards *Civil society* (2004). For a generally accepted definition see the Centre for Civil Society (London School of Economics) web-site at www.lse.ac.uk/collections/CCS.

⁶⁸ CE Welch *Protecting human rights in Africa* (1995) 45.

⁶⁹ M Keck & K Sikkink (eds) *Beyond borders* (1998); M Mamdani *Citizen and subject* (1996); B Rajagopal *International law from below* (2003). T Tvedt *Angels of mercy or development diplomats* (1998).

⁷⁰ Among the local NGOs concerned with land matters in SSA are the Tanzania Land Forum, Uganda Land Alliance, South African National Land Committee, and Zambia National Land Alliance, while international NGO networks include the Habitat International Coalition, Housing and Land Rights Network, and Cities Alliance (with its 'Cities Without Slums' action plan).

boundaries and break down any unsanctioned land enclosure. Such community involvement requires a rethinking of professional roles, stakeholder relationships, dispute resolution methods and record-keeping systems, but it needs partnerships and capacity-building.

4 'The land question' and pro-poor land law

Exploring the sources and actors in land law still leaves the question: what would a pro-poor land law for Africa comprise? Although many sub-Saharan African countries since independence have undertaken land law reform, aspirations have been frustrated by weak implementation, and 'the land question' or 'the land issue' remains persistent and politically sensitive. To quote Kenya's national land policy:

The land question has manifested itself in many ways such as fragmentation, breakdown in land administration, disparities in land ownership and poverty. This has resulted in environmental, social, economic and political problems including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilisation and abandonment of agricultural land, tenure insecurity and conflict.⁷¹

Unpacking the meaning of a pro-poor land law reveals four key elements: more equitable land distribution, the forms of land tenure, land use planning, and the system and processes of land administration.

Firstly, at the heart of pro-poor land policy must be easier access to land for the landless, and protection against arbitrary forced eviction. Pro-poor land law reform would assist land redistribution from large private estates (some with owners outside the country) to the landless and those in effective occupation. The proportion of registered land in such large estates is much higher in Eastern and Southern Africa, due to past white settlement supported by the colonial powers. Delivery of land to the poor may come from land held in either private, state or communal ownership, typically through confirmation of effective occupation or possessory title, legal recognition through adjudication processes, and protection from arbitrary forced eviction.⁷² Post-independence sub-Saharan African states have, however, generally been financially unable to pursue such policies on the scale required, whether by 'willing seller, willing buyer' purchase or compulsory acquisition.

⁷¹ Kenya Land Policy.

⁷² The South African Land Policy (1997) defined the aim of land redistribution as 'to provide the poor with land for residential and productive purposes in order to improve their livelihoods'. The beneficiaries would include urban and rural poor, farm workers, labour tenants and 'emergent farmers'. See DL Carey Miller and A Pope *Land title in South Africa* (2000) 398.

Secondly, much land law concerns the protection of private property rights (seen as a central aspect to the rule of law), through registration of land title and interests in property. Under the neo-liberal market-based approach, the state protects the security of private property title as a basis for finance and capital-raising, supported by land surveyors and valuers who define the parcels of property parcels and appraise its value for mortgage or hypothecation purposes. Transnational capital flows mean that large tracts of land may be transferred to absentee legal entities, a process which started in the colonial period and continues. Clear and secure land rights, as de Soto argued, help economic growth and can reduce poverty by empowering the poor, but may also reinforce unequal land distribution.

For the poor, land titling may not be their main concern, and has been compared to a passport – useful, but only if you plan to go somewhere. For most of the poor, the state is either irrelevant or interferes with their daily life. It creates illegality, and only refrains from harassing them because of its inertia and inefficiency. One achievement of the new thinking about tenure security has been, however, to soften official hostility to ‘squatter’ settlements, and achieve a greater acknowledgment of the rights of the poor to secure tenure. Governments have come to recognise the political costs of squatter eviction, and are more willing to respond to pressure exerted by the poor. Tenure reform has entailed a formalising of customary or community land arrangements, and the status of such land, with its traditional social importance, needs to be reinforced if it is not to be eroded and turned into a tradable commodity.

Land law, traditionally concerned with private property rights, and defining their relation to the state, has become increasingly involved with the third element, planning and regulation of land use, a function of government that only arrived in the 20th century. Land use planning can assist with better food production, urban development, economic productivity and environmental sustainability. The state has a particular role in managing the conversion of land to urban use (especially housing), and yet exclusionary zoning and lack of capacity mean that most new development is unauthorised. The town planning system was largely a colonial creation, and needs to decolonise its thinking – ‘unlearning privilege’ – and adapt to new population pressures on land.⁷³

Fourthly, better land governance can achieve much, through more inclusive partnerships, capacity-building, education and training. The traditional professional skills of surveyors and lawyers need to be supplemented by the more political skills of mediation, dispute resolution and local coalition-building. A modernising state needs to promote equal

⁷³ L Porter *Unlearning the colonial cultures of planning* (2010) 151; RK Home *Of planting and planning* (1997); C Rakodi (ed) *The urban challenge in Africa* (1997); C Rakodi & CR Leduka (2005) *Informal land delivery processes in African cities*.

and effective relationships between poor people and the state, assessing the poverty impact of public policies, strengthening poor people's assets and capabilities, through pro-poor policies, correcting gender inequity and children's vulnerability, and protecting poor people's rights.

5 Conclusions: Prospects for a pro-poor land law

In the half century since independence in 1960s most sub-Saharan African states have reformed their land laws, but new issues have emerged, particularly pressures of population, urban growth and environmental sustainability. Colonial legacies persist in the pattern of land ownership and legal regulatory frameworks, and the early optimism of the law and development movement has evaporated with the new concerns, and challenges to the rule of law. Pressure for land law reform is being placed upon governments from agencies of both the international development community (linked to programme funding) and civil society, while the Millennium Campaign and the broader approach to human rights law are holding governments rather more accountable for poverty reduction. Land law reform is a long process, and requires a national constituency, and relation to the existing corpus of law. Without more participatory local strategies, the management of land, that most basic resource of the modern territorial nation-state, will not meet the needs of 'the poor'.

3 INTERNATIONAL LAW AND LAND RIGHTS IN AFRICA: THE SHIFT FROM STATES' TERRITORIAL POSSESSIONS TO INDIGENOUS PEOPLES' OWNERSHIP RIGHTS

*Jérémie Gilbert
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1 Introduction

Land rights have been recognised as a central human rights issue for indigenous peoples,¹ emerging both internationally and regionally. At the international level, the adoption by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 marked a resolute step from the international community in affirming indigenous peoples' human rights, and puts a great emphasis on land rights. The African states under the guidance of the AU played an important role in shaping this declaration.² This reflects the developments regarding indigenous peoples' human rights that have been taking place at the regional level, particularly the African Commission on Human and Peoples' Rights (ACHPR), which established a Working Group on Indigenous Populations/Communities in 2001 with the mandate to examine the situation of indigenous peoples on the continent.³

A central issue of contention concerned the definition of indigenous peoples, with several States proposing that in Africa all inhabitants are indigenous,⁴ and viewing the legal emergence of such a category of rights-holders as potentially a cause of 'tension among ethnic groups and

¹ See: 'Indigenous people and their relationship to land', Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur. UN Doc. E/CN.4/Sub.2/2001/21; J Gilbert *Indigenous peoples' land rights under international law: From victims to actors* (2007).

² For an analysis, see A Barume 'Responding to the concerns of the African states', in C Charters & R Stavenhagen (eds) *Making the declaration work: The United Nations Declaration on The Rights Of Indigenous Peoples* (2009); W Genugten 'Protection of indigenous peoples on the African continent' (2010) 104 (1) *American Journal of International Law* 29.

³ N Kealeboga & GM Wachira 'Protecting indigenous peoples in Africa' (2006) 6 *African Human Rights Law Journal* 382.

⁴ H Weber *et al* (eds) 'Never drink from the same cup: Proceedings of the Conference on Indigenous Peoples in Africa' (1993); A Bernard & J Kenrick (eds) *Africa's Indigenous Peoples: Peoples: 'first peoples' or 'marginalised minorities'?* (2001).

instability between sovereign States.⁵ Adopting a pragmatic approach, the ACHPR has highlighted that ‘in Africa, the term indigenous populations does not mean “first inhabitants” in reference to aboriginality as opposed to non-African communities or those having come from elsewhere.’⁶ The Commission has emphasised that there is no universally agreed definition of the term indigenous peoples, and that the most constructive approach is to refer to common characteristics which allow for the identification of indigenous peoples in Africa. The Commission explains that a first major characteristic is self-identification, which implies that a people initially identify itself as indigenous. A second major characteristic is indigenous peoples’ ‘special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples.’⁷ Finally, the Commission adds that indigenous peoples are often communities which face ‘a state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.’⁸

As the work of the ACHPR highlights, access and security over land rights are the principal issues for indigenous peoples. With the establishment of protected areas and the ever increasing exploitation of natural resources, indigenous peoples have experienced large scale displacements and often been evicted without compensation or alternative land. Most of them hold no formal legal title to land under national tenure laws, which means that they have technically become squatters on their own lands or on other people’s lands, and suffer permanent risk of eviction. In some cases, indigenous peoples are allowed to remain on land owned by non-indigenous communities in exchange for agricultural work; others are allowed to stay on land owned by charitable organisations. Land rights will determine whether indigenous peoples have the right to remain on their lands, or at least get compensation for their expulsion, and are not only crucial to their cultural survival as peoples but also for their livelihoods and economic development. By becoming landless most indigenous communities have been pushed into further economic and spatial marginalisation, living in extremely vulnerable conditions. Loss of access to their traditional territories is often synonymous with marginalisation, homelessness, increased mortality, food insecurity, and social disarticulation arising from the forced change of lifestyle. Securing

⁵ African Group, ‘Aide-memoire of the African group on the United Nations Declaration on the Rights of Indigenous Peoples’ (2006).

⁶ ACHPR ‘Advisory opinion on the UN Declaration on the Rights of Indigenous Peoples’, 41st Ordinary Session, Accra, Ghana, May 2007.

⁷ Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities submitted in accordance with ‘Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples’ Rights at its 28th ordinary session (2005) 93.

⁸ Report of the African Commission’s Working Group (n 7 above).

access and ownership of land therefore remains a critical concern for many indigenous communities.

International law, and more particularly international human rights law, has for some time been seen as a positive tool to support indigenous peoples' rights; when it comes to land rights, however, such positivity is new. September 2007 marked the start of a new era for indigenous peoples, with the adoption of the UNDRIP. Despite this recent development, international law has historically played a negative role regarding indigenous peoples' rights, and more especially their rights to land. An important tool in the hands of the colonial powers, international law has been a central vehicle in the dispossession of indigenous peoples. Most of the rules regarding title to territory under international law were aimed at justifying the dispossession of indigenous peoples of their lands. While various legal systems applied, during colonisation, to land rights for indigenous peoples – depending on which state was the coloniser – international law played the role of common denominator, ensuring that all powers adhered to the same legal doctrine. The rules governing title to territory under international law became the basis of the 'rules of the game' between the colonial powers, and as such had a direct impact on indigenous peoples' land rights. Because of this legacy, international law still plays a huge part in the contemporary situations faced by indigenous communities throughout the continent today, a legacy now being challenged by international human rights law.

The first part of this chapter retraces in history the manner in which territory was acquired by the State according to international law with a view to analysing the consequences of this acquisition for indigenous peoples. It examines to what extent international legal rules designed by colonial powers directly and indirectly affected indigenous peoples' land rights. It is argued that international law played an important role in such colonial operation, serving as a basis to establish the rule of territorial rights. In contrast, the second section highlights that contemporary international human rights law has supported the recognition of indigenous peoples' rights over their traditional territories. By undertaking such a historical approach to land rights, the chapter analyses to what extent contemporary international human rights standards support the recognition of the land rights of indigenous communities. The emergence of a specific body of law regarding indigenous peoples' rights is becoming important for Africa. The rights to land, and also the emerging international legal standards on free, prior and informed consent, could potentially play a key role in the future relationship between States, investors, and indigenous peoples. By focusing on both the history of international law and contemporary human rights law standards, this chapter examines the sometimes contradictory rules, on the one hand rules governing territorial possession by states, and on the other hand human rights law arguing for the recognition of indigenous peoples' land rights.

2 International law, colonisation and land rights

Ironically, the universalisation of international law was principally a consequence of the imperial expansion that took place in past centuries, as the development of international law was primarily guided by the establishment of rules governing title to territory over newly colonised countries. For the African continent, these rules were crucial in defining land titles both for the colonial powers and for the so-called 'native' populations. In what is now referred to as the 'scramble for Africa',⁹ colonial powers needed rules to divide the continent between themselves, and to justify the colonial enterprise of taking lands from the 'natives'. Most of the rules regarding title to territory under international law were based on these two premises.

2.1 International law and the 'civilising' mission

The colonial enterprise, especially during the new imperialist period (1880-1914), justified itself under a banner of 'Commerce, Christianity and Civilisation'. While ultimately the primary goal of colonisation was undoubtedly trade expansion, the notion of 'Civilisation' provided the colonial powers with a moral vindication, the equation being: 'Commerce plus Christianity equals Civilisation'. Especially in Africa a 'civilising mission' was proposed as the main justification for the colonial enterprise. Illustrations of such a 'civilising mission' can be found in the Berlin Conference (1884-85), which played a huge role in the development of the international 'rules' regarding the colonisation of Africa. The Berlin Conference represented one of the first gatherings of the main colonial powers and the first formal recognition of their different 'spheres of influences'. Concomitant to the prevailing '*mission civilisatrice*' governing that period the Final Act refers to colonial states' mission to bring the 'blessings of civilisation' to the African continent. The development of international law throughout that period contains many references to 'civilising mission' ('*mission civilisatrice*'), providing colonial powers with rules justifying territorial dispossession of indigenous peoples in Africa.¹⁰

A legal consequence of this 'civilising mission' was the doctrine of trusteeship, and the 'humanitarian' call to help the 'natives' (or 'primitives') to join the 'enlightenment' and stop their 'barbaric' traditions. As a result colonial powers (or 'civilised' powers) had to act in a spirit of trusteeship towards the non-civilised native populations. The trusteeship doctrine is summarised in a 1919 decision from the Privy Council which stated that: 'some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled

⁹ TF Pakenham *The scramble for Africa* (1991).

¹⁰ M Koskenniemi *The gentle civiliser of nations* (2002).

with institutions or the legal ideas of civilised society.¹¹ Behind this veil of 'civilising mission' European powers took control of the lands in the hands of indigenous communities, not for their own interest but for the benefit of indigenous people themselves. This international doctrine of a trusteeship mission was translated into colonial laws, as most (if not all) colonial powers put in place a system of land control for the 'most uncivilised'. In central Africa such a doctrine can be found in legislation up to the 1950's. For example, a 1952 decree in the Congo stated that, to be able to register a right to land, native peoples had to prove their degree of education and civilisation.¹² In practical terms the trusteeship doctrine resulted in the establishment of reserved lands or reservations for indigenous communities, conferring a right of usage for native communities with a restriction on their ability to alienate such lands (as the aim was to 'protect' them). Even today reserved lands for indigenous peoples are based upon hypocritical humanitarian grounds (to allow indigenous peoples to enable to maintain a reasonable standard of existence), and on the absolute control of the government over such right (the government holds the ultimate title to the land).

The colonialist distinction between 'civilised' and 'uncivilised' societies had another consequence for land rights for indigenous peoples through the notion of 'pre-existing rights'. Under colonial rules, when a colonial power took control of a territory there was an obligation to recognise 'pre-existing rights', including land rights, in that territory. The Final Act of the Berlin Conference stipulated that colonial states had to exercise their authority in such a way as to protect existing rights within the territory (article 35 of the Final Act). In theory such recognition of 'pre-existing rights' could have some important consequences for indigenous peoples, as if their rights were 'pre-existing' the colonial legal regime they could 'survive' it. However, in the words of Westlake, a prominent nineteenth century publicist: not 'all rights are denied to such natives, but that the appreciation of their rights is left to the conscience of the state within whose recognised territorial sovereignty they are comprised ...'.¹³ This statement accurately highlights how the recognition of pre-existing land rights was in the absolute control of the colonial power. Lindley, in his seminal work on the acquisition of territory, also highlighted the distinction made by the colonial states between the recognition of 'civilised' and 'un-civilised' pre-existing rights, with states rejecting the notion of 'uncivilised' pre-existing rights to land (such as customary indigenous peoples' laws).¹⁴ Some contemporary land claims at the national level (especially under the common law) have started to examine

¹¹ Privy Council, *In Re Southern Rhodesia* (1919) AC 211, 233 - 234.

¹² Décret du 17 mai 1952 sur l'immatriculation des indigènes. tout indigène ayant justifié par sa formation et sa manière de vivre d'un état de civilisation impliquant l'aptitude de jouir des droits et à remplir les devoirs prescrits par la législation écrite pouvait passer du régime de la coutume au régime du droit écrit.

¹³ J Westlake *Chapters on the principles of international law* (1894) 138.

¹⁴ MF Lindley *The acquisition and government of backward territory* (1969).

what pre-existing rights ‘survived’ the colonial rules.¹⁵ Some courts have stated to examine to what extent indigenous peoples ‘pre-existing’ laws could have survived colonisation, and what their impact could be in contemporary land claims, notably in the *Richtersveld* decision of the Supreme Court of South Africa.¹⁶

One consequence of the colonial era’s classification of societies on a scale of ‘civilisation’ is the view of nomadic societies. Under the tenets of international law, nomadic peoples were traditionally considered to be at the bottom of the scale. By being nomadic they had no right to the land, as one of the rules of territorial occupation under international law is the principle of effective use of the land. Only agricultural societies were deemed to use lands effectively, and nomadic peoples were considered as only wandering across territories and therefore having no rights to occupation. The assumption was that nomadic peoples’ territories were not used productively and therefore should be regarded as empty and open to colonisation. Nomadic peoples’ territories were regarded as *terra nullius*, lands belonging to no-one. This assumption was partially challenged only in 1975 when the ICJ in its advisory opinion on the Western Sahara recognised that nomadic peoples could also exercise some form of social and political organisation, but fell short of recognising the capacity of nomadic peoples to exercise territorial sovereignty.¹⁷ As highlighted by Reisman, ‘the Court formally acknowledged the existence of a theory of international land tenure based on a non-European conception of title as generative of “legal ties” ... But such “legal ties” were not enough to defeat title deriving from European colonial claim.’¹⁸ The view that only societies with a permanent settled population can exercise territorial control remained. This historical bias against nomadic communities still has some impact in contemporary land claims, as most nomadic communities throughout the continent have only very limited access to legal titles to their lands, and the dominant assumption is still that they do not ‘effectively’ occupy their lands.

2.2 The principle of ‘effective occupation’

In contrast to other instances of colonisation, where European colonial powers just decided that the colonised territories were empty and therefore open to colonisation (Australia, Americas), in the case of Africa (at least following the Berlin Conference) colonial powers had to establish formal legal ties with the local populations to establish their authorities. Article 35 of the Final Act stated:

¹⁵ J Gilbert, ‘Historical indigenous peoples’ land claims’ (2007) 56 (3) *International and Comparative Law Quarterly* 538 – 611.

¹⁶ *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA).

¹⁷ ICJ, *Western Sahara*, Advisory Opinion, ICJ Reports 1975.

¹⁸ M Reisman, ‘Protecting indigenous rights in international adjudication’ (1995) 89(2) *American Journal of International Law* 354 - 355.

The signatory powers of the present Act recognise the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights (*droit acquis*) and, as the case may be, freedom of trade and of transit under the conditions agreed upon.¹⁹

While the Final Act remained vague regarding the implementation of the principle of effective occupation, it had several long-lasting consequences for the development of the international rules regarding title to territory in Africa.

One of the first consequences was that colonial powers renewed their use of chartered companies as agents of the state. As in most situations the effective control of huge territories was deemed too expensive for the administrative systems of the colonial states, and so states granted rights to private companies (often referred to as chartered companies), not only trading rights but also rights regarding the administration of the colonised territories, including territorial rights. Thus chartered companies became important actors regarding land rights for the local communities, sometimes over huge areas of lands. For example, the UK placed the area corresponding to what is today Uganda under the charter of the IBEAC²⁰ in 1888, and ruled it as a protectorate from 1894. At some stage chartered companies were responsible for securing control over 75 per cent of British territory in sub-Saharan Africa.²¹ Similar processes were followed by the French, German, Portuguese and Dutch administrations, so that private trading companies could act as the colonial power with rights over land and natural resources.²² Chartered companies also had the power to enter into treaty relationship with communities, such treaties often having territorial consequences. While treaties with indigenous populations have always been part of the colonial enterprise, following the Berlin Conference colonial powers (mainly through their chartered companies) entered into a period of intense treaty making with African leaders and communities. In the end of the nineteenth century, Africa (and especially West and Central Africa) witnessed a 'race' between the main colonial powers in trying to sign as many treaties as possible with local chiefs, to ensure the transfer of the lands.²³ While the forms of these treaties vary across the continent, usually they involved a notion of peaceful relationship and provided for the cession of land ownership from the

¹⁹ Note that such obligation of effective occupation was repeated in the 1919 Convention of Saint Germain in its article 10.

²⁰ Imperial British East Africa Company.

²¹ JE Flint 'Chartered companies and the transition from informal sway to colonial rule in Africa' in S Forster *et al* (eds) *Bismarck, Europe, and Africa* (1988) 69 - 83.

²² On the power of such companies, see decision from the Privy Council in Southern Rhodesia (n 11 above).

²³ An account of such race for treaty making is available in Lindley (n 14 above) 34 - 36.

African communities.²⁴ These treaties were then used by the colonial powers as proof to ensure the transfer of sovereignty in their favour.

3 Contemporary African and international human rights law

In contrast with the rationales behind colonial law-making processes, human rights developments since the 1948 Universal Declaration of Human Rights have created legal norms that operate according to a different paradigm. While traditionally international law is concerned with the rights of states to claim title to territory, human rights law focuses on the rights of the peoples living in those states. Hence international human rights law starts from a different perspective on land rights: it requires that indigenous peoples' ownership and other rights to their lands, territories and resources be legally recognised and respected. It connects those land rights to a variety of other rights, including the general prohibition against racial discrimination, the right to property, the right to cultural integrity and the right to self-determination.

This section explains some relevant human rights standards pertaining to indigenous peoples' right to land, including provisions from the AU's instruments, the UN system and the ILO. Those sets of standards are applicable to African countries, and the African Charter on Human and Peoples' Rights can be interpreted by reference to other international human rights instruments and decisions.²⁵ The analysis of those standards reveals an important gap between the human rights situation of indigenous peoples and the human rights protection provided by legal standards. Their implementation remains challenging, but they form the core guiding principles to which states have committed themselves as members of intergovernmental bodies, through their ratification and participation in the adoption of these instruments.

3.1 The right to land

In the African Charter on Human and Peoples' Rights of 1986, the right to property is guaranteed, but can be 'encroached upon in the interest of the public need or in the General interest of the community and in accordance with the provisions of appropriate laws'.²⁶ This restriction could at first glance be taken to provide justification for evictions and displacements of indigenous peoples, but the right to property should be interpreted

²⁴ For detailed analysis of these treaties and the role of international law, see J Castellino & S Allen *Title to territory in international law* (2003).

²⁵ Article 60 of the African Charter.

²⁶ Article 14 of the African Charter.

alongside other provisions of the charter, and the work of the Working Group on Indigenous Peoples/Communities.

The Working Group on Indigenous Peoples/Communities is a special mechanism of the ACHPR, the human rights organ of the regional inter-governmental African Union. It was established in 2001, and part of its role is to research the human rights situation of indigenous peoples in Africa and to formulate recommendations to prevent and provide remedy for violations of indigenous peoples' human rights. In an extensive report adopted in 2003, the working group explained that:

The protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relate ... to articles 20, 21, 22 and 24 of the African Charter.²⁷

These articles provide the rights of all peoples to: existence and self determination; freely dispose of their wealth and resources and, in case of dispossession, the right to recover their property and be compensated; development and equal enjoyment of the common heritage; and a general satisfactory environment favourable to their development. They amount to a solid legal protection of indigenous peoples' land rights in Africa.

The report of the working group further emphasises that a major problem leading to the loss of indigenous peoples' land in Africa is that customary collective tenure was neither recognised nor secured. Instead, land occupied by pastoralists and hunter-gatherers was defined as *terra nullius*. Also collective land titles are not granted by most national laws, and yet: 'Collective tenure is fundamental to most indigenous pastoralist and hunter gatherer communities, and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure'.²⁸

The ACPHR, by endorsing the report of the working group, has acknowledged that the land rights of indigenous peoples have been violated:

The land alienation and dispossession and dismissal of their customary rights to land and other natural resources has led to an undermining of the knowledge systems through which indigenous peoples have sustained life for centuries and it has led to a negation of their livelihood systems and deprivation of their means. This is seriously threatening the continued existence of indigenous peoples and is rapidly turning them into the most destitute and poverty stricken. This is a serious violation of the African Charter (article 20, 21 and 22), which states clearly that all peoples have the

²⁷ Report of the African Commission's Working Group (n 7 above) 21.

²⁸ Report of the African Commission's Working Group (n 7 above) 22.

right to existence, the right to their natural resources and property, and the right to their economic, social and cultural development.²⁹

In 2009, the ACHPR issued a decision on the first formal complaint received about indigenous peoples' land rights, submitted by the Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community against the government of Kenya.³⁰ A nature reserve was established by the Kenyan government in the 1970s in the Lake Bogoria region on lands inhabited since time immemorial by the indigenous Endorois pastoralist communities. When the reserve was created the Endorois were evicted and relocated without compensation, and in vain sought redress in Kenya's national courts. They continued to face contestation from the state when they brought their case before the ACHPR. The ACHPR's decision constitutes an extensive and clear piece of jurisprudence, which is unequivocal on the definition of indigenous peoples and the necessity to recognise their ownership rights over their ancestral lands.

The ACHPR built on definitions provided by the UN, the ILO and its Working Group on Indigenous Populations/Communities to clarify the contested terms, and noted that:

there is a common thread that runs through all the various criteria that attempt to describe indigenous peoples – that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture.³¹

The ACHPR found that articles 1, 8, 14, 17, 21 and 22 of the African Charter had been violated, referring respectively to: the duty of States to recognise the rights enshrined in the Charter; the right to practice religion; the right to property; the right to culture; the right of peoples to the free disposal of their natural resources; and the right of peoples to development. It recommended that the State of Kenya:

- (a) Recognise rights of ownership to the Endorois and restitute Endorois ancestral land.
- (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
- (c) Pay adequate compensation to the community for all the loss suffered.
- (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.

²⁹ Report of the African Commission's Working Group (n 7 above) 108.

³⁰ Complaint No 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*. Decision adopted by the ACHPR in May 2009 and endorsed by the AU Assembly of Heads of State in February 2010.

³¹ (n 29 above) para 154.

- (e) Grant registration to the Endorois Welfare Committee.
- (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations.
- (g) Report on the implementation of these recommendations within three months from the date of notification.

This ground-breaking decision has become the most important precedent in international human rights law with regard to indigenous peoples land rights in Africa.

These rights are also affirmed by the UNDRIP of 2007, which states that indigenous peoples have the 'right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.'³² This also comprises 'the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.'³³ Furthermore, the UNDRIP affirms that states' duty to guarantee the right to land must be realised in respect of tradition and land tenure systems of indigenous peoples. The vast majority of UN member states voted in favour of its adoption, and no African country voted against it.³⁴

African indigenous peoples' right to land also stems from fundamental binding international treaties. The International Covenant on Civil and Political Rights (ICCPR) of 1966 protects the right of ethnic, religious and linguistic minorities to enjoy in community their own culture, practices, religion and language.³⁵ The Covenant also affirms the right of all peoples to self-determination and freely to dispose of their natural wealth, and fifty AU member states ratified it. The UN Human Rights Committee, the body monitoring the implementation of the ICCPR, linked the right to land to cultural rights guaranteed in the Covenant, and advised that measures be taken to restitute to indigenous peoples their native lands.³⁶

The ILO has adopted two Conventions pertaining to indigenous peoples' rights: Convention 107 (ILO 107) of 1957 and Convention 169

³² Article 26(1) of UNDRIP.

³³ Article 26(2) of UNDRIP.

³⁴ The African Group submitted an 'Aide mémoire' to the United Nations session in November 2006 in New York. Namibia and Botswana led this group, which raised several concerns concerning the adoption of the Declaration. These concerns were responded to by expert NGOs and the African Commission' Working Group on Indigenous Peoples/Communities. The Declaration was adopted without any African vote against in 2007. See the Advisory Opinion of the African Commission on Human and Peoples Rights Concerning the United Nations Declaration on the Rights of Indigenous Peoples, adopted at the 40th Ordinary session of ACHPR, May 2007, Accra, Ghana.

³⁵ Article 27 of ICCPR.

³⁶ Concluding observations by the Committee on the Elimination of Racial Discrimination, Australia, 24 March 2000, CERD/C/56/Misc. 42/rev. 3.

(ILO 169) of 1989.³⁷ Their content is, however, only partially applicable in Africa, as African states have not yet broadly ratified these instruments.³⁸ Yet the two Conventions are part of the ILO's standards on indigenous land rights and represent the views of a major intergovernmental organisation.

While ILO 107 has been superseded and replaced by ILO 169, it remains in force for those countries which ratified it but have not ratified ILO 169. ILO 107 states that 'The right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognised'. The Committee of Experts stated that the fact that a people has some form of relationship with land currently occupied, even if only for a short time, was sufficient to form an interest and, therefore, rights to that land and the attendant resources.³⁹

ILO 169 contains a number of provisions on the territorial rights of indigenous peoples. It requires that governments recognise and respect the special spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories, and especially the collective aspects of this relationship.⁴⁰ It further affirms that states shall recognise indigenous peoples' collective rights of ownership and possession over the lands which they traditionally occupy, and take the necessary measures to identify these lands and to guarantee effective protection of indigenous peoples' rights of ownership and possession.⁴¹ Finally, it states that indigenous peoples may be relocated only as an exceptional measure and only with their free and informed consent, and stipulates the measures to be taken in the event of relocation.⁴²

3.2 A matter of equality and non-discrimination

When indigenous peoples claim their land rights, they claim the rights to equality and non-discrimination. Discrimination was both a catalyst in and a consequence of their loss of ancestral lands. Human rights standards pertaining to discrimination issues are thus fundamental to indigenous land rights. At the international level, the rights to equality and non-discrimination are guaranteed in numerous international instruments,

³⁷ ILO 169 came into force in 1991.

³⁸ ILO 107 is ratified by only a few and ILO 169 by none. Angola, Egypt, Ghana, Guinea-Bissau, Malawi and Tunisia have ratified ILO 107. However, both the Central African Republic and Cameroon have actively started a process of negotiation towards the potential adoption of ILO 169. See ILO Programme to Promote ILO Convention No 169.

³⁹ International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (4A)*, (1988) 287.

⁴⁰ Article 13(1) of ILO 169.

⁴¹ Article 14 of ILO 169.

⁴² Article 16(2) of ILO 169.

including the UDHR,⁴³ the ICCPR⁴⁴ and the Convention on the Elimination of all Forms of Racial Discrimination.

The United Nations Committee on the Elimination of Racial Discrimination, the body responsible for monitoring of the CEFRD of 1969 affirms that it:

calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁴⁵

At the regional level, rights to non-discrimination and equality are guaranteed by the African Charter, and equality of all peoples is explicitly protected.⁴⁶ The Working Group on Indigenous Populations/Communities of the African Commission explains how different indigenous groups in central Africa suffer from being looked down upon by other members of the society, how in many places they are dehumanised and described as creatures, and how the rest of the population would prefer them to 'settle down and abandon their way of life and imitate their own way of living and earning'. The working group declares that: 'the rampant discrimination towards indigenous peoples is a violation of the African Charter'.⁴⁷

While it is clear to the ACHPR that groups of hunter-gatherers from the African forests, such as the Batwa, Baka and Bagyeli, are indigenous peoples as understood in international law,⁴⁸ the Commission also acknowledges that 'very few African countries recognise the existence of indigenous peoples in their countries' and 'even fewer recognise them in their national constitutions or legislation'.⁴⁹ In many African countries, the use of the term indigenous peoples – and by extension the implementation of international standards pertaining to indigenous peoples – has revealed a challenge because of its colonial meaning relating to natives or first inhabitants. It was argued by some African states that the meaning of 'indigenous' in their constitution is not the same as the one

⁴³ Article 7 of UDHR.

⁴⁴ Article 26 of ICCPR.

⁴⁵ General Recommendation XXIII of 1997.

⁴⁶ UN CEFRD, *General Recommendation XXIII (51) concerning Indigenous Peoples*, adopted at the 1235th meeting, 18 August 1997, UN Doc. CERD/C/51/Misc. 13/Rev. 4, paragraph 5; and article 2 and 3 of ACHPR.

⁴⁷ Article 19 ACHPR; ACHPR Report (n 7 above) 35 – 36.

⁴⁸ ACHPR Report (n 7 above) 95 – 97.

⁴⁹ ACHPR Report (n 7 above) 107. For a definition of indigenous peoples see 86 – 104.

under international law.⁵⁰ Some African states have also declared that implementing the rights of indigenous peoples under international law will generate conflicts as it risks being seen as preferential treatment. Rwanda, for example, explained to the AHCPR during the examination of its state report in November 2007, that, because of the genocide of 1994, the government could not integrate the concept of indigenous peoples, and claimed that every Rwandan was equal, there were no indigenous peoples in Rwanda, and therefore the legal concept of indigenous peoples and its different protections did not apply to the country.⁵¹

However, as stated by the ACHPR, reactions such as that of the Rwandan government reveal a misunderstanding of the status of indigenous peoples. According to the Commission:

One of the misconceptions regarding indigenous peoples is that to advocate for the protection of the rights of indigenous peoples would be to give special rights to some ethnic groups over and above the rights of all other groups within a state. This is not the case. The issue is not special rights. As explained above, the issue is that certain marginalised groups are discriminated [against] in particular ways because of their particular culture, mode of production and marginalised position within the state. This is a form of discrimination which other groups within the state do not suffer from. It is legitimate for these marginalised groups to call for protection of their rights in order to alleviate this particular form of discrimination.⁵²

The Commission further explains a related misconception: ‘talking about indigenous right will lead to tribalism and ethnic conflicts’, and responds that human rights promote multiculturalism and diversity, while the conception of unity and assimilation that causes conflicts.⁵³ African countries should not, therefore, fear that accepting the concept of indigenous peoples will cause conflicts in the country and divide their peoples.

3.3 Conservation practices and customary use of land and natural resources

Relevant norms on indigenous land rights can also be found in instruments pertaining to environmental conservation. The Convention on Biological Diversity (CBD) of 1992 was ratified by many African states, and its preamble recognises

⁵⁰ See for example the constitution of Cameroon and of Uganda.

⁵¹ There are no official transcripts of the oral response delivered in public session during the ACHPR meeting in Brazzaville, Republic of Congo, in November 2007. However, unofficial notes taken by the International Working Group for Indigenous Affairs can be found at <http://www.gitpa.org/People%20GITPA%20500/GITPA%20500-6.htm>

⁵² ACHPR *Indigenous Peoples in Africa: the Forgotten Peoples?* (2006) 11 - 12.

⁵³ ACHPR Report (n 7 above) 88.

the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.⁵⁴

The respect and preservation of traditional knowledge relevant for the conservation and sustainable use of biological diversity is also promoted and protected.⁵⁵ The CBD further provides that states should ‘protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.’⁵⁶ This includes indigenous agriculture, agro-forestry, hunting, fishing, gathering, use of medicinal plants, and other subsistence activities. This article, by implication, should also be read to include protection for the land base, ecosystem and environment in which those resources are found, as acknowledged in the *Addis Ababa Principles and Guidelines on Sustainable Use of Biodiversity* of 2004.⁵⁷

In addition, in 2000, states party to the CBD adopted guidelines for the conduct of cultural, environmental and social impact assessments to help develop a collaborative framework within which governments, indigenous and local communities, decision makers and managers of developments can act. It also gives advice on the incorporation of cultural, environmental – including biodiversity-related – and social considerations of indigenous and local communities into new or existing impact-assessment procedures.⁵⁸

The *African Convention on Conservation of Nature and Natural Resources*, in its revised version adopted in 2003,⁵⁹ provides that states should take measures ‘to ensure that traditional rights and intellectual property rights of local communities including farmers’ rights are respected’.⁶⁰ The Convention further recognises that access to indigenous knowledge requires prior and informed consent from communities.⁶¹ This Convention revises the 1968 version, which did not integrate specific

⁵⁴ The CBD entered into force in 1993.

⁵⁵ Article 8(j) of CBD.

⁵⁶ Article 10(c) CBD.

⁵⁷ Adopted by the VIIth Conference of Parties to the CBD, especially in Principles 1 and 2. Principle 2 provides that ‘sustainability is generally enhanced if Governments recognise and respect the “rights” or “stewardship” authority, responsibility and accountability to the people who use and manage the resource, which may include indigenous and local communities ...’. The first principle of the ‘Ecosystem Approach’, adopted by the COP in Decision V/6 and considered to be one of the main tools for the implementation of the Convention, states that ‘Different sectors of society view ecosystems in terms of their own economic, cultural and societal needs. Indigenous peoples and other local communities living on the land are important stakeholders and their rights and interests should be recognised.’

⁵⁸ Secretariat of the CBD *Akwé: Kon Guidelines* (2004).

⁵⁹ *African Convention on the Conservation of Nature and Natural Resources* (2003).

⁶⁰ Article XVII(1) of *African Convention* (n 58 above).

⁶¹ Article XVII(2) of *African Convention* (n 58 above).

provisions for peoples' rights and was solely oriented towards the protection of soil, flora, fauna and other natural resources. The revised Convention is not yet in force, as only eight states have so far ratified it since its adoption.⁶² The Convention has potential for indigenous land rights if its provisions are interpreted in conjunction with other relevant international and regional standards, first and foremost, the African Charter on Human and Peoples' Rights and the work of the African Commission's working group on indigenous populations/communities.

Another useful guideline in the context of conservation and land rights is the *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*, developed in 2000 by the OAU, and designed to provide guidelines for access and benefit-sharing regimes with respect to biodiversity.⁶³ In 2004, more than half of African countries had taken steps to adopt legislation based on the model law.⁶⁴ The model legislation promotes and supports traditional and indigenous technologies for the conservation and sustainable use of biological resources, guides states into recognising local and indigenous communities' collective rights to their biological resources, and includes an obligation to obtain prior and informed consent of indigenous and local communities to access resources.⁶⁵

3.4 Participation and consent

The principle of free, prior and informed consent (FPIC) is possibly the most dramatic example of the paradigm shift since the international colonial era to the modern conception of international human rights law. In contemporary international law, indigenous peoples' have the right to participate in decision-making and to give or withhold their consent to activities affecting their traditional lands, territories and resources. International human rights law places clear and substantial obligations on states in connection with resource exploitation on indigenous lands and territories. Several decisions of intergovernmental human rights bodies have established the rights of indigenous peoples to free prior and informed consent, founded upon an understanding of the full range of issues.⁶⁶

⁶² According to article XXXVIII fifteen ratifications are required for its entry into force.

⁶³ OAU (2000), available at <http://www.cbd.int/doc/measures/abs/msr-abs-oau-en.pdf>.

⁶⁴ N Zerbe 'Biodiversity, ownership and indigenous knowledge' (2005) 54 *Ecological Economics* 493 – 506.

⁶⁵ OAU (n 62 above) article 18.

⁶⁶ See, *inter alia*, UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) Concerning Indigenous Peoples* (1997); UN Committee on Economic, Social and Cultural Rights, *General Comment No 7* (1997); *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (2001) 49 – 54, paragraph 18; Committee on the Rights of the Child, *Day of General Discussion on the Rights of Indigenous Children: Recommendations* (2003) para 4;

The UNDRIP (2007) explicitly stipulates the right to FPIC.⁶⁷ The CBD requires that the traditional knowledge of indigenous and local communities may be used only with their 'approval'.⁶⁸ The Inter-American Commission on Human Rights (IACHR) has developed considerable jurisprudence on FPIC.⁶⁹ The African Commission also used this principle in the case of the Ogoni people of Nigeria considering the impact of oil exploration on them through an analysis of both the economic and social rights and the collective rights in the Charter.⁷⁰ The Government of Nigeria was part of a consortium involved in oil production in Ogoniland, part of the oil-rich Niger delta region. Local Ogoni communities were not involved in the decisions affecting development of their region, and production activities were carried out without regard for their health or environment. A number of oil spills contaminated the water and soil, causing short- and long-term health consequences for the Ogoni people, due in part to the lack of proper safety measures. When the Ogoni people protested, state military forces carried out violent and often lethal attacks against them. The Commission found a violation of the right of peoples to a general satisfactory environment,⁷¹ linking it with a violation of the individual's right to health.⁷² Moreover, the Commission found a violation of the right of peoples freely to dispose of their wealth and natural resources,⁷³ since the government failed to involve Ogoni communities in the decision-making regarding oil exploration.⁷⁴ In the Endorois case, the ACHPR also expressed the view that, in any development or investment project, the state had a duty to seek the free prior and informed consent of indigenous communities, which had not been respected by the Government of Kenya.⁷⁵

3.5 The right to reparation

According to international legal principles and standards, indigenous peoples have a right to reparation for the human rights violations they have experienced, including restitution, compensation, rehabilitation,

Organisation of American States, *Report on the Situation of Human Rights in Ecuador* (1997) 89; *Report No 96/03, Maya Indigenous Communities and their Members Case 12.053* (2003) para 149.

⁶⁷ Articles 10, 11(2), 19, 28 and 32 of UNDRIP (2007).

⁶⁸ Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Working Group on article 8(j) and Related Provisions of the CBD (2001) 11.

⁶⁹ See, *inter alia*, IACHR Report No 27/98 (Nicaragua), para 142; *Report No 96/03, Maya Indigenous Communities and their Members Case 12.053* (2003) para 141.

⁷⁰ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria*, Communication 155/96 (2001 – 2002).

⁷¹ Article 24 of African Charter.

⁷² Article 16 of African Charter.

⁷³ Article 21 of African Charter.

⁷⁴ *SERAC* (n 69 above) para 58.

⁷⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International* (n 29 above), para 290 - 291.

satisfaction and guarantees of non-repetition.⁷⁶ Reparation is intended to relieve the suffering of and afford justice to victims 'by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations'.⁷⁷ One basic aspect of the right to reparation is the availability of effective remedies.⁷⁸

Theo van Boven, UN Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, states in his landmark UN study on reparations that:

Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, *inter alia*, restoration of liberty, citizenship or residence, employment or property.⁷⁹

The Inter-American Court on Human Rights has consistently held that 'Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio integrum*), which includes the restoration of the prior situation ...' and compensation or other forms of indemnification for material and immaterial damages.⁸⁰ The same principle has been applied by UN bodies responsible for oversight of state compliance with universal human rights and instruments, the ICJ, and the European Court on Human Rights, pursuant to article 50 of the ECHR.

The general principle of restitution in human rights law also applies to indigenous peoples. There is a difference in its application to indigenous peoples, however, because indigenous people hold property rights individually and collectively. As van Boven stated, a

coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples. Against this background it is therefore necessary that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimised communities to present collective claims for damages and to receive collective reparation accordingly.⁸¹

He adds that:

⁷⁶ For a detailed treatment of remedies in human rights law, see D Shelton, *Remedies in international human rights law* (1999).

⁷⁷ T Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (1993) 56.

⁷⁸ In human rights law, the availability of effective remedies is a right in and of itself that complements other recognised rights. See, *inter alia*, UDHR, article 8; ICCPR, article 2 (3); CERD, article 13; ECHR, article 13; American Convention on Human Rights, articles 1, 8 and 25; ACHPR, article 7.

⁷⁹ Boven (n 77 above) 57.

⁸⁰ n 77 above, 13.

⁸¹ n 77 above, 8 para 14.

Vital to the life and well-being of indigenous peoples are land rights and rights relating to natural resources and the protection of the environment. Existing and emerging international law concerning the rights of indigenous peoples lays special emphasis on the protection of these collective rights and stipulates the entitlement of indigenous peoples to compensation in the case of damages resulting from exploration and exploitation programmes pertaining to their lands, and in case of relocation of indigenous peoples. The draft declaration on the rights of indigenous peoples [article 27] recognises the right to the restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those territories which were lost.⁸²

Article 28 of the UNDRIP states that:

- (1) Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
- (2) Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

In 1997 the UN Committee on the Elimination of Racial Discrimination also addressed this issue, and its General Recommendation XXIII called upon States parties:

to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁸³

In the case of indigenous peoples in Africa evicted for environmentally protected areas, some might want to argue that restitution of ancestral lands is impossible. This hypothesis has, however, been defeated in the ACHPR Endorois decision, that the indigenous community rights of ownership of an area gazetted as a Game Reserve be recognised and that they should be granted unrestricted access to the said area.⁸⁴

⁸² Boven (n 76 above) 9.

⁸³ UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples* (1997) para 5.

⁸⁴ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International* (n 29 above).

Finally, ILO Convention 169 requires that indigenous peoples' collective rights of ownership and possession over the lands which they traditionally occupy shall be recognised.⁸⁵ The term 'traditionally occupy' does not require a continued and present occupation, but rather, according to the ILO, 'there should be some connection to the present'.⁸⁶ Consequently, under ILO 169 – and ILO 107, which uses the same language – indigenous peoples have the right to restitution and recognition of their rights to lands 'traditionally occupied' that they have been expelled from or that they have lost title to or possession of in the recent past, including those incorporated into protected areas without their consent. In the case of relocation, both consensual and non-consensual, ILO 169⁸⁷ also contains specified remedies: the right to return to traditional lands once the reason for relocation no longer pertains; allocation of lands of equal quality and legal status, unless the people(s) concerned express a preference for compensation; full compensation for any loss or injury resulting from relocation.

4 Conclusion

As highlighted, international law has played a mixed role regarding land rights in Africa. During the colonial era international law was an important factor in initiating the dispossession of indigenous peoples. The emergence of human rights law as a branch of international law marks an important change of approach. Indigenous peoples' rights to land and natural resources are strongly affirmed and guaranteed by numerous inter-related human rights decisions and instruments, which emerged from both regional and international human rights mechanisms in recent years. The wide ratification by African states of international and regional instruments pertaining to indigenous peoples' rights demonstrates a strong commitment toward the protection and promotion of indigenous land rights. However, the realisation of these rights through the implementation of the relevant decisions and instruments remains challenging. While international and regional bodies have created solid instruments and taken pioneering decisions, few of the principles expounded have been implemented in practice. Concrete measures are needed to translate the standards into reality, including those of the African Charter on Human and Peoples Rights, the United Nations Declaration on the Rights of Indigenous Peoples, the United Nations Convention on the Elimination of All Forms of Discrimination and the Convention on Biological Diversity. States can show greater commitment by ratifying other recent international and regional treaties engaging the rights of indigenous peoples, such as the revised African Convention on the Conservation of Nature and Natural

⁸⁵ Article 14 of ILO Convention 169.

⁸⁶ International Labour Office, *ILO Convention on Indigenous and Tribal Peoples 1989: A Manual* (2000) 18.

⁸⁷ ILO 169, article 16 (3 – 5).

Resources and ILO Convention 169. The principles and rights emerging from international law should be seen as minimum standards of protection for the rights of indigenous peoples, which no state legislation should fail to integrate.

The recognition of the existence of indigenous peoples in Africa is crucial to the realisation of the human rights guaranteed in international and regional instruments. Confusion around the concept of indigenous peoples has been recognised in documents of the Working Group on Indigenous Peoples/Communities, and few African countries recognise the existence of indigenous peoples on their territories.⁸⁸ Recognition must be the starting point, and then indigenous peoples should be given the opportunity to reacquire their ancestral land and acquire legal property rights on these lands. International law is unequivocal: it provides for reallocation of ancestral land to indigenous peoples and, when this is impossible, the allocation of alternative lands. The ongoing reforms on land rights undertaken at the national level are opportunities for government to take affirmative measures to tackle the specific problems that indigenous peoples face. In some cases, reintegration on the ancestral lands is possible and compatible with environmental conservation objectives. In other cases, alternative land can be provided, in accordance with international standards. Additionally, urgent measures to fight extreme poverty and marginalisation can be taken while reforms are being implemented.

Contemporary human rights law is also clear about participatory requirements in relation to decisions affecting indigenous peoples' right to land, which must be validated through their free, prior and informed consent. Displacements and eviction of indigenous peoples have happened without them being consulted and involved in the decision. Still landless, indigenous peoples continue to be marginalised from decisions concerning land. Viable and fair solutions will only emerge from consultations with indigenous communities and their involvement in decision-making processes.

⁸⁸ The report of the working group: *Advisory Opinion of the ACHPR Concerning the UNDRIP*, adopted at the 40th Ordinary session of ACHPR, in May 2007, Accra, Ghana.

INDIGENOUS PEOPLES AND
ANCESTRAL LANDS:
IMPLICATIONS OF THE
BAKWERI CASE IN CAMEROON*Ambe J Njoh***1 Introduction**

Conflicting claims of entitlement to land in Cameroon exist at two levels. The first level involves conflicts between the state and society, while the second involves conflicts between indigenous groups and strangers.¹ These conflicts and the tensions they engender have historically been heightened in Fako Division, particularly the region occupied by the Bakweri,² which is home to Mount Cameroon, one of Africa's three highest peaks.³ Thanks to soil from this volcanically active mountain, the region boasts the best land for agriculture in the nation. German colonial authorities recognised the region's agricultural potential early in their brief colonial tenure, and hastened to expropriate large tracts of land for plantation agriculture. The concomitant need for labour resulted in an influx of 'strangers' to the region, a land shortage for habitation, cultivation and other needs of the Bakweri people.⁴ The land shortage and the persistent refusal on the part of successive governments in Cameroon to recognise this people's entitlement to land constitute in essence the Bakweri land problem.

This chapter discusses how the problem has evolved since the German colonial era. It briefly describes the Bakweri and their traditional land tenure system, then reviews the colonial era in Cameroon as a source of the Bakweri land problem. Next, it identifies and discusses major relevant

¹ The term 'strangers' connotes people living in areas to where they do not trace their ancestry. Conversely, the term 'indigenous groups' encompasses people living in areas of their ancestry.

² This region lies on the southwestern slopes and foot of Mount Cameroon bordering on the Atlantic Ocean. The term 'Bakweri' in its plural form refers to the indigenous people of this region.

³ The two other high peaks are Kilimanjaro in East Africa and the Atlas Mountains in North-west Africa.

⁴ This problem was brought to the attention of the German colonial authorities at an early date. See CK Meek, *Land tenure and administration in Nigeria and the Cameroons* (1957) 404.

legislation and explores the human rights dimensions of the problem, drawing from the case of the Bakweri Land Claims Committee (BLCC), the accredited agent of the Bakweri, against the Government of Cameroon, which was heard by the African Commission of Human and People's Rights (ACHPR) in Banjul, Gambia in 2002. The chapter ends with some concluding remarks.

As with other cases of conflicting state-society claims of entitlements to land involving indigenous minorities, such as the *Mabo v Queensland*⁵ case in Australia, the *Guerin v The Queen*⁶ and the Ogoni people of Nigeria's Delta region case against the Government of Nigeria,⁷ the Bakweri case has implications that transcend the socio-economic and politico-administrative frontiers of Cameroon.⁸

2 The Bakweri in brief

The Bakweri are said to have migrated to their present locale on the slopes and foot of Mount Cameroon from an area east of the mountain in the mid-18th century. By the time the Germans arrived Cameroon in the late-1800s, the Bakweri were already completely but sparsely settled in the region around the mountain, stretching from its south-western slopes to the creeks by the Atlantic Ocean. The Bakweri population has always been relatively small in comparison to other indigenous Cameroonian groups, and is thinly spread and organised in small clusters over their ancestral lands. At independence, the Bakweri were estimated to be at most 16,000.⁹ As a polity, the Bakweri were largely fragmentary and acephalous. Thus, unlike some of their hinterland counterparts, pre-colonial Bakweri society was neither centralised nor possessed powerful paramount chiefs.¹⁰ Presently, the Bakweri are grouped into sixty-three villages, each headed by an autonomous and independent chief.¹¹

⁵ *Mabo and Others v Queensland* (1992) 2 HCA 23; *Mabo and Others v Queensland* (1992) 175 CLR 1.

⁶ *Guerin v the Queen* (1984) 2 S.C.R. 335.

⁷ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v Nigeria*, Communication 155/96 (2001 – 2002).

⁸ MA Stephenson & SR Stephenson *Mabo: A judicial revolution* (1993) MM Slaughter 'American indian tribes: Not as belonging to but as existing within' (2000); S Motha & C Perrin 'Deposing sovereignty after Mabo: Special issue' (2002) 13(3) *Law and Critique* 63 - 83.

⁹ C Fisiy & P Geshier 'The Bakweri: Nyongo witchcraft and the "Banana Boom"' trans D Tande http://www.bakweri.org/files/Bakweri_Nyongo_Witchcraft.pdf (accessed 30 May 2010).

¹⁰ It is erroneous to believe that all hinterland polities, particularly those of the country's grassfield region are centralised. As anthropologists with research experience in Cameroon have noted, some grassfield polities, such as Meta of the North-West Region, are acephalous. See R Dillon *Ranking and resistance: A precolonial Cameroonian polity in regional perspective* (1990).

¹¹ See Communication 260/2002, *BLCC v Cameroon*, reply presented by the Government of Cameroon on the exhaustion of remedies (2003) 6.

Like their hinterland counterparts, pre-colonial Bakweri society observed a land tenure system centred on the communal control of land. Members of this society used land in the built-up areas mainly for residential building, food crop cultivation, and the rearing of animals. The rest of the land served as hunting grounds and the source of medicinal products such as tree barks, roots and leaves. The pre-colonial Bakweri used rivers and other bodies of water on their ancestral lands for hydrotherapeutic and other rituals designed to positively affect their physical, mental and spiritual health. These bodies of water also served, and continue to serve, as a food source, with fishing the vocation of choice for many Bakweri.

In pre-colonial Bakweri society, communities comprising mainly extended families (as opposed to individuals) controlled land. Such control as was commonplace throughout most of Africa before the European conquest did not imply ownership of any sort. Consequently, it was never permissible for individuals to alienate or transfer land as custom allowed for no more than the privilege to use land. Land therefore had use, as opposed to economic, value in this society, was never viewed as a commodity and therefore could not be sold.¹² All living members of pre-colonial Bakweri society viewed themselves as custodians and not proprietors of the land bequeathed from earlier generations: the living had the responsibility of guarding and protecting land for the unborn.

3 Colonialism and the emergence of the Bakweri land problem

The formal annexation of Cameroon by the Germans came with the signing of a treaty between the German government representative, Nachtigal, and the native chiefs in 1884. By this time, German commercial interests in Cameroon, or what they called Kamerun, had expanded to encompass plantation agriculture, and the German imperial government had been quick to recognise the agricultural potential of the Mount Cameroon region. Accordingly, the government embarked on well orchestrated efforts to amass vast parcels of land in the region for plantation agriculture. Initially, these efforts included the active support of private German farmers to acquire agricultural land in the territory, and later the direct involvement of German imperial authorities in the land appropriation process.

Evidence suggests that both private German farmers and the German imperial government employed questionable means to acquire land in

¹² Over the years, and especially as a result of continuous contact with Europeans, this situation has changed. The most remarkable change has had to do with the practice of alienating and selling land, which has been adopted and recognised by the Bakweri.

colonial Cameroon. By some accounts, Swedish middlemen, who had been present in the region since 1883, and acting on behalf of German capitalist interest, coaxed, tricked, and deceived local chiefs into making wholesale transfers of vast parcels of communal land to private German farmers.¹³ On its part, the German imperial government gave explicit orders to its representatives on the ground in the territory to employ every means necessary to convert as much land as possible into German Crown property. A letter dated 6 May 1884 from Adolph Woermann¹⁴ to this effect instructed colonial authorities in the territory thus: 'By all means get the cession of very extensive land as private property – especially those suitable for plantations.'¹⁵ From instructions such as this, it is clear that German imperial authorities were bent on forcibly expropriating lands from indigenous groups without any meaningful compensation.

By the end of the First World War, when Germany relinquished control of the territory, some 264,000 acres in the area around Mount Cameroon were in the hands of German private companies and individuals, mainly in the form of freehold estates under German Crown Grant.¹⁶ Following the conclusion of World War I, Proclamation No 25 of 1920 conferred public custodianship of these estates upon the colonial government of Nigeria. Although this was meant as a temporary measure while awaiting a final decision to properly dispose of the estates, no efforts were ever made to seek the input of the natives. The importance of this point will become obvious when we turn our attention to the grievances of the Bakweri.

Efforts to dispose of the estates culminated in a public auction in London in October 1922, intended to sell the estates and apply the proceeds towards the war reparations payable by the vanquished (Germany) to the victors (the Allied Powers). One condition of the auction was that ex-enemy nationals could not bid, but hardly any estates sold. Meek, the foremost authority on land tenure in colonial Africa at the time attributed the failure to the ambiguous and perhaps dubious nature of the titles to the estates.¹⁷ It is also possible that the nature of the League of Nations' Mandate that transformed the Cameroonian territory into a Trust Territory raised questions about the status of the estates.

¹³ E Arderner *Kingdom on Mount Cameroon: Studies in the history of Cameroon coast, 1500-1970* (1996) 151 - 155; A Njoh 'Continuity and change in Cameroonian land policy' (2000) 15 *Planning Perspectives* 241 - 265.

¹⁴ Adolph Woermann (1847 – 1910) was a German merchant active in trade in West Africa and influential in Germany's territorial acquisition ventures in the region during the years leading up to the formal annexation of Cameroon in 1884.

¹⁵ C Fisiy *Power and privilege in the administration of law: Land law reforms and social differentiation in Cameroon* (1992) 27 Leiden: African Studies Centre; AJ Njoh, *Planning in contemporary Africa: The state, town planning and society in Cameroon* (2003) 76.

¹⁶ Meek (n 4 above).

¹⁷ Meek (n 4 above) 355.

A second auction, accompanied by a lifting of the embargo against ex-enemy nationals, was held in November 1924, and yielded better results, with most estates being purchased by their former owners. While the Cameroonian territory was under the control of Allied Powers, private German farmers either as individuals or companies maintained control of the estates until the Second World War.

When the war ended in 1945, the colonial government of Nigeria adopted a new stance toward the estates, deciding to purchase and administer the estates for the common good of the African inhabitants of the territory. In 1946 the colonial Nigerian legislature enacted two ordinances, Ordinance No 38 and 39. The first of these empowered the Governor of colonial Nigeria and Southern Cameroons to acquire and employ the ex-enemy lands, as he sees fit for the purpose of promoting the common good of the indigenous inhabitants of the territory.¹⁸ The second established the Cameroons Development Corporation (CDC) as a statutory body to assume control and exploit the ex-enemy lands, to operate on a commercial basis and devote the surplus profits for the benefit of the natives. By 1950, a decade before the formal termination of the colonial era in Cameroon, the CDC had assumed control over 395 square miles of land previously classified as ex-enemy estates, which were granted to the corporation for a period of 60 years, with the possibility of renewal for a further 60-year period. Entitlement to the corporation and its possessions was claimed by the post-colonial Cameroonian Government, yet the terms of the Mandate Territory Agreement of the League of Nations, and the subsequent 1946 Directives of the UN General Assembly, raise serious questions regarding about the constitutionality of the situation. In its Annual Report of 1946, the colonial government of Nigeria stated that the estates in question were held for the indigenous people until such time as they can assume control on their own. The fact that successive governments in Cameroon since the colonial era have deviated from this is a critical element in the Bakweri land problem.

4 The state, land laws and the Bakweri land problem

Successive governments in Cameroon have reinforced the state's power over land, typically in legislation masquerading as land reform initiatives. A number of these legislative actions are especially relevant to this chapter. The first is the German colonial government policy establishing 'native reservations', to which the Bakweri farming communities were confined. This policy, dating from the first tenure of Governor von Puttkamer, was designed to free large tracts of Bakweri ancestral lands for private

¹⁸ These are the lands that had been vacated by German plantation farmers.

agricultural plantations and colonial government use.¹⁹ Implementation of this policy entailed assigning each native an area of no more than 1.5 hectares for habitation and cultivation purposes, and the policy also required that dispersed settlements be consolidated into villages, with surveyed and numbered buildings and plots.²⁰

For the fishing communities of Tiko, the German colonial government enacted a scheme to convert all lands that were not 'needed' by the natives into property of the Crown in 1911.²¹ This dubious scheme arbitrarily determined that each native adult male (not females) should receive six hectares of land for habitation and cultivation, so that some 300 hectares of land were set aside and distributed, since the colonial government's census of 1908 recorded 50 adult males.

The decision to convert Bakweri ancestral lands in the Tiko area into property of the state was one of the last policy initiatives by German colonial authorities before the First World War, after which France and Britain assumed control of the territory as trustees of the League of Nations, the forerunner to the UN. In principle, France and Britain operated under the watchful eyes of the League of Nations, and could therefore not forcibly expropriate or convert native lands into property of the state. An important provision of the League of Nations' Trust Agreement exhorted the administering authorities to ensure the preservation and protection of all native laws and customs, especially relating to land. Article 8 of the Agreements approved by the UN General Assembly on 13 December 1946 and 1 November 1947 stipulated thus:

In framing the laws relating to the holding or transfer of land and natural resources, the Administrative Authority shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests, both present and future, of the native population. No native land or natural resources may be transferred, except between natives, save with the consent of the competent public authority.²²

In practice, the designated trustees of the territory (France and Britain) spared no opportunity to replicate the efforts of their imperial predecessors, Germany. On paper, the trustees appeared to be attentive to the stipulations of the UN Mandate Agreements. France established two parallel systems of land laws in her portion of the territory.²³ One of these systems, namely *l'indigénat*, was designed for lands of the natives or *les indigènes*, which comprised the unassimilated members of the indigenous

¹⁹ Njoh (n 4 above) 78.

²⁰ Njoh (n 11 above).

²¹ AJ Njoh 'Development implications of colonial land and human settlement policies in Cameroon' (2002) 26 *Habitat International* 399 - 415.

²² As quoted in Meek (n 4 above) 370. Also see Njoh (n 11 above) 79; Fisiy (n 13 above) 30.

²³ Njoh (n 11 above) 80 - 81.

population. The decree establishing this system (1924) constituted, in essence, the transfer of a policy that had been in force in French West Africa since 1917 to Cameroun. The other system was designed to govern European residents and assimilated members of the indigenous population (ie, *les assimilés* or *les évolués*). Although the first of these systems appeared to be sensitive to native customs and traditional land tenure practices, it functioned just like the second one, which was simply a replica of land ordinances in force in France at the time. French land laws in Cameroon, like those of their German predecessors, sought to convert as much land as possible into property of the state. A French decree of 1938 declared as property of the colonial state all land left unused or unoccupied for a period of ten years (ie *terres vacantes et sans maître*).²⁴

British colonial authorities were also bent on endowing the state with as much land as possible, although on the surface the most attentive of all the colonial authorities to customary practice. Support for this assertion can be found in the decision of the British imperial government to adopt in Southern Cameroons the land laws of colonial Northern Nigeria rather than those of colonial Eastern Nigeria. This decision hinged on the fact that whereas the land laws of Northern Nigeria accorded due regard to native customary land tenure practices, those of the Eastern Province of Nigeria, of which Southern Cameroons was administratively a part, did not. The Land and Native Rights Ordinance (No 9 of 1910) of colonial Northern Nigeria traces its roots to a Report of 1908 that was the brainchild of a committee comprised mainly of officials of two major British colonies, Nigeria and India. British colonial authorities considered the Ordinance such a success that they transferred it to Tanganyika and British Southern Cameroons, where the Ordinance was adopted verbatim in 1925.²⁵ The preamble to this Ordinance is immediately followed by a statement to the effect that all lands of the Northern Provinces of Nigeria and the Cameroons 'whether occupied or unoccupied' shall be considered 'native lands,'²⁶ but Section 4 stipulates that 'all native lands and all rights over same are hereby declared to be under the control and subject to the disposition of the Governor.'²⁷

Efforts on the part of the government to aggrandise the powers of the state, and reduce those of other societal entities, in the land domain did not end with the demise of colonialism in Cameroon, but were accelerated by the post-colonial authorities, who have proven to be the most oblivious to the Bakweri land problem. These authorities have pursued initiatives that have done more to supplant customary land laws with Euro-centric

²⁴ Njoh (n 11 above) 82; Fisiy (n 13 above) 35.

²⁵ Meek (n 4 above) 371; Njoh (n. 11 above) 86.

²⁶ Njoh (n 11 above) 86; Meek (n 4 above) 371.

²⁷ Njoh (n 11 above) 87; Meek (n 4 above) 371.

equivalents than any initiative by their European colonial predecessors.²⁸ Four major initiatives on the part of the indigenous leadership are worth noting in this connection. Decree No 63-2 of 9 January 1963 effectively reversed the 1959 colonial law that re-established the supremacy of customary entitlements to land. Secondly, the state ignored all claims to land backed by other than formal or modern instruments, with officials rejecting more substantive terms such as 'owners' and 'landlords' in favour of lesser terms such as 'holders' and 'occupants' for members of the indigenous population in relation to ancestral lands.

The third has to do with rejuvenating relevant provisions of pre-independence laws that were specifically aimed at increasing the colonial state's inventory of land and/or dispossessing the indigenous population of same. To accomplish this objective, the indigenous leadership drew inspiration from two colonial acts, namely the German Crown Lands Act of 15 July 1896 and the Act of 12 January 1938 that was introduced in Cameroun under French Mandate. Recall that both Acts converted so-called vacant and unoccupied lands into property of the colonial state. As demonstrated by the land law of 1974, post-colonial authorities inherited and adhered to the letter and spirit of the land legislation blueprint of their colonial predecessors.

Fourth, major amendments to the 1974 law were effectuated two years later in 1976, the groundwork being in Law No 73-3 of 9 July 1973. This law authorised the Head of State to establish rules governing land tenure in the country. With the powers conferred upon him by this law, President Ahidjo enacted a major land ordinance on July 6, 1974. Part I, section 1 (2) of the Ordinance makes the State the guardian of all lands throughout the country:

The State shall be the guardian of all lands. It may in this capacity intervene to ensure rational use of land or in the imperative interest of defence or the economic policies of the nation.²⁹

Part III, of the Ordinance declares national lands to include:

- (a) Lands that are free of any effective occupation;
- (b) Lands confiscated from private parties for committing any of a number of infringements including failure to convert informal instruments or deeds of land rights into land certificates; and
- (c) All parcels of land, which do not fall into the category of public or private property of state and other public bodies.

²⁸ Fisiy (n 13 above). AJ Njoh 'The political economy of urban land reforms in a post-colonial economy' *International Journal of Urban & Regional Research* (1998) 22. Republic of Cameroon *Land tenure and state lands* (unknown).

²⁹ Republic of Cameroon (n 28 above).

One important element of colonial land policies that has been duplicated by post-colonial authorities in Cameroon is the requirement that all interests in land be registered in the National Lands Registry, continuing the Grundbuch of the German colonial era. The post-colonial authorities went further in efforts to 'modernise' the land tenure system, by making registration of land titles in the Registry a pre-condition for claiming entitlement to any parcel of land in the country. The Ordinance No 77-1 of 10 January 1977, gave all urban land owners until 6 July 1984 (rural owners until 6 July 1989) to convert all land deeds or certificates of occupancy into land certificates duly registered in the National Land Registry, at risk of forfeiting their rights. Thus, urban and rural land owners had 10 and 15 years respectively from the date of publication of Land Ordinance No 1 of 6 July 1974 to formalise their land claims.

5 Important features of the Bakweri land problem

The Bakweri land problem possesses both tangible and intangible dimensions. The notion of intangibility captures attributes of the African ethos that places inordinate premium on a people's ancestral lands, as the venue where a people's souls must re-unite once their sojourn on earth is concluded. Such attributes are deemed intangible, not because they are any less important, but because they are neither visible nor easily appreciated by non-Africans. The architects of the Trusteeship Agreement of 1946 recognised this intangible attribute of land, and administering authorities in UN Trust Territories were exhorted to respect the traditions and customs of the natives relating to land.

The tangible dimensions include land shortages and the social and political upheavals they may generate. Three major factors are at the root of the problem of land shortage among the Bakweris: the fact that a substantial portion of the terrain around Mount Cameroon is neither habitable nor cultivable, government policies, and incessant pressures from members of non-indigenous populations. The first of these problems is rooted in the nature of the terrain of the region, which is dominated by the volcanically active Mount Cameroon, one of the highest peaks in Africa, the unmanageable slopes of the mountain and the swamps marking the outer reaches of the Atlantic Ocean.

Pressure from members of hinterland groups as a cause of land shortage among the Bakweri is rooted in pro-plantation colonial government policies that created the need for workers from these groups, and led to the alienation of significant tracts of land to non-natives. As far back as the early-1900s, the influx of 'strangers' in Victoria Division (present-day Fako Division) had already attracted the attention of not only the Bakweri but also the German colonial authorities. Members of the indigenous population, particularly those located on the slopes of Mount Cameroon, drew the attention of the German colonial authorities to this

problem during the first decade of the 1900s.³⁰ In a rare attempt to address the land-related grievances of the Bakweri, the German colonial government in 1908 decided to considerably increase the size of the areas that they had designated as 'reservats' or 'native reservations', and to which the Bakweri had been confined. The severity of the land shortage problem grew over the years. This compelled the British colonial government of Nigeria to take steps aimed at addressing the situation, through the 1931 decision to purchase and place at the disposal of members of the indigenous Bakweri population 5,089 acres of land at the cost of £6,871 in Victoria Division.³¹ As indicated in a 1932 Colonial Government Report, this and similar purchases of the ill-gotten lands were meant to settle the land-related concerns of the natives, but the colonial government efforts did not succeed in making a dent on the problem, let alone resolving it.³²

The potential for such problems was long appreciated by the Bakweri. Recognition of the need to resist government policies led to the creation of the Bakweri Lands Committee (later the Bakweri Land Claims Committee, or BLCC) in 1946. Created as a reaction to the establishment of the CDC, this committee was initially placed 'in charge of all the land in Victoria Division,' and defended Bakweri land rights through many petitions to the British colonial government of Nigeria and the UN Trusteeship Council.³³ In a letter dated 24 August 1946 to the Governor of colonial Nigeria, the BLCC requested the UN Trusteeship Council to return to the Bakweri 580 square miles of land illegally expropriated by the German colonial government.³⁴ The Trusteeship Council invited the BLCC to appear in 1947, but the committee lacked the funds to do so. The BLCC's charges show the roots and magnitude of land shortage facing the Bakweri: the BLCC alleged that colonial authorities had sold or leased plantations, or converted into Crown lands, the most fertile and usable areas of Bakweri ancestral lands, leaving the community with swamps, rocky and barren mountain slopes. At its Sixth Meeting in March 1950, the UN Trusteeship Council voted to declare that a total of 250,000 acres of formerly alienated lands be reinstated as 'native lands'.³⁵ This declaration was the last major official action on the Bakweri land issue before the Southern Cameroons became independent as part of the Republic of

³⁰ Meek (n 4 above) 404.

³¹ Meek (n 4 above) 405.

³² Meek (n 4 above) 406.

³³ According to the BLCC, it represented the entire Bakweri people, including the sub-tribes of Bota and Bimbia of the Victoria Division of the Cameroons under British Mandate.

³⁴ Njoh (n 11 above), Africa 'Petition of the Bakweri Land Committee, Cameroons under British Mandate' Africa (1948) *Journal of the Royal African Society* 18.

³⁵ Reinstating the lands as 'native lands' meant that the land became effectively part of the inventory of lands under the control of the Cameroons Development Corporation (CDC).

Cameroon in 1961.³⁶ Part of the assets bequeathed was the CDC estates, and political independence for Cameroon served to complicate, rather than simplify, the Bakweri land problem. The post-colonial government of Cameroon adopted almost *verbatim* the land policy of its colonial predecessors.³⁷

The BLCC was unable to continue mounting pressure under the political climate of the unitary party state that emerged in the post-colonial Cameroon, which not only ignored but undertook initiatives that significantly aggravated the problem. One such initiative was Decree No 94/125 of 14 July 1994, to privatise the CDC along with the ancestral Bakweri lands upon which its plantations stand. This action, which came at a time that the country was enjoying a climate of political liberalisation, induced a revival of the BLCC. In August 1994 it addressed a memorandum to the Head of State, declaring that the Bakweri can only endorse a plan to privatise the CDC that commits the corporation to pay ground rents to the Bakweri.³⁸ This same point was reiterated in another memorandum of 3 March 1999, signed by HRM Billa F. Manga Williams, Paramount Ruler of the Victoria Coastal District Traditional Authority; HRM Chief Philip Mofema Ewusi, Chairman of the Bakweri Land Claims Committee, and co-signed by 300 chiefs and notables of Bakweri extraction.³⁹

Attempting to unilaterally privatise the CDC is only one of many instances in which the government of Cameroon has sought to treat the CDC and its assets as property of the Cameroonian state. Another instance involves the sale of 38 hectares of CDC land in the Isongo, Idenau area in Limbe (formerly Victoria) to a private entity, Cam-Mal Timber Industries Ltd., Douala. The sale is attested to by Land Certificate No 01754 of 30 September 1997.⁴⁰ Also, the Minister of Lands has recently announced the procedure that anyone, Bakweri or not, can follow to acquire a parcel or more of CDC land as freehold property. The Secretary-General of the BLCC, Mola Njoh Litumbe, charges that such attempts on the part of the Cameroonian government to bestow upon any entity title over CDC land

³⁶ Cameroon under French Mandate gained independence in 1960, and the following year the British Mandate Territory of Southern Cameroons decided through a plebiscite to re-unite with French Cameroon to become the Federal Republic of Cameroon. In 1972, the Federal Government structure was replaced with a unitary government structure known as the United Republic of Cameroon. In 1982 the country became simply the Republic of Cameroon.

³⁷ Njoh (n 11 above); Njoh (n 13 above).

³⁸ D Tande 'A brief history of the Bakweri land problem' <http://www.blccarchives.org> (accessed 30 May 2010).

³⁹ Memorandum from BLCC to H.E. President Paul Biya Concerning the Privatisation of the Cameroon Development Corporation (CDC). 3 March 1999. <http://www.blccarchives.org> (accessed 30 May 2010).

⁴⁰ N Litumbe 'Illegitimate pretence of Cameroon government' *The Sun* (2007) http://the-news-from-cameroon.com/article.php?category_id=1&article_id=177 (accessed 2 February 2010).

that it never inherited from its predecessor is a flagrant abuse of power and violation of the human rights of Bakweri.⁴¹

The government of Cameroon has continued with its objective of privatising CDC, despite the BLCC's memoranda requesting involvement of the Bakweri in any decisions on CDC assets, which are comprised largely of estates on ancestral Bakweri lands. As one analyst has observed, the Cameroonian government has opted to silence all dissenting voices through intimidation and persecution especially of BLCC members.⁴² In addition, the government has employed a 'divide-and-conquer strategy' that has resulted in pitting one group of Bakweri, the pro-BLCC camp, against another, the pro-government camp. Prominent among those constituting the latter camp are the Paramount Chief of Buea Town, His Royal Majesty (HRM) SML Endeley and a notable local lawyer, Gordon Mwambo Ngu. These two personalities appeared on the Government side in the case against the Government of Cameroon filed by the BLCC at the African Human and People's Rights Commission in Banjul.

The government has never had any dialogue with the BLCC or the Bakweri people it represents in this matter. On its part, the Bakweri Lands Committee (BLCC) has responded on two major fronts. The first of this entails the launching of an international campaign designed to draw attention to the plight of the Bakweri land problem. No effort has been spared to highlight the Bakweri as an indigenous minority group whose human rights have been grossly and wantonly violated by its own government. To succeed along these lines, the BLCC has made maximal use of state-of-the-art communication technology, including the internet, to contact entities with real or potential roles in efforts to privatise the CDC.⁴³

Secondly, the BLCC, filed a complaint against the Government of Cameroon under the African Commission on Human and People's Rights in Banjul under articles 55, 56 and 58 of the African Charter on Human and People's Rights.⁴⁴ The Complaint, which was filed in September 2002, charged that the Government of Cameroon grossly violated the land rights of the indigenous people of the country's administrative division known as Fako. The remainder of this chapter analyses the BLCC case against the

⁴¹ Litumbe (n 40 above).

⁴² Tande (n 38 above) 3.

⁴³ An open letter dated 12 October 2000 was addressed to 'All prospective buyers of CDC Plantations'. A second letter dated 23 August 2001, was addressed to Mr Hampo Ghazurossian of Price Waterhouse Coopers. A third letter was addressed to Mr Marwan Ahmed Hayel Saeed, General Manager of Pacific Inter-Link SDN BHD. These letters sought to put the concerned companies on notice that they (BLCC) planned to seek legal redress against them if they persisted in dispossessing the Bakweri of their ancestral lands.

⁴⁴ These articles stipulate the procedures and conditions governing how petitions may be submitted to the ACHPR and how the ACHPR must proceed in dealing with these petitions.

Government of Cameroon with a view to highlighting the human implications of the Bakweri land problem.

6 Human rights dimensions of the problem

The human rights dimensions of the Bakweri land problem have been eruditely articulated by Ndiva Kofele-Kale, counsel to the BLCC in its case against the Government of Cameroon on behalf of the Bakweri. The BLCC charges that by forcibly expropriating Bakweri ancestral lands, and by privatising the CDC, which owns the plantations occupying these lands, the Government has violated the human rights and fundamental freedoms of Bakweri people.⁴⁵ The remainder of this chapter discusses the relevant articles of the UDHR as adopted by the UN General Assembly on 10 December 1948,⁴⁶ and the African Charter on Human and People's Rights, ratified by Cameroon on 20 June 1989.⁴⁷

The BLCC case against the Government of Cameroon prayed the ACHPR to recommend *inter alia* that the Government of Cameroon:

- affirm the rights of the Bakweri over the lands that were forcibly expropriated by the German colonial authorities and have since been occupied by CDC plantations;
- fully involve the Bakweri in any CDC privatisation negotiations; and
- pay into a Bakweri Trust Fund, ground rents owed to the Bakweri dating back to 1947.

On its part, the Government, represented by Dr Dion Ngute, Minister-Delegate for Commonwealth Relations, submitted a motion for dismissal of the BLCC case on the following specific grounds:

- the BLCC is not the accredited agent of, and does not speak for all of, the Bakweri (in other words, the BLCC lacked *locus standi*);
- the BLCC had an imprecise and unclear case;
- the BLCC unjustifiably casts suspicion and aspersions on Cameroon's judicial system and its complaint must therefore be viewed as insulting;
- the UN Sub-Commission had already dealt with the BLCC case; and
- the BLCC had failed to exhaust local remedies prior to bringing the matter to the ACHPR.

In its ruling, the Commission rejected the Government's motion, arguing that the BLCC was indeed the accredited agent of the Bakweri, and that it

⁴⁵ The Presidential decree privatising the CDC 94/125 of 14 July 1994.

⁴⁶ UN, Universal Declaration of Human Rights, art 17(1) & (2).

⁴⁷ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986; BLCC (2002) 4; article 14 of African (Banjul) Charter on People's and Human Rights.

has a strong case reposed on a rich historical and legal foundation. To this end, the Commission availed both parties in the dispute of its 'good offices' and recommended that they to seek an 'Amicable Settlement' of the longstanding Bakweri land problem. The BLCC appears to have very little faith in the Cameroonian Government's good faith, seeing the Commission's ruling as fuel for its efforts to seek a just solution.

The Bakweri claim violations of specific human rights including the right to:

- human dignity and equal protection under the law (article 1, Universal Declaration/article 1, African Charter);
- have one's cause heard in an appropriate forum (article 7, African Charter);
- an effective remedy for acts violating one's fundamental human rights (article 8, Universal Declaration);
- own property (article 14, African Charter/article 17 Universal Declaration);
- the same degree of respect as other human beings (article 19, African Charter);
- dispose of one's own wealth, property and natural resources (article 21, African Charter);
- economic, social and cultural development (article 22, African Charter).

6.1 The right to human dignity

Arguably the most egregious violations of the human rights of the Bakweri occurred during the German colonial era, when they were hurled into '*reservats*' to make room for agricultural plantations and colonial government facilities. In doing so, the German colonial authorities failed to treat the Bakweri as human beings 'born free and equal in dignity and rights' as required by article 19 of the African Charter and article 1(1) of the Universal Declaration of Human Rights. Instead, these authorities packed the Bakweri into disease-infested and inhospitable reservations. In one swoop, this policy transformed 'the Bakweri, who prior to the arrival of the Germans were described as aggressive, independent and dynamic' into a 'dejected, despondent, lethargic and dependent people.'⁴⁸ An Annual Report by the British Mandate Administration in Southern Cameroons to the League of Nations drew attention to this problem as far back as 1922 noticed that the alienation of Bakweri land had eroded the sense of tribal unity and cohesion enjoyed by other groups whose lands have never been forcibly expropriated. This apparent lack of unity and cohesion among the Bakweri and the concomitant inability to compete economically with the so-called 'stangers' have led members of the

⁴⁸ Tande (n 38 above).

'stranger population' to disrespect, and assume a sense of superiority over, the Bakweri.

Post-colonial governments in Cameroon have done nothing to reverse the situation. While the Bakweri were confined to native reservations and treated as criminals, with no access to economically productive activities, members of the 'stranger' population were gainfully employed in the agricultural plantations or in ancillary activities on Bakweri ancestral lands. Thus, the opportunities for income generation that were available to the 'strangers' were denied the Bakweri. Since the demise of the reservation policy, no effort has ever been made to afford the Bakweri an opportunity to make up for lost time. Arguably, this policy explains the inferior economic status of the Bakweri *vis-à-vis* 'strangers' in Fako Division.

Successive governments since the German colonial era have had an opportunity to reverse this situation, but have not done so. The British Mandate government, through the colonial government of Nigeria, is on record for 're-purchasing' and returning to the Bakweri some minute portions of their expropriated ancestral lands. Yet the Bakweri land problem, its appellation notwithstanding, is not exclusively about land. Rather, land must be appreciated as a factor of production and source of socio-economic and political power. Elsewhere, such as the United States, where native Americans (or American Indians) were dispossessed of their ancestral lands by Europeans, robust programmes, including affirmative action, have been created with the aim of compensating for past discrimination and exploitation. Instead of exploring the possibility of such programmes, the government of Cameroon has opted to behave just like its colonial predecessors. It is currently converting some of the lands previously occupied by colonial plantation farmers into state lands and selling them as freehold lands to private individuals.⁴⁹ Most of these individuals are 'strangers' whose ancestral lands in their regions of origin remain intact. By its actions in this regard, the Government has reneged on its promise, as a signatory of the Universal Declaration of Human Rights, and the African Charter to protect the human dignity of all, including the Bakweri.

6.2 The right to have one's cause heard in an appropriate forum

Successive governments of Cameroon have ignored the Bakweri land problem, wishing it would go away on its own. In addition to the unrecorded and sometimes unorganised efforts by villages throughout

⁴⁹ Examples are the Elders and Fyffes estates in Likomba (Tiko), the CDC rubber plantations in Mutengene and Ombe (Tiko), and the CDC palms plantations in Moliwe and Bonadikombo (Limbe).

Fako to protect ancestral lands from appropriation, the BLCC has been employing sound, peaceful and methodical methods to draw the attention of successive governments to the problem. However, in violation of articles 1 and 7 of the African Charter, and article 8 of the Universal Declaration of Human Rights, these governments have never deemed it necessary to afford the Bakweri an opportunity to have their cause heard. Article 8 of the Universal Declaration of Human Rights guarantees an individual or members of any aggrieved group the right to effective remedy by competent national tribunals for acts violating their fundamental human rights. On this score, the successive governments of Cameroon, dating back to the colonial era, have violated the fundamental human rights of the Bakweri in multiple ways. First, they never prioritised the need to look into the complaints of the Bakweri. Second, there has been a dearth of competent national tribunals capable of adjudicating in matters where the State is the defendant. For this reason the BLC felt compelled to seek redress to the Bakweri land problem at the UN Trusteeship Council in 1950. At the time, the BLC was concerned with the growing scarcity of land for members of the native Bakweri population – a problem that was rooted in the colonial economic development endeavours. The BLC demanded a thorough revamping of these aggressive economic development initiatives of colonial authorities, but the Trusteeship Council objected to this demand, which it characterised as recalcitrant: The BLC

have persisted in their non-co-operative attitude, in spite of explanations given them by the Acting Governor in November-December 1950, and by other Government officers during 1951 on lines recommended by the Trusteeship Council.⁵⁰

The right to an effective remedy for the Bakweri people was thus violated not only by the government of the British Mandate Territory of Southern Cameroons but also by the UN Trusteeship Council.

Like its colonial predecessors, the current Government of Cameroon comes shy of guaranteeing its citizens, as individuals or members of aggrieved groups, the right to an effective remedy by national tribunals. Such tribunals, as the BLCC argued, are non-existent in Cameroon,⁵¹ and the notion of 'independence of judiciary' is alien in Cameroon. Cameroon's judiciary, made up completely of appointees of the Head of State, is found wanting on almost all of the basic principles of the

⁵⁰ See section 495 of the 1951 Report of the Sixth Meeting (March 1950) of the UN Trusteeship Council on Cameroons under United Kingdom Trusteeship, prepared by the British Colonial Office for the UN General Assembly.

⁵¹ The BLCC was responding to the charge by the Government of Cameroon that it had failed to exhaust all available local legal remedies in accordance with article 56(5) of the African Charter. See N Kofele-Kale 'Response of the Bakweri Land Claims Committee to the reply presented by the Government of Cameroon on the exhaustion of local remedies' (2003).

‘independence of judiciary’, as adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders that was held in Milan (26 August to 6 September 1985).⁵² Thus, in Cameroon, judicial power is inseparable and non-distinguishable from executive and legislative powers. There is no denying that the Bakweri land case has never been dealt with by any court in Cameroon. Therefore, the Government can be said to have reneged on its promise, as a signatory of the Charter on Human Rights, to guarantee everyone – including the Bakweri – the right to be heard.

Considering a Government’s action on a problem such as the Bakweri land problem as a violation of fundamental human rights is not without precedent. A case of this nature has come before the ACHPR before, pitting the Social and Economic Rights Center and Social Rights against the Government of Nigeria.⁵³ In this case, the plaintiffs charged that the Government of Nigeria ignored and even condoned the destruction of Ogoniland by multi-national oil companies for several decades. The ACHPR ruled in favour of the plaintiffs arguing that by condoning and facilitating the activities of oil companies, and by ignoring calls for intervention from the people of Ogoniland, the Military Government of Nigeria violated several aspects of the human rights of this people. These rights, the Commission argued are clearly stated or implied in the African Charter.

6.3 The right to property

The right to property, which can only be encroached upon for the greater good of the public at large is guaranteed everyone under article 14 of the African Charter. An identical right, the right to own property is guaranteed under article 17 of the Universal Declaration of Human Rights. There is no question that successive governments throughout the history of Cameroon have strived to either expropriate and transfer to preferred private entities or convert into property of the State, Bakweri ancestral lands. Rather, the question has to do with the basis upon which these governments justify their actions. To address this nagging question, it is necessary to peruse the policies or instruments through which these lands have been expropriated or converted. The common denominator of these policies is their marking indigenous lands intended for expropriation or conversion to state property as ‘vacant and ownerless.’ The Germans were the first to enact such a policy on July 15 1896. Subsequent governments had their own version of this policy, and today, the country’s current law declares as belonging to the state all ‘lands that are free of any effective occupation.’⁵⁴

⁵² The principles were endorsed by General Assembly as Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁵³ *Social and Economic Rights Action Center and Social Rights v Nigeria* (Communication No 155/96, paras 37-39).

⁵⁴ See the Cameroon land law of 6 July 1974 Section 1, part III(a).

As mentioned earlier, prior to the arrival of the German colonial authorities, the Bakweri lived in village clusters, which occupied only a minute portion of all their land, and used the rest of the land for farming, hunting and other cognate purposes. Today little has changed among the Bakweri, which means that while lands may not be under effective occupation, they are used for other purposes.

From the use of terminology such as ‘vacant and ownerless’ it is clear that the Cameroonian government’s rationale for converting so-called Bakweri ancestral lands into state property is based on the notion that there is such a thing as ‘no man’s land’ or ‘land belonging to no-one.’ The government of Cameroon is neither the first nor unique in harbouring this notion, but its foundation has never been on *terra firma* since the landmark Australian High Court case that pitted the Meriam people (the plaintiffs) against the government of Queensland, (the defendant), decided by the High Court of Australia on 3 June 1992.⁵⁵ The plaintiffs contended that they were entitled to the lands which their ancestors had occupied or used in one form or another prior to the arrival of the British. The defendant argued that subsequent to the British conquest, lands throughout the entire territory of Australia, including those on the Murray Islands, where the Meriam people are found, became part of the dominions of the British Crown and automatically subject to the law of England. In this case, the Crown had acquired the ‘absolute beneficial ownership’ of especially all ‘land belonging to no-one’ throughout the territory upon British conquest in 1788.

Finding in favour of the plaintiffs, the judges viewed the doctrine of *terra nullius* (that is, ‘land belonging to no-one’) as preposterous. Rather, five out of the six High Court judges who rendered judgment on this case agreed as follows. The Meriam people had a concept of land tenure and entitlement that preceded the British conquest. Title to land in traditional Meriam society is/was derived from sources that differ from those known under English law, and the notion of occupation of land in this society is not the same as what obtains under the English system. Briefly, the judges recognised the concept of customary entitlement to land, as well as traditional instruments attesting to land ownership.

The Mabo decision holds many lessons for the Bakweri land case. Like the Meriam people, the Bakweri have lived on their ancestral lands in a subsistence economy built around cultivation, hunting and fishing before the colonial era. The Meriam people like the Bakweri had a functional land tenure system based on their customs and tradition that preceded the colonial era. Also, like the Meriam people, the Bakweri have a special connection to their ancestral lands that cannot be measured in exclusively

⁵⁵ (n 5 above). In this case, the Queensland Government’s case that the land in question belongs to no-one (i.e., the doctrine of *terra nullius*) was deemed preposterous and rejected by the High Court of Australia.

economic terms. Therefore, as in the *Mabo* case, the doctrine of *terra nullius* or 'vacant and ownerless land,' invoked by successive governments of Cameroon, is untenable. To the extent that the Government has never been able to demonstrate that the customary title of the Bakweri over their ancestral lands has been extinguished, as part of a valid exercise of the police power of the state, the Government has been in violation of article 14 of the African Charter and chapter 17 of the Universal Declaration of Human Rights. This Charter guarantees everyone the right to own property, and, by converting Bakweri ancestral lands into property of the state, the government of Cameroon has effectively denied the Bakweri this right.

6.4 The right to economic development

This is guaranteed under articles 21 and 22 of the African Charter. Article 21 specifically states that 'All peoples shall freely dispose of their wealth and natural resource. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.' The article is not oblivious to the fact that occasionally a need arises for the state to employ its police power to claim private property in the interest of the greater good of society at large, but requires that dispossessed individuals or groups be adequately compensated.

Apart from the questionable payments made to some gullible chiefs during the earlier phase of the German colonial era, no compensation has ever been made for the large tracts of Bakweri ancestral lands expropriated over more than a century. It has already been established that the German colonial authorities forcibly expropriated and converted these lands into property of the colonial state. During their brief tenure as UN Trustees of the Mandate Territory of Southern Cameroons, the British attempted to reverse the egregious actions of the Germans, and the British colonial administration is on record for re-purchasing so-called Ex-Enemy lands and re-instating same as native property. As noted earlier, these lands were leased to the CDC in 1947 for a period of 60 years with the possibility of renewal for a further 60-year term. One confusing aspect of the afore-described transaction is the fact that CDC was established as a statutory body, and along with the repurchased ex-enemy lands, placed under the control of the Governor of colonial Nigeria. At the same time, the CDC was given the mandate to administer and develop the plantations which occupied said lands until such time as the Bakweri people were competent to manage them without assistance. One cannot but ponder whether this confusing language was inadvertent or a well calculated attempt on the part of the authors to convert Bakweri ancestral lands into property of the state.

It would appear that the Government of Cameroon interpreted the fact the land in question was under the control of the colonial governor to mean

that the land belonged to the government of Nigeria. Consequently, by inheriting Southern Cameroons from the colonial government of Nigeria, it inherited all of its property, including the Bakweri ancestral lands. To the extent that this is true, the Government can be said to have misrepresented the terms of the transaction involving the Bakweri lands to the Bakweri, which constitutes a breach of trust on the part of the Government. This was the finding in the landmark case of *Guerin v the Queen*, decided by the Supreme Court of Canada.⁵⁶ In this case, an aboriginal group, the Musqueam Indians, held 416 acres (about 1.7 sq. km) of land in the Vancouver area. In 1958, the Canadian Government leased 162 acres (0.7 sq. km) of the lands to a private Golf Club, but misrepresented the details of the deal to the Musqueams, who sued the Government in a lower court for breach of trust. The Court ruled in favour of the Musqueams and awarded them \$10 million, a ruling overturned by the Federal Court of Appeal, so the Musqueam took the matter to the Supreme Court of Canada, which as the lower Court, ruled in their favour.

Post-colonial authorities in Cameroon have been less tolerant of customary entitlements to land than their colonial predecessors. By so doing, these authorities have denied indigenous peoples such as the Bakweri the right to enjoy and celebrate their tradition and cultural heritage, a right implicitly guaranteed in article 22 of the African Charter. Sections 1 - 2 of this article states that,

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

As stated at the outset of this chapter, African traditional ethos does not consider land as a commodity. In other words, land cannot be sold, exchanged or permanently transferred to anyone. No-one owns or can own land; the living have only use rights over land, and are seen merely as custodians of the land bequeathed them by their ancestors. Those alive are charged with the duty of guarding and protecting land for the generations to come. Any theory purporting that Bakweri ancestral land had been bought by colonial authorities, who in turn handed it to their post-colonial successors, must first seek to address the following question. How could the Bakweri alive at the time have sold land they did not own?

7 Summary and conclusion

The state in Cameroon, dating back to the colonial era, has demonstrated a penchant for striving to usurp all other societal interests in the land domain. The country's first colonial rulers, the Germans, proceeded early

⁵⁶ *Guerin v the Queen* [1984] 2 S.C.R. 335.

during their brief colonial tenure in Cameroon to enact a series of laws designed to achieve this goal. Prominent in this regard, is the Act of 15 July 1896, which converted all so-called 'unoccupied lands' into property of the German colonial state. The converted lands were in turn, placed at the disposal of private German farmers who used it for plantation agriculture.

Subsequent administrations, following the ousting of the Germans from the country after World War I, adhered to the aggressive land acquisition blue print left behind by the German colonial authorities. The French who controlled four-fifths of Cameroon as a Trust Territory of the League of Nations, enacted a law in 1932 – a facsimile of the 1896 German colonial government Act – classifying all vacant lands as '*terres vacantes et sans maîtres*' and converting same into property of the French colonial state. On their part, the British enacted a law 1927 the Land and Native Rights Ordinance, classifying as 'native land' all land in the British Mandate Territory. This classification was deceptive because the so-called native lands were placed under the control of the colonial governor of Nigeria, who could in turn do as he chose with the land.

The actions of the post-colonial state in the land domain have mirrored those of its colonial predecessors. The country's 1974 landmark land law was designed to consolidate the state's power. According to Ordinance No 74-1 of the Law, not only is the state the guardian of all lands, it is also endowed with the powers to use the land as it sees fit in the interests of the nation at large. More importantly, the post-colonial governments have been less tolerant of, and even oblivious to, customary entitlements to land. The state recognises only formal instruments of land ownership, particularly a government-issued land certificate, and the concomitant registration of such title in the National Land Register. These and other requirements and behaviour of the government in the land domain has heightened land-related tensions, which manifest the continuing struggle over legitimacy and control over valuable resources between the state and society.⁵⁷

Since the 1990s, and as part of efforts to fulfill its obligations under the Structural Adjustment Programmes of the International Monetary Fund (IMF) and World Bank, the Government of Cameroon has proceeded to unilaterally privatise the Cameroon Development Corporation (CDC) and its assets. This action has triggered a flurry of reactions especially from the Bakweri, whose ancestral lands are occupied by CDC's estates. Thus, the Government decision to privatise the CDC fuelled the longstanding Bakweri land problem.

⁵⁷ Njoh (n 13 above); Njoh (n 28 above); Z Ergas (ed) *The African state in transition* (1987); G Feder & R Noronha 'Land rights systems and agricultural development in sub Saharan Africa' (1987) 2 *Research Observer*.

This chapter has retraced the evolution of this problem from the German colonial era, through the creation of the CDC in 1946 to date. The Bakweri acted through their accredited agent, the Bakweri Land Claims Committee (BLCC), to thwart, at least temporarily, the Government's effort to privatise the CDC. To accomplish this feat, the BLCC addressed a barrage of letters to national, regional and international entities asserting the customary land rights of the Bakweri over the lands in question, and protesting what it views as the state's callous disregard of these rights. In October 2002, the BLCC filed a formal complaint against the Government of Cameroon at the African Commission on Human and People's Rights (ACHPR) in Banjul. In its communication to the ACHPR under articles 55, 56, and 58 of the African Charter, the BLCC prayed the Commission to find that by refusing to affirm the rights of Bakweri people over the lands occupied by the CDC, the Government of Cameroon has violated some fundamental human rights of these people. The BLCC further urged the Commission to recommend that the Government makes a good faith effort to resolve the longstanding Bakweri land problem. Despite a motion for dismissal from the Government, the Commission not only entertained the case, but also found in favour of the BLCC.

This case has implications that transcend Cameroon's frontiers, holding important lessons for indigenous groups whose lands have been expropriated by the state elsewhere. One can only hope that international organs such as the ACHPR are not toothless barking dogs, but, upon finding in favour of the Bakweri, the Commission did not lay down any mechanism to implement its recommendations. What authority does the Commission have over Cameroon as a sovereign nation? What if the Government were to invoke its police power to employ the land in question? The country's landmark land law provides for such invocation of the police power of the state. Although the BLCC appears oblivious to this possibility, it recognises the apparent inability of the Commission to compel the Government of Cameroon to implement its recommendations, and is consoled by the fact that the Commission has confirmed the legitimacy of its case. Furthermore, as the BLCC notes, the Commission has the authority to forward the matter to the African Union Assembly should the Cameroonian Government fail to take the steps necessary to implement its recommendations.

Siraj Sait

1 Introduction

The grand narrative of African land law tends to rehearse an unequal contest between the exotic and chaotic customary communal tenures and the self-evidently redeeming individual title enterprises, the two mediated through modernist statutory compromises. Variations of the theme include probes into pluralism and hybridity of tenures, critiques of the motives and methodologies of land reform experiments, and assessments of improvements in security of tenure. Yet, missing from the discourse is another tenorial influence with a historical presence in Africa,¹ a highly developed land tenure framework² and a potential application to over a third of the continent³ – Islamic land law.

No country in Africa – or in any other part of the world – can claim to follow Islamic land law exclusively. Customary norms and successive waves of colonialism, modernisation and reform have created legal pluralism and hybridity in Muslim countries too. Yet no country with significant Muslim populations is without the influence of Islamic land laws or principles, official or informal, however varied or mutated. As Islamic land law evolved in Africa it often interlocked with customary, colonial and statutory systems pollinating its distinctive concepts that are discernible even today.

For over a thousand years Africa experienced dynamic and turbulent spells of Islamic stimulus – from Muslim conquerors, traders, missionaries

¹ JS Trimmingham *Islam in East Africa* (1964); N Levtzion & R Pouwels (eds) *The history of Islam in Africa* (1997); D Robinson *Muslim societies in African History* (2004).

² S Sait & H Lim *Land, law and Islam: Property and human rights in the Muslim world* (2006).

³ Recent studies show that the Muslim populations in Africa account for a third of the continent, and up to a third of the world Muslim population: Pew Research Centre *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population* (2009); H Kettani 'World Muslim Population: 1950 - 2020' (2010) 1(2) *International Journal of Environmental Science and Development* 1.

and scholars. From the ancient African Muslim kingdoms of Mali and Songhai, to the Sokoto Caliphate (1809-1906) in present day Nigeria, Islam influenced African ways of life and was transformed into many 'African Islams'. Along with new beliefs and socio-political frameworks, Islam brought into Africa far reaching changes in trading protocols, livelihood techniques and tenure concepts.⁴ As Callaway and Creevey reflect, 'in each major region of each country [of Africa], the impact of Islam is different. No study can reasonably blanket the region with one set of generalisations about how Islam interacts with society and shapes it'.⁵ There is no single edition of Islamic land law because Islam is contested, responsive and evolving, determined by local histories, cultures and politics.

Islamic land tenures are seen in Gambia; the Moroccan family code *Mouduwana* affects gendered property flows; and Mauritanian law legislates appropriation of abandoned land (*indirass*). The inheritable rights of first clearer of land in Niger, the Islamic long-term land leases (*hikr*) in Egypt, individual land rights among the Tuareg, the Fulani and Chad's savannah inhabitants can only be understood with reference to Islamic concepts. The *Shari'a* courts in Ethiopia, the recognition of Islamic contracts in South Africa, or Islamic endowments (*waqf*) in Uganda are all cogs in Islamic land law working within pluralist African legal frameworks. To unlock the land conflicts in Darfur in Sudan one needs to refer to the *Funj* Islamic kingdom (1504-1821) where individual ownership was marked through concession documents (*hakura*) that prevail even today. Islamic influences appear in 1984 Sudanese legislation which stipulates that land belongs to god and is a public utility. A recent report on Somalia finds alternative tenure models in Sufi communities derived from Islamic principles.⁶ Throughout Africa, there are reports of innovative Islamic land tools such as endowments (*waqf* or *habus*), pre-emption (*shufa*), land sanctuaries (*hima*), land grants (*iqta*) or the revival of dead land (*mewat*), as well as Islamic-inspired processes, institutions and resources in an African context.

This chapter explores Islamic land law through legislation or policies derived from Islamic law (*Shari'a*), and from principles, concepts and practices associated with Islamic theory and philosophy (*fiqh*). It focuses upon the complex relationships and dynamics informing land policies in selected Muslim countries. The four countries chosen – Kenya, Nigeria, Senegal and Tanzania – represent very different Islamic contexts (minority, secular, socialist and religious), and the varied ways in which

⁴ G Lydon *On trans-saharan trails: Islamic law, trade networks, and cross-cultural exchange in nineteenth-century Western Africa* (2009).

⁵ B Callaway & L Creevey *The heritage of Islam: Women, religion, and politics in West Africa* (1994).

⁶ G Norton *Land, property, and housing in Somalia* (2008); United Nations Human Settlements Program (2008) 86 - 87.

Islamic land law expresses itself (individual, collective, customary and pluralist tenure). Each country case study explores the complex interplay between colonial, Islamic, customary and statutory tenures in contrasting African settings.

The Ottoman Empire (1302-1922), known for its developed land tenures, at one time straddled several continents, including Western Asia, North Africa and Southeastern Europe. Between the sixteenth and nineteenth centuries, countries such as Egypt and Sudan and much of the African Maghreb (now Morocco, Algeria, Tunisia, Libya, Mauritania and Western Sahara) came under Ottoman suzerainty. The Ottomans encountered in Africa a different and diffused Islam. Rather than their usual *Hanafi* code, they adopted the *Maliki Sunni* doctrine in Africa, the most accommodating and flexible legal code, already worked on by African Muslim scholars. While the slave trade and some *jihads* reflect a darker side of African encounters with Muslims, Islam survived and grew in Africa because of tolerance and interchange between Islamic and African customs. Islamic law explicitly recognises *urf* (custom) as long as there is compatibility. A vital difference between Islamic law and African customary norms is said to be the codified and written form of the former,⁷ yet the close interaction between Islamic norms and Muslim customary practices produced 'unwritten customary law of an Islamic nature [which] existed and continues to exist'.⁸

When the Europeans scrambled for Africa in the 1880s, a formidable obstacle to control and transformation of its land tenure system was Islam. Even France, with its uncompromisingly secularist ideology at home, projected itself as a 'Muslim power' in Africa,⁹ and a successor to the Ottomans. Land reform was central to the colonial project.¹⁰ A variety of deals were struck by colonial administrators with African Muslim power-brokers, over the continuation of Islamic land principles, protection of Islamic practices as 'custom' or their absorption into colonial laws. Mamdani argues that, even where the colonial powers preferred 'indirect rule', allowing customary or Islamic practices to continue, they were actually distorting traditions, racialising and dividing communities.¹¹

⁷ TO Elias *The nature of African customary law* (1956).

⁸ J Miles 'Customary and Islamic law and its development in Africa' (2006) 1 *African Development Bank Law for Development Review* 81.

⁹ D Robinson 'France as a Muslim Power in West Africa' (1999) 46(3) *Africa Today* 105-127

¹⁰ CK Meek *Land law and custom in the colonies* (1946); E Colson 'The impact of the colonial period on the definition of land rights' in V Turner (ed) *Colonialism in Africa 1870-1960, Profile of change: African society and colonial rule* (1971).

¹¹ M Mamdani *Citizen and subject: Contemporary African and the legacy of late colonialism* (1996); see also D Robinson *Paths of accommodation: Muslim societies and French colonial authorities in Senegal and Mauritania, 1880-1920* (2000); JL Triaud 'Islam in Africa under French colonial rule' in *The history of Islam in Africa*. Levtzion N & R Pouwels (eds) (1997) 169 - 188.

The colonisers had difficulties in fitting indigenous and Islamic land conceptions into their legal terminology and systems.¹² 'Inventions' of tradition in colonial Africa often took place when the Europeans believed themselves to be respecting age-old African custom when in fact they were manufacturing convenient innovations.¹³ Another myth about the colonial land project is the European 'introduction' of individual tenure to a continent. Pre-colonial indigenous African tenure systems already recognised extensive individual property rights, including ownership though within a spiritual and community-based framework. Furthermore, Islamic law had imported sophisticated individual property ownership doctrines into Africa centuries before the European colonisers.

The Islamic individual property concept differed from the Western equivalent in being conditional upon responsible and productive land use and subject to Islamic egalitarian principles. Since Islam also facilitated collective tenures similar to customary norms, colonial administrators banished Islamic tenure into the fold of customary norms. This rebranding of Islamic law as Muslim customary practices was not resisted by African Muslims because it brought no material change in their practices. Islamic law continued to evolve in the garb of an indigenous framework, though with greater flexibility. Muslims had secured the formal recognition and legal protection of their Islamic inheritance and private (family) property laws.

The colonial policy to let Muslims practice Islamic norms designated as 'custom' continued after independence. Yet, the Europeans were well aware of the difference, and Islam and custom have been distinct but related fields. While they were often harmonised, competing spaces and identities lead to conflicts between the two (or between different customs), and mechanisms were developed to resolve them.¹⁴ A key question for this research is whether land customs of Muslims can be studied without reference to Islamic land law. It will argue that African Islamic land laws emerged as a distinct field which cannot always be subsumed within an all encompassing 'custom, informal and alternative' category. Nor can the power of Islamic ideas understood without exploration of the dynamic and pluralistic relationship between Islamic, secular, customary and State norms.¹⁵

¹² SF Joireman 'Inherited legal systems and effective rule of law' (2001) 39(4) *Journal of Modern African Studies* 571 - 596; M Chanock *Law, custom, and social order: The colonial experience in Malawi and Zambia* (1985).

¹³ T Ranger 'The invention of tradition in colonial Africa' in E Hobsbawm & T Ranger (eds) *The invention of tradition* (1983) 211 - 62.

¹⁴ E Cotran 'Integration of court and application of customary law in Tanzania' (1965) 5(1) *East African Law Journal* 108 - 123.

¹⁵ GR Woodman 'The idea of legal pluralism' in B Dupret *et al* (eds) *Legal Pluralism in the Arab World* (1999).

2 Islamic individual land ownership in Coastal Kenya

In colonial coastal Kenya (*Mwambao*), the British faced a web of land tenures. The Sultan of Zanzibar had long administered Islamic law (*Shari'a*) for the Arab settlers, the local Swahili Muslims had developed their customary practices (*mila*) and customary laws applied to the indigenous tribes, particularly the *Mijikenda*. Islamic individual tenure for farmland and urban lands was well-established, while pastures, forests and water bodies were seen as to belong to God, regulated by the Sultan for the benefit of the community. Within towns (*kiambo*) commercial and residential land was demarcated, individually owned and transferred under Islamic law, backed up by the Islamic court judge (*Qadi*) and administrator (*liwali*).

Outside towns Muslims dealt with land through Swahili customs (*mila*), a customary adaption of Islamic ideas.¹⁶ *Mila* is often used in contradistinction with religion (*dini*). Despite individual tenure being available, lands were mostly not demarcated or transferred outside, and the community elders played an important role in allocation and use. Thus, *mila* land tenure was a hybrid of Islamic and African customary tenure, fusing individual and collective ownership.¹⁷ Several features of *mila* distinguished the system from Islamic law proper. It embodied values, rituals and meanings of land that reflected the social function rather than the economic asset approach. It varied from place to place, and was custom-responsive, not administered by the *Qadi*, though Swahilis could, in theory, assert their Islamic land rights.

The *Mijikenda* of the coastal areas are a conglomeration of nine Bantu-speaking heterogeneous tribes, of which *Digo* and *Giriama* are sub-group discussed below.¹⁸ The *Mijikenda* were farmers, fisherfolks and traders, and constituted the majority of the coastal population before being pushed into the hinterland, first by the Arabs and Swahilis, and then by the British into 'native reserves'. *Mijikenda* considered the earth to be their mother, blessed or impregnated by the Supreme Being through rain. All *Mijikenda* were entitled to use a demarcated piece of land within their fortified forest village (*kaya*), and had grazing and hunting rights outside. They were allotted suitable lands by a council of elders (*kambi*) that was not in conflict with other users, and ownership of land and trees was differentiated. The same land was often passed to the next generation. The British considered

¹⁶ P Caplan *Choice and constraint in a Swahili community* (1975); R Loimeier & R Seesemann (ed) *The global worlds of the Swahili: Interfaces of Islam, identity and space in nineteenth- and twentieth-century East Africa* (2006).

¹⁷ HA Hamidin 'From bad to worse: The implementation of the Land Titles Ordinance in Coastal Kenya, 1908-1960s' (2003).

¹⁸ See RL Pouwels *Horn and crescent: Cultural change and traditional Islam on the East African Coast* (1992).

this combination of communal ownership and individual land rights as merely individual user rights within communal tenure, and so created 'native reserves' for the *Mijikenda*. In 1934 the Kenya Land Commission reversed the British policy, recognising that the *Mijikenda* in fact practiced individual ownership, but this was too late.

The British were aware of the diverse land tenure arrangements of the Arabs, Swahilis and various coastal tribes such as the *Mijikenda*. Under the 1895 arrangement, the Sultan of Zanzibar obtained a commitment that the non-Muslim *Mijikenda* would also be consulted on land matters, but the British reneged, considering the coastal tribe as different from Muslims, and never the Sultan's subjects. This differentiation meant that the Muslim Arabs and Swahilis, governed by Islamic law, were able to register land as private property, while the *Mijikenda*, governed by custom, could not.¹⁹

Individual land ownership under Islamic law was convenient for the Imperial British East Africa Company, and later the colonial government, to 'purchase' land from Muslims. In doing so, the British were also seeking to superimpose the Western concept of private ownership on the Islamic doctrine, even though Islamic individual rights are subject to responsible use. The British also recognised two other principles of Islamic land law, the revival of dead land (*mawat*) as a means of acquiring 'waste or abandoned land' unused for twelve years by individuals and the State. Cooper argues that British propped up the former planter elite after slavery was abolished, making them local allies and agents, at the expense of the coastal tribes who were sent to 'native reserves' in the interior.²⁰ The British preferred the Arab or Persian (*Shirazi*) class, and later the Indian Banyan, over the African identity, as part of its socio-racial hierarchy.²¹

A key component of British land policy was the 1908 Land Titles Ordinance (LTO) for Kenya, which initiated a process of survey, land adjudication and registration, critical for revenue-raising and security of tenure. Between 1919 and 1926 vast sections of land were surveyed and registered, with Arabs and Swahilis given freehold titles, but the *Mijikenda* not. The exercise was a disaster, because the British failed to understand the relation of Islamic and customary tenure. The reports of the British Secretary for Native Affairs (AC Hollis), tasked with clarifying the application of land laws for the Arabs, Swahilis and *Mijikenda* in 1907, emphasised the application of *Shari'a* (Islamic) land tenure to all Muslims, without considering the prevalence of Swahili customary land practices. He also decreed that *Mijikenda* did not follow individual rights and recommended reserve lands for their communal rights. In a twist, some of the *Digo* group of *Mijikenda* converted to Islam, raising the question of

¹⁹ VP Ghai & J McAuslan *Public law and political change in Kenya* (1970).

²⁰ F Cooper *From slaves to squatters: Plantation labour and agriculture in Zanzibar and Coastal Kenya, 1890 - 1925* (1980).

²¹ C Leo *Land and class in Kenya* (1984).

which body of law would apply – Islamic individual or African communal? In 1913 the colonial government went ahead with the *Digo* reserve, but also demarcated individual parcels in case individual claims arise from within. Cooper shows how the colonial perspectives and political interests disrupted the close social and historical ties between the *Mijikenda* and Swahili, and many *Mijikenda* were dispossessed and sent to native reserves elsewhere to make way for European settlement.²² When the British attempted to collect hut and poll tax, and recruit forced labour, the largest group of the *Mijikenda*, the *Giriama*, and other sub-groups rose up in rebellion (1913 - 1914).²³ They suffered significant losses but no change of heart from the British, and the underdevelopment of the *Mijikenda* coast has been seen as partially a punishment for rebellion, the region being deemed largely ungovernable.

The implementation of the Land Titles Ordinance (LTO) in the coastal areas was slow and expensive, and triggered complex land disputes. The exercise was meant to determine the extent of private possessions along the coastal area, before alienating land for the crown and giving grants to individual settlers, as unregistered land under freehold was deemed crown land. Sir Ernest Dowson, veteran of the Zanzibar land tenure study and an expert on Islamic tenure from Egypt to Palestine (although unsympathetic),²⁴ was called in as a consultant in 1934, and his report (delayed until 1938) found that the process was flawed, and recommended a fresh start, but, lacking official support or funds, the British gave up on land reform in coastal Kenya.

The LTO recognised land ownership among the Arabs and Swahilis through their Islamic norms, but not for the *Mijikenda* and the ex-slaves, thereby creating divisions and widespread squatters in Kenya even today. The *Mijikenda* occupy land, but technically ownership is with others, making them legally squatters on the land they may have long inhabited under absentee landlords. On Kenyan independence in 1963, *Mijikenda* hopes of restitution of their land rights evaporated, with the independent government decreeing all colonial crown land, over which *Mijikenda* had claims, to be government land, yet accepting the Sultan's demands for recognition of Islamic private land rights on the coast.²⁵ Equally precarious were the land rights of freed slaves (slavery was abolished in 1907) who stayed on the property abandoned by their owners, thereby acquiring 'Islamic' rights but recognised by both the British and independent Kenya.

²² Cooper (n 20 above).

²³ CS Brantley *The Giriama and colonial resistance in Kenya 1800 - 1920* (1981).

²⁴ R Home 'Scientific survey and land settlement in British colonialism, with particular reference to land tenure reform in the Middle East 1920 - 1950' (2006) 21(1) *Planning Perspectives* 1 - 22; G Forman 'Settlement of the title in the Galilee: Dowson's Colonial Guiding Principles' (2002) 7(3) *Israel Studies* 61 - 83.

²⁵ K Kanyinga *Struggles of access to land: The 'squatter question' in Coastal Kenya* (1998).

Kenya, even before the 1954 Swynnerton Report, pioneered systematic procedures for converting customary tenure into individual freeholds. Systematic adjudication of rights and registration of title continue to drive post-colonial land policy, marginalising the landless and 'squatters'.²⁶ Recent developments, including the 2007 land policy and 2010 referendum, are trying to shed the colonial land baggage. Kenya voted in the 2010 referendum to continue Islamic law and courts in personal law matters, but, despite widespread Islamic land practices such as Islamic endowments (*waqf*), Islamic land rights are absorbed into land statutes applicable to all Kenyans. Islamic land law, at the hands of the Sultan and the British colonial administration, was manipulated to create unequal and differentiated land rights, arising from a selective and partial understanding of the law and its relationship with customary norms.

3 'Socialist' Islamic land law in Tanzania

At independence, the East African neighbours of Tanzania and Kenya (Muslims being in minority in both) chose divergent paths on land tenure, prompting Islamic land law to negotiate different deals. Independent Kenya individualised title, while permitting lineage or clan ownership, and Islamic land concepts continued either as specific tenure types (such as *waqf*) or were absorbed into the 'modern' land tenure system. Independent Tanzania by contrast proclaimed state ownership of all land, and demonstrates a different relationship between customary systems, Islam and the State, with indirect influence of Islamic land law.

On the pre-colonial Tanzanian mainland, land was traditionally held communally through chiefs and elders who controlled and allocated land to members of the tribe.²⁷ Arab and other Muslims exercised individual ownership rights under the patronage of the Sultan of Zanzibar.²⁸ The German colonisers introduced freehold mainly for settlers, and seized all land not individually owned or possessed by chiefs and indigenous communities as 'crown' land in 1895, thereby initiating the ultimate nationalisation of land. Their British successors went further to designate all land, whether occupied or unoccupied, as public land under the 1923 Land Tenure Ordinance, obtaining radical title, merging property and sovereignty. Users would be given 'rights of occupancy', sometimes projected as 'native title' under customary law. Unlike Kenya, it was not individualisation but the strong centralisation of land control that created the platform for nationalisation of all land in independent Tanzania. In 1928 the Land Ordinance was amended to recognise customary law title,

²⁶ P Shipton 'The Kenyan land tenure reform: Misunderstandings in the public creation of private property' in RE Downs & SP Reyna (eds) *Land and society in contemporary Africa* (1988).

²⁷ RW James *Land tenure and policy in Tanzania* (1971).

²⁸ AY Lodhi 'The Arabs in Zanzibar: From the Sultanate to the People's Republic' (1986) 7(2) *Journal of Institute of Muslim Minority Affairs* 404 - 418.

but not conferring equal status with rights of occupancy. Where customary rights were not recognised, the Africans became 'tenants of the crown' in their own lands.

Tanzania was formed through the 1964 merger of Tanganyika (independent in 1961) and Zanzibar (independent in 1963), with Zanzibar guaranteed considerable autonomy – but not in land matters. For the socialist President Nyerere, *ujumaa* ('pulling together' in Kiswahili) based upon communitarian or communal property ideals, was a key pillar of his African socialism and de-commodification of land. Nyerere argued that *ujumaa* was a return to African values, but also embodied Islamic values, so that Islam was backing up socialism.²⁹ Mwaisondola argues that since independence a common land law has emerged in Tanzania, blending customary, Islamic and English concepts.³⁰

In pre-independent Tanganyika and Zanzibar individual land ownership, certainly among Muslims, was widespread. For example, plantations were Islamic freehold tenure, while also recognising traditional rights of slaves and squatters.³¹ During the independence struggle, however, Okello,³² the revolutionary leader, in contrast from the Kenya narrative, publicly decried the Arabs as 'squatters' on African land, while Kurume coined the political slogan directed at Muslims: 'the trees are yours, the land is ours'.³³ Both Western and Islamic individual property rights were derecognised at Tanzanian independence, with freehold titles converted to leaseholds in 1963 and to 'rights of occupancy in 1969'. Effectively, the current tenure system recognises three forms of ownership: customary, right of occupancy and public land, and all lands and villages were vested in the President of Tanzania and owned by the State. The Land Act 1999 provides for application of the customary law in land matters. Despite classical Islamic land law being formally displaced, it continues to echo both Muslim practices and concepts that apply to all Tanzanians.

When the Sultan of Zanzibar was overthrown shortly after independence, the succeeding revolutionary government promised to permit Islamic laws, and (unlike the Tanganyika government) did not declare itself as owner of all lands in Zanzibar. A 1964 decree merely arrogated powers to confiscate lands in public interest for land redistribution in favour of the African peasant majority. A year later,

²⁹ D Westerlund *Ujamaa na dini: A study of some aspects of society and religion in Tanzania, 1961 - 1977* (1980); I Yusuf 'Islam and African socialism: A study of the interactions between Islam and Ujamaa socialism in Tanzania'. Unpublished PhD Thesis, Temple University, 1990.

³⁰ GN Mwaisondola 'The modern law of mortgages in Tanzania: The role of the Land Act, 1999' unpublished PhD Thesis, University of Birmingham, 2007.

³¹ J Middleton *Land tenure in Zanzibar* (1961) 69.

³² J Okello *Revolution in Zanzibar* (1967).

³³ Middleton (n 31 above) 77.

however, the government decided to equate Zanzibar with the rest of Tanzania, and declared itself the paramount landlord of the country, vesting itself with all land (Decree 13/1965). The caveat was that it would respect the Islamic principle, that State ownership was subject to usufructuary rights, and a citizen could apply for an allocation based upon user or potential user rights.

The technical repudiation of ownership was thus more a psychological adjustment, as Tanzanians were granted rights to keep the land on which they already lived or worked. The occupation right is perpetual and transferable, subject to termination on grounds of misuse or abandonment of land (Land Tenure Act 1992, article 8). This was similar to the Sultan of Zanzibar's right to take private unused lands under Islamic law.³⁴

The 1999 Land Act gives Tanzanian women right of access to land, including the right to own, use and sell land,³⁵ as recognised under Islamic law. Inheritance rights of Tanzanian Muslims (which was protected) allow occupancy right not ownership to be transferable. Though this is often the case under customary rights tenures, rights of individual occupancy transfers are innovative. Under the law, the inheritance will only be recognised if registered like any other occupation right. Thus unregistered inheritance rights would be void, since the Land Transfer Board do not approve them under the 1994 Land Transfer Act. For the Board to approve, it must be shown that the inherited share is intended to be used, and can be lost by improper use. Both registration and the requirement of productive use provide safeguards, particularly for women, in keeping with Islamic injunctions of 'use it or lose it'. Islamic inheritance thus follows the principle that land entitlements are based upon the fulfilment of obligations, a compatible Islamic concept.

Islamic law is an important source of land law in Tanzania, particularly in Zanzibar. Some tenures (such as *waqf*, once covering half of Zanzibar)³⁶ continue despite the socialist framework, as *waqf* objectives are unchangeable by even the government. Developments in Tanzanian land policy exhibit another aspect of Islamic land law. The paradigm shift from rights-based to needs-based tests is easily accommodated in Islam, with its emphasis upon rights being conditional on productive use. According to Jones-Pauly, 'the Islamic injunction that those with more land than they need or use "lend" to those in need' becomes important for Tanzania, so

³⁴ VN Moyo 'The National Land Policy 1995, the Land Acts 1999 & the Presidential Commission of Inquiry into Land Matters: Contradictory perspectives on land reforms and securing rights of disadvantaged Tanzanians' (2002).

³⁵ D Tsikata 'Securing women's interests within land tenure reforms: Recent debates in Tanzania' (2003) 3(1) *Journal of Agrarian Change* 149 - 183.

³⁶ L Fair *Pastimes & politics: Culture, community and identification in post-abolition urban Zanzibar, 1890 - 1994* (2001).

that the needs of some can be met by inheritance adjustments or 'borrowing' from relatives and non-relatives.³⁷

Despite the absence of land ownership and the official state monopoly of land, an active property market exists.³⁸ Under the Village Land Acts 1999 such lands can be alienated to foreign investors, and the President may transfer 'in public interest'. Though no monetary value was attributed to land, per se, contributions and improvements (such as construction, cultivation and trees) created security of tenure tantamount to 'ownership'. A holder of deemed or customary right of occupancy may dispose of his/her interest by mortgage, pledge or sale in accordance with customary law, but the commodification of land emphasises its productive use. The ideological shifts and the free market forces appear to point towards a return to individual unrestricted freehold.

Shivji argues that the land tenure system in Tanzania needs revolutionary steps and greater democratisation if security of tenure is to be made available to the majority.³⁹ The Tanzanian Land Commission (1991) which he headed found that most Tanzanians, especially in rural areas, do not have security of tenure over land, but the move towards a land market economy required revisiting notions about the value and ownership of land.⁴⁰ The Commission's recommendations were mostly accepted by the Government in 1995, but it disagreed with the location of radical title and the reform of land administration. The 2004 amendments to the Land Act now render bare land as a transferable commodity at market value.

The Tanzanian experience differs from Kenya's because of their respective colonial encounters with customary and Islamic law. Some of the players (Sultan of Zanzibar and the Arab land owners) were similar but the revolutionary politics and ideologies varied. In Kenya, Islamic land law was hijacked primarily as a tool for individual land ownership, without accountability. In Tanzania, it had a more subtle but responsible role in supporting socialist and customary tenures balancing land rights and productive use. Whether Tanzania retains its socialist model or moves towards individual ownership, Muslim customary land norms will continue to influence land tenure initiatives.

³⁷ C Jones-Pauly 'Old problems and new ideologies in land reform in Tanzania' in *Land tenure in development cooperation: Guiding principles* (1998).

³⁸ JM Kironde 'Understanding land markets African urban areas: The case of Dar Es Salaam, Tanzania' (2000) 24 *Habitat International* 151 - 165.

³⁹ IG Shivji *Not yet democracy: Reforming land tenure in Tanzania* (1998) 19.

⁴⁰ Government of Tanzania *Report of the Presidential Commission of Enquiry into Land Matters* (1991).

4 'Customised' Islamic land law in Northern Nigeria

Long before the advent of British colonial rule in the area, Islamic land tenure and land administration were well established under the Sokoto Caliphate,⁴¹ and Nigeria offers an intriguing study of Muslim customary practices and Islamic land law fused in the face of the colonial onslaught. Commentators from Meek to Yakubu point to Islamic and customary laws as key sources of Nigerian land law, alongside statutory law and English law, but embedded within customary systems and the newer forms of tenure.⁴² Northern Nigeria is predominantly Muslim, with Kano and Sokoto among the oldest and biggest centres of Islam in West Africa. A fusion of Hausa and Muslim cultures and pre-existing customary land tenure are well-adapted to local conditions.⁴³ Though *Shari'a* operates in northern Nigeria, especially in civil matters (marriage and inheritance), the customary laws of the various ethnic groups continue.

The Sokoto Caliphate (1809-1906) was the largest state in West Africa after the fall of Songhai in the sixteenth century, and followed classical Islamic land law.⁴⁴ Land was 'owned' by God, and human beings only had 'usufructuary' rights, constructed more broadly than under Roman law. The valid possessor of land could sell, pledge or loan, and enter into tenancy agreements, without interference from any authority, subject to the rights of others or community welfare. The land tenure systems asserted political control over the emirates, while securing political and social cohesion.

Land classification, regulation and taxation were guided by the nature of land (occupied or unoccupied), land use and the status of the owner. The five land categories introduced by the Caliphate were land held in absolute ownership by individuals/groups (*mamluka*); state land (*amiriyya*); common land (*matruka*); 'dead' land (*mawatoi*) or God's bush (*dajin Allah*); endowments (*waqf*). These closely resemble the 1858 Ottoman Land Code (though Nigeria was not ruled by the Ottomans), indicating how land jurisprudence was shared between Africa and the rest of the Muslim world.⁴⁵ Though individual ownership was recognised by Islamic land law, it was subject to productive and responsible use, and private ownership could be exercised either individually or collectively. While the Caliphate was relying on Islamic law sources from the *Qur'an* to *ijma*

⁴¹ M Last *The Sokoto Caliphate* (1977).

⁴² CK Meek *Land tenure and administration in Nigeria and the Cameroons* (1957) 163; MG Yakubu *Nigerian land law* (1985) 6.

⁴³ A Frishman 'The impact of Islam on the urban structure and economy of Kano, Nigeria' (1986) 7(2) *Journal of the Institute of Muslim Minority Affairs* 464 - 475.

⁴⁴ HJ Abdullahi & I Hamza 'Women and land in Northern Nigeria: the rights' in LM Wanyeki (ed) *Women and land in Africa* (2003) 133 - 175.

⁴⁵ Sait & Lim (n 2 above).

(consensus), it was also conscious of the need to restrain the landed aristocracy from taking more land, and to resettle those displaced by *jihad*. Key features of the Sokoto land policies were generating revenue, increasing land productivity and improving access to land as well as protection of lands (*hima*) and grant of virgin lands (*iqta*). Valuable lands, such as those containing minerals, were held by the State and granted to those who could exploit it and paid mining royalties.⁴⁶

Like the Ottomans, the Caliphate administered land closely, through annual tributes or land tax paid by the emirates, tax on Muslims and non-Muslims, tax on farm produce (*kharaj* or *kudin - al - barkar kasa*), and charitable levy (*zakat*). Non-Muslims, governed by their own customary laws, had both proprietary and usufructuary land rights, but had to pay tribute tax (*zija*) for protection as well as exemption from military service.⁴⁷ They were allowed to observe their religion and customs, and had rights to buy, sell, bequeath and lease out their land as freehold without interference; non-Islamic courts served non-Muslims who had *dhimmi* or tributary status within a Muslim domain.

The Sokoto Caliphate is known for several land innovations. First, Islamic law here did not recognise holding of land for a fixed tenure, but on the duration of productive use, even though extensions may involve formal re-applications. Second, the Caliphate extended the concept of Islamic endowments (*waqf*) to land obtained by *jihad*, so that annexed lands were not booty but protected for the benefit of the community. Lands in Sokoto and Gwandu (the capital) were declared *waqf*, exempt from taxes and protected from alienation. Third, the Caliphate recognised the practical difference between urban and rural land: lands in and around towns required permits from the Emir, but less for those further away. Another Islamic land categorisation is based on whether land is occupied, unoccupied or common land. Lands deemed as 'dead' (*mewai*) are those that have not been owned or cultivated, such as pasture, fallow land or vacant land. In addition to the State, it was the religious leader with community and political status (Imam) who granted ownership to individuals, while accountable to the Emir for his decisions. He could not alienate *waqf* land, but distributed *ushr* or abandoned non-booty land acquired by Muslims from non-Muslims, on the basis of need and ability to use, as well as charity.

Lugard, first High Commissioner of Northern Nigeria (1900-06), with experience from India, Egypt, and East Africa, in 1903 addressed the defeated Fulani elders thus:

⁴⁶ Sait & Lim (n 2 above) 77.

⁴⁷ I Jumare 'Land tenure in Sokoto Sultanate Northern Nigeria' unpublished PhD thesis, York University, 1995 11.

The Government will, in future, hold the rights in land which the Fulani took by conquest from the people, and if Government require land it will take it for any purpose.⁴⁸

The Land Proclamation Act of 1902 made all lands in Northern Nigeria public or crown land (public lands acquired from the Caliphate, crown lands bought by the Royal Niger Company). Under indirect rule, caliphate officials became merely salaried district heads accountable to the British for peace-keeping and tax collection, and were to supervise and protect the indigenous population's traditional rights.⁴⁹ Now, the government derecognised private ownership in 'community lands' and required 'occupancy certificates'. For the Muslims, the Islamic land inheritance laws continued but their land was sought to be administered in the name of Muslim customary land laws derived from Islamic law.

Lugardian indirect rule policy created multiple systems of land tenure and administration. Islamic laws and court system (headed by Islamic judge *alkali*) continued to govern the personal status of Muslims including land disputes, marriage and release of slaves, to which was added English property laws, particularly for the settlers and eventually for the Nigerian elite. The British in effect confirmed the Hausa-Fulani socio-cultural and political model in the Nigerian middle belt.⁵⁰ The emirs were empowered as 'traditional rulers' and justified their interpretation of 'tradition' on the basis of their understanding of Islamic law and how their decisions promoted general welfare.

Lugard's successor Girouard recognised the significance of Islamic law from his Sudan experience, and translated from French the *Moukhtasar*, a well-known treatise on Islamic jurisprudence from the North African *Maliki* school (followed by the Sokoto Caliphate) which he argued guided Islamic conceptions on tax and land.⁵¹ He amended the 1902 Land Proclamation Act in the Land and Native Rights Proclamation of 1910, which remained in use until 1962, and reduced the rights of chiefs and subjects. Colonial representations of land tenure were not merely aimed at revenue generation, but followed a political logic which misrepresented indigenous experience and led to contemporary problems in African states.⁵²

⁴⁸ F Shaw *A tropical dependency: An outline of the ancient history of the Western Sudan, with an account of the modern settlement of Northern Nigeria* (1905) 451.

⁴⁹ A Kirk-Greene *The principles of native administration in Nigeria: Selected documents 1900 - 1947* (1965).

⁵⁰ M Ochonlu 'Colonialism within colonialism: The Hausa-Caliphate imaginary and the British colonial administration of the Nigerian Middle Belt' (2008) 10(2) *African Studies Quarterly* 95 - 127.

⁵¹ ML Smith 'Sir Percy Girouard: French Canadian consul in Africa 1906 - 1912' unpublished MA thesis, McGill University 1989.

⁵² S Pierce *Farmers and the state in colonial Kano: Land tenure and the legal imagination* (2005).

The British preference for customary land tenure over Islamic land law, to be administered by the Muslim elite, created a situation where Islam was expressed through a customary framework. Customary land practices had endured during the Caliphate, particularly in the rural areas. While Islamic land law did not extinguish customary tenures, it certainly borrowed from them and in turn influenced them. As Islamic land law retreated into customary forms, it interacted with Muslim customary and non-customary practices more intensively. A 1949 report on land tenure by a colonial officer documented eight modes of acquisition or transfer of land under customary laws, which bear close resemblance to Islamic land tenures: allocation of an abandoned farm or uncleared bush by the village head, inheritance (*gado*), gift by an existing owner (*kyauta*), purchase (*saye*), acceptance of a pledge (*jingina*), lease (*aro*) sharecropping (*kashi* or *nomamuraba*) and loan (*aro*).⁵³

No uniform system of customary law operated in Nigeria, but a plurality of localised customs intersecting with Islamic norms. Customary laws varied among ethnic groups and even within an ethnic area, not in essence but in detail.⁵⁴ Individual usufructuary rights could be upgraded to absolute rights, but in the context of family decisions and particular modes of acquisition such as reclamation of an area, partition of family property or gifts among living persons (*inter vivos*). The Nigerian tribal philosophy that land was sacred corresponded with Islamic ideas of land as a gift of God, to be exercised responsibly and for the benefit of the whole community.⁵⁵

Customary tenure did not forbid alienation of land, although there were restrictions on it leaving the community. The right of disposal belonged only to the community, acting through traditional authorities, and exercised in accordance with customary law. Land in Northern Nigeria could be held individually or jointly, or by the *gandu* (extended family) as a lifetime allotment. In most communally held land, individuals or households exercised usufruct rights rather than 'ownership' of the land. The customary system is based on the needs of the individual, within the bounds of the land available.

In 1960 independent Nigeria assumed ownership of all land, and the 1962 Land Tenure Law repealed previous laws and created the nationally uniform category of 'native lands'. The 1978 Land Use Act sought to nationalise land, but its centralised land governance led to bureaucratic hierarchical decision-making which undermined customary institutions. It divided lands into 'urban' and other land, and distinguished two rights of

⁵³ CW Rowling *Report on land tenure: Kano Province* (1939).

⁵⁴ BT Aluko & AR Amidu 'Women and land rights reforms in Nigeria: Promoting land administration and good governance'. Paper presented at the 5th FIG Regional Conference, Accra, Ghana, 8 - 11 March 2006.

⁵⁵ OA Famoriyo 'Administration of land allocation in Nigeria' (1985) 1(3) *Land Use Policy* 103.

occupancy (customary and statutory), echoing the Tanzanian experience. Customary rights were bestowed by the local government, statutory rights by the governor. The statutory Certificate of Occupancy confers leasehold rights (on payment of rents) for periods up to 99 years, renewable, and acceptable to banks for purposes of mortgages and loans, while individuals could sell or transfer their interest. If the land is undeveloped, the holder can only retain one plot of up to half a hectare; any excess, or undeveloped land, returns to the state.

While controversy remains over the imposition of other aspects of Islamic law in Northern Nigerian, Islamic land law is not on the agenda because customary land practices of Muslims are seen as compatible with Islamic land principles. Customary rights, including those obtained by inheritance, are adjudicated in local (*Shari'a*) courts, and traditional authorities regularly use Islamic principles to settle land disputes (such as the Supreme Council of *Shari'a* in Oyo State).⁵⁶ Thus Islamic law remains an important source of Nigerian land law.

5 Secularised Islamic land law in Senegal

Islam since the eleventh century, and the French even before colonisation, have combined to create Senegal's unique Western African Muslim secular model. The 1963 Constitution declares Senegal to be a secular state (article 1), with no allowance for Islamic land tenure. Senegal was led for over twenty years after independence by a French-speaking and Catholic modernist, Senghor, yet one can still discern Islamic dynamics in negotiating land relations.

While Vallon, the Governor of Senegal and proponent of assimilation, saw Islam as private, custom, and not openly challenging to French culture and laws, taming Islam was important because the French understood the potency of political Islam and that its growth was partly because it was not associated with the colonialists. The French scholar-administrators developed a theory of 'Black Islam' (*Islam noir*) which held that the localised and unorthodox African Islam was inferior to proper Arab Islam. The French attempted to racialise Islam by projecting differences and dividing the Western African Muslims and sub-Saharan Muslims.⁵⁷ During the French colonial rule, Islam expanded, exploiting the French grudging toleration of Muslim practices and also the growth of city-based trade.

⁵⁶ R Blench *et al* *The role of traditional rulers in conflict prevention and mediation in Nigeria* (2006).

⁵⁷ JL Triaud 'Islam in Africa under French colonial rule' in N Levtzion & R Pouwels (eds) *The history of Islam in Africa* (1997) 169 - 188.

The Muslims faced pragmatic choices regarding their future identities and survival. Islamic norms hid among customary laws to avoid being purged, and the chiefs had wide discretion in applying both custom as well as Islamic *Maliki* law (*Risala*) in land matters. Islamic leaders (*marabouts*) resisted colonial land tenure, packaging Islam as indigenous custom. Despite running their *taalibé* (*Qur'anic* or *Coranic* schools), *marabouts* were seen as the only organised social institution capable of legitimising colonial policies, in return for toleration of their customary or Islamic character.⁵⁸

The French also found it difficult to rid the Senegalese of other Islamic groups such as the mystical *Sufi* brotherhoods,⁵⁹ and the *Murids* who developed their own tenure systems. Most 'mainstream Muslims' (*Sunni Malikis*) were sufficiently enmeshed in customary land practices to be characterised as adherents of customary rather than Islamic tenure, yet conflicts did arise between Islamic and customary land systems within communities.

Islamic family and inheritance law shows the influence of Islamic land law in Senegal. The 1963 Constitution had no specific provisions relating to customary and Islamic law, but Islam directly influences laws on marriage, affiliation, succession and ownership relations. French attempts at secularising the laws did not displace either customary or Islamic laws, and the current legal system follows legal pluralism through civil law, customary norms and Senegalese Islamic law. The post-independence modernisation of Senegalese family and property law borrowed from French law, but the objectives of the 1961 Codification Commission included 'observing prescriptions related to family law in the Qur'an'. The resulting Family Code 1973 shifted recognition from customary to the Islamic. It abrogated all general and local customs apart from those regulating the formalities of marriage, and any reference by the courts to customary laws is not permitted, recognising only Islamic law. In practice, however, custom continues to flow into Senegalese practice even though not a formal source of succession and family laws. The Family Code contains provisions on succession derived from classical Islamic law, while incorporating some French succession ideas and Senegalese Islamic customary laws. Senegal chose to be modern, with no one religion for the basis of its laws, but promoted legal pluralism and rejected anti-faith approaches. The hybrid model of Islamic/modern works because it preserves the unity of the family and respects the social diversity of the nation. Thus, Senegal refined 'secularism' not as the French did (separation of church and state), but as a positive example of Islamic law applied within a secular system.⁶⁰

⁵⁸ MC Diop & M Diouf 'L'Administration Sénégalaise, les confréries religieuses et les paysanneries' (1992) 17 *Africa Development* 65 - 87.

⁵⁹ L Behrman *Muslim brotherhoods and politics in Senegal* (1970).

⁶⁰ AA An-Na'im *Islam and the secular state: Negotiating the future of Shari'a* (2008).

The French took advantage of Islamic land principles convenient for them. In 1904, it stated that all 'vacant and unowned land' (*terres vides et sans maîtres*, derived from the Islamic *indirass* principle) belonged to the state. Private rights are generally established through ten (or twelve) years of continuous occupation and use, and landholders not cultivating their own land are obliged to have it worked by others (tenants, sharecroppers, borrowers), otherwise their ownership lapses. Such powers were endorsed and expanded by 1976 laws which govern state property and rules on expropriation of land for public purposes. The French also used favourable Islamic support for private property for their decrees of 1932 and 1935, which resonate in the Senegalese Civil Code even today. Article 56 of the Constitution of Senegal guarantees the protection of human rights, but private landed property applies only to about 2% of the land. However, the chaotic nature of customary property regimes (through which Muslims accessed their individual property rights) and abuse prompted reform of customary systems. In 1964 the law on the *domaine national* repealed all autochthonous land rights, turning most land into national land.

In practice, both custom and Islamic law (the *Maliki Risala*) were the basis of customary land law and were accepted by the colonial administration, the *Chefs de Canton* who had wide discretion in dealing with land matters. The Senegalese colonial land tenure system (*Lamanat*) administered through the customary chiefs (*chef de terre*) were supplanted by hand-picked district chiefs as part of the colonial administration (*chef the canton*), leading to both chiefs allocating state land. Such was the continuing confusion over roles, that in 1964 President Senghor superseded customary law and structures. The French also failed in their efforts to register customary land use rights (*immitriculation*) because of resistance to registering ownership of customary lands.

At independence, the Senegalese Commission on Tenurial Reform (1960) recognised that French individual land registration had failed, the customary tenurial system was problematic, and expressed concerns over religious groups' abuse of lands at their disposal. The 1964 Law of National Property recommended unifying a complex system including customary, colonial and Islamic rights. The law recognised existing titles and provided a two-year period for registration, and classified lands into urban areas, classified areas, cultivated land and recently developed agricultural land in forest area.⁶¹ The independent government retained the colonial regime of state ownership of most land, but created a framework of local institutions called *communautes rurales* to administer the land.⁶²

⁶¹ HE Golan 'Land tenure reform in the peanut basin of Senegal', in Bruce JW (ed), *Searching for land tenure security in Africa* (1994).

⁶² MS Freudenberger *Land tenure, local institutions and natural resources in Senegal* (1994).

Under prevailing Senegalese law the State is the trustee of all land, responsible for planning and implementing development. Senegalese achievements include the extensive but controversial land reform that strengthened the village community's land allocation role and mechanisms for resolving disputes, where Islamic practices are evident. Senghor called the 1964 law a 'return to the African culture' and a negation of colonialist legal doctrine and bourgeois concepts of land ownership. The privileges of the Islamic leaders (*marabouts*) were safe-guarded, and their role in customary land tenure system continues. Islamic and customary land norms are not 'officially' part of the land tenure system but not hard to find.

6 Conclusions

The case studies in this chapter show that Islamic land law in each country or local region takes a different form and role within pluralist land systems. Though its visibility varies, its influence direct or indirect is detectable though its own name, under the rubric of custom or through principles captured in statute. The relevance of religion and the creativity of culture keep changing in globalising communities where Islam and custom continually intersect.⁶³ African Islamic land law challenges the Orientalist and neo-colonial characterisations of Islam as autonomous, homogeneous, unchanging or rigid. Islamic and customary tenures are either modified and formalised into law, or absorbed into national land legislation and policies, usually without comment or credit.

Each African country's colonial encounter has been different. The colonial drama involved personalities, ideologies, corporate interests, resistances and alliances. The contest was not simply between collective custom and colonially inspired individual tenures, but a range of tenure concoctions, accommodations and compromises, with Islam playing an important visible or background role. The colonial legacy on land generally was the promotion of individualised tenure, but the colonisers hardly 'introduced' individual tenure.

At independence, most African countries with large Muslim populations and Islamic histories and identities mostly kept the metropole's legal systems with some repackaging. Unlike many Arab States who reverted to Islamic law, the Africans consciously chose not to adopt a single religious framework. This multiculturalism can be partly explained as respect for non-Muslim minorities, while Islamic family law for Muslims was invariably retained. This was also because the Muslim Africans were generally comfortable with their dual identity as Muslims and Africans, and so chose Islamic law and custom as arbitrated by

⁶³ MI Aguilar 'Religion as culture or culture as religion? The *status quaestionis* of ritual and performance' (2000) 1(2) *Culture and Religion: An Interdisciplinary Journal* 233 - 245.

modern, statutory or secular law (derived from Western codes). In some countries such as Nigeria, Somalia, Sudan and Mauritania the contest between Islamic and customary law is more pronounced, but with regard to land the two are closely joined. African culture and traditions are seen as the glue that holds people together and allow communities, including Muslim societies, to function.

The successful partnership between Islamic land law and Muslim (and often non-Muslim) customary land norms is a curious but comprehensible phenomenon. A supposedly uncompromising monotheist religion was often combined with drums, dances, magic and superstition, blurring the lines between Muslim African customs and Muslim religious beliefs. Many Africans view Allah as the supreme traditional spirit, or at least one of the two parts of the same religious experience. The accommodation between the two has been attributed to the Islamic concept of racial equality, acceptance of practices such as polygamy and circumcision and (in defiance of traditionalists) belief in spirits. Common to Islam and African custom are family, community and kinship loyalties which often take precedence over religious ties for many individuals, and in some West African areas there are many families with Muslim and non-Muslim members.

The conversation between the spiritually sacred character of African communal property and the religiously founded Islamic land tenure is striking. African customs, though varied, generally constructed land as belonging to the Gods and the spirits, through ancestors and with regard to future generations, where the living venerate the land and use it gratefully.⁶⁴ Land was worshipped under traditional customs as the expression of the Gods, just as *Qur'an* refers to land as God's bounty and a 'sign' of divine gifts (*ni'amah*). Though Islamic land tenures promoted individual (as well as communal) rights these are not unconditional, as God alone has the right to absolute ownership of all worldly things, and individuals merely have usufructuary rights.⁶⁵ As such it is widely recognised that 'the Islamic philosophy of property is more similar to the African way of thinking than the northern ideal of private property'.⁶⁶ The colonial commodification of land threatened the African way of life, leading a closer liaison between African custom and the Islamic range of land tenures.

The resilience of Islamic land law is broader than common law or civil law, and its significance, as a way of life, goes beyond the appeal of colonial law or modern legislation. It is the socio-cultural values and

⁶⁴ ES Craigwell-Handy 'The religious significance of land' (1939) 38 *Royal Africa Society* 114 - 123.

⁶⁵ S Behdad 'Property rights in contemporary Islamic economic thought: A critical survey' (1989) 47 *Review of Social Economy* 2.

⁶⁶ GTZ 'Property regimes in land – a socioeconomic analysis' in *Land tenure in development cooperation: Guiding principles* (1998).

egalitarian principles, rather than strictly legal doctrines, which provides Islamic land law its vigour. Islam also served as a trading and law-giving religion, and furnished ethical rules for markets, financing (prohibition of interest) and contracts. In addition to core legal doctrines covering the family, wrongs, procedure, and commercial transactions, Islamic law also includes detailed rules regulating religious ritual and social etiquette.

The gendered impact of Islamic land law also requires further study, for example the much-vaunted claim that Muslim women are better off than under customary laws which mostly did not permit inheritance by women. Islamic law does recognise extensive rights of Muslim women to own, manage, inherit and dispose land under the authority of the *Qur'an*, despite lesser inheritance shares.⁶⁷ Muslim women develop strategies to counter the patriarchal control of assets.⁶⁸ When Muslim women are denied their land rights despite their Islamic prescriptions, what are the remedies?⁶⁹ From pre-independence Nigeria where Islamic law had to be clarified to permit women to inherit land (again),⁷⁰ to present day debates over land and gender in Muslim African countries, it is civil society debates, political space and gendered participation that are critical to translating property rights of Muslim women.

African Islam in general and African Islamic law in particular, has remained largely neglected in the global land discourse and agenda,⁷¹ which assumes that Africa is 'only superficially Islamised'.⁷² It is also an anthropological obfuscation to collate custom and Islamic norms despite their close relationship. The persistence of sophisticated Islamic land tools arising from Islam's historical presence in Africa and the size of its Muslim populations should challenge the indifference of land researchers, professionals and policy makers, such as the Global Land Tool Network (GLTN). Hanretta⁷³ argues that conventional research methods, derived from colonial misunderstandings, prevent an appreciation of Muslim intellectual history and its contributions in Africa. Islam is a distinctive contributor to African land law, directly or indirectly, not just another morphing custom. More detailed studies, at African, country and local level are needed to test Muslim claims of human rights, empowerment and

⁶⁷ JP Platteau *et al* *Marriage system, access to land, and social protection for women* (2000) 17 - 18.

⁶⁸ S Sait & H Lim 'Accidental Islamic feminism: Dialogical approaches to Muslim women's inheritance rights' in H Lim & A Bottomley (eds) *Feminist perspectives on land law* (2007) 133 - 157.

⁶⁹ SF Hirsch *Pronouncing and persevering: Gender and the discourses of disputing in an African Islamic court* (1998).

⁷⁰ S Pierce 'Farmers and "Prostitutes": Twentieth-century problems of female inheritance in Kano Emirate, Nigeria' (2003) 44 *Journal of African History* 463 - 486.

⁷¹ S Sait *The relevance of Islamic land law for policy and project design* (2008).

⁷² O Kane 'Moderate revivalists: Islamic inroads in sub-saharan Africa' (2007) *Harvard International Review* 64 - 68.

⁷³ S Hanretta *Islam and social change in French West Africa: History of an emancipatory community* (2009).

participation, and the compatibility of Islamic land laws with universal development goals and standards.

Whilst both customary law and *Shari'a* have an influence beyond their more narrowly defined area of personal status law, their respective futures are quite different. Customary law faces an uncertain future, but *Shari'a* will continue to grow and develop on the continent, with few countries unaffected.

CHAPTER 6

THE *HUMWE* PRINCIPLE: A SOCIAL-ORDERING *GRUNDNORM* FOR ZIMBABWE AND AFRICA?¹

Ben Chigara

1 Introduction

The obligation of our profession is to serve as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with the minimum of stress on the participants. That is what justice is all about!²

Zimbabwe's land issue has been subject of much litigation between the principals, namely the commercial farmers and the government of President Mugabe, involving the Zimbabwe Supreme Court, the Southern African Development Community (SADC) Tribunal in Namibia, and the International Centre for the Settlement of Investment Disputes in Washington, but remains unresolved. The coalition government of President Mugabe and Prime Minister Tsvangirai appears to hold contrasting views. This chapter considers not whether the Zimbabwe land issue is a justiciable matter,³ but upon what principle it should be resolved.

Public international law is clear that the existence of a legal dispute is an objective question.⁴ Non-legal disputes are generally regarded as non-justiciable.⁵ The logic behind the distinction may no longer subsist in light of the requirement attendant upon tribunals to establish their jurisdiction

¹ The term *Grundnorm* denotes the basic norm, order, or rule that forms an underlying basis for a legal system. H Kelsen *General theory of law and state* (1949).

² WE Burger 'Isn't there a better way?' (1982) 68 *American Bar Association Journal* 274, 275.

³ See especially *South West Africa* case (1962) ICJ Rep. 319 328; *Interpretation of Peace Treaties* case (1950) ICJ Rep. 65 74; *Mavrommatis Palestine Concessions* (1924) PCIJ Ser. A, No 2, 11; SMG *Koopmans diplomatic dispute settlement: The use of inter-state conciliation* (2008) 11 - 16; J Nijman & A Nollkaemper *New perspectives on the divide between national and international law* (2007).

⁴ *South West Africa* (1962) ICJ Rep. 319 328; *Interpretation of Peace Treaties* case (1950) ICJ Rep. 65 at 74; *Mavrommatis Palestine Concessions* (1924) PCIJ Ser. A, No 2, 11.

⁵ *Haya de la Torre* (1951) ICJ Rep. 71 at 8.

before considering the issues. Thus the alleged distinction between justiciable and non-justiciable disputes has the effect of enabling or disabling a tribunal's capacity to address a matter. Writing in 1921, Master of the Supreme Court Jelf supposed that the distinction between justiciable and non-justiciable disputes was plain to see:

Everyone can understand the general meaning of *justiciable* disputes. They are those disputes which admit of judicial determination in the Courts of Justice, and everyone can name certain disputes which fall obviously upon one side or the other of the line.⁶

Some eighty-seven years later, Koopmans pointed to the difficulties with the distinction.⁷ The quest for a typical definition of 'legal dispute' has proved extremely elusive and difficult.⁸ If we suppose that political disputes, as opposed to legal disputes, are characterised first and foremost by a lack of competing legal claims, then that would make the former synonymous with non-legal disputes. But such a supposition presupposes also the existence of a comprehensive legal system that has previously contemplated and provided for all eventualities, which exists nowhere. The situation is made more complex because the term 'political dispute' is used habitually 'to argue that a matter is of greatest importance', not to suggest that a matter lacks legal claims.⁹ Consequently, it seems better to refer to political disputes as those where application of the law would not be useful, because of the higher general interest that would be affected by the insistence upon legal claim rights of disputants.

Non-justiciable disputes are often described as those disputes that do not lend themselves to judicial settlement, where settlement by the application of rules of law would not resolve the dispute at all. Koopmans concludes that within the scope of non-justiciable disputes '... fall those disputes of which treatment by a court would not allow the court to fulfil its function as a court of justice.'¹⁰ He prays in aid Hersch Lauterpacht ('certain disputes should not be decided judicially, because practical reality does not allow for solution of the case through legal settlement') and Kunz, who writes that, while 'disputes can be judicially decided, it is not true that they can be judicially settled'.¹¹

This suggests that the mere presence of competing legal claims may not be sufficient to qualify a dispute as justiciable, with acceptance by the disputants of a judicial determination of the issues. This enhances the perception of the Tribunal's stature in the estimation of those regulated by

⁶ A Jelf 'Justiciable disputes' (1921) 7 *Transactions of the Grotius society* 59.

⁷ Koopmans (n 3 above) 11 - 16.

⁸ See also B Chigara *Legitimacy deficit in custom: A deconstructionist critique* (2001) 118 - 121; P Allot 'The emerging universal legal system' in Nijman & Nollkaemper (n 4 above) 63 - 83.

⁹ Koopmans (n 3 above) 15.

¹⁰ Koopmans (n 3 above) 18.

¹¹ As above.

it. Where the disputants are likely to maintain their dispute in spite of a determination of the relevant Tribunal, and neither the Tribunal nor the abiding party can do anything about it, then such a dispute could be termed political. In this sense the potential of disputants to cooperate with the decision of the relevant Tribunal becomes a significant factor in the determination whether a dispute is justiciable or not.

This chapter argues that the rejection of considerations of underlying context by all the Courts that have so far pronounced on the matter, coupled with their common insistence on a blind rule-of-law approach that acknowledges only current context, not the underlying context, has resulted in the alienation of the much favoured context specific African social-ordering principle of *humwe*, which may offer the key to resolving the matter. This is because, as a tool of social construction, the law does not possess an autonomous existence. Poole argues that the law often relies on the 'past as a storehouse of dramatic examples that can be drawn upon to guide decision making and as a source of constitutive values' for combating justificatory narratives that may be deployed to ensure a particular position.¹² Watson's distant social realities theory shows that 'laws come from men reflecting on [their] ancient traditions... and not from [their] ... serious consideration of what rules would be most suitable for the contemporary society'.¹³ According to Geertz, 'law and ethnography are crafts of place: they work by the light of local knowledge'.¹⁴ Local knowledge itself, on any matter, is to be found in the particular culture, defined in part as a storehouse of collective or pooled learning.¹⁵ The past as context is critical to the comprehension of social challenges such as Zimbabwe's land issue. Majority-rule SADC States, including Namibia, South Africa and Zimbabwe, have adopted *humwecentric* legislation as a means of addressing the legacies of apartheid rule on their territories. The Constitution of Zimbabwe Amendment Act¹⁶ and South Africa's emergent Black Economic Empowerment Act of 2001 are examples of this approach. In South Africa, President Zuma himself chairs South Africa's Advisory Council on Black Economic Empowerment. The declared purpose of South Africa's Black Economic Empowerment Act¹⁷ is to reverse economic inequality along racial lines, previously championed and entrenched by successive apartheid administrations until the advent of majority rule in 1994.¹⁸ Its dynamic seeks to enhance the number of black people that manage, own and control

¹² T Poole 'Harnessing the power of the past? Lord Hoffmann and the Belmarsh detainees case' (2005) 32 *Journal of Law and Society* 534.

¹³ A Watson 'From legal transplants to legal formants' (1995) *American Journal of Comparative Law* 469 470.

¹⁴ C Geertz *Local knowledge* 167.

¹⁵ C Geertz *The interpretation of cultures* 4 - 5.

¹⁶ Act 17 of 2005.

¹⁷ Act 53 of 2000.

¹⁸ <http://www.thedti.gov.za/bee/beehome.htm> (accessed 4 June 2010.)

their own country's economy. The Act supports the Department of Trade and Industry's work in this area by:

- (1) Establishing a legislative framework for the promotion of Black Economic Empowerment.
- (2) Empowering the Minister to issue Codes of Good Practice and publishing Transformation Charters.
- (3) Establishing the Black Economic Empowerment Advisory Council.
- (4) Making provision for matters connected therewith.¹⁹

This emerging state practice on the significance of context to the determination of social issues raises the question whether, and to what extent, African states may invoke their ancient traditions in dealing with and addressing present challenges. Kahn-Freund writes that the UK refused to sign the Geneva Conventions of 1930 and 1931 on bills of exchange and cheques precisely because it wished to keep intact its own laws and preserve 'that which was felt to express an ancient tradition'.²⁰ We might ask whether there exists a link between the dominance of African States on the list of failed States²¹ and their attachment to African social-ordering ideas traceable to their own ancient traditions, rather than transplants of little or no relevance at all to them. In his examination of the uses and misuses of law-making, Kahn-Freund listed three purposes that may recommend the borrowing of legal ideas or techniques from sources external to one's own.

- (a) With the object of preparing the international unification of the law.
- (b) With the object of giving adequate legal effect to a social change that is shared by the foreign country with one's own country.
- (c) With the object of promoting at home a social change which foreign law is designed either to express or to produce.²²

But, even when such borrowing occurs from a different system, what may really be happening in transactions of that nature may be similar to what Poole described as resort to the 'storehouse of ideas',²³ or what Watson has characterised as reflecting on distant social realities, albeit in relation to another state's experience.²⁴ This is not the same as colonial imposition of values that even international law opposed as racist. This calls into question African governments' awareness of the place in their social ordering practices of African ideas and techniques that had evolved and

¹⁹ n 18 above.

²⁰ O Kahn-Freund, 'On uses and misuses of comparative law' (1974) 37 *Modern Law Review* 4.

²¹ www.foreignpolicy.com/articles/2010/06/21/2010_failed_states_index (accessed 15 September 2010).

²² Kahn-Freund (n 21 above) 2.

²³ Poole (n 12 above).

²⁴ Watson (n 13 above).

successfully supported life and civilisations on the continent before the disruptive intervention of colonialism.

Economic arguments for a cost-based approach to resolution of land issues in Southern Africa abound, and generally tend towards maintenance of the status quo. Rule of law approaches being rehearsed in dispute settlement bodies reject social justice arguments, of which the land issue is one. Regional and international tribunals have assumed questionable competence to pronounce on measures appropriate for the resolution of the matter.

On 18 November 2008 the Windhoek based Southern African Development Community (SADC) Tribunal passed judgment in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*. On 22 April 2009 the Washington-based International Centre for the Settlement of Investment Disputes (ICSID) pronounced its judgment in *Bernardus Henricus Funnekotter and Others (Claimants) v Republic of Zimbabwe (Respondent)*.²⁵ This essay argues that these cases suggest that the Zimbabwe land-redistribution issue has festered largely because of apparent intellectual and cultural hostility, indeed epistemicide, against well established African ideas and techniques for social-ordering that predate the phenomenon of colonisation and later globalisation.²⁶ It recommends the use of the principle of *humwe*, an ancient social-ordering paradigm credited with the establishment and management of pre-colonial African societies. Connah writes that historical and archaeological evidence point to the existence of well organised African states with high population densities and cities of 20,000 or more inhabitants from AD 1000 until the onslaught of Europe's mighty empire-building nations. Areas of urban development in tropical Africa included West Africa, the Ethiopian mountains, the East African coast, the middle Nile, the Zimbabwe Plateau, the lower Congo and around Lake Victoria. For these cities and States to develop, particular social ordering ideas and techniques must have been implemented, which support the concept of *humwe* as one of Africa's enduring values.²⁷

1.1 *Humwe* principle

Humwe is probably one of Africa's oldest, most practised and most enduring ideas. *Humwe* is *Shona* for 'in this together' and 'us all'. Table 1 below shows the equivalent terms in other African languages.

²⁵ ICSID Case No ARB/05/6 judgment of 22 April 2009.

²⁶ K Bennett 'Epistemicide! The tale of a predatory discourse' (2007) *The Translator* 13(2) 151 - 169.

²⁷ G Connah *African civilizations: Pre-colonial cities and states in tropical Africa: an archaeological perspective* (2001) 18 - 21 & 228.

Table 2: *Humwe* in a selection of African States*Source: Author's research*

Term	Language	Where used
' <i>kunyitanira</i> '	Kikuyu	Kenya
' <i>apapo</i> '	Yoruba	Nigeria
' <i>ubumwe</i> '	Kinyarwanda	Rwanda
' <i>ubumwe</i> '	Kirundi	Burundi
' <i>umoja</i> '	Swahili	East Africa: Kenya, Tanzania, Uganda, Zanzibar
' <i>ubuntu</i> '	Sindebele	South Africa, Zimbabwe
' <i>ubwananyina</i> '	Bemba	Zambia
' <i>pamodzi</i> '	Nyanja	Malawi, Zambia
' <i>al takafol al egtma'ey</i> '	Arabic	North Africa: Egypt, Libya, Morocco, Tunisia, Sudan, Algeria,
' <i>ku tchew</i> '	Baleng	Cameroon

As an ideal, *humwe* targets the promotion of individual welfare through the communal preservation of the inherent dignity of a community. It pursues this objective by focusing on the fundamentals of equity, social justice and human security. In all matters pertaining to social-ordering, and in particular the distribution of life advantages and disadvantages, *humwe* requires that all agents of the community focus on the whole and not the sum of its parts. It insists on a knowledge-based, human-rights-orientated paradigm to social ordering – what South Africa's post-apartheid government has popularised as *ubuntu*, meaning 'to be human'. In other words you achieve your humanity by pursuing humane values. In dispute settlement, *humwe* or *ubuntu* targets four things.

The first is that all stakeholders must first reach the point where they realise and acknowledge that sustainable relations on the matter of difficulty – in this case unequal land distribution on racial lines – will only be reached when the need of every community member has been met.

The second is to establish a common understanding of the local significance of land and how the majority, and not the minority, are to be included in both its subsistence and commercial enterprise. This is because quite apart from the social status and power that we commonly associate with land ownership, especially in the West, in Zimbabwe's predominantly agricultural economy land ownership is key to survival. The implementation of robust constitutional land laws by successive colonial administrations had resulted in a situation where, at Zimbabwe's independence from Britain in 1980, native Zimbabweans held less than 5 percent of the country's best land even though they represented

approximately 95 percent of the population. Successive colonial land legislation had expropriated the native black population of its lands without compensation, and forced them onto land in regions with the least agricultural potential and least favourable rainfall.²⁸

The third is that *humwe* premised land redistribution must take cognisance of the universal significance of land as a commodity in light of the international human rights norm around which civilised nations are being organised today. Human rights law has confirmed that every individual has a right to life. Among the commercial and peasant farming communities of Zimbabwe the fulfilment of that right implies the right to own and use a portion of land for agricultural purposes.

Fourthly, efficient *humwe*-premised social-ordering practice should combine the local and the universal significance of land, with a common appreciation of the significance of land to all stakeholders. That understanding should then become the matrix on which land allocation proceeds, ensuring that the rights and minimum needs of all stakeholders are provided for.

This approach is what I call *humweefficiency*.²⁹ It appears more suited than other paradigms to resolve a wide range of social issues in African States because:

- It takes account of the past as significant context in the determination of the solution to the question at issue.
- It accommodates both the local and universal insights into the problem in order to maximise the recommended solution's chance of success.
- It is inclined towards reason and sober-mindedness rather than emotional tantrums in seeking a solution to the issue.
- It is inclusive in that it requires the collective responsibility of all stakeholders in constructing both the knowledge base and the solution for, in the case of Zimbabwe and the SADC, the land issue.
- It inspires legitimacy because it is premised upon equity, fairness, openness, human security and realism.
- It requires a common understanding of the society's historical fortunes and misfortunes, and challenges all stakeholders to show both courage and humility in perceiving one another as equals in the search for a solution to their common inherited problem.
- It requires the recognition by all stakeholders that the dignity inherent in them as human beings depends upon their recognition of the dignity of other stakeholders as human beings.

²⁸ B Chigara 'Land rights and human rights in transitional states' (2007) 11 *Mediterranean Journal of Human Rights* 101 - 132. B Chigara 'The inherent dignity of mankind and the contest for labels in the land issue' 72 *Nordic Journal of International Law* (2003) 369 - 397

²⁹ B Chigara *Land reform policy: The challenge of international human rights law* 198.

In the final analysis, *humwefficiency* is a strategy for peaceful coexistence that depends upon dialogue even among fractured communities. Often it takes courage and humility for all stakeholders to engage in *humwefficient* dialogue. Independent public commissions of enquiry and a responsible media are possible facilitators in this process. *Humwefficient* practice seeks consensus on a matter, so that procedures and processes can be instituted to resolve it. That consensus fuels support of the whole community to ensure the success of the programme of action.

This approach liberates all stakeholders from any myths that they might have previously held about their fellow human beings, and recognises all stakeholders as co-owners of the resolution strategy with an interest in its success. In this sense *humwefficient* practice unifies the community by committing them to a commonly shared purpose. Even the British Pioneer Column that first reached Salisbury in 1890 had been treated by the native Africans with *ubuntu*. Gazi writes that:

The first private wagon to arrive at Salisbury carried whisky and nothing else. ... Indeed it was the local Africans that had saved the settlers from starvation during the drought of 1892 by providing them with food. Africans were still prepared to help the foreign settlers with food and other provisions two years after their arrival. The settlers, for their part, were still coldly exploiting any such humane lapses on the part of the African.³⁰

Humwe is a human right value that privileges the recognition, promotion and protection of the inherent dignity of the entire community over personal aggrandisement. It argues that an individual's self-fulfilment lies in his/her determination to ensure the fulfilment of others. To be African should be to be *humwe* driven. Apartheid's most salient legacy in Zimbabwe, South Africa and Namibia - unequal land distribution on racial lines - has proved difficult to sustain because of its conflict with these states' new social-ordering *grundnorm*, namely, *humwe*. Failure to accept *humwe* as the new social-ordering *grundnorm* in these three SADC States will result in needless litigation and endless human suffering.

1.1.1 *Mike Campbell Case*³¹

In the *Mike Campbell case*, some 77 white farmers challenged the validity and operation of the Constitution of Zimbabwe Amendment Act.³² Section 16 of the Act authorises *inter alia* that:

³⁰ D Gazi *Zimbabwe: Racism and the land question* (2004) 91.

³¹ SADC Case No 2/2007 (28 November 2008); B Chigara 'Southern African Development Community (SADC) Tribunal: *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* 48 ILM (2009) 534 - 548.

³² Constitution of Zimbabwe Amendment Act 17 of 2005.

- (i) The Minister responsible for lands or any other Minister whom the President may appoint may acquire and transfer full title of agricultural land targeted for resettlement or other purpose.
- (ii) Expropriations of title to land shall not be accompanied with compensation except for any improvements effected on such land before it was acquired.
- (iii) No court may entertain a challenge to the compulsory acquisition of land by the State.

The SADC Tribunal ruled that the implementation of the Constitution of Zimbabwe Amendment of 2005 contradicted Zimbabwe's obligations under the constitutive SADC Treaty. According to the Tribunal, the contested legislation had discriminated against the applicants on the basis of race, because it authorised the Zimbabwe government to confiscate agricultural lands for agricultural or other purposes without regard to the principle of the rule of law.

Following an impressive recital of the jurisprudence of the European Court of Human Rights on the rule of law (some of which had also been previously cited in decisions of the African Commission on Human and People's Rights, and of South African courts), the Tribunal held that:

the Applicants had been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and we consequently hold that the Respondent has acted in breach of article 4(c) of the [SADC] Treaty.³³

If the law always operated in a vacuum, this decision would be intact and elegant, especially because of its consistency with human rights theory, traceable to the Universal Declaration of Human Rights (1948). However, when the same decision is examined under the light of the *underlying context* of Zimbabwe's colonial constitutional land statutes, it transforms into violation of the law because of the Tribunal's resort to selective use and rejection of context.

That selectivity rejects *humwe* as a valid candidate for application in the resolution of the land issue in spite of its manifest presence and application before and during colonisation. It rejects and disqualifies the post-independent Zimbabwe government from passing constitutional land laws to undo the colonial legacy of unequal land distribution based on race. The Zimbabwean authorities could not restore *humwe* to its former glory as the cardinal principle for the determination of land use in the country, which appears to be the purpose and effect of the Constitution of Zimbabwe Amendment Act of 2005. Instead the decision privileges

³³ B Chigara (n 31 above) 544. Article 4(c) provides that the SADC and its member states parties shall act in accordance with the principles of human rights, democracy, and the rule of law.

colonial land-ordering legislation, and relies on ECHR values to validate its violation of post-independence land-ordering laws. This decision lacks legitimacy - law's pull of its addresses towards compliance.³⁴ Zimbabwe's Minister of State for National Security, Lands, Land Reform and Resettlement, denounced the decision, stating that the SADC Tribunal was 'day-dreaming ... we will take more farms. It is not discrimination against farmers, but correcting land imbalances.' President Mugabe himself described the Tribunal's ruling as 'an exercise in futility!'³⁵ The SADC Tribunal's choice to reject the significance of *underlying context* in this case appears to perpetuate, maintain and reinforce epistemicide against ancient ideas of social-ordering on the continent.

The SADC Tribunal condemned the Constitution of Zimbabwe Amendment Act 2005 for breaching the constitutive provisions of the SADC Treaty, in that it denied the applicants' right to equal treatment before the law, their right to a fair hearing before an independent and impartial court of law or tribunal, and their right not to be discriminated against on the basis of race or place of origin regarding ownership of land.³⁶ It rejected considering the historical treatment of land allocation in Zimbabwe, starting with the 1894 Matabeleland Order in Council of the British Government, all the way through to the Act of 2005. It gives no reasons for taking this position, thereby infusing indeterminacy rather than clarity in its work. It makes it difficult to predict which way the Court may go next, and the Tribunal must still answer the question that it avoided, namely: What makes colonial, racist, constitutional land-ordering statutes superior to social justice inspired post-independence land-ordering ones? Why did the Tribunal imply that only the colonial land-ordering statutes that had instituted racially divisive formal private titles were relevant, but not the *humwe*-inspired statutes that the government of the day sought to enforce? Evidence of *humwe* social-ordering was commonplace among pre-colonial African civilisations, probably as ancient as life itself on that continent. Should it not therefore be a natural first choice strategy in the resolution of social issues linked to the unjust legacy of colonialism in Africa?

The Tribunal's rejection of the *humwe*-inspired Act of 2005 is most curious, because even the colonial land-ordering paradigm applied between 1890 and 1980 had acknowledged the significance of *humwe* land-ordering practice in the 2.2 million acres earmarked in 1895 for native occupation 'according to their tribal custom'.³⁷ In nine decades of colonial-rule *humwe* land-ordering had been subordinated to private ownership on white farmlands, but still applied to the Tribal Trust Lands

³⁴ TM Franck *The power of legitimacy among nations* (1990) 23.

³⁵ B Chigara (n 31 above) 530.

³⁶ B Chigara (n 31 above) 538.

³⁷ J Platteau 'The evolutionary theory of land rights as applied to sub-saharan Africa: A critical assessment' (1996) 27 *Development and Change* 29.

reserved for native black use. The Tribunal casually noted that the acquisition of land in Zimbabwe has had a long history.

However, for the purposes of the present case, we need to confine ourselves only to acquisitions carried out under section 16B of the Constitution of Zimbabwe Amendment Act 17 of 2005.³⁸

This may go down as the saddest day in the Tribunal's troubled life, because research shows that Zimbabwe's land issue has always been, and is likely to remain, a matter of constitutional control. Through successive pieces of constitutional laws, starting with the Matabeleland Order in Council (1894) through to the Land Tenure Act (1969), successive colonial administrations expropriated native land without compensation, just as the 2005 Act (complained about in this case) seeks to do.

The Tribunal's unexplained exclusion of this context shows its naivety and inclination towards epistemicide against concepts with demonstrable record of success in social-ordering on the continent. Post-independence Southern African governments are restoring these ideas, hence the difficulties that the SADC Tribunal's decision has created for itself. On 28 July 2004 Namibia's Prime Minister Theo-Ben Gurirab stated that Black Economic Empowerment (BEE) had become SADC States' foremost post-apartheid reconstruction objective. South Africa's Black Economic Empowerment Act of 2003³⁹ legally initiated a process for undoing economic inequality along racial lines – the biggest weakness in the economies of post-apartheid SADC States.

The SADC Tribunal should learn that jurisprudence ignoring relevant African social-ordering concepts makes bad law because it is inconsistent with the legitimate expectations of the society that the Court must serve. Courts should arrive at outcomes that the parties will find acceptable through the clarity, objectivity and reasonableness of their arguments. Graham writes that:

The intersection of morals, law and ethics is nowhere evident than in the daily affairs of those who practice law. Every aspect of the practice of law tests the moral mettle of those who purport to act as agents of the legal system.⁴⁰

Every act of 'lawyering' is filled with ethical implications that test lawyers' moral fibre.

The SADC Tribunal's decision in the *Mike Campbell Case* has been roundly condemned and rejected by SADC member states, who are reviewing the Tribunal's role, functions and terms of reference, and have

³⁸ B Chigara (n 31 above) 536.

³⁹ <http://www.thedti.gov.za/bee/beehome.htm> (accessed 15 September 2010).

⁴⁰ RN Graham 'Moral contexts' (2001) 50 *University of New Brunswick Law Journal* 77.

stopped it from taking on new cases pending the review.⁴¹ The *Mike Campbell* decision has added to the controversy and discord on the land issue, instead of illuminating it, because the Zimbabwe land issue is steeped with its pre-colonial land use paradigm, premised on the *humwe principle*.

By the Royal Charter granted in 1889, the British South Africa Company (the Company) had obtained from the British Government authority to settle and administer an unspecified area known as Southern Rhodesia. New patterns of property rights began to emerge in 1895, when the Company identified 2.2 million acres for native occupation 'according to their tribal custom'. The Land Apportionment Act of 1930 reserved thirty percent of agricultural land for the 1.1 million Africans and fifty-one percent for the 50,000 whites; the Land Husbandry Act of 1951 enforced private ownership of land, while the Land Tenure Act of 1969 reinforced land classification into African and European areas.⁴² Thus natives were expropriated of their lands without compensation, and forced mostly into the wilderness of regions with the least agricultural potential and least favourable rainfall, so that by 1960 more than 25,000 black families were squatting in their own country of origin. The Advisory Committee of the Southern Rhodesia Government reported in 1962 on the acute problems of satisfactory re-settlement of the more than 3,000 people who had applied for relief.⁴³

By 1976 four and a half million Africans were crowded in the infertile, drought prone Tribal Trust Lands (TTLs) reserved by the colonial administration for them.⁴⁴ Africans were forbidden to hold land in:

... what was officially termed the European Area, the designation of the several other classes of land then being Native Reserve, the Native, the Undetermined, the Forest and the Unassigned Areas. He could purchase land in the Native Area, under certain conditions. The Native Area was, indeed, what is known today as the Native Purchase Area, a title not embodied in the Legislation until the 1950 amendment to the Land Apportionment Act.⁴⁵

This position was maintained and reinforced by successive colonial administrations up to Zimbabwe's independence from Britain in April 1980, and makes the SADC Tribunal's decision an extension of the former colonial administration's will. Zimbabwe, South Africa and Namibia urgently need to undo apartheid's unequal land allocation legacy on their

⁴¹ Communiqué of the 30th Jubilee Summit of the SADC Heads of State and Government, Windhoek, Namibia 16-17 August 2010 <http://www.sadc.int/index/browse/page/782> (accessed 16 September 2010).

⁴² B Chigara 'From oral to recorded governance: Reconstructing title to real property in 21st century Zimbabwe' (2001) 30 *Common Law World Review* 36.

⁴³ Chigara (n 42 above) 16.

⁴⁴ 'The Zimbabwe land question in perspective', Zimbabwe High Commission, summary of Commissioner's discussion with Tim Sebastian, BBC News 24 April 2000.

⁴⁵ Chigara (n 43 above) 16.

territories. This raises the question of probity of the SADC Tribunal as presently constituted to attend land issues from Zimbabwe, South Africa and Namibia.

1.1.2 Zimbabwe's humwe-inspired land reform paradigm

The Zimbabwe land issue questions the extent to which extra-territorial tribunals, however well-intentioned, can assist. Tribunals and Courts exist to heal human conflict by producing an acceptable result in the shortest possible time, with the least possible expense, and with the minimum of stress on the participants,⁴⁶ and should acknowledge context, both *underlying* and *current*, with complete and not selective regard. Only such an approach would satisfy the requirements of justice, and makes the *Mike Campbell* decision unsustainable. It discarded *underlying context* and privileged *current context* or the *status quo* without explanation, and still hoped that its decision would settle the matter.

According to Miller, social justice, the idea from which *humwe* proceeds, is a people-oriented idea because to describe it, 'we must look at what the people themselves think'. Social justice theory has always been, and must always be, a critical idea – one that challenges us to reform our institutions and practices in the name of greater fairness.⁴⁷

The legitimacy of private property rights, instituted through colonial laws for the benefit of the minority white community at the exclusion of the black majority, is what the *Mike Campbell case* is about. The SADC Tribunal's challenge in the matter was to determine what constitutes fairness in the allocation of land in present-day Zimbabwe.

Dworkin indefines fairness as '... procedures and practices that give all citizens more or less equal influence in the decisions that govern them'. He contrasts fairness with justice, which '... is concerned with the decisions that standing political institutions, whether or not they have been chosen fairly, ought to make'.⁴⁸ To the extent that it empowers them collectively to influence decisions that govern them, fairness is people-oriented.

The connection between laws and principles of morality or justice, discoverable by human reason without the aid of revelation, becomes relevant because where the former conflict with the latter, the former should become invalid – '*Lex iniusta non est lex*'. An analogous argument is that SADC Tribunals have no business upholding claims of exclusive legal titles to farms that had been created under apartheid rule, because all

⁴⁶ Burger (n 2 above).

⁴⁷ D Miller *Principles of social justice* (1999) ix.

⁴⁸ R Dworkin *Law's empire* 164 - 165. Discussing Dworkin's triad of justice, fairness and integrity, see J Rivers 'The interpretation and invalidity of unjust laws' in D Dyzenhaus (ed) *Recrafting the rule of law: The limits of legal order* (1999) 58 - 65.

such titles lacked the democratic seal of approval under the social justice requirement of fair distribution of all the advantages and disadvantages accruing to the political community at issue.

Rawls writes that the primary subject of justice is how the major social institutions distribute fundamental rights and duties, and determine the division of advantages from social cooperation.⁴⁹ Properly executed *humwe* would seek to ensure justice by undoing the discriminatory effects of the colonial structure that had fixed the social positions into which men and women had been born, and from which their life expectations were largely determined. Two arguments can be made in favour of restorative post-independent *humwe*-inspired land legislation in Zimbabwe.

The first is that colonial legislation on land allocation and land use imposed upon the post-independence government of Zimbabwe a duty to correct the situation. According to Rawls, such structures affect men's initial chances in life even if they cannot possibly be justified by any appeal to the notions of merit or desert. This required the adoption of laws that would override the colonial land allocation laws. The Constitution of Zimbabwe Amendment Act 2005 is an example of that, characterised by its supreme quality.⁵⁰ The SADC Tribunal condemnation of the Constitution of Zimbabwe Amendment Act 2005 can be explained only by the Tribunal's failure to acknowledge *underlying context* in its determination.

The Constitution of Zimbabwe Amendment Act 2005 appears to be *humwe*-driven in that it returns ownership of agricultural land to the State which holds it in trust for "all." Individuals obtain from the designated local government authority permission to use land for life for as long as it is not already under someone else's charge. In this sense *humwe* appears to be consistent with *laissez-faire* redistributive theorists' arguments, that the initial appropriation of resources should be limited by some principle of equality. Steiner writes that persons who appropriate more than an equal share impose an unjust distribution on those with a less than equal portion.⁵¹

Humwe land-ordering seeks to equalise opportunity for allocation of a minimum portion of land to everyone that requires land for their subsistence. Where such a portion was unavailable a right to redress would occur. This right to redress 'carries over into a world in which there are no more un-owned things: in a fully appropriated world, where each person's original right to an equal portion of initially un-owned things amounts to

⁴⁹ J Rawls *A theory of justice* (revised ed 1999) 6.

⁵⁰ *Madzimbamuto v Lardner-Burke* (1978) 3 WLR 1229.

⁵¹ H Steiner *An essay on rights* (1994) 268.

a right to an equal share of their total *value*' and a right to compensation where that right has or cannot be satisfied.⁵²

The State thus incurs a duty to establish a 'redress fund' to compensate all those that may end up without. This may be achieved by requiring those that hold more than their minimal equal portion to pay a fee proportionate to their oversized share. Beitz observes that

Because every living adult at any given time has a right to an equal share of resources, the value of an equal share fluctuates with population size. So there is a more or less continuous need for compensatory redistribution. Second, on this view, there is no right of inheritance; when a person dies, that person's possessions become un-owned and revert to the redress fund.⁵³

Trusteeship titles to land would give holders:

- (1) The exclusive right to use land that was not in another's use.
- (2) The duty to surrender through established channels, actual land that was not under the holder's use only if another had need of it.
- (3) The right to seek more land provided that one had exhausted one's initial capacity and still had need for more.
- (4) The right to be treated equally and like anyone else *viz* land claims and land use.

That would guarantee that all concerned would not be impeded but assisted in their effort to live off the finite resources of their geographically fixed political community and ensure the dignity of subsistence agricultural communities. It would ensure that minimum standards of equity necessary in a civilised community are realised, and that enterprising members can exercise their talents. In this sense *humwe* appears to be consistent with aspects of the liberal tradition of distributive justice, according to which distributive responsibility for resources that belong to all lies with the State.⁵⁴ Distributive justice theory seeks to inform:

... a range of choices whose outcomes bear on the well-being of individuals located in societies other than our own. These include, for example, choices about individual conduct such as whether to donate to Oxfam; the policies of our own government concerning for example, foreign aid or immigration; the policies of international institutions and regimes (rules of international trade, international monetary policy, environmental controls, labour standards, conditions on multilateral aid and structural assistance); the constitutions of international institutions, as distinct from their

⁵² Steiner (n 51 above) 271.

⁵³ CR Beitz 'International liberalism and distributive justice: A survey of recent thought' (1999) 51 *World Politics*, 282.

⁵⁴ Beitz (n 53 above) 269 - 96.

policies; and the policies of non-governmental organisations. Recognising the potential consequences of these choices, it is natural to wonder what moral considerations should guide our judgment.⁵⁵

Laissez-faire liberalism is clear that distributions are not just if they have been arrived at from a previous distribution that itself was not just. 'A distribution is just when it has been arrived at from a previous distribution that itself was just, through a series of transactions that have not violated anyone's rights.'⁵⁶ A preceding distribution must be tested as to whether it had resulted from a process that had respected everyone's rights, and the one before it, back to the beginning, when resources occurring in nature were initially appropriated. This is what the SADC Tribunal missed in the *Mike Campbell case* by its privileging of *current context* over *underlying context*.

The Tribunal's decision favours the *status-quo* theory that insists that:

... whatever injustices may have occurred in the first appropriation will have been rectified subsequently, perhaps as a result of many generations of economic growth and innovation. There is therefore no argument for redistribution to rectify inequalities in benefits derived from resources. *Laissez-faire redistributivists*, argue that it may be necessary for the state to intervene to rectify the effects of injustices in earlier appropriations of un-owned things, either by redistributing control over resources or by compensating those who have less with transfer payments from those who have more.⁵⁷

The hope that social evolutionary processes will adjust the initial and successive distributive injustices is not borne out by the legacy of apartheid rule in Zimbabwe and other SADC States. Their hope appears illusory, unless they argue for revolution rather than reformation. Literature on the topic suggests that redistributive arguments are regarded as being the more plausible form of *laissez-faire* theory, and the more pertinent to questions of global economic and environmental justice.⁵⁸ In this sense the justiciability of a distribution depends on how it came about. Historical perspectives of justice typically hold that 'considerations of liberty argue against most political forms of intervention in market processes except when required to remedy the effects of prior violations of liberty. (Therefore) ... laissez-faire liberalism involves the definition and justification of the rights that market transactions should respect'.⁵⁹

The Zimbabwe government has a strong case for reforming its agricultural sector because of the gross unfairness inherent in the status quo when it achieved political independence from Britain in 1980. Table 1 below illustrates the racial prioritisation of land allocation in colonial

⁵⁵ Beitz (n 53 above) 270 - 271.

⁵⁶ Beitz (n 53 above) 279.

⁵⁷ Beitz (n 53 above) 281.

⁵⁸ Beitz (n 53 above) 281.

⁵⁹ Beitz (n 53 above) 279.

Zimbabwe, according to types of soil. Zones I and II are the best soils, while zones V and above are unsuitable for agriculture.

Table 3: Type of farming in relation to the European and African zones (1962)

Farming Region	European Area	
	% of Southern Rhodesia	% of total European Area
Based on livestock production (Natural Regions IV and V)	28.95	50.98
Based on crop production (Natural Regions I and II)	15.67	27.59
Based on livestock and cash crops (Natural Region III)	11.11	19.56
Unsuitable for farming	1.06	1.87
Totals	59.79	100.00

Source: Adapted from ‘The development of the economic resources of Southern Rhodesia with particular reference to the role of African agriculture’, Report of the Advisory Committee of 1962.

Beitz writes that, because individuals are entitled to benefit equally from the opportunities open to other agents of a political community, inequalities should be compensated for ‘in ways that encourage or at least do not obstruct the processes of economic and social transformation through which a society must pass in order to develop the capacity to satisfy its people’s material needs.’⁶⁰ This has implications for Zimbabwe’s application of *humwe*-inspired land allocation reforms.

1.1.3 Concerns with humwe principle

Humwe is consistent with Dworkin’s idea of a solution that is ‘... so obviously fair and sensible that only someone with an immediate contrary interest could disagree with it’.⁶¹ Because any one population has only a finite amount of land at its disposal, its allocation to members of the community ought not to prejudice even the weakest that need it for their subsistence.

But theories idealise. Humwe presupposes certain qualities about human nature that may not be easy to justify. Do human beings always act altruistically? If communal existence is a co-operative venture for mutual advantage, and the community is a theatre marked by conflicts as well as

⁶⁰ n 53 above, 286.

⁶¹ R Dworkin *Taking rights seriously* (1991) 151.

an identity of interests,⁶² then the human altruism supposed in the humwe principle could be limited. Care needs to be taken to ensure against potential un-altruistic abuse of the humwe paradigm in Zimbabwe's pursuit of a fairer non-racially based land allocation programme. Transparency of the process is needed in order to maintain the claim to altruism based humwe practice.

Those united in their basic need for land (both peasants and career farmers) need to ensure that none among their membership is disadvantaged, and may have to reduce their own allocation so that everyone that has need of it has a proportional share. In this sense humwe appears to target protection of the inherent dignity of all. The theory of social justice on which humwe is premised requires that the institutions that serve a particular political community cooperate with the agency (the government) in its effort to achieve the declared will of the people. Miller writes that social justice views society as

... an organism in which the flourishing of each element requires the cooperation of all the other members and the aim of social justice is to specify the institutional arrangements that will allow each person to contribute fully to social well-being.⁶³

This requirement of humwe is consistent with both principles of Rawls'⁶⁴ theory of justice which provide that:

- (1) Every person must have the largest political liberty compatible with a like liberty for all – equality in the assignment of basic rights and duties.
- (2) Inequalities in power, wealth, income, and other resources must not exist except as they work to compensate the worst-off members of society.

Rawls writes:

These principles rule out justifying institutions on the grounds that the hardships of some are offset by a greater good in the aggregate. It may be expedient but it is not just that some should have less in order that others may prosper.⁶⁵

Rawls' insistence on equality is opposed by some sections of the libertarian school of thought, who argue instead that individuals' freedom to enjoy

⁶² Hill *et al* writes that 'There is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to try to live solely by his own efforts. There is a conflict of interests since people are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share'. RP Hill *et al*. 'Global consumption and distributive justice: A Rawlsian Perspective' (2001) 23 *Human Rights Quarterly* 171.

⁶³ Discussing Hobhouse's elements of social justice see also Miller (n 55 above) 4.

⁶⁴ n 49 above, 13.

⁶⁵ n 49 above, 6.

their legally acquired resources leaves no room for practices advocated by social justice.

Nonetheless, *humwe* rejects any attempt to justify unequal access and distribution of a community's finite life-enabling natural resources. Thus, the argument often made to justify the status-quo, that land redistribution should not ignore the skills base and capacities of different communities to use the land to maximum advantage for the country's economy, is unsustainable. What both *humwe* and Rawls' theory of justice as fairness suppose is that the preservation of the inherent dignity of individuals, insurable only through equal access to land, is more basic than the need to enhance the country's foreign income.

To insist that social progress be measured by agriculture's financial contribution to the national economy against the nation's potential is problematic, because it ignores the fact that a liberated self-respecting person is more capable of attaining self-actualisation than others. Motivational theorists cite Mahatma Ghandi and Martin Luther King Jr as good examples of self-actualised individuals (the goal to which rational beings should aspire to) because of their passion for equity, justice and peace.⁶⁶ Foreign currency cannot purchase the relative peace and security required for other human endeavours - equity, justice, and freedom. The lack of profound practice regarding these values in Africa threatens progress towards achievement of the UN Millennium Development Goals and the fight against corruption.⁶⁷ Moreover, agriculture's contribution to the national economy must take into consideration the skill base of those that must get land, not those that had land on the basis of apartheid's previous unfair distribution.

Humwe applies to the SADC land issue, not only because of its theoretical consistency with the social justice agenda, but also for natural progression reasons. Because it regulated property rights to the general satisfaction of all concerned until the intervention of colonial administrations, it could be said that *humwe* itself had been hijacked. The private property agenda that substituted *humwe* ironically served also to emphasise *humwe*'s relevance to the emerging new property rights.

Sallis writes that all major philosophical concepts – being, essence, the good, the One, truth, logos, etc. are values of unbreachable plenitude and presence.

Concepts are not point-like simplicities, because in order to be what they are, they must be demarcated from other concepts to which they thus incessantly

⁶⁶ RL Atkinson *et al* *Introduction to psychology* (1990) 524 - 526.

⁶⁷ B Chigara 'Social justice: the link between trade liberalisation and Sub-Saharan Africa's potential to achieve the United Nations millennium development goals by 2015' (2008) 26 *Netherlands Quarterly of Human Rights* 9-42.

refer. In addition to such referentiality to other concepts with which they form binary oppositions, they are, moreover, caught in systems and conceptual chains.⁶⁸

Theneuissen argues that 'communicative freedom' is when an idea experiences its opposite not as boundary but as the condition for its own generalisation.⁶⁹ Instead of perceiving 'A' and 'B' as a pair of independent determinant ideas it is possible to show that the pair are internally related, first negatively, in their contrastive relationship with that which yields their self-definition, and then positively, as the belonging together in that which makes them what they are.⁷⁰

The contention that *humwe* applies to the land issue is now being determined against international standards that did not exist when colonial territories were carved out; standards that would have perhaps proscribed colonial conquest of other territories, slavery, apartheid, etc. The land issue manifests a constitutional deficit in that it was colonial legal titles that placed most of the best land with a small white elite, and reduced the native majority population to squatters in the worst lands. This context is significant to the Constitution of Zimbabwe Amendment Act 2005 because of the apparent change in context, from a power-based international order that facilitated evil practices such as colonialism and slavery, to a human-rights-based world order opposed to State arbitrariness. The question is how African States should handle the challenge this change in context raises.

2 Conclusions

This chapter has examined the significance of context in resolving issues around social-ordering that transcend the colonial and post-independence divide. The period of colonisation of African States served as incubators for structures and practices that demonstrated the evil of colonialism, and ensured the servitude of the native black population to the white master class. This is the *underlying context* of the challenges for African States to deliver sustainable solutions. In Zimbabwe the burning issue is how to dismantle the colonial legacy of racially unfair land allocation.

The chapter considered the SADC's tribunal's application of the rule of law principle to Zimbabwe's counter claims of title to agricultural land, between white farmers expropriated of their lands without compensation for resettling landless black people under the Constitution of Zimbabwe Amendment Act 2005. The Tribunal's decision has attracted scorn and resulted in the suspension of the Tribunal itself by the member states. The

⁶⁸ J Sallis *Deconstruction and philosophy, the texts of Jacques Derrida* (1987) 4.

⁶⁹ Quoted in D Cornell *The philosophy of the limit* (1992) 15.

⁷⁰ B Chigara *Legitimacy deficit in custom: Towards a deconstructionist critique* (2001) 118.

chief weakness in the Tribunal's approach is that it ignores the *underlying context* to Zimbabwe's land issue, but chooses to favour the status quo sought to be upheld by the white farmers. To be acceptable, and therefore hold out a chance of success, social reform and social-ordering paradigms must engage both the *underlying* and the *current* contexts.

The Tribunal's approach failed because it borrowed and applied ideas that the ACHPR and the South African Courts had cited from Europe's Human Rights and Constitutional Courts at the expense of ideas and insights that had evolved in Africa, only to be supplanted upon colonisation. The Tribunal would have been better served by application of *humwe* principle, which is referenced across Africa as a basic norm. The Constitution of Zimbabwe Amendment Act 2005 and South Africa's Black Economic Empowerment Act 2001 are examples of this application.

Humwefficient practice requires regard to be had to the *underlying* and the *current* contexts, and the local and universal values attached to land. *Humwe* as a paradigm of social-ordering aspires towards fairness, social justice and human security, and the recognition, promotion and protection of the inherent human dignity of all individuals in a particular political community. It rejects the un-African values of egocentrism and false sense of superiority. The Applicants in the *Mike Campbell Case* had insisted, and the SADC Tribunal's decision found in their favour, that their *current context/status quo* argument trump *underlying context* arguments. But the Government of Zimbabwe had insisted that could inaugurate constitutional land laws capable of instituting new land allocation structures in order to reverse colonial land legislation that had expropriated native lands without compensation.

Support for *humwe* principle is explicit in emerging legislation in Zimbabwe and South Africa – a nascent norm of customary international law. The sooner national, regional and international tribunals realise this, the sooner they can fulfil their role as healers of conflict. Rejection by SADC of the Tribunal's approach privileging *current* over *underlying context* in the *Mike Campbell case* is resounding. The Tribunal has been suspended, but hopefully it will not be for long or forever.

GENDER PERSPECTIVES OF
PROPERTY RIGHTS IN
RURAL KENYA

Leah Onyango
Anne Omollo
Elizabeth Ayo

1 Introduction

Land tenure in Kenya today is largely the result of the country's colonial history which established two sets of laws, thus creating a plural legal system: one set to govern land occupied by the natives and another for land occupied by the European settlers. The laws governing the native areas accommodated the customs of the people many of which were not written but were generally known, accepted and practiced. Laws governing land in the European settlement areas on the other hand were formal, written and borrowed heavily from British law. The customary system focused on communal rights (access for all), while the statutory system places emphasis on individual rights. This chapter explores gender perspectives to property rights in rural Kenya where both customary and statutory laws are applied. It examines women's access to property in the light of customs which often relegate them to a subordinate position to men, and links access to land closely to the institution of marriage and the four related life stages: before marriage, during marriage, on divorce and widowhood. As women change their marital status, their property rights change. This chapter examines the effect of statute law upon women's access to land in each changing circumstance, and the implications of proposed changes in the Land Policy and new Constitution on women's access to property in rural Kenya. Thus the chapter describes women's property rights today in the face of legal pluralism.

The chapter draws examples from research carried out in the Nyando river basin of Western Kenya under the Safeguard Project,¹ and upon the authors' experience working as lawyers and land administrators in the area. The Safeguard study sampled 14 communities across the basin to

¹ This is a collaborative project between the World Agro Forestry Centre, Maseno University and IFPRI on safeguarding the rights of the poor to critical water, land and tree resources in the Nyando River basin in Western Kenya. .

establish how property rights vary from one management system to another, and how they have changed since independence. The research is limited to sedentary communities, since pastoralism is not found within the region, but the implications of legal pluralism on gender and property rights apply more widely in Kenya because of the common history.

2 Property rights and legal pluralism

Property means a right of action for things that can be exchanged. Important types of property include real, personal and intellectual. A right of ownership assures the owner the right to dispense with the property how he or she deems fit, whether to use or not use, exclude others from using, or to transfer ownership. Public property is any property that is controlled by a state or by a whole community, while private property may be under the control of a single individual or by a group of individuals collectively. Property rights may be formal or informal, but both are often referred to as bundles of rights, each representing a different aspect of property ownership. Poorly defined property rights lead to conflict and must be enforced by strong institutions to be effective. This often gives formal property rights advantage over informal property rights.²

The concept of legal pluralism proposes that property rights are affected by multiple sources of legal, social and political authority, including customary and religious law, local norms, and even project regulations. All can be the basis for claims over resources, which reflect the negotiation processes and relative bargaining power of different claimants. Legal pluralism recognises multiple legal orders, which are more flexible, dynamic and responsive to the uncertainties and changes than a single, fixed legal system with a static property regime. Individuals may choose one or several of these legal frameworks for their claims on a resource. Legal pluralism can cause uncertainty, especially in times of conflict, and statutory law seeks to provide security of tenure and enhance efficiency, but may not be able to adapt to the uncertainties of environment, livelihood, society and politics.

In this chapter statutory claims will sometimes be referred to as formal claims, the non-statutory as informal or customary. The study assumes that the flexibility in informal sources of authority may serve the vulnerable better than rigid formal ones, but that informal systems are subject to manipulation. Local communities in Kenya are patrilineal and therefore customary systems are controlled by the male members of the community, who may manipulate them to their advantage, and the disadvantage of women and children. The chapter explores instances where informal systems favour the vulnerable, and argues for the need to

² R Meinzen-Dick & R Pradhan *Legal pluralism and dynamic property rights* (2002).

legitimise informal sources of authority that enhance access to land and security of tenure. Insecure and conflicting property rights are associated with management problems and non-sustainable resource use.³ Property rights shape the incentives people have for investing in sustaining the resource base over time.

The importance of security of land tenure is widely recognised. A public framework that allows households or individuals to obtain and possess secure rights to the land they use or occupy has obvious benefits, in terms of enhanced investment incentives, reduced potential for conflict, the employment of land as collateral, and improvements in equity through increased bargaining power amongst social groups. The establishment of such a framework requires legal recognition.⁴

3 Land tenure in Kenya

The land management systems in Kenya today are the product of three periods: the pre-colonial era dominated by customary land rights; the colonial era in which large areas of land were alienated for specific users and the majority of the Kenyan population confined to native reserve areas; and the post-colonial era that has encouraged large-scale private ownership of land.⁵

In pre-colonial Kenya all natural resources were owned communally and claims were determined by clans. In the colonial era, the Crown Lands Ordinance of 1902 gave authority to the Crown to alienate land. Any land not physically occupied by local people was considered wasteland (free land) and free for alienation to the European settlers. Local people's rights to land were defined by occupancy, while settlers were given freehold titles by the Crown. Two parallel land-holding systems thus developed. The settlers advocated grouping the Africans in separate reserves away from any lands deemed suitable for European settlement. The Crown Lands Ordinance of 1915 allowed the Governor to create Native Reserves and provided for the settlers to be given agricultural leases of 999 years. Following the Kenya Land Commission (Carter Commission) of 1934, the Native Lands Trust Ordinance of 1938 re-designated Native Reserves as Native Land and removed them from the Crown Lands Ordinance. Thus were created one set of laws for native lands and another for Crown land. Even after independence both sets of laws remained in force, which in part

³ L Onyango *et al* 'Coping with history and hydrology: how Kenya's settlement and land tenure patterns shape contemporary water rights and gender relations in water' in Van Koppen *et al* (eds) *Community based water law and water resource management reform in developing countries* (2007) 189.

⁴ World Bank *Reaching the rural poor: A renewed strategy for rural development. A summary* (2002).

⁵ LA Onyango 'Poverty, livelihoods and property rights in the Nyando basin, Kenya' unpublished PhD Thesis, Maseno University, 2008, 118.

explains the current state of confusion in land administration in Kenya. The Native Land Trust Board under the Chief Native Commissioner held native land in trust for the communities, and local people lost all rights to lands outside the native lands. The Crown Lands Ordinance was amended to define the White Highlands, which were administered by a separate Highlands Board; both boards and their boundaries were set up by 1939 and remained until independence.⁶

After independence the Native Lands became Trust Land, and Crown land became Government land. This paper will refer to the native land as ancestral land and the government land as the newly settled areas. Local communities within the ancestral lands were given freehold titles for their land through the process of Land Adjudication which started in 1956, but before independence Crown Lands were not available for occupation by the local communities. In the Nyando basin 43% of the land was crown land. After independence, the government embarked on land redistribution programme through the Settlement Fund Trustee (SFT),⁷ Land Buying Companies, Land Buying Cooperatives and outright purchase of European farms.

The SFT acquired land for Settlement Schemes, planned and subdivided it, then allocated it to African farmers on loan and registered a charge with the Permanent Secretary in the Ministry of Lands. When a farmer paid off the cost of the land, the property was discharged and a free hold interest registered in his/her favor. By 1994 109,000 families had been settled on 910,000 ha of agricultural land through the SFT. More than three-quarters of allottees of SFT land were male heads of household, following tradition. SFT was open to allocate land to both men and women. The policy did not discriminate against women, but implementation did disadvantage them.

Land Buying Companies emerged after independence to facilitate transferring former Crown Lands to African farmers. Few Africans were in a position to make outright purchases, so individuals came together to form Land Buying Companies or Cooperatives. Members contributed money and were allocated land worth the value of their share contribution on subdivision. There were no rules restricting membership, and shares were determined by the amount of money a person paid. Women had as much access as men, but in practice, their limited access to money disadvantaged them. Women had few opportunities to raise money in colonial Kenya, few were educated enough to hold regular jobs and few were engaged in commercial agriculture.

⁶ C Juma & JB Ojwang (eds) *In land we trust: Environment, private property and constitutional change* (1996) 123.

⁷ This is a corporate body established under section 167 of the Agriculture Act chapter 318 of the laws of Kenya.

Forest Lands were established by the Crown Lands Ordinance that established the native reserves. Once land has been gazetted as forestland, then it cannot be put to any other use unless de-gazetted through another gazette notice. Gazetted forest land (Tinderet forest, Londiani forests and West Mau forest) covers 19% of the Nyando river basin. Communities bordering the forest were allowed to grow crops in the forest as non-resident cultivators under the shamba system, but this was abused and subsequently abolished by the government. Gazetting of forest land did not consider the fate of communities living in the forest like the Ogiek/Dorobom. Men, women and children were legally locked out from forest land and any resources found within, yet forest-dwellers continued to access the forests for the necessities of life, making their livelihoods illegal (hunting and gathering in the forest). The new forest policy advocates co-management of forest resources by the Kenya Forest Services and neighboring communities, which will once more allow the community to access resources within the forest lands.

Colonial Kenya had many Large-Scale Commercial Farms within the Crown Lands, operated as commercial enterprises on 999-year leases from the government. Some large scale farms were transferred and subdivided for smallholder farming but some still operate as large scale farms to date. In the Nyando river basin these large scale farms include tea, coffee and sugar plantations and they covered 43% of the basin at independence, but by 2004 they had been subdivided and only 9% of the land in the basin was under large scale farms.⁸ This implies that 34% of the land within the basin had been converted from large to small scale farming.

Today, land in Kenya is managed under the following systems: (1) Trust land – unalienated; (2) Government land – unalienated; (3) Adjudicated land – freehold titles on completion of adjudication; (4) Settlement schemes – freehold titles on discharge from the Settlement Fund Trustee (SFT); (5) Large-scale farms with lease hold titles; (6) Land buying companies – freehold title on subdivision to small units; (7) Forest land – reserved on gazettement; (8) Group ranches-with group titles.⁹ Figure 1 is an illustration of the range of systems under which land is managed in Kenya. As each land holding system emerged there was a corresponding need to create legislation to control management of each.

Independent Kenya inherited British land laws which were applied alongside African customary laws. African customary land laws express communal or family ownership, whereas the statutory laws express individual/private ownership of land. Post-independence legislation on land has also emphasised private ownership. Land is defined in law to

⁸ Onyango (n 5 above) 122.

⁹ Group Ranches are found amongst the pastoral communities such as the Maasai. There are no group ranches in the Nyando basin. They are included in the diagram because the diagram covers land management systems in the whole of Kenya.

include not only the soil or ground but also everything under it and above it up to the sky including any thing that is permanently fixed to the soil. This concept of land differs from that of most customary systems of law where land is perceived to be the soil, and there is a clear distinction between the soil and what is on the land.¹⁰ In such systems the land may be yours, but the vegetation on it may not necessarily be, hence the potential for conflict under conditions of legal pluralism.

Land in Kenya can be held as freehold where there are no development conditions; the land is for agricultural use and belongs to the owner forever. It can also be held as leasehold, where the use and time period for which it is held is specified on the lease document. Leases are obtained from the government for government land (crown land), the local authority for trust land and the registered proprietor for private land. The central government is the custodian of un-alienated government land, while the local authority is the custodian of un-alienated trust land.

The land administrative system in Kenya today is based on outdated legal frameworks. There are many pieces of legislation applied variously to different parts of the country, creating confusion and complicating the process of land administration.¹¹ Table 1 illustrates some of the land legislation and the land management systems to which they are applied. *The Njonjo Commission*¹² identified the lack of an overall land policy for Kenya as the basic cause of current problems in the administration of land. The process of formulating a land policy began in 2004 to address the land question, which is very sensitive and explosive. A land policy is a set of socio-economic, legal, technical and political measures that dictate the manner in which land and benefits accruing from land are allocated, distributed and utilised,¹³ and gives direction for future land reform. The Land Policy Secretariat in Kenya identified 'Poor land administration' and 'different land tenure regimes with limited harmonisation' as problems associated with the management of land, which leads to confusion and many grey areas in the application of the law, and creates room for corruption which favors the rich and influential. Women and children are often the victims of this corruption. The National Land Policy indicates that the unsatisfactory state of the land rights delivery system (sec 3.5.1) has been caused in part by multiple registration regimes.¹⁴ In order to establish an efficient system, the government needs to consolidate, harmonise and streamline all land registration statutes to ensure clarity and reduce bureaucratic bottlenecks.

¹⁰ The Institution of Surveyors of Kenya (ISK) *Land reforms of Kenya* (2000) 9.

¹¹ O Ogendo *Tenants of the crown; evolution of agrarian law and institutions on Kenya* (1991) 147.

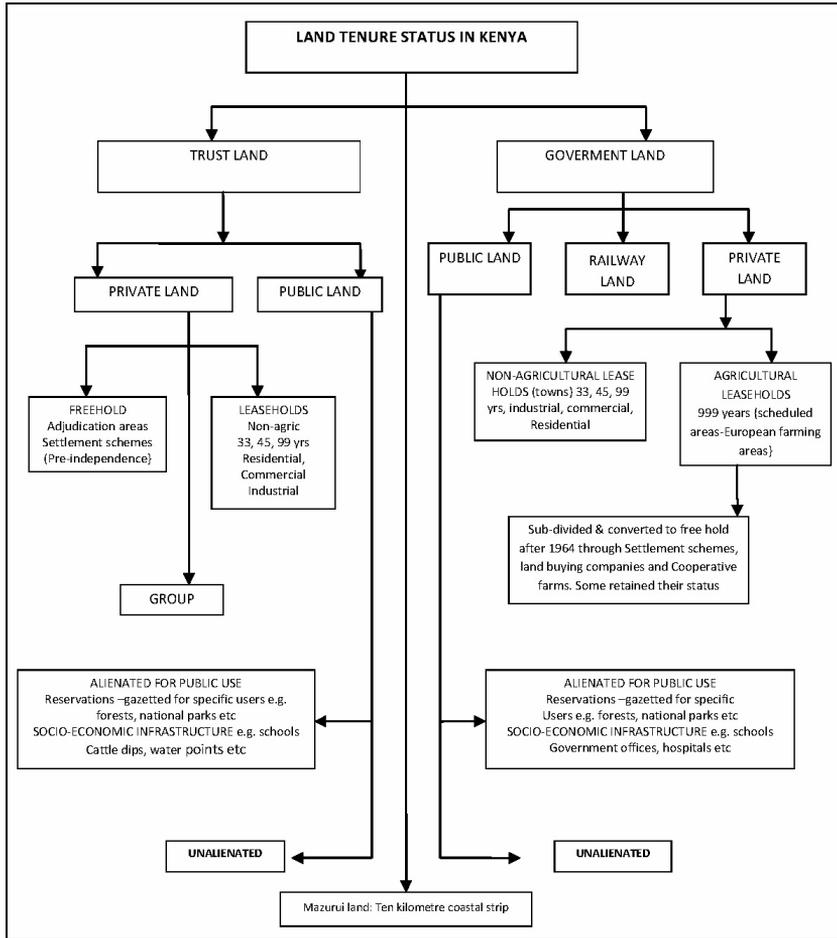
¹² Commission of Enquiry into the land law system of Kenya on Principles of Land Policy Framework.

¹³ ISK (n 10 above).

¹⁴ Kenya Land Policy 2007.

Figure 1: Land classification in Kenya

Source: Swallow, Onyango and Meinzen-Dick 2003.



Valuation for Ratings Act Cap 266	X	X	O	O	O	O	O	X
Ratings Act Cap 267	X	X	O	O	O	O	O	X
Sectional properties Act (20 of 1987)	O	X	O	O	O	O	O	X
Indian Transfer of Properties Act (ITPA)	O	O	O	O	O	O	O	X
Key: O=does not apply X=applies								

3.1 Customary rights to land in the ancestral lands

Land in Kenya is acquired through purchase, inheritance or by way of gift. In the Nyando basin the most important way of acquisition in the ancestral lands is inheritance from fathers to sons, while in the newly settled areas it is through purchase (as in other parts of Kenya). Respondents in the research (see figure 2) confirmed that most land is owned by the head of the household (59%) or the father of the household (19%). Land is a male-dominated resource with 78% of the respondents' land owned by male members of household, inherited under customary laws or purchased under statutory laws.

The number of landless people in ancestral lands is small compared with other lands: only 10 % of respondents in the ancestral lands knew of a landless person. In the ancestral land every man - but not a woman - has a customary right to inherit land from his father. Land inherited from parents is occupied and put to use with or without formal documentation and the boundaries shown by the fathers who are bequeathing the land, publicly in the presence of the family members, and marked by live fences or other natural land marks. Nothing is put in writing, and security of tenure is guaranteed by the community, who respect the source of authority used to make the allocation. Family members and clan leaders are important witnesses to such allocations, and are called upon from time to time to verify boundaries and allottees. These rights are formalised on registration.

Customary rights to land can be transferred within the community before formalisation, with formal documentation sought subsequently to strengthen security of tenure, especially if the new owner is not part of the family. Fathers show their adult sons their land inheritance, but most will wait for many years before formally subdividing the family holding to provide each individual son with land in their individual name. This can be a bone of contention between fathers and sons, with the fathers feeling their sons are not responsible enough to be held totally accountable, so

want to retain the final say for as long as possible. When a man dies while his children are still minors, the wife can hold his land on behalf of his children. When both parents die while their children are still minors, their land can be used/held by other relatives, and when they are old enough they can claim it back. This is increasingly endangered by the statutory system when the custodian transfers the land to his name and later refuses to transfer it back to the children, making the children very vulnerable on the death of both parents.

All land within the Nyando basin has been adjudicated, but most is still registered in the names of fathers and grandfathers. In other cases the land has been purchased but the procedures are not complete, the urgency to complete being absent where customary rights are strong and processing by governments is slow. Where customary rights are weak, there is an urgency to complete the procedures because statutory rights are the source of legitimacy.

Share-cropping arrangements between farmers are not documented but based on customary norms. Farmers who need more land for cultivation can use land belonging to others. Customary land rights do not provide for women to inherit land from their fathers, but women can access land for cultivation from their husbands, each married man being obligated to provide his wife with a piece of land to cultivate, which she can cultivate but not transfer. Thus women can participate in agricultural production, but not use the land as collateral, a disincentive for development which places the woman in a disadvantaged position. The customary rights of inheritance, which stipulate that each son has a right to inherit land from his father, has worked to fragment the ancestral lands and created uneconomical parcels. This fragmentation does not improve access to land for women since it is done in favor of the male members of the household.

Customary rights do not offer exclusive ownership over natural resources. Fencing of property is done in a manner that does not deter access to the property, since it is expected that everyone allows other community members to obtain resources such as water, wood fuel and pasture. This is, however, changing as resources become scarce, live fences (rarely barbed wire) being the commonest form of fencing.

The most important function of ancestral land is the provision of a place called home, a social function perceived as more important than the productive functions. Ancestral land acts as a social base, and its sale is not traditionally encouraged because it infringes on a basic right – the right to have a place called home. Selling ancestral land is seen as denying the next generation their inheritance, and children can appeal to community elders to prevail upon parents who want to sell all their ancestral land. Every man is expected to marry and provide a home for his wife and unmarried women have no place in the traditional setting, being considered social

misfits and not allowed to build a house in their father's homestead (only live in their mother's house). The increasing number of unmarried women is creating a social dilemma: 3% of women over 40 years of age in the study were unmarried. Young men are expected to build a house within their father's homestead, but when they grow old, are expected to establish their own homestead on land provided by the father. Section 3(1) of the National Land Policy recognises that land represents multiple values, being 'a significant resource to which members of society should have equitable access for livelihoods' and a cultural heritage to be conserved for future generations, which should be protected by policy and law.

3.2 Statutory rights to land in the newly settled areas

In the newly settled areas (government settlement schemes, Land buying companies/cooperative farms), the incidence of landlessness is higher. All the people living in these areas moved from elsewhere, and their rights to land are determined by the written law: one is either allocated the land by the government or one purchased the land. Statutory land rights require that a piece of land be surveyed to ascertain boundaries and area before registration and there are many statutes under which land is registered (Table 1), each with its terms and conditions. The registered owner of the land has exclusive rights over the land and all the resources on it.

The registered proprietor can transfer the land to whoever he wishes and is not under any legal obligation to consult the rest of the community. There are legal procedures for effecting transfers and all stages are documented. Statutory rights allow women to buy and sell land, but not minors. Land belonging to minors is protected from abuse by restricting the titles with cautions and caveats, aimed to prevent transfers by custodians.

Statutory rights to land indicate the use to which the land may be put (agricultural, residential, commercial, industrial etc), and the proprietor is expected to adhere to the conditions. Any other person who wishes to use the land must seek consent from the registered owner. Natural resources found on the land belong to the owner unless stipulated by the law. Barbed wire fences are common to keep away trespassers. Statutory rights entrench individual ownership and are enforced by the courts of law.

Formal rights in the upper reaches of the basin have also encouraged land fragmentation. Land-buying company farms were subdivided over the past forty years and titles issued for small parcels, converting the land from large-scale farming to intense smallholder cultivation. In the same time period the population of the area has increased as people move in to occupy the subdivided farms. Nyaribari, a village in Bartera sub-location, for example, was formerly Lelu farm (land registry parcel LR.1442/2), one farm holding owned and managed by one person. It was purchased by a

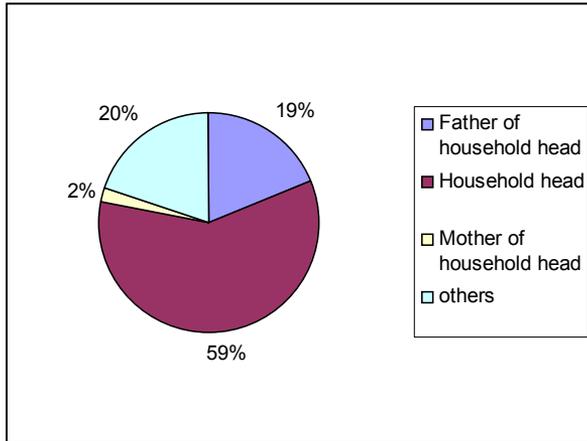
land-buying company (Nyagacho) that subdivided it and settled its members. Today, Lelu farm makes up Bartera sub location with a population of 2810 people, 526 households and a density of 273 people per km,¹⁵ contributing to land degradation in the basin. This fragmentation, however, can benefit women because those with capital have equal opportunity with the men to purchase and own land in the area. The Land Policy Secretariat identified land fragmentation, and the National Land Policy proposes to control the minimum size of land based on economic viability. It recognises the values of land as ‘an economic resource that should be managed productively’ and the value of land as ‘a finite resource that should be utilised sustainably’; both values that should be protected by policy and law.

The Land policy therefore ‘adopts a plural approach in which different systems of tenure co exist and benefit from equal guarantees of tenure of security. The rationale for this plural approach is that the equal recognition and protection of all modes of tenure will facilitate the reconciliation and realisation of the critical values which land represents’.

4 Women’s access to land

In the traditional Kenyan context the men own land, and wives use the land to produce food for the household. In the Nyando river basin the dominant ethnic groups are the Kalenjin in the upper reaches and the Luo in the lower. In Luo culture the land that a woman cultivates will eventually be allocated to her sons, and, although the woman is allocated the land, the man decides which portion goes to which son. She works the land but never owns it, and is a custodian of the land on behalf of her sons while they are young. As each son gets married he is shown his piece of land. In her lifetime she continues to cultivate land which belongs to her son or her husband. The Luo community is polygamous and as the man distributes land to his wife/wives, he retains a portion for himself, which any wife may cultivate, but it will not be allocated to any son until he is dead. In the study area it was found that 65% of the women are married, so have access to land through their husbands as long as the husbands are not landless.

¹⁵ Onyango (n 5 above) 143.

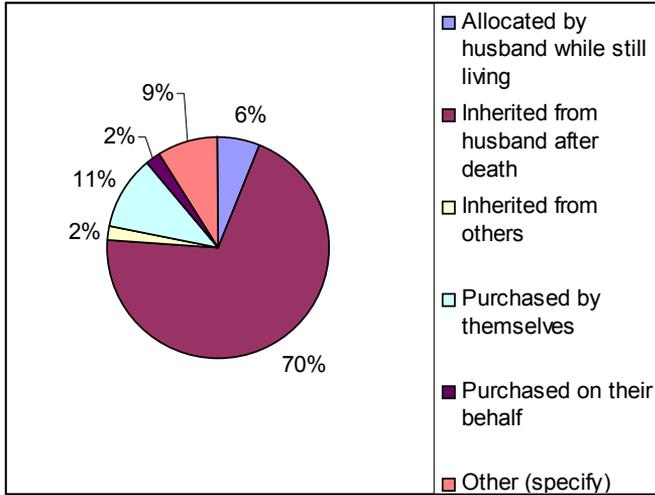
Figure 2: Land ownership in the Nyando river basin?*Source: The Safeguard Study*

Many respondents (76%) in the study indicated that women own land in the Nyando river basin. Seventy percent of respondents indicated that women inherit land from their husbands after their death. Six percent of the respondents indicated that women were allocated land by their living husbands and 11% that women got land by purchase (figure 4). This implies that most women will get to own land when they are widowed, yet widows are vulnerable and often face challenges in exercising their rights. A woman inheriting ancestral land on death of husband is not free to do with it as she wishes. She may obtain the statutory rights and documentation, but she is expected to conform with an unwritten code of behavior dictated by society.

Under statute the wife can enjoy all household items, but only a life interest in land when the husband dies, and on remarriage loses this right. Many widows in Kenya are excluded from inheriting from their husbands, and in-laws frequently evict widows from their lands and homes and take other property, such as livestock and household goods. Women, especially unmarried ones, can acquire land by purchase, but few do so. A small number have acquired land through inheritance, and they can also rent land. The written law does not bar women from inheriting land from their fathers but in practice few do. A few inherited from their parents on an equal basis with brothers but women are expected to marry and be absorbed by their husbands' families.

Figure 3: Ways through which women acquire land in the Nyando basin

Source: The Safeguard Study



The Succession Act¹⁶ provides that all children have equal rights of inheritance but discrimination has not been cured. For example, in the case of *Mary Rono v Jane Rono*,¹⁷ the trial judge held that the girls could not inherit their father’s property in equal share because that would give them a higher advantage when they get married. They challenged this decision on appeal, and the court of appeal held that there was no basis for such position, and shared the deceased properties equally among all the children.

Divorce and separation do not appear to be common in the study area (see table 2), reflecting the local cultural values which stigmatises divorce and separation. Upon divorce, case law established that family property would be evenly divided if the woman could prove contribution, but in practice women rarely get property upon separation or divorce without court intervention. In *Kivuitu v Kivuitu*,¹⁸ *Essa v Essa*,¹⁹ *Nderitu v Nderitu*,²⁰ *Kamore v Kamore*,²¹ *Muthembwa v Muthembwa*,²² *Mereka v Mereka*,²³ the

¹⁶ The Succession Act Cap 160 of the laws of Kenya of 1984 (revised 2008). See section 3.

¹⁷ *Mary Rono v Jane Rono* (2002), unreported.

¹⁸ *Kivuitu v Kivuitu* (1991) 2 KAR 241.

¹⁹ *Essa v Essa* (1995), unreported.

²⁰ *Nderitu v Nderitu* (1997), unreported.

²¹ *Kamore v Kamore* (1980) 1 KLR 389.

²² *Muthembwa v Muthembwa* (2001), unreported.

court of appeal gave the wife an equal share, primarily because the properties were registered in joint names. Justice Omolo in *Kivuitu & Kivuitu* stated that non-financial contribution ought to be valued when apportioning the property. However, the court of appeal rejected this in *Echaria v Echaria*.²⁴ It stated that where the property was registered in the name of only one spouse, then it had to be apportioned after considering the respective financial contributions of each, but non-financial contribution (including domestic labour) would not be considered.

Table 5: Marital status of women in the Nyando river basin

Source: The Safeguard Study

Age group	Single	Married	Widow	Separated	The Vulnerable
Above 18	20%	65%	11%	1%	32%
Above 30	5%	75%	18%	1%	24%
Above 40	3%	70%	25%	1%	29%

The study results indicate that women have far less access to land compared to men. Many respondents (90%) indicated that access and control of land are critical in the movement of people in or out of poverty, placing those without land at grave disadvantage. Table 2 indicates the proportion of women in the study who are vulnerable (in terms of access to land) due to their marital status and age. The widows, the separated and the single over 18 years old have no guarantee of access to land and are considered vulnerable. In terms of youths, the major cause of vulnerability in relation to access to land for women is the unmarried state. Most women (65%) in western Kenya eventually get married because it is socially unacceptable for a woman to remain unmarried all her life. From age 40 (see table 2) and above the major cause of vulnerability is widowhood (86%). The customary practice of ensuring that each married woman has access to land for cultivation is a positive practice, because it ensures most women can participate in agricultural production. However, the benefits can be enhanced by making these rights more secure.

The National Land Policy (Sec 3.6.10.4) on Matrimonial Property notes that 'existing laws and practices governing matrimonial property discriminate against spouses whose contribution to the acquisition of such property is indirect and not capable of valuation in monetary terms. Further, the courts have been inconsistent in determining what amounts to

²³ *Mereka v Mereka* (2001).

²⁴ *Echaria v Echaria* (2007) eKLR.

such contributions, with the result that some spouses have unfairly been denied of their right to land'. The Policy is committed to:

- (a) Review succession, matrimonial property and other related laws to ensure that they conform to the principle of gender equity.
- (b) Enact specific legislation governing division of matrimonial property to replace the 'Married Women's Property Act of 1882 of England'.
- (c) Protect the rights of widows, widowers and divorcees through enactment of a law on co ownership of matrimonial property.
- (d) Establish appropriate legal measures to ensure that men and women are entitled to equal rights to matrimonial property
- (e) Establish mechanisms to curb selling and mortgaging of family land without the involvement of spouses.

4.1 Gender and security of tenure

Customary rights are guaranteed by the community, so do not offer exclusive ownership of land. The family members and the clan leaders are important witnesses to the transactions. Customary rights are formalised on registration but can be transferred even before registration. Sharing is strongly encouraged, weakening the potential for wealth accumulation and infrastructure investment, and farmers who need more land for cultivation are able to use land belonging to others through customary crop sharing arrangements. Customary rights offer stronger security of tenure for men than women because women's access to land is linked to the institution of marriage. While ancestral land is subject to statutory law, the urgency to complete formal transaction is absent where customary rights are strong. Where customary rights are weak, there is an urgency to complete the procedures because statutory rights are the source of legitimacy.

Statutory land rights give exclusive rights over the land and all the resources on it to the registered owner: he can transfer, lease, subdivide, charge and develop the land. Where there are no common customary norms among the residents of an area, statutory sources of authority tend to be more important entrenching individualisation of property and weakening access for others to key sources located on private land. Men are typically the registered landowners holding title deeds, and there is no legal bar against selling family land without their wives' consent, so that married women can seldom stop their husbands from selling valuable family property.

A constitutional amendment in 1997 provided that all Kenyans were entitled to fundamental rights and freedoms, whatever their sex, and prohibited laws that discriminate on the basis of sex. However, section 82(4) exempted certain laws from the prohibition against discrimination. It permitted discrimination:

with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law and with respect to the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons

Therefore, in spheres such as marriage, inheritance, and the application of customary law, discrimination was tolerated. Additionally, under section 82(6), if a Land Control Board gave or withheld consent to a transaction, this decision could not be challenged as discriminatory.

The National Land Policy Secretariat identified insecure land tenure as a problem associated with the management of land. The land policy (section 3.3) defines land tenure as 'the terms and conditions under which rights to land and land based resources are acquired, retained, used, disposed of or transmitted'. It acknowledges that existing policies and laws on land have not provided equal protection to all categories of land rights, and the colonial and post colonial land administration has undermined traditional resource management institutions, and created uncertainty in access, exploitation, and control of land and land based resources. The National Land Policy²⁵ provides for the protection of the rights of children and wives to private land. It also provides for protection from discrimination in alienation, holding and transmission of land based on sex, ethnicity or geographical origin, which is expected to improve security of tenure for women and children.

The former constitution of Kenya provided for enforcement of women's property rights, but there is little record of women ever proceeding to institute suits to enforce their rights. Under The New Constitution²⁶ Parliament is committed to enact legislation to regulate the recognition and protection of matrimonial home during and on termination of marriage, and to protect the interest in land of dependants of deceased persons, including spouses in actual occupation of land.

5 Legal pluralism and land dispute resolution

Legal pluralism recognises multiple legal orders, which are supposed to be more flexible, dynamic and responsive to uncertainty and change than a single, fixed legal system with a static property regime. Individuals may choose between these legal frameworks as the basis for their claims on a resource. The flexibility in informal sources of authority is sometimes seen to serve the interests of the poor better than the rigid formal sources of authority. However the legitimacy of informal sources of authority is not

²⁵ Section 3.3.1.3.

²⁶ Article 68(c)(iii).

always assured, especially when challenged by a claim supported by the formal system.

The institutions of the chief and village elders is a point where customary law and statutory law merge, and are often used to solve land disputes. The chief in the rural setting is always a local person and well versed with the customs of the people, and works with village elders who not only know the customs but also the families. Many issues are resolved at this level, drawing upon customary norms. Where conflicts go beyond them to the courts of law, then customary rights are explained by the chief, and thus non-statutory laws blend with the statutory. In the research 45% of respondents questioned about land conflict resolution indicated that they preferred statutory sources of authority, while 55% preferred customary sources. This is an indication that customary sources of authority serve the needs of rural communities slightly better. The relatively high cost of litigation disadvantages the poor from seeking redress through statutory mechanisms such as the courts of law, which are sometimes slow and corrupt, with judicial officers impatient and dismissive of women's issues. Rural women, who most need court protection, have limited access. Customary systems, however, tend to favour men over women, especially in matters of land and property because of the patrilineal nature of the society. Most customary conflict resolution mechanisms are dominated by men with minimal or no female representation. There are a few women chiefs in Kenya but they work with village elders who are men.

Claims are as strong as the institutions that support them. When customary claims are pitted against statutory claims, the claim supported by stronger institutions win. In the Matter of *the Estate of Ruenji*²⁷ and *Re Ogolla's Estate*,²⁸ for example, the High Court held that where a man has undergone a Christian or civil marriage, a subsequent wife and her children could not claim property.

6 Conclusions

Property rights in the Nyando basin vary over the different land tenure systems. In the ancestral lands the community is more tightly connected by customary norms, and statutory laws are applied less frequently. Customary norms link woman's property rights to the institution of marriage, thus compromising their access, making them vulnerable, and providing poor security of tenure. In the newly settled areas the people are socially disconnected and have no common customary norms amongst them, and statutory sources of authority tend to be more important. Both men and women can purchase land, and their rights are protected by the

²⁷ *Estate of Ruenji* (1977) KLR 21.

²⁸ *Re Ogolla's Estate* (1977) KLR 18.

written laws of the land, but some customary norms that link land ownership to marriage still apply at individual level. Women who have money can purchase their own land and are free of these encumbrances.

Inheritance is the most common way through which people acquire land in rural Kenya, and contributes to women's disadvantage. Their male counterparts are provided with a head start because they inherit land and can lease or transfer for money to invest in alternative livelihoods, whereas the women can only cultivate the land unless they purchase it.

The new constitution is expected to reduce this vulnerability through relevant provisions in the Bill of Rights. Part (2) on 'Rights and Fundamental Freedoms' spells out the specifics on 'equity and freedom from discrimination'. Article 27(1) states that 'every person is equal before the law and has the right to equal protection and equal benefit from the law'; article 27(3) provides that 'women and men have the right to equal treatment including the right to equal opportunities in the political, economic, cultural and social spheres'; article 27(4) further provides that 'the state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health, ethnic or racial origins, color, age, disability, religion, conscience, belief, culture, dress, language or birth'. Article 40, on the protection of the right to property also offers some gain for women. Article 40(1) states that 'subject to article 65, every person has a right either individually or in association with others, to acquire and own property of any description in any part of Kenya'. According to article 40(2), parliament shall not enact a law that permits the state or any other person to limit or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27(4). Women's access to matrimonial property is also improved by the new constitution. Article 45(3) states that 'parties to marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage'. Their security of tenure is also strengthened by article 45(4) which states that 'Parliament shall enact legislation that recognises marriages concluded under any tradition or system of religious, personal or family law'.

The National Land Policy establishes three key land institutions: the National Land Commission, District Land Boards and Community Land Boards. The platform at the community level will allow the incorporation of customary systems and could be used to improve customary rights affecting women's access to property and to counter customary rights that compromise that access. It is supported by the proposed constitution (chapter 5) which encourages communities to settle disputes through recognised local community initiatives consistent with the constitution and eliminates gender discrimination in law, customs and practices related to land and property in land. Civil society groups should follow keenly the bills to be drawn up by parliament to ensure that they do not take away the gains given in the constitution.

LEGAL CHALLENGES OF LAND HELD IN TRUST FOR ORPHANS AND VULNERABLE CHILDREN (OVCS) IN KENYA

*George Anang'a
Colleta Otieno
Awuor Oluoch*

1 Introduction

Between 1990 and 2000 the number of orphans in Africa rose from 30.9 million to 41.5 million of which about 7 million were orphaned by HIV/AIDS. Other causes of parental deaths include poverty, malnutrition and hunger, violence and wars, and diseases such as malaria and measles. UN agencies projected that by the end of 2010 some 53 million children under the age of 18 years could have been orphaned in Sub-Saharan Africa.¹ Apart from the emotional trauma and associated social stigmatisation relating to orphanhood, the children suffer discrimination, conflicts, grief, depression and separation from siblings, often leading to loss of family bond with the surviving family members. One of the biggest challenges facing this group, however, is the conundrum of laws that dis-allows and dis-empowers the children of the right to inherit their parents' properties. Children's insecure rights to property and inheritance in many sub-Saharan countries is not new, but a rapidly growing issue, as the extended family support systems which served as social safety nets for widows and orphaned children weaken as a result of social change.

In Kenya, the numbers of orphans was expected to stand at two million by 2010 with HIV/AIDS contributing up to 60% of the total cases.² With the high rate of population growth in Kenya (a ten million rise within a span of ten years, according to the 2009 census),³ pressure on land has increased, and the otherwise sound tradition of land inheritance has become monetarised, and land commodified. In Kenya, land is viewed as a life-long property, a basis of livelihood, and to the different ethnic groups its greatest importance is that it provides identity and cultural belonging. People greatly value their ancestral roots which they call 'home', while

¹ 'Children and youth in history' <http://chnm.gmu.edu/cyh/primary-sources/293> (accessed 27 September 2010).

² Kenya 'National Policy on Orphans and Vulnerable Children 2007-2010' (2008) 9.

³ Kenya National Bureau of Statistics *Population and Household Census highlights* (2009) 3.

town residences are considered temporary and often referred to merely as 'houses'. Most communities in Kenya have always lived and worked on the land, and land uses vary from crop and animal farming, land being rented or leased out, and land for homesteads, while others are left fallow.

Land policy can be categorised into land use, land rights and land administration. Land, property and housing rights are generally asserted within every socio-economic and political system, yet practice may take different forms. Ownership of land in Kenya may be by individuals (locals or foreigners), communal or by government. Most land in Kenya is still communal (65.4%), and only 18.3 percent has been adjudicated and registered under individual tenure, mainly in the medium to high potential areas.⁴ Kenya's dual legal system recognises both customary and common law depending upon circumstances. The administration of land at local level is handled by the land tribunals and their resolutions are then adopted as a court order.⁵ Land tenure reform has tended to emphasise the replacement of customary land tenure with individual tenure, linked to a liberalised land market anchored on the principle of 'willing buyer, willing seller', but customary law means that holding a title deed may not make the tenure secure.⁶

In Kenya, a country of over 42 ethnic groups, diverse tradition and cultures have affected the inheritance rules upon the death of a parent or both parents. As recently as 2009, legislation recognised the rights of women to inherit their parents' property, a condition that in the past only applied to male siblings. But, while there is increasing recognition of the rights of both genders with regards to property inheritance, the laws still restrict ownership of property to those over 18 years old, the universally accepted lower age of adulthood. This presents its own dilemma, as millions of orphans are under 18.

Under customary law, after the death of a parent, the closest family members assume the role of guardian to the orphans, including the protection and ownership of any assets that belong to the deceased. This goodwill arrangement, however, does not include any process for returning ownership back to the children at the age of 18. Most orphans often stay with distant relatives or in orphanages, their absence creating a vacuum with time and opportunity for land-grabbing.

In most instances, where the trustees are entrusted with care of property and land on behalf of orphans, the children lose their rights.⁷ Women and children are often both disadvantaged.⁸ The guardians,

⁴ Kenya Land Alliance 'The National Land Policy in Kenya' (2004) 4.

⁵ S Coldham 'Land-tenure reform in Kenya' (1979) *African Studies Journal* 615-627.

⁶ A Knox & R Giovarelli 'Land tenure, property rights, and HIV/AIDS' (2010) 4; T Yamano & K Deininger 'Land Conflicts in Kenya' (2005) 5.

⁷ Kenya Land Alliance (n 4 above).

⁸ Human Rights Watch 'Rights at risk: Issues of concern for Kenyan children' (2001) 14.

mostly from the extended families, traditionally took charge of the orphans, but with growing numbers of orphans in the AIDS epidemic, this approach is inadequate, with the emphasis now on nuclear families due to economic hardship, and pressure for industrialisation and urbanisation. Many potential guardians may not take due care, in the past a role obediently undertaken. With increased population and more intense land use, orphans stand a greater chance of losing their rights of land inheritance, due to formal or informal sale of land by the guardians.⁹ It is difficult to ascertain when children's property and property rights have been violated. Members of the extended families usually have rights to the property of their deceased relatives, and they decide how to apportion that property, often denying vulnerable children their rights.

Lack of social protection leads to land being taken by the guardians, relatives or fellow villagers. Customary laws block minors from making decisions over land, and land disinheritance and dispossession by relatives and guardians lead to many land disputes as a result of misunderstanding of property rights, with the children being usually the losers. Such disputes can result in family break-up and at national level even civil strife and political movements. OVCS are stigmatised if HIV/AIDS caused the parents' death, or if the children are themselves infected with HIV/AIDS. Some OVCS end up on the streets with no home, and get into prostitution and drug abuse.

Gross disparities in land ownership occur with regard to gender and inter-generational discrimination in succession and transfer of land.¹⁰ Women usually access land through men (parents, husbands, brothers, sons or male cousins), because it is the men who pay dowry upon marriage. Title to family land has always been registered in the husband's name, even if both spouses contributed to the purchase, and the one with the title deed in his/her name is deemed the rightful owner.¹¹ A registered title deed in the name of a male head of household gives him the right to dispose of the land by any means without recourse to other family members. Women suffer when their spouses alienate family land, and have little say in how money from the sale is used. There should be rights to land inheritance and use, but traditional land management institutions affect ability to enjoy the rights, leading to numerous challenges from OVCS. Cultural beliefs in many African societies hinder full acceptance of the institution of property rights.

⁹ L Rose 'Children's property and inheritance rights and their livelihoods' (2006) 6.

¹⁰ P Syagga 'Land ownership and use in Kenya: Policy prescriptions from an inequality perspective' in Readings on inequality in Kenya: Sectoral dynamics and Perspectives (2006) 10.

¹¹ T Yamano & K Deininger 'Land conflicts in Kenya: Causes, Impacts, and Resolutions' FASID discussion paper (2005) 5 available at [http://www3.grips.ac.jp/~yamanota/Land%20Conflicts%20in%20Kenya%20\(FASID%20DP\).pdf](http://www3.grips.ac.jp/~yamanota/Land%20Conflicts%20in%20Kenya%20(FASID%20DP).pdf) (accessed 26 August 2011).

2 Challenges facing OVCs in land inheritance

With the AIDS crisis there is the likelihood of violation of land rights of orphaned children.¹² Orphans' ability to own, control and have access to land and other properties is increasingly threatened. They face inhibitive cultural practices such as access to land and other productive assets, exclusion from decision-making and restrictions on family inheritance. Some orphans, due to haphazard documentation and storage of information, are simply unaware of the size and location of their parents' land, hindering their capacity to negotiate for land inheritance. Deaths associated with HIV/AIDS reportedly create serious tenurial insecurity for OVCs,¹³ although other studies argue that there is insufficient evidence of distress sale of land due to HIV/AIDS.¹⁴

In Kenya, children have access to land by virtue of their relationships to lineage ties to the kin group, and most communities are patrilineal in descent, favouring access to land by males rather than females. Vulnerability of orphans is worsened by factors (including the colonial legacy) which extend male ownership of land, and male preference in land inheritance. Land left in trust for orphans is often sold by the adult carers to raise funds for the children's needs, such as medical needs and funeral expenses, without taking account of long-term secure livelihood. Also incomes from such sales are not communicated to the OVCs, or to a neutral observer or representative.

OVCs also face eviction by relatives from their parental land, sometimes by violence. Many orphans are dispossessed because of the stigma of HIV/AIDS deaths, lack of clear legal rights for them, secretive land transactions, the powerlessness of children, and overburdening of the extended family network by HIV/AIDS.¹⁵ In most African societies, orphaned children would migrate at a tender age to live with more affluent relatives, where their basic needs are provided for, and this facilitates dispossession. OVCs are often compelled to support themselves upon the demise of one or both parents, and that they also have to defend themselves from usurpation of their properties by relatives neighbours and relative.¹⁶ A significant cultural factor allowing guardians to deny children their

¹² D Mullin 'Land reforms, poverty reduction and HIV/AIDS' Paper presented at the SARPN conference on Land Reform and Poverty Alleviation in Southern Africa, Pretoria (2001) 20.

¹³ K Wambui *et al* 'The impact of HIV/AIDS on land issues in Kenya' SARPN paper (2002) 14 available at http://www.sarpn.org/documents/d0000162/P148_Kenya_Report.pdf (accessed 26 August 2011).

¹⁴ M Aliber *et al* (2004) *The impact of HIV/AIDS on land rights* (2004) 5.

¹⁵ SO Okuro 'Spoiling property' (2002) 11(2) *African Sociological Review* 108.

¹⁶ L Rose 'Children's property and inheritance rights and their livelihoods: The context of HIV and AIDS in Southern and East Africa' LSP Working Paper 39 (2006) 2, available at <http://www.fao.org/es/esw/lsp/cd/img/docs/LSPWP39.pdf> (accessed 26 August 2011).

inheritance is that adults often do not see the need to account for their actions towards children. Drimie found that orphan-headed households (defined as children under 16 years of age who have lost both their parents or their mother) are most affected through dispossession by 'guardians'.¹⁷ Most informants in his study knew of the practice of dispossessing orphans under the pretext of acting as custodians or guardians (in most cases men). Inheritance issues are seen as a private, family matter, so that, despite strong condemnation of individual cases of property-grabbing, there is little active opposition from community members or leaders, who are reluctant to interfere unless asked.

In some communities in Kenya, children have not only lost their parents but all siblings and cousins in the parents' generation, and have no-one to turn to except relatives who may have more interest in the property than caring for them. Even women, because of the gender role attributed to them, often feel they are not in a position to oppose (male) relatives, or to ask outsiders for help, when their rights are abused after the death of their husband. Despite steps by the government to mitigate these issues, poverty, lack of knowledge and implementation capacity, coupled with bureaucratic processes within government institutions, hinder the success of these statutes meant to protect children's rights.

3 Laws influencing OVCs inheritance rights

Kenya is a multi ethnic community with diverse religious groupings, which in effect means that many laws and rules may govern inheritance. These groups recognise inheritance for passing on or acquiring property, but there may not be consensus on how.

3.1 Customary Laws

Traditions and beliefs of ethnic groups form the backbone of the customary laws, usually based on precedence passed from generation to generation often verbally, but largely acceptable to the society. These laws are informed by societal norms that differ from community to community, but are largely similar. For instance, until recently, Gusii women had no right of inheritance because traditional society was (and remains) patrilineal. Thus inheritance of property, children, wives, power etc came from the male side, and was passed from father to son. Traditionally, the elders are the sole decision-makers, as power generally has been taken by the older people, especially men. They are believed to remember as far back as possible the issue at hand, being the repository of societal knowledge on who owned what and who the customary legal custodians of land and

¹⁷ Human Sciences Research Council 'The Impact of HIV/AIDS on Land: Case Studies From Kenya, Lesotho and South Africa' (2002) 11.

property are. Often they would have knowledge passed to them by the deceased, and can identify children who might not have been known to exist. Customary laws on land and property inheritance are based on these tenets; decision-makers, gender, age, legitimacy, religious background and availability of land. There are many gaps, making customary laws inadequate in amicably handling the children's land inheritance issues.

Customary laws are prone to misinterpretation, especially on issues that are divisive. A community with fewer elders experiences difficulty in decision-making pertaining to land inheritance, since the available elders may lack full knowledge in given instances. The elders' 'know-it-all' attitude, compounded by a 'must respect' kind of attitude from the younger members, can become intimidation of the disadvantaged and vulnerable, particularly orphans. If land is to be appropriately shared amongst children, it should presumably be upon attaining the age of majority, on the basis of first come, first served. Usually people of legal age can easily inherit and/or acquire land. In the application of traditional dispute resolution mechanisms, children because of their age always do not have a good hand, because of how the traditional society still views them. First-borns are given first priority before those who follow in any distribution.

Orphans away from the sight of the homestead can be forgotten, assumed gone and never to return, although they may have been driven out by conditions and malicious innuendos directed at them. Where the living relatives and elders believed orphans had been favoured by their father, disputes between siblings can occur, and elders may decide in favour of those siblings that they have a liking for, perhaps motivated by money or the belief that the favoured sibling can be manipulated in future.

Children born out of wedlock have no right to inheritance, and custom discriminates against them since they are generally considered unwanted. Such a child may be first-born, but has no right to inheritance without prior consideration of the so-called legitimate children of the family. When they become of age they tend to buy their own pieces of land other than inheriting their father's, though they may have lived in the family from childhood and use the family name, and may have invested much in supporting their family and siblings. In family traditions such as building new homes, illegitimate children are excluded with feeble excuses, such as they bring 'bad omen', resulting in bad blood amongst siblings and inhibiting a joint approach to land matters.

Gender consideration has been an important aspect in land inheritance in Kenya. A common belief is that only male children inherit land, not females. Men are usually favoured over women, and the girl child may not inherit land at all, as they are assumed to be soon getting married and leaving the property and land behind. Women and girls face destitution after the death of their husbands, partners or parents, and are frequently relegated to the status of second-class citizens, in that their rights depend

on husbands or other male relatives. Independent women are less likely to be accorded access to productive resources, such as land. For a long time wives and younger children remained at risk of being landless should the marriage fail, as the customs favour inheritance of the property/land by sons rather than daughters of the deceased. Even though a parent may wish to leave land and property to the daughter, it is still subject to the wider community's say, which often disfavours the girl child.

Too often global reviews of land tenure are undertaken without taking Islamic laws sufficiently into account.¹⁸ About 8% of Kenyans are Muslims, for whom Islamic law recognises women's rights of inheritance, although her share is usually smaller than that of a male relative. According to Islamic wills (*wasaya*), only up to one-third of an individual's estate can be bequeathed in this manner, with the remaining two-thirds determined under compulsory rules. Women's inheritance share is considered as part of a wider property system. Female relatives and spouses are accorded shares, but half that of a male in a similar position, so that male relatives are likely to inherit a greater share of the estate. The law does provide a starting point for women to assert the full range of their property rights. A child in the womb is competent to inherit under Islamic law, being deemed to exist from the point of conception. An illegitimate child whose paternity was contested may not inherit from the wife's husband, although that child may inherit from its mother and its mother's family.

Islamic land law is evolving through a struggle between conservatives and liberals. Since Islamic inheritance rules conflict with international human rights, NGOs and liberal personalities in Muslim countries have called for equal inheritance rights, but the general position, even among many Muslim women, is that what God has ordained for shares cannot be changed. Some Muslims with an aim of avoiding costs and inheritance rules fail to register land, and so avoid giving women their allotted shares under the Islamic inheritance rules. The development of Islamic land tools can support fuller land rights for various sections of Muslim societies, including women, but the various stakeholders need to review the normative and methodological Islamic frameworks, and their relationship with other systems of formal and informal land tenure.

3.2 Land policies

Before the referendum vote on the new Kenyan constitution in 2010, there were several land reform proposals on land systems and the principle of

¹⁸ S Sait & H Lim 'Islamic inheritance laws and systems' Islam, Land & Properties Researchers series Islam, Land and Property series research 6 (2010) 13.

equality between men and women. Inheritance rights of unmarried daughters are to be secured with practices of respective communities.¹⁹

The successful implementation of the National Land Policy will have far-reaching implications, and change the institutional, normative and policy frameworks of land ownership, use and management. It is being developed at a time when the country has adopted a new constitution, and aims to ensure that men and women are entitled to equal rights to land and other land-based resources during marriage, dissolution and death of a spouse. The policy approves women's inheritance of family property and land, and seeks to empower minors with some control of family property. Family land and matrimonial homes are to be protected by the presumption of co-ownership in favour of both spouses. The same will apply to polygamous unions where each wife shall commonly own (with the husband) family land and matrimonial property.

Securing inheritance rights of unmarried daughters with the different communities in Kenya is a leading controversial issue. The effort to ensure unmarried daughters inherit a portion of their parents' land, while already happening in some communities, was one divisive issue that led to the defeat of the proposed new constitution in the previous 2005 referendum, and children may be denied the chance to raise complaints on present and previous land injustices. The 2010 constitution charges Parliament to enact legislation to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land, but there is no specific mention of children. Equal rights for women in inheritance of family property and land face resistance by cultures and traditions which had confined women within the fence of family property. While the new national land policy marks a significant step forward, it still needs to be translated into effective protection on the ground for Kenya's most marginalised.²⁰

3.3 National laws

The Succession Act takes care of inheritance. An owner can freely give property or land to anyone prior to his/her death, with few legal restrictions. Property can be inherited by minors, but a guardian should be appointed in the will to manage their affairs. If only children are left, with no surviving spouse, then the estate devolves upon the children equally.²¹ If there are no children and no surviving spouse, the estate devolves upon the kindred, in the following order of priority: the father; or if dead, the mother; or if no parents, then brothers and sisters, and their children, in

¹⁹ Kenya Land Alliance 'The National Land Policy in Kenya: Critical gender issues and policy statements' issues paper No 1/ 2004 (2004).

²⁰ Human Rights Watch (note 8 above) 14.

²¹ Catholic Information Service for Africa. See www.cisanewafrika.org (accessed 9 February 2010).

equal shares; next, half-brothers and half-sisters and their children in equal shares; or if none, the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares. Failing survival of any kindred, the estate devolves upon the State. Where there is no will, children are at risk of being short-changed by the so-called guardians.

The Law of Succession Act 1981 provides for the inheritance of property by surviving children with or without the presence of a surviving parent. Section 26 provides for dependent children (or someone acting on their behalf) to apply to the court for redress in cases where 'reasonable provision' has not been made.²² It also outlines the need to ensure trusteeship of property of a surviving child until he or she reaches the age of 18 years, the trustee to be appointed by a court of competent jurisdiction (subsidiary rules, section 32).

Decisions on the inheritance of property owned by non-resident foreigners (not of the Islamic faith) are normally made by the Family and Probate Division of the High Court of Kenya. Making a will is advisable since a person who is not a Kenyan can only hold land as leasehold, which makes it easier for the High Court to deal with the disposal of property.²³ Any decisions made by a foreign court must be registered with the High Court of Kenya for them to be enforceable in Kenya. The Kenyan Constitution guarantees that foreigners of different nationalities or religions are not treated differently to Kenyan citizens, and foreigners can legally inherit, buy, and sell property in Kenya. Normally the applicable law is no different for spouses with different nationalities and/or religions, and the court in the locality where the immovable property is situated usually has jurisdiction to hear and determine proceedings regarding property rights. If the parties are of the Islamic faith, then Islamic law is likely to apply through the Kadhis courts, which have jurisdiction in matters of status, marriage, divorce and inheritance.

Before the new constitution was promulgated, there was no legislation governing property of a married couple, with most matrimonial property being registered in the name of the male spouse; problems can arise upon death, divorce or separation.

3.4 Kenya's New Constitution 2010

While the New Constitution encompasses land and inheri-

²² Kenya's New Constitution 2010 Chapter 4 (The Bill of Rights), Part 1 art 21(1), (3) & (4), Part 3 art 43 & Part 5.

²³ 'Global Property Guide 2004-2010, Kenyan Law Determines Ownership'. See (<http://www.globalpropertyguide.com/Africa/Kenya/Inheritance> website (accessed 20 April 2010)).

tance,²⁴ some gaps remain. The Bill of Rights (Part 3) states that every child has a right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. A child's best interests are of paramount importance in every matter concerning the child. Part 3, however, fails to specify areas of interest and rights of children to inheritance of property.

In Part 5 of the Bill of Rights, the functions of a new Human Rights and Equality Commission include receiving and investigating complaints about alleged abuses of human rights, and taking steps to secure appropriate redress.²⁵ Every person has the right to complain to the Commission that a right has been denied, violated or infringed, or is threatened. However, this guarantee over-looks the fact that OVCs may lack capacity to raise a complaint to the Commission. The question therefore arises as to what happens in the event that the child lacks a voice?

Clause 60 of the Constitution states that land customs and practices should not discriminate on gender, but Clause 67 encourages traditional dispute mechanisms in land matters, although these routinely leave daughters out of land inheritance, and generally children are discriminated against. Traditional dispute mechanisms are encouraged, but shall not violate the Bill of Rights, but where that is deficient, a gap remains. Parliament has the discretion to set rules under article 68 of the Constitution on land investment, minimum and maximum land holding, foreign ownership of land, matrimonial sharing and inheritance. Under article 65, land-holding by non-citizens is restricted to 99-year leases and by virtue of article 62, land without an heir reverts to the state.

The Law of Succession Act²⁶ has harmonised the succession and matrimonial property laws to conform with the principle of equality between women and men, since it provides for wives and all children (including daughters) the right to inherit property and titles. Family land and matrilineal property are not specifically defined, however, and aspects of customary law which ensure women's rights of access to land and enhance security of tenure over family or community land are not recognised by statutory land law.

The United Nations Convention on the Rights of the Child (CRC)²⁷ and the Africa Charter on the Rights and Welfare of the Child²⁸ recognise

²⁴ The proposed constitution of Kenya, 6th May, 2010, published by the Attorney-General in accordance with Section 34 of the constitution of Kenya Review Act, 2008 (No. 9 of 2008).

²⁵ The Kenya's new Constitution (2010). Chapter 4: The Bill of rights Part 1, art 21 Number 1,3 &4. Part 3 Article 43/ part5 5.

²⁶ Law of Succession Act Cap 160 of 1984.

²⁷ Adopted by *UN General Assembly Resolution 44/25* of 20 November 1989.

²⁸ Adopted in Addis Ababa, Ethiopia on 11 July 1990 and entered into force on 29 November 1999.

children as rights-bearers and further define their rights. The global mandate and activities of UN-Habitat in promoting access to land and security of tenure, derived from a range of international human rights and development standards. In the implementation of these international laws, however, the challenge is costs and lack of awareness of their availability. Human Rights Watch in Kenya found that persons orphaned or widowed by AIDS are more likely than others to experience property-grabbing, reflecting a gap in the international laws. There are few explicit provisions in Kenyan law for protection of orphans, possibly because the current law was written before the explosive increase in their numbers over the last decade.

3.5 Institutions

OVCs do not enjoy equal protection of the law, as their voices are not being heard in existing state institutions meant to deal with property and land questions. Ignorance and lack of awareness on their rights, and lack of financial resources are not recognised.

Legal aid services are provided by a few NGOs, setting up hotlines and crisis centres, but the problem affects hundreds of thousands of children. Communities have a responsibility to protecting children from property-grabbing, but it is still seen as a problem for the state.²⁹ The draft Children Bill does not adequately address this problem, nor do the government's proposed changes in the structure of children's services at the district level. The director of the Children's Department is proposing a new cadre of volunteer children's officers to help strengthen the care and protection role of the state's services for children but the proposal does not ensure that these volunteers will in fact be steered to child protection activities.

The newly created Family Division of the High Court of Kenya, a civil court for family disputes, holds some promise but currently is only a pilot effort in Nairobi. The children's court deals with inheritance and general issues pertaining to children, so is inadequate for land dispute cases. Human Rights Watch observes that the atmosphere of the court room is intimidating and frightening for children, the court proceedings are rushed (a few minutes per case), and children may get frightened and break down into tears or respond inaudibly to the stern questioning of the presiding magistrate. None of the 94 children processed on the days observed by Human Rights Watch were represented by legal or other counsel, and only a few had family members present in the court room. Children processed in regular adult courts told Human Rights Watch that they were not informed of the status or time-tabling of their cases.³⁰ There was no clear

²⁹ Human Rights Watch (note 8 above).

³⁰ Human Rights Watch (n 8 above).

procedure for OVCs to seek legal address through the courts, with no assigned advocates to represent them.

Orphanages and children's homes, which might be able to help, are few relative to need. Except in the few state-run children's homes, the government does not provide inspection or support. The state institutions, particularly the district-level public trustees to which children can in theory turn to represent their interests, are sparse, do not favour the representation of children's interests, and are open to bribery and abuse due to low pay. District children's officers and the Children's Department remain too focused on the punitive aspect of their work.³¹ Due to high legal fees, legal assistance for children in these matters is most often unavailable or unaffordable.³²

4 Some short case studies

4.1 Gender dimensions of loss³³

Angeline, on losing her husband Billie, came up against traditions and customs that she had never anticipated and court battles, intimidation and harassment went on for more than a year. Eventually, she won through the courts what rightfully belongs to her and her children. Angelina wrote of the case:

Through this experience of losing Billie, I have learnt some things about the gendered experience of loss. Within the Kenyan community – and this is regardless of whether you are Luo, Luhya, Maasai or Kamba – as a woman you own nothing and have no right to property. If and when the woman is economically empowered, this is then used as an excuse that she does not deserve anything more and she can make her own money. I have learnt the difference between having laws in books and enforcement of these laws.³⁴

4.2 Court delays³⁵

Ochieng' stated that a land case begun when he was in primary school is still unsettled and he is in his late thirties, because of court delays in land cases in Kenya. The disputed land has seen little economic activity

³¹ As above.

³² Attributed to D Otieno, a member of Kenya Legal and Ethical Network on HIV/Aids in Kisumu.

³³ The well-known succession case of *Angeline Siparo v Billie's Family*. Interagency gender work group on Inheritance Rights (e-mail from Advocate Anne Omollo on 20 November 2010).

³⁴ As above.

³⁵ Interview with George Ochieng of Kandaria, Kisumu, Kenya on 10 August 2010.

pending the court's ruling, while other family members who bought their own parcels from neighbours have gone ahead with their developments.

4.3 Disinheritance by guardians³⁶

Before her death, Beatrice Amwoyo worked for the Kenya Post Office, and was survived by three children (minors) and a husband. The husband applied for estate administration, but paternal relatives of Beatrice felt that he was a drunkard who could not take care of the property, which was shared out. Monies were then to be put in the accounts of Victor (the husband) and Dorothy until the children reached their majority, but all the money went to aunt Josephine's account. The children have since suffered from lack of money, and one of them, upon joining University of Nairobi (Kisumu campus), has no fees. After summons by a lawyer, the aunt paid Ksh. 30,000 into the college account.

4.4 Children of locals³⁷

'My dad passed away in 2008, he left two wives and 8 children. Although he didn't have a will, he left property and shares worth 3 million Kenya shillings. All his properties are in my late mum's name, and now my step-mums want to divide the 3 million among themselves. Although we are all above 18 yrs, is there a way us the children can receive part of the inheritance?'

4.5 Children of foreigners³⁸

Caz is the only child of a father who died leaving a wife with whom he stayed with only for one year and who has a history of nine marriages. He bought property in Kenya and died with no will. Caz, wondering whether her case was salvageable, posted a comment in the internet, asking about Kenyan laws on intestacy in relation to a daughter's rights to property.

4.6 Children in orphanages lose land

Oluoch, from Ahero (Nyanza Province), lost both parents in 2007, and was taken up by a maternal uncle in Nyabondo. The paternal uncle sold the father's land, and in 2010 Oluoch returned home only to find the land fenced off, having been sold to a stranger. He was told they thought he had died since they did not hear from him for long. He had to find his way to

³⁶ *Government of Kenya and Others v Dorothy Wasike and Others* (2006) 23 KHCK.

³⁷ E-mail from Sheila on 19 May 2010.

³⁸ See 'Global Property Guide' (2007).

Kisumu to seek advice from an advocate. Because of such occurrences, most orphanages in Kenya have developed a rule to close during holidays, to ensure that all OVCs go to their homes to be seen as present, besides getting the feel of home.

4.7 Orphans' uncles sell their parental land³⁹

The boy's father was formally employed before his death. Upon the death of the father and the boy still a minor, the paternal uncle processed letters of administration. Upon the boy reaching secondary level of education, there was no money to pay fees, the uncle alleging that he used the money to purchase a plot and that the boy should wait until the plot is sold. The land was actually ancestral land, and should be the boy's land after family sub-division. If the land is sold the boy is excluded from any inheritance. The boy's father had build rental houses, from which the uncle has been collecting rent, but the uncle claims that he was the developer. So the boy has no fees and no property to inherit. The case is now voluntarily being handled by CLEAR (Christian Legal Education Aids and Research) programme.

4.8 Orphans formerly together separated

Witty is a 12 year old girl, the first born and only girl in a family of three children. The father died in 2005 after a long period suffering from HIV/AIDS, and his wife died soon after, while his mother (the children's grandmother) also had HIV/AIDS. On the burial day, no close relative from their father's side was ready to take them, so the maternal grandmother left for Nyabondo (Kisumu) with the children at least to give them a roof over their heads. Two weeks later, word was sent to Nyabondo that the paternal grand-mother had also died, and they attended the burial but returned to the maternal grand mother's place. The neighbours then took advantage and grabbed the land, each now claiming it, leaving the three children with no place to call home and land to call theirs. Back at the grand-mother's place, a step-son took two into his house, leaving the grandmother with one, resulting in disintegration of the family of children.

4.9 Polygamous marriage effect upon inheritance⁴⁰

Stephen Rono (of the Keiyo sub-tribe of the Kalenjin community) died without a will in 1988 at the age of 64, survived by two wives (Jane and Mary), with three sons and two daughters from Jane, and four daughters

³⁹ Information from Anne Omollo, advocate in Kisumu (Conversation between the author and Anne Omollo at Anne Omollo Advocate Offices, Oginga Odinga Road, Kisumu on 20 August 2010).

⁴⁰ *Mary Rono v Jane Rono & another* (2005) 29 eKLR.

from Mary. Both houses agreed to share certain property, but the main bone of contention related to the distribution of 192 acres of land. Jane proposed that the first house would share 108 acres, 22 acres going to each of the three sons, and 14 acres each to her and her two daughters. The second house would share 70 acres, all five getting 14 acres each. The remaining 14 acres would be used communally for the benefit of all family members. The reason for giving a larger share to the first house and to the male children was that the land was bought and improved before the second house came into existence, and the girls had an option of getting married and leaving the home (under Keiyo tradition, girls had no right to inheritance of father's property).

The second house demanded an equal share of the land, maintaining that the first house had not worked harder on the land than the second house, and the deceased treated and educated all equally, not discriminating between boys and girls, and had even given one son of the first house to the second where there were no sons.

On a first hearing, the High Court awarded the daughters a lesser share of the property, because of the possibility that they would marry and get further property from their new families. Mary challenged the decision, alleging that it was wrong to consider customary law, as the matter was regulated by the Law of Succession Act.

5 Conclusions

The Government of Kenya should recognise the scale of these issues, and formulate a strategic plan to address the legal challenges of land supposedly held in trust for OVCs. The law should seek to empower minors and other vulnerable groups with some amount of control of family property, reviewing the existing laws, differentiating the rights of OVCs from those of their widowed mothers or fathers. Kenya has signed the relevant international conventions, and should translate them into practical legal obligations to protect children's rights. Human Rights Watch researchers in Kenya have proposed *inter alia* that: NGOs should have standing to act as guardians for children; children should be helped with legal assistance; succession laws be simplified to improve access; better information be available; and a properly resourced public trustee office created, not open to abuse. Malawi was the first country in sub-Saharan Africa to develop National Orphan Care guidelines in 1992, and deserves to be emulated by others. The work of NGOs with OVCs should be incorporated within the government structure and processes, since NGOs are temporary and accountable to their donors, rendering their work necessarily short-term.

The Bill of Rights in the new Kenyan Constitution creates an opportunity for legislation that incorporates the rights of children,

especially on land property inheritance, and the proposed National Land Commission may be able to ensure a better voice for OVCs. National law bodies, such as the Law Society of Kenya and the Federation of Women Lawyers, can help with child-friendly paralegal structures to support OVCs, perhaps through a percentage of their professional time as *pro bono* services to children. Groups should lobby for child-friendly courts with magistrates and judges appropriately trained to handle cases involving OVCs.

COMPENSATION FOR
COMPULSORY ACQUISITION OF
LAND FOR MINING ACTIVITIES
IN NIGERIA: THE SEARCH FOR A
VIABLE SOLUTION*Oludayo Gabriel Amokaye*

1 Introduction

Nigeria is blessed with abundant mineral resources, particularly oil and gas¹ located in the Niger Delta region. Under the Constitution of the Federal Republic of Nigeria, the right of every Nigerian to own land is guaranteed² but the ownership of mineral resources found in, or over land in the federation is vested in the Federal Government.³ However, the requirement of land for mining purposes and the constitutionally recognised property right for individuals or communities necessarily involve the compulsory acquisition of resource-rich land from the owners, and subsequent reallocation to the licensed mineral-prospecting companies.⁴ Compulsory acquisition of land necessarily implies the constitutional and statutory obligation to pay compensation to the landowner, whether an individual, family or community. The issue of what constitutes adequate and fair compensation remains controversial, and has provoked tensions between the host communities and mineral licensees. While officials of mining companies maintain that the compensation paid so far to deprived landowners is fair, adequate and consistent with the extant compensatory laws, landowners often reject such compensation as paltry and unreasonable, and have resorted to

¹ Nigeria's geology comprises two broad categories, the Basement Complex and the Sedimentary Series. Although there are seven sedimentary basins in Nigeria, only the Niger Delta is actively explored because it contains most of the Nigeria's hydrocarbon deposits. It is one of the world's largest delta formations, with an average area of 300,000 square km and a sediment volume exceeding 500,000 cu km. The major petroleum bearing structure in the delta is the Akata/Agbada formation, with an estimated reserve of 20 billion barrels of oil and 120 trillion cu ft of gas. See New Democratic Nigeria *Official publication of the Nigeria High Commission, London, oil and gas* (2001) 28.

² Constitution of the Federal Republic of Nigeria of 1999 sec 43.

³ Sec 44 of the Constitution.

⁴ Mineral and Mining Act of 2007, Cap 162 of Laws of the Federation of Nigeria 2004; Petroleum Act of 1969, Cap 10 of Laws of the Federation of Nigeria 2004; and Oil Pipeline Act of 1956, Cap O7 of Laws of the Federation of Nigeria 2004.

violence and vandalism of the multi-national mining companies' properties to press home their demands for just compensation.⁵

Against this background, this chapter discusses the various compensatory regimes for compulsory acquisition of land for mining purposes under the Nigerian law. Section 2 revisits and reviews the established doctrinal bases for compensation and compulsory acquisition. Section 3 assesses these theories within the legal regime in Nigeria, and highlights imperfections in the Nigerian compensatory regime, and how these imperfections explain the incessant conflicts and insecurity within the region. The conclusion calls for reform of the law on compensation in Nigeria.

2 Doctrinal bases for property compensation in Nigeria

Compensatory issues emanating from mining and extractive activities in Nigeria have two major aspects. The first arises where communal or individual land is compulsorily acquired for mineral extractive purposes. The second arises where land is not directly acquired but condemned or disturbed as a result of mining activities. Undoubtedly, prompt settlement of claims for compensation in any of these circumstances is in everyone's interest, mainly for purposes of efficiency and distributive justice.

2.1 Efficiency

In law and economics, efficiency relates to the rational allocation of resources among alternative uses in ways that maximise value. In its purest form, economic efficiency is defined by the Pareto principle. One state of affairs is a 'Pareto improvement' over another if it would result in at least one person being better off and no one being worse off.⁶ A situation is 'Pareto efficient' if there is no alternative state of affairs that would be a 'Pareto improvement'. Under the laws of welfare economics, Pareto efficiency is produced by a perfectly functioning market.⁷ The efficiency criterion dictates that a choice between two or more equally effective means should be decided in favour of the least expensive one. The problem, however, is that any attempt to use Pareto efficiency as the standard for evaluating the efficiency of any action is impractical for two

⁵ C Obi 'Globalisation and local resistance: The case of the Ogoni versus Shell' (1997) *New Political Economy* 137 - 148. Local and international newspapers have numerous reports of attacks on foreign oil workers in the Niger-Delta. For example 'Two Germans kidnapped in Niger Delta released unharmed'. Available online at <http://www.thelocal.de/national/20100425-26765.html>. (Accessed on 4 February 2010).

⁶ G Debreu 'Valuation equilibrium and Pareto optimum' (1954) 40 *Proceedings of the National Academy of Science* 588.

⁷ See AE Boardman *et al Cost-benefit analysis: Concepts and practice* (1996) 53.

reasons. First, there will always be a market failure since Pareto efficiency assumes a perfect market. Market failure often arises as a result of misbehaviour of the market actors.⁸ Where market fails for one reason or the other, economists turn to government to intervene through regulatory law to cure the failure. Second, it is impossible for the action of one not to harm another, almost all action harms at least one person; virtually all activities would fail a Pareto-efficiency test. Accordingly, for these purposes, economists turn to a slightly less appealing but more practical standard known as 'potential Pareto' or 'Kaldor-Hicks' efficiency.⁹ An activity is 'efficient' in the Kaldor-Hicks sense if those who would benefit from the regulation could fully compensate those who would lose and still be better off. Efficiency, then, is a measure of aggregate social welfare.

Economic analysis of compensatory law, however, focuses on the incentive effect of different compensatory rules on the decision of private individuals in business analysis.¹⁰ In discussing compensatory doctrine within the tort liability context, economists point to two conflicting considerations. The first is the incentive effect of a full-compensation rule on a landowner's investment. Here, where the law guarantees a private landowner's full value on any investment (where full compensation is paid when government compulsorily acquires the property of the owner), the individual landowner can make huge investment without bearing any risk that a conflicting public use will arise. In contrast, in the absence of a non-compensatory regime, it will be discouraging to invest in private property that may also generate inefficiency.

The second consideration, and the one more relevant for our current purposes, is the incentives influencing an individual (whether a businessman or government), who actually make the crucial production and compensatory decisions. Economists argue that for resources to be rationally allocated and value maximised, every cost (external or internal) associated with the production process must be internalised as a disincentive to mismanage scarce resources.¹¹

⁸ For a discussion of market failure which is intelligible to lawyers, see FM Bator 'The anatomy of market failure' (1958) 72 *Quarterly Journal of Economics* 351.

⁹ Named after the theorists who developed the analysis. See N Kaldor 'Welfare propositions of economics and interpersonal comparisons of utility' (1939) 49 *Economic Journal* 549; JR Hicks 'The foundations of welfare economics' (1939) 49 *Economic Journal* 696. See also DM Driesen 'The societal cost of environmental regulation: Beyond administrative cost-benefit analysis' (1997) 24 *Ecology Law Quarterly* 579 - 580.

¹⁰ For an excellent introduction to law and economics in compulsory acquisition of land, see WA Fischel 'Introduction: Utilitarian balancing and formalism in taking' (1988) 88 *Columbia Law Review* 1581; WA Fischel & P Shapiro 'Takings, insurance, and Michelman: Comments on economics interpretations of "just compensation" law' (1988) 17 *Journal Legal Studies* 269; L Blume & DL Rubinfeld 'Compensation for takings: An economic analysis' (1984) 72 *California Law Review* 569.

¹¹ These costs are borne by the public in such forms as damage to forests and streams, increased respiratory ailments, and reduced pleasure in clear vistas and safe beaches. See MA Heller & JE Krier 'Deterrence and distribution in the law of compulsory acquisition' (1999) 112 *Harvard Law Review* 998 -999. F Michelman 'Property, utility,

The concept of cost internalisation was first articulated by Pigou and expanded by Coase.¹² Both argue that an individual whose activities have harmful effects on others must undertake a cost-benefit analysis, to include both benefits to him and costs to others. So long as such individual does not bear the cost of the harmful activities, he has no incentive to prevent it. Where the cost of pollution is not internalised, it may produce an inefficiently high level of good production and low level of pollution control. The most economical way to measure accurately the costs and benefits of a given use of property is to internalise externalities, and insist upon the right to prior compensation for accepting a harmful effect on the part of the landowner. Thus, if the cost of land compulsorily acquired is internalised by the payment of the market value of the acquired property as compensation, accurate price signals are given to the consumers, and compensation provides the appropriate incentive for decision-makers.¹³ When the acquiring authority does not need to pay compensation or an inadequate sum is paid, it disregards the costs its decision imposes upon such land. Compensation ensures that the acquiring authority pays for the land compulsorily acquired and compensates the landowner for the loss of a property or injury suffered. In this case, where compensation is paid to the landowner, the owner is left no worse off than he was initially (assuming money perfectly compensates for the loss of land or injury suffered). Economists would call this a Kaldor-Hicks optimal result: no one is made worse off because the landowner receives a suitable set of cash transfers or monetary equivalent of his property to induce such change; and, at least, the acquiring authority is made better off by not abandoning its business.

2.2 Distributive justice

Distributive justice is concerned with the equitable distribution of the costs and benefits resulting from resource allocation amongst members of a society ('giving each person his or her due').¹⁴ The theory of distributive justice, which seeks to ensure that no private individual alone is forced to bear public burden, which in all fairness and justice, should be borne by the public as a whole, is well illustrated in compulsory acquisition and compensation cases.¹⁵ Distributive justice theories relating to compulsory

and fairness: Comments on the ethical foundation of "just compensation" law' (1967) 80 *Harvard Law Review* 1165.

¹² AC Pigou *Wealth and Welfare* (1920); RH Coase 'Problem of social cost' (1960) *Journal of Law & Policy* 1.

¹³ D Hunter *et al* (eds) *International environmental law and policy* (2002) 129. See MJ Radin *Reinterpreting Property* (1993) 158; S Levmore 'Just compensation and just politics' (1990) 22 *Connecticut Law Review* 306 - 308; S Levmore 'Compulsory acquisition, torts, and special interests' (1991) 77 *Virginia Law Review* 1344 - 1348; MR Porier 'Compulsory acquisition and natural hazards policy: Public choice on the beachfront' (1993) 46 *Rutgers Law Review* 260 - 283.

¹⁴ Aristotle *Nicomachean ethics* Book v 3:113a - 4:1132h in *The complete work of Aristotle*, Vol. 2, 1785-1787.

¹⁵ Per Justice Hugo Black in *Armstrong v United States* 364 US 40 (1960).

acquisition and compensatory doctrine fall under three categories: the Difference Principle, the libertarian approach and the progressive approach.

2.2.1 *The difference principle*

The Difference Principle was popularised by Rawls, who proposed that social and economic inequalities are to be arranged so that they are both (a) attached to positions and offices open to all the under the condition of the equality of opportunity; and (b) for the greatest benefit of the least advantaged members of the society. According to him, in the distribution of natural resources in terms of powers, opportunities and wealth, justice demands that preference be accorded to areas where the resources are derived as long as the unequal distributions benefits the worst-off group by maximising their shares, provided there is equal access to various offices and positions in the society.¹⁶ Michelman further provides the most famous and theoretical insight into the need for fairness in compensatory issues, conceptualising the issues of compensation in distributive terms:

when a social decision to redirect economic resources entails painful obvious costs, how shall these costs ultimately be distributed among the members of society? Shall they be permitted to remain where they fall initially or shall the government, by paying compensation, make explicit attempt to distribute them in accordance with decisions made by whatever processes fashion the tax structure, or perhaps according to some other principles. Shall the losses be left with the individuals on whom they happen first to fall, or shall they be “socialised”?¹⁷

Michelman's answers to these questions are found in his utilitarian calculus, according to which a landowner injured by a legitimate public action should be compensated if (only if) rendering compensation is cost beneficial. The benefit from rendering compensation is the avoidance of 'demoralisation cost' which is the total of (1) the monetary value necessary to offset disutilities which accrue to a loser and his sympathisers specifically from the realisation that no compensation is offered; and (2) present capitalised monetary value of the lost future production (reflecting either impaired incentives or social unrest) caused by demoralisation of an uncompensated loser, his sympathiser and observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion. The cost of rendering compensation is the 'settlement cost', that is, the naira value of time, efforts and resources which would be required in order to reach compensation settlement that will be adequate to avoid demoralisation cost. In deciding whether to acquire private land, the acquiring authority contemplating such decision

¹⁶ J Rawls *Theory of justice and political liberalism* (1971).

¹⁷ FI Michelman 'Property, utility and fairness: Comments on the ethical foundations of "just compensation" law' (1967) 80 *Harvard Law Review* 1165.

must make two comparisons. First, he must decide if the efficient gains of an act are greater than either the demoralisation cost or settlement cost; if not, he must reject the measure as inefficient. Second, he must compare the demoralisation cost to the settlement cost, and choose to pay the lower amount. In the event that the settlement cost is the lower amount, compulsory acquisition of land is desirable and compensation is necessary. Otherwise, there is no compulsory acquisition.

2.2.2 *The libertarian approach*

The libertarian conception of property focuses on shielding an individual from the claims of other persons and the power of the public authority,¹⁸ and preserving an untouchable private sphere, which is a prerequisite to personal development and autonomy.¹⁹ Private property and the constitutionalisation of its protection from governmental interference seek, according to this conception, to decentralise the ownership of resources in order to diminish the power of governments or any single private entity: they endow individuals, rather than any collective bureaucracy, with control over resources and thus preserve personal freedom, security and independence.²⁰

For the libertarian, compensation should be required every time a compulsory acquisition's impact on one owner is disproportionate to the burden (if any) carried by other beneficiaries of the public use.²¹ This rule of proportionality dictates that a claimant cannot sustain a burden that is disproportionately heavy in comparison to that sustained by other beneficiaries of the public action, taking into account the respective benefits to all parties involved. It bars any public action that would make some owner worse off by transferring some of his economic interest to the public or other individuals.

2.2.3 *The progressive approach*

Dagan and White aptly summarise diverse views on the progressive approach to distributive justice.²² According to them, these theories start with the premise that ownership is not merely a bundle of rights, but also a social institution that creates bonds of commitment and responsibility

¹⁸ BA Ackerman, *Private property and the Constitution* (1977) 71 - 74.

¹⁹ I Berlin 'Two concepts of liberty' in *Four essays on liberty* (1970) 118, 122 & 124; J Rawls *Political Liberalism* (1993) 298.

²⁰ RE Barnett *The structure of liberty* (1998) 139 - 142, 238; M Friedman *Capitalism and freedom* (1962) 7 - 21; BH Siegan *Property and freedom: The constitution, the courts, and land-use regulation* (1997) 10; CA Reich 'The new property' (1964) 73 *Yale Law Journal* 771; CR Sunstein *On property and constitutionalism* (1993) 14 *Cardozo Law Review* 914-15.

²¹ See RA Epstein *Compulsory acquisition: Private property and the power of eminent domain* (1985) 207.

²² H Dagan & JJ White 'Governments, citizens, and injurious industries' (2000) 75 *New York University Law Review* 411 - 414.

between the owner and others who live, work, or are otherwise affected by the owner's properties.²³ John Locke first articulates the idea that it is part of every person's natural right to own property and enjoy the fruits of their labour, and one might reasonably infer that any attempt by an individual or State to interfere with such a right should be heavily restricted.²⁴ Furthermore, property is an expression of a cluster of values (primarily privacy, security and independence) that always involve the distribution as well as the retention of wealth.²⁵ Property must entail distribution since ownership is a source of economic resources, and also social, political, and cultural, rights and powers; the correlative of which are other people's duties and liabilities.²⁶ A progressive compulsory acquisition doctrine, committed to social responsibility and 'the ongoing normative commitment to dispersal of access',²⁷ must not be contrary to some conventional wisdom,²⁸ or oblivious to the imposition of disproportionate burdens in the pursuit of public actions. The progressives opine that a liberal compulsory acquisition doctrine, one that gives compensation only in extreme cases, harms property holders of all sorts, rich and poor. A no compensation regime might lead to systematic exploitation of small and relatively less well-off owners, who by hypothesis have no other way to protect themselves.²⁹ This does not mean that the progressives subscribe to the libertarian rule of proportionality. Strict proportionality would bar any reconfiguration of the distribution of the aggregate of resources, wealth and legal rules.³⁰ Strict proportionality would also undermine social responsibility, by insisting that our mutual obligations as citizens should be derived solely from either consent or self-advantage, thus underplaying the significance of belonging, membership and citizenship.³¹ A compulsory acquisition doctrine attuned to the virtues of social responsibility and

²³ See H Dagan 'Compulsory acquisition and distributive justice' (1999) 85 *Virginia Law Review* 772 - 773.

²⁴ J Locke *Second treatise on government* (2004)17.

²⁵ FI Michelman 'Tutelary jurisprudence and constitutional property' in *Liberty, property and the future of constitutional development* (1990)127, 149 - 150, 154; FI Michelman 'Possession vs. distribution in the constitutional idea of property' (1987) 72 *Iowa Law Review* 1319; M Radin 'Property and personhood' (1982) 34 *Stanford Law Review* 957. Kant explored the personhood argument in 'Of the injustice of counterfeiting books' in *Essays and treatises on moral, political, and various philosophical subjects* 225, 229 - 230 trans W Richardson (1798).

²⁶ MR Cohen 'Property and sovereignty' (1927)13 *Cornell Law Quarterly* 11-14; RL Hale 'Coercion and distribution in a supposedly non-coercive state' (1923) 38 *Political Science Quarterly* 470 - 79; WN Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale Law Journal* 16.

²⁷ JW Singer & JM Beerman 'The social origins of property' (1993) 6 *Canadian Journal of Law & Jurisprudence* 245.

²⁸ See CE Baker 'Property and its relation to constitutionally protected liberty' (1986) 134 *University of Pennsylvania Law Review* 764 - 765; F Michelman 'The common law baseline and restitution for the lost commons: A reply to professor Epstein' (1997) 64 *University of Chicago Law Review* 69.

²⁹ BH Thompson Jr 'The endangered species act: A case study in compulsory acquisition and incentives' (1997) 49 *Stanford Law Review* 361 & 367.

³⁰ J Rubenfeld 'Using' (1993) 102 *Yale Law Journal* 1077.

³¹ C Taylor 'Atomism' in *Philosophy and the human sciences: Philosophical papers* (1985) 187-188. See also R Nozick *Anarchy, state, and utopia* (1974) 171 - 172.

equality must therefore avoid these extreme positions. Instead, it should start with a rule of long-term reciprocity of advantages. This approach prescribes that a public action imposing a disproportionate burden is not an acquisition as long as two conditions are met: if the immediate burden on the claimant is not extreme; and if the claimant stands to enjoy benefits of similar magnitude from some other acquisition, even if such benefits are not contemporaneous.³² This conception of reciprocity of advantages attempts to recognise, preserve and foster the significance of membership and citizenship, while recognising our non-ideal world and, thus, requiring long-term rough equivalence of burdens and advantages.³³

3 Compulsory acquisition and compensation under Nigerian law

Having considered theories on compensation, the legal regime available under Nigerian law to compensate a landowner for land acquired for mining shall be examined. Now, the applicability of efficiency and distributive justice theories under the Nigerian legal system shall be examined, and the judicial interpretation of statutes to resolve compensatory issues arising from compulsory acquisition under the 1999 Constitution and the Land Use Act of 1978.

3.1 Procedure for the acquisition of land for mining purpose

The right of every Nigerian to own, use and enjoy land in Nigeria is guaranteed by the Constitution of the Federal Republic of Nigeria, 1999. Section 43 thereof provides that every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria. Absolute right of ownership over land is limited by the Land Use Act which vests the absolute ownership of land in the Governor of a State, who holds the land of a State in trust for the benefit of all Nigerians.³⁴ The greatest proprietary interest any person can have over land under the Act is the right of occupancy, which the Governor has the power to grant. Compulsory acquisition of land by the Federal, State or Local Government is for overriding public interest, defined to include, *inter alia*, the requirement of land for mining purposes, oil pipelines or public purposes.³⁵ Where land has been validly acquired for mining purposes, a mineral prospecting

³² RC Ellickson *Order without law: How neighbors settle disputes* (1991) 56, 234 - 36, 274 - 275.

³³ MJ Radin *Contested commodities* (1996) 5 & 118.

³⁴ Sec 1 of the Land Use Act of 1978.

³⁵ Secs 28 & 29 (n 34 above). Secs 28(2)(c) and 3(b) provides for the 'requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith'. Mining operations include 'prospecting for and getting of minerals or petroleum and any activities preparatory to or incidental thereto'. See statutes cited in note 4 above. Sec 22(1) of the Nigerian National Petroleum Corporation Act of 1977 define mining

company is empowered to enter upon, take possession of, or use a strip of the land specified in its licence to construct, maintain and operate pipelines and ancillary installations. The acquisition of land for public purpose under sections 28 and 51(1) of the Land Use Act does not admit of revocation of right of occupancy for the benefit of another private interest

The liberal interpretation of the statutory power of revocation of the Governor by the judiciary reinforces and protects the proprietary land rights of Nigerians in many respects. Firstly, the right of every Nigerian to own property is constitutional and can only be divested under the legally permissible circumstances. Secondly, revocatory power has far reaching implication on the property right of the holder - it is expropriatory. Consequently, the person being deprived of his property has the right to know why his property is being taken over by the government. Thirdly, a statute that seeks to deprive an individual of his property should be strictly construed against the acquiring authority.

3.2 Compensation for land acquisition

The right of a landowner to be compensated for land compulsorily acquired for mining purposes is fixed in the Nigerian Constitution, the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act),³⁶ Land Use Act, Nigerian Minerals and Mining Act 2007, Petroleum Act and the Oil Pipeline Act. Compensation for compulsory acquisition of land means the sum of money to be paid by a public body carrying out some authorised undertaking, and includes loss of land, loss of farming rights, disturbance and injurious affection suffered by the landowner.³⁷

3.2.1 *The Nigerian Constitution and African Charter on Human and Peoples' Rights*

Under section 44(1)(a) of the 1999 Constitution, an acquiring authority must pay compensation promptly to an affected landowner. Article 14 of the African Charter on Human and Peoples' Rights further provides that the right of every Nigerian to own property shall be guaranteed, and may only be encroached upon in the interest of public need or in the general

operation to include 'prospecting for and getting of minerals or petroleum and any activities preparatory or incidental thereto'. Sec 51 of the Act defines 'Public purpose' to include land acquired for exclusive Government use or for general public use, for use by any body corporate directly established by law or any body corporate registered under the Companies and Allied Matters as respects which Governments owns shares, stocks or debentures; for or in connection with sanitary improvement of any kind, telecommunication, mining, economic, industrial or agricultural development, education and other social services.

³⁶ Cap A10 of Laws of the Federation of Nigeria.

³⁷ JPH Soper 'Arbitrations and analysis' in DM Lawrence & JM Williams (eds) *The estate gazette* (1965) 132-133.

interest of the community and in accordance with the provisions of appropriate laws. Article 21 further provides that all peoples shall freely dispose of their wealth and natural resources, and in the event of compulsory acquisition, those dispossessed shall have the right to lawful recovery of its property and adequate compensation.

Opinions differ as to the scope and nature of compensation under the 1999 Constitution. The first view expressed by Nwabueze is that the 1999 Constitution does not guarantee 'fair and adequate compensation' (since the phrase is deliberately omitted from the Constitution), only 'prompt' compensation.³⁸ This view fails to take cognisance of the fact that constitutional provisions are given purposeful interpretation, as opposed to plain grammatical expression, to ensure that the ends of justice is best served. It is trite law under Nigerian jurisprudence that, in the interest of justice and fair play, a statute that seeks to touch and concern the proprietary right should not be construed to deny a landowner of compensation. This view negates the principle of distributive justice which the Constitution seeks to achieve.

Judicial construction of the 1979 and 1999 Constitutions appears to support the latter view. In *Attorney-General of Bendel State & Anor v Aideyan*,³⁹ the court held that:

In Nigeria, one's right to one's property was an entrenched constitutional right under section 31 of the 1963 Constitution as indeed, it is under section 40 of the 1979 Constitution. That right is inviolate. In the *ipssimis verbis* of the Constitution itself, such a property or any right attendant thereto can only be taken possession of or compulsorily acquired by or under the provisions of a law. Furthermore, such a law must provide for the payment of adequate compensation thereof to him and must give the owner the right to access a High Court for the determination of his interest in the property and amount of compensation due to him. It follows therefore that any purported acquisition which is not according to a law containing the above provisions is no acquisition at all in the eyes of the Constitution.⁴⁰

3.2.2 Land Use Act

The method of valuation for compensation after compulsory acquisition is fixed in Section 29(3) of the Act. Unlike the common law approach, whereby compensation is based on open market value of the acquired land, the compensation under the Act is the unexhausted improvement on land

³⁸ BO Nwabueze *Presidentialism in Commonwealth Africa* (1974) 361. Sec 44(1)(a) of the Nigerian Constitution of 1999 reproduces sec 40(1) of the 1979 Constitution, but contrasts with the 1963 Constitution which expressly provided for the payment of 'fair and adequate' compensation.

³⁹ *Attorney-General of Bendel State & Anor v Aideyan* (1989) 4 NWLR (Pt 118) 646; *Ferguson v Commissioner for Works and Planning Lagos State* (1999) 14 NWLR (Pt 638) 315, 328; *Kukoyi & Anor v Aina* (1999) 10 NWLR (Pt 624) 633.

⁴⁰ *Per Nnaemeka-Agu JSC in Attorney-General of Bendel State* (n 39 above) 667.

based on depreciated replacement cost plus rent, if any, paid by the occupier in the year of revocation of the right of occupancy for overriding public purposes. The test for determining whether an improvement is exhausted is expenditure of capital or labour; where there is no pecuniary improvement or physical effort on the land, the land owner is not entitled to any compensation. Thus compensation is not paid for loss of land but only payable to any noticeable improvement permanently attached to the land; or the utility or amenity thereof, and includes building, plantation of long-lived crops or trees, fencing, well, road and irrigation or reclamation, but does not include the result of ordinary cultivation other than growing produce.⁴¹ Although the Act prescribes that replacement cost method of valuation should be used in assessing compensation for land and building, the valuation methodology for the crops and economic trees is not spelt out, but left to the acquiring authority. The result is that Land Officers of the acquiring authority usually fix prices for crops and economic trees arbitrarily, making compensation paid to the landowners meagre and inadequate. The nature and quantum of compensation payable under the Act for mining purposes is fixed in section 29(2) of the Act, which provides that it shall be under the appropriate Mineral Act or Mineral Oil Act or any legislation replacing them.

3.2.3 Nigerian Mineral and Mining Act

This Act applies to land acquired for the extraction of mineral resources⁴² other than oil and gas, and identifies three recognisable compensable items: loss of land, disturbance, and damages to crops and building. Compensation for loss of land right is payable to the holder of right of occupancy recognised by the Governor, whose responsibility is it to pay the displaced landowners. The valuation method is similar to that in Section 29(3) of the Land Use Act. The only liability imposed on the licensee is to reimburse the Governor with the compensation money paid by the Governor on its behalf to the landowners.⁴³ In addition to this, a licensee must pay adequate compensation to a landowner for disturbance and damage to land or any crop, economic tree, building or work damaged, or removed by the holder of the mining license.⁴⁴ What constitutes reasonable compensation is not defined in the Act, but the general principle should be the fair market value of the land in question.⁴⁵

⁴¹ Sec 51 of the Land Use Act; *Upper Benue River Basin Authority v Aika* (1998) 2 NWLR (Pt 537) paras 328, 337, 339.

⁴² Mineral resources refers to any substance whether in solid, liquid or gaseous form occurring in or on the earth, formed by or subjected to geological processes including occurrences or deposits of rocks, coal, bed gases, bituminous shales, tar sands, any substances that may be extracted from coal, shales, tar sands, mineral water and mineral components in tailings and waste piles including petroleum.

⁴³ Nigerian Minerals and Mining Act (n 4 above) secs 164 & 104.

⁴⁴ n 4 above, secs 164 & 107.

⁴⁵ *Commissioner of Lands v Adeleye* (1938) 14 NLR 111; *Chairman L.E.D.B v Joye* (1939) 15 NLR 50; *Chairman L.E.D.B v Olopinkwu* (1958) LLR 25, 26 - 27; *Eugene Nzekwu & Anor v*

Over the years the Nigerian courts have applied several criteria in determining the fair market value of a land compulsorily acquired. They have held that the market value of a compulsorily acquired land could be the price within a reasonable time of ownership; or the price at which the owner has sold a piece of land of the same size forming part of the area compulsorily acquired;⁴⁶ or the price at which a piece of land of the same size has been sold generally at the locality; or capital value of rent payable in respect of the land;⁴⁷ or average return per hectare of the land.⁴⁸ In practice, it is doubtful if a reasonable compensation along the market value would be paid to a deprived landowner, because the valuation is to be done by the officials of the acquiring authority, after consultation with the State Minerals Resource and Environmental Management Committee and a Government licensed- valuer.

3.2.4 Oil Pipeline Act

Compulsory acquisition of land for laying oil pipelines necessarily requires the payment of compensation for land acquired, injurious affection and disturbance suffered by the landowner as a result of the acquisition. Unfortunately, the Act is silent on the payment of compensation for the bare land acquired but it recognises compensation for 'injurious affection'⁴⁹ suffered by a deprived landowner as a result of the exercise of the rights statutorily conferred on the licensee. In addition, compensation is payable for any damage done to any buildings, crops or profitable trees by the licensee.

It is pertinent to note that the Act does not offer much by way of analysis and interpretation of the phrase 'injurious affection'. Injurious affection at common law relates to the depreciatory effect of the acquisition on the other land retained by the owner.⁵⁰ Therefore, unless a landowner retains the other land depreciated by injurious affection, he may not be entitled to any compensation under this Act. It is settled law that the only compensation which can be obtained under this statute is the one based on injurious affection in respect of lands, that is, in respect of some loss of value of land, or in respect of some damage to lands; and that compensation cannot be obtained for any loss which is personal to the owner, or which is related to some particular user of the land.⁵¹ Both in

The Attorney-General East Central State & Anor (1972) 5 SC 224, 242 - 243.

⁴⁶ *Commissioner of Land v Efiya Stool* (1955) WACA 712.

⁴⁷ *Nzekwu* (n 45 above).

⁴⁸ *Minister of Lands & Housing v Ayonishan Family* (1968) NMLR 483, 486.

⁴⁹ Secs 11(5)(a) & 20(2) of Oil Pipeline Act (n 4 above). This should be contrasted with section 29(1) of the Land Use Act which expressly prohibits compensation for injurious affection of land acquired for non-mining purposes. See sec 20(5) of the Oil Pipeline Act.

⁵⁰ *Edmunds v Minister of Transport* (1964) 2 QB 134; *Cowper Essex v Acton Local Board* (1889) 14 AC 153.

⁵¹ *Metropolitan Board of Works v McCarthy* (1874) LR 7 HL 253 per Lord Cranworth; *Wildtree Hotels Ltd v Harrow London Borough Council* (1998) 3 All ER 638.

principle and on authority, it seems no landowner comes within the purview of this statute unless some damage has been occasioned to the land itself, in respect of which, but for the statute, the complainant might have maintained an action. The injury must be actual injury to the land itself such as by loosening the foundation of a building thereon, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of 'injurious affection' would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature.

In assessing compensation for injurious affection, the measure of compensation should be the diminution in the value of the land caused by that interference and a claimant had to establish his loss on ordinary principle of causation.⁵² However, assessment of compensation under the Oil Pipeline Act is based on the residual value of the land injuriously affected. This is arrived at by initially assessing both the value of the land or the interest injuriously affected at the date immediately before the grant of the licence and the residual value of the same land or interest consequent upon at the date of the grant of the licence.

Notwithstanding the statutory stricture, in practice, assessment of compensation payable to the land-owner under the Oil Pipeline Act is generally complex and unsatisfactory for two reasons. First, compensation is not paid for the land alone, since ownership of land is vested in the State held in trust by the Governor. Compensation is payable for the improvement made on the land.⁵³ Second, in many mineral-prospecting areas most of the landowners are either farmers or fishermen; thus the only noticeable improvements on the land are the economic crops planted on the land or fish in their ponds. In the assessment of compensation, mining companies generally rely on the approved government rates or predetermined rates by the Shell Petroleum Development Company of Nigeria Limited Lands Department Procedure Guide (commonly called the Land Procedure Guide)⁵⁴ and the Oil Producers Trade Section of the Lagos Chamber of Commerce, an organisation in which the oil producing companies have influence, as opposed to the appropriate market value in the compensatory calculus. The Land Procedure Guide and OPTS rates mostly disregard items such as claim for disturbance and injurious affected covered by the Petroleum Act and Oil Pipeline Act. In the valuation of crops in compulsory acquisition cases, the practice is that the estate surveyor employed by the oil company quantified the damage and the soil

⁵² This is based on the principle of equivalence espoused by Scott LJ in *Horn v Sunderland* (1941) 2 KB 42 to the effect that a landowner is entitled to receive compensation commensurate in monetary terms to the value of expropriated land.

⁵³ Sec 29 of the Land Use Act; sec 20(4) of the Oil Pipeline Act.

⁵⁴ Issued by Shell in 1987 and updated from time to time. This manual has been used by other oil companies notably Total, Chevron in assessment of compensation paid to communities.

expert determines the length of time the soil will remain unproductive. The crops or trees on the farm are then enumerated, and given a value. Although that value is approved by the State Government; it can vary according to a number of factors, such as the age of the crop, the size of the crop, whether it is young, medium or mature, amount of money used to care for or nurture the crop (fertilisers, insecticide, etc). If there is inter-cropping on the farm, the full rate recommended is paid for the main crop, while compensation for subsidiary crops is a quarter of the full rate recommended for that main crop. The value of the product on the farm is multiplied by the number of years that the farm will be unproductive; for instance, if the value of the product is N300 and the soil will be unproductive for the next four years, the victim will be paid N1,200(that is, 300 x 4). In addition to this, the victim is paid some amount for loss of the farming rights. It should be noted that it is the farm gate price⁵⁵ and not the market value that is paid for these crops. The consequence is that the oil communities generally reject this paltry sum and engage in litigation to press further their claims.

In *Umudje v Shell BP Petroleum Development Co. of Nigeria Limited*,⁵⁶ the learned trial Judge awarded the plaintiffs compensation on the basis of injurious affections without reference to the common law remedy, even though the claim was anchored in the rule of *Rylands v Fletcher*.⁵⁷ It is curious to note that despite the statutory provisions for compensation in respect of injurious affection, the Supreme Court, on appeal, set the trial court's award aside. But in *National Electric Power Authority v Amusa*,⁵⁸ where the land of the plaintiff/respondent was rendered useless by the defendant/appellant's transmission lines, the Supreme Court held that the plaintiff/respondent's land was injuriously affected, and compensation payable. Following this decision, the courts have applied this principle in many oil-pollution related cases.⁵⁹

Fekumo has argued that in addition to the payment for injurious affection in cases involving compulsory acquisition of land for mining purposes, the court may award compensation for disturbance and general inconvenience based on the provisions of section 20(2)(b) and (e) of the Act.⁶⁰ While this section authorises the court to award compensation for disturbance, it is, however, procedural and directory, and should not be interpreted as authorising the payment of other compensations not envisaged nor specifically provided for in section 11(5) of the Act.

⁵⁵ Farm gate price is the cost of the crop on the farm.

⁵⁶ *Umudje v Shell BP Petroleum Development Co. of Nigeria Limited* (1975) 9 -11 SC 155. This case was followed by the Court of Appeal in *Ojo Ogbemudia Eholor v Idemudia Idahosa* (1992) 2 NWLR (Pt 223) 336.

⁵⁷ *Rylands v Fletcher* (1868) LR 3 HL 330.

⁵⁸ *National Electric Power Authority v Amusa* (1976) 12 SC 99.

⁵⁹ *Shell Petroleum Development Co. of Nigeria v Farrah* (1995) 3 NWLR (Pt 382) 148; *Shell Petroleum Development Co. of Nigeria v Chief Graham Otoko & Others* (1990) 6 NWLR (Pt 159) 693.

⁶⁰ JI Fekumo, *Oil pollution and the problems of compensation in Nigeria* (2001) 9.

3.2.5 *Petroleum Act*

The only recognisable compensation under the Petroleum Act is adequate and fair compensation for 'disturbance'.⁶¹ The Act is silent on the compensation payable for land acquired for oil prospecting and mining purposes, and indeed what constitutes compensable 'disturbance' is not defined in the Act.

Generally, compensation for disturbance upon compulsory acquisition of land⁶² relates to loss of business or trade, such as loss of goodwill, increased rental or other outgoings, cost of alternative property, cost of relocation, forced sale or diminution of value, and loss of profit during the period of re-establishment; it does not relate to the cost of the land acquired. Such loss of business or trade must be in respect of a going concern, not where the undertaking is unprofitable or abandoned.⁶³ In *Williams v Kamson*,⁶⁴ it was held that compensation for disturbance arises where a claimant could establish loss owing to the disturbance from the action of the defendant, and such disturbance would arise where there is alteration of something that would otherwise have continued. Government in this case compulsorily acquired under the Public Land Acquisition Act the respondent's residential property and factory buildings, at the time the factory being a going concern and the residential building occupied. The acquisition necessitated relocation at great cost to the respondent, and the Supreme Court affirmed the trial court's award of compensation for disturbance.

In assessing compensation for disturbance, the principle of equivalence applies, under which a displaced landowner has the right to be put, so far as money can do, in the same position as if his land had not been taken from him; in other words, monetary compensation should be neither less nor more than the loss imposed on him in the public interest.⁶⁵

A closely related issue is how the courts should treat various heads of claim: independently or concurrently? Fekumo⁶⁶ suggests that claims for compensation for disturbance and injurious affection should be independently assessed. In the case of 'injurious affection', there is usually a need to prove loss of use of the subject matter of the claim alleged to be affected; in the case of disturbance, the subject-matter of the claim is usually loss of business or trade, with (he argues) no basis for concurrent

⁶¹ Para 36 of the First Schedule to the Petroleum Act of 1969.

⁶² *Williams v Kamson* (1968) NSCC 318; *Attorney-General of the Mid-Western State v Chief Sam Warri Essi* (1977) 4 SC 71.

⁶³ *Maja v Chief Secretary to Government* (1952) 12 WACA 392.

⁶⁴ *William v Kamson* (n 62 above).

⁶⁵ *Horn v Sunderland Corporation* (1941) 2 KB 26.

⁶⁶ Fekumo (n 60 above).

assessment of the claims.⁶⁷ In practice Nigerian courts, following the reasoning in *Horn v Sunderland Corporation*,⁶⁸ have consistently treated claims for disturbance and injurious affection separately, and refused to make independent assessment of each in determining the compensatory sum. Except in the isolated case of *Farrah v. SPDC*,⁶⁹ the courts often insist that, though disturbance is an element to be considered in the assessment of compensation, like injurious affection claims, it is the only element to be considered in the total computation of compensation. My argument is that it is wrong to treat compensation for disturbance differently and independently of the compensation for the value of the land; they must be considered simultaneously in arriving at the appropriate compensation.⁷⁰

4 Conclusions

This paper has shown the different compensatory regimes for compulsory acquisition of land for mining purposes in Nigeria, which are found to be complex, flexible, inefficient and unsatisfactory. Although the Constitution and extant law examined appear to recognise the normative efficiency and distributive principles of compensation, by providing for reasonable compensation for compulsory acquisition of land for mining purposes, the criteria for assessment of compensation are unfairly skewed in favour of the acquiring authorities, thereby undermining the fairness and efficient compensatory principles. The poor compensatory regime is further accentuated by the arbitrary valuation of structural or economic crop improvements on the land by government officials, without involvement of the landowners or the community. When paid at all, the payment of compensation is usually delayed, with no serious effort made to address or assuage the feelings of indigenous communities or landowners, who may have profound cultural and social-political values and spiritual attachments to land holdings. Although the Constitution states that compensation should be paid promptly, the period within which payment is to be made is often left undefined in the statutes.

While one must acknowledge the need for government acquisition of land and control of resources for social and development purposes, the inadequate compensation or non-payment to land-owners affected has left many Nigerians landless, helpless and agitated; hence the need for a thorough reform of the compensatory regime in Nigeria, and for more activism on the part of the judiciary. Special legislation is needed to deal with compensation, particularly the valuation criteria, if the rights of landowners and lives and properties of the mineral licensees and their

⁶⁷ JA Omotola 'The Quantum of Compensation for Oil Pollution' in JA Omotola (ed) *Environmental Laws in Nigeria including Compensation for Pollution* (1990) 292.

⁶⁸ *Horn v Sunderland Corporation* (1941) 1 All ER 480.

⁶⁹ *Shell Petroleum Development Co. of Nigeria* (n 59 above).

⁷⁰ *Horn v Sunderland* (n 65 above); *M'Ardle v Glasgow Corp* (1972) SC 41.

employees are to be protected. It is also desirable to have consistency in the assessment of compensation on acquisition of land in materially similar cases, whether or not the statutory provisions apply.

CONCLUSION

African land law is a rich tapestry, for which the term 'legal pluralism' might have been invented. This book and its companion volume try to reflect some of that richness, and these conclusions cover both books (*Essays* and *Local case studies*). Africa's sheer size and diversity underlays its land law – a human population of about a billion, speaking hundreds of languages, on a land mass of some 30 million square kilometres. The continent has experienced over the last century unprecedented changes. European colonisation was succeeded after only a few decades by decolonisation and the creation of new nation states, with over fifty members in the African Union. Violent upheavals are being caused by pressures of population growth, environmental change, urbanisation and competition for natural resources. The rule of law may be an urgent aspiration, but whose law? The very structures of law can be seen as colonial imports, as discussed in Home's chapter (*Essays* book) on the prospects for a pro-poor land law, while the boundaries of national jurisdictions are largely colonial demarcations upheld through the Cairo Declaration, as discussed in Donaldson's chapter.

Pre-colonial or indigenous legal cultures mostly evolved over centuries in hundreds of tribal and clan communities, and were rarely codified in written form until the 20th century. The religion of Islam did provide something of a legal code over much of the continent, spreading from the north over centuries, as discussed in Sait's chapter (*Essays* book) through specific country case studies. Customary law, developed by and for local communities rather than imposed by the state, was acknowledged but marginalised by the dual mandate or trusteeship ideology of colonial administrations. It has shown lasting resilience, but remains in continuing tension with imported concepts of private property and state intervention, while the colonial powers confiscated the best land for white settlement and economic development (or exploitation, depending upon one's viewpoint). How to deal with these conflicts and contradictions is the great challenge facing African land law, as explored by Kangwa's chapter on Namibian land reform (*Local case studies* book) and Amokaye's two chapters on Nigeria (respectively on the Land Use Act and land expropriation for mineral exploitation).

The emergence of an international human rights movement since the Second World War is having a growing impact upon African land law. It has exposed the failure of customary law to respond adequately to social and economic change, as shown in two chapters on Kenya (*Essays* book) – on the disadvantage faced by women in rural areas (Onyango and others), and by orphans and vulnerable children (Anang'a and others). It has revived indigenous land rights claims in Africa as in other continents, as explored by two chapters in the *Essays* book: Gilbert and Couillard's, and

Njoh's chapter. Such emerging human rights law potentially challenges the legal centralism of the postcolonial nation-state, and Chigara's chapter (*Essays* book) on the *humwe* principle raises the possibility of a new African jurisprudence, recognising and applying legal principles that have roots in African society and history.

The *Local case studies* book further explores national and local situations. Western concepts of trusteeship (formerly the 'civilising' mission) still permeate the liberal development and peace agenda, as discussed in McAuslan's chapter on post-conflict land policies in several African countries. The case presented by Hernando de Soto for the legal empowerment of the poor through formalising their property rights also exercises strong influence upon land and property law in Africa: Payne's chapter discusses one example, the ambitious Rwandan land tenure reform programme, which is seeking to formalise millions of land holdings as state-registered titles. Abdulai's chapter questions de Soto's assumed link between land titling and mortgage credit through empirical work on bank lending practices in urban Ghana. Kufuor's chapter discusses another form of property imported to Africa – the gated community for high-income residents – and links it to new institutional economics theory.

Postcolonial nation states have undertaken many land law initiatives, sometimes resulting in confusion and conflicts of laws. Molebatsi's chapter discusses the problems arising for Botswana's traditional settlements (its so-called 'urban villages') by the co-existence of a much-acclaimed Tribal Land Act and a Town and Country Planning Act imported from Britain. Van Asperen's chapter presents field research on the Namibian town of Oshakati, on an experiment with a flexible land tenure alternative to past land tenure practices. The result of legislative hyper-activity may simply be too many laws, exceeding local implementation capacity. The chapter by Home and Onyango on Kisumu (Kenya) explores the impact upon urban governance of multiple land tenure systems, while Kalabamu's chapter on Botswana warns of the danger of too much law and too many institutions concerned with land, creating opportunities for corruption and confusion.

African land law is, therefore, dynamic, and the prospects are of continuing challenge and change in many arenas: national constitutions, policy-making, statute law, administrative and executive capacity, and local and community involvement.

BIBLIOGRAPHY

- Abdullahi, HJ & Hamza, I 'Women and land in Northern Nigeria: the rights' in LM Wanyeki (ed) *Women and land in Africa* (2003) London: Zed
- Abramson, A & Theodossopoulos, D (eds) (2000) *Land, law and environment: Mythical land, legal boundaries* London: Pluto
- Ackerman, BA (1977) *Private property and the Constitution* New Haven: Yale University Press
- ACHPR 'Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples' 41st Ordinary Session, Accra, Ghana, May 2007
- Adelman, S & Paliwala, S (eds) (1994) *Law and crisis in the Third World* London: Hans Zell
- Adler R 'Geographic information in delimitation, demarcation and management of international land boundaries' (2001) 3 *IBRU Boundary and Territory Briefing* 3
- African Group, 'Aide-memoire of the African Group on the United Nations Declaration on the Rights of Indigenous Peoples' (2006)
- Aguilar, MI 'Religion as culture or culture as religion? The status quaestionis of ritual and performance' (2000) 1 *Culture and Religion: An Interdisciplinary Journal* 233
- Ajibola, B & van Zyl, D (eds) (1998) *The judiciary in Africa* Kenwyn: Juta
- Aliber, M *et al* (2004) *The impact of HIV/AIDS on land rights* Cape Town: HSRC Publishing
- Al-Nur TH 'The Sudan-Ethiopia boundary' (unpublished PhD thesis, University of Durham, 1971)
- Alexander, JG (1924) *International social progress* London: George Allen & Inwin Ltd
- Allen, T (2000) *The right to property in Commonwealth jurisdictions* Cambridge: University Press
- Allott, A 'Boundaries and the law in Africa' in CG Widstrand (ed) (1969) *African boundary problems* Uppsala: SIAS
- Aluko, BT & Amidu, AR 'Women and Land Rights Reforms in Nigeria: Promoting Land Administration and Good Governance'. Paper presented at the 5th FIG Regional Conference, Accra, Ghana, 8 – 11 March 2006.
- Anderson, JND (1978, reprint from 1955) *Islamic law in Africa* London: Frank Cass
- An-Na'im, AA *Islam and the secular state: Negotiating the future of Shari'a* (2008)
- Ardener E *Kingdom on Mount Cameroon: Studies in the history of Cameroon coast, 1500-1970* (1996) Providence: Berghahn
- Aristotle, *Nicomachean ethics*, Book V, 3:113a - 4:1132h in *The complete work of Aristotle*, Vol. 2, 1785-1787
- Asiwaju, A (ed) *Partitioned Africans 1884 - 1984* (1984) Lagos: Lagos University Press
- Baker, CE 'Property and its relation to constitutionally protected liberty' (1986) 134 *University of Pennsylvania Law Review* 764
- Banda, S 'Land law reform: A comparative analysis of South Africa's Labour Tenancy Contract and Malawi's Tenant Worker's Contract' (2006) 6 *Oxford Commonwealth Law Journal* 201
- Banik, D (2008) *Rights and legal empowerment in eradicating poverty* Aldershot: Ashgate

- Barnett, RE (1998) *The structure of liberty* Oxford: Clarendon
- Barry, M 'Now another thing must happen: Richtersfeld and the dilemmas of land reform in post-apartheid South Africa' (2004) 20 *South African Journal of Human Rights* 355
- Barume, G 'Responding to the concerns of the African States', in Charters C & Stavenhagen R (eds) *Making the Declaration work: The United Nations Declaration on the Rights of Indigenous Peoples* (2009) Copenhagen: IWGIA
- Bator, FM 'The anatomy of market failure' (1958) 72 *Quarterly Journal of Economics* 351
- Baxi, U (2003) 'Global development and impoverishment' in Cane, P & Tushnet, M (eds) (2003) *Oxford Handbook of Legal Studies* Oxford: University Press
- Becher, T & Trowler, PR (2001) *Academic tribes and territories: Intellectual enquiry and the culture of disciplines* Buckingham: Oxford University Press & Society for Research into Higher Education
- Behdad, S 'Property rights in contemporary Islamic economic thought: A critical survey' (1989) 47 *Review of Social Economy* 2
- Behrman L (1970) *Muslim brotherhoods and politics in Senegal* Cambridge, Mass: Harvard University Press
- Beitz, CR 'International liberalism and distributive justice: A survey of recent thought' (1999) 51 *World Politics* 269
- Bennett K 'Epistemicide! The tale of a predatory discourse' (2007) 13(2) *The Translator* 151
- Bennett, TW 'Historic land claims in South Africa' in Van Maanen, GE & AJ van der Walt (eds) (1996) *Property law on the threshold of the 21st century* Maklu: Apeldoorn
- Berlin, I 'Two concepts of liberty' in *Four essays on liberty* (1970) London: OUP
- Bernard, A & Kenrick, J (eds) *Africa's indigenous peoples: 'first peoples' or 'marginalised minorities'?* (2001) Edinburgh: CAS
- Bilchitz, D (2007) *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* Oxford: University Press
- Bingham T (2010) *The rule of law* London: Allen Lane
- Blench, R (2006) *The role of traditional rulers in conflict prevention and mediation in Nigeria* London: ODI
- Blomley, ND, Delaney, D & Ford, RT (eds) (2001) *The legal geographies reader* Oxford: Blackwell
- Blume, L & Rubinfeld, DL 'Compensation for takings: An economic analysis' (1984) 72 *California Law Review* 569
- Boardman, AE (1996) *Cost-benefit analysis: Concepts and practice* London: Prentice-Hall
- Boven, T *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (1993) 56
- Brantley, CS (1981) *The Giriama and colonial resistance in Kenya 1800 - 1920* Berkeley: University of California Press
- Brigham, AP 'Principles in the determination of boundaries' (1919) 7 *Geographical Review* 201-219
- Brownlie I (1979) *African boundaries* London, RIIA
- Bruce, J & Miogot-Adholla, S (eds) (1994) *Searching for land tenure security in Africa* Dubuque IA Kendall/Hunt
- Callaway, B & Creevey L (1994) *The heritage Of Islam: Women, religion, and politics in West Africa* Boulder: Lynne Rienner

- Caplan P (1975) *Choice and constraint in a Swahili community* London: OUP
- Carey Miller, DL & Pope, A (2000) *Land title in South Africa* Kenwyn: Juta
- Castellino, J & Allen, S (2003) *Title to territory in international law* Aldershot: Aldgate
- Chan, TM 'The Richtersveld challenge: South Africa finally adopts aboriginal title' in Hitchcock, R & Vinding, D (eds) (2004) *Indigenous People's Rights in Southern Africa* Copenhagen: IWGIA 114
- Chanock, MJ (1985) *Law, custom and social order: The experience in Malawi and Zambia* Cambridge: University Press
- Chanock, MJ (2001) *The making of South African legal culture 1902-1936: Fear, favour and prejudice* Cambridge: University Press
- Chanock, MA 'A peculiar sharpness' (1991) 32 *The Journal of African History* 70
- Chigara, B (2001) *Legitimacy deficit in custom: Towards a deconstructionist critique* Aldershot: Ashgate Publishing
- Chigara, B (2004) *Land reform policy: The challenge of human rights law* Ashgate: Aldershot
- Chigara, B 'From oral to recorded governance: Reconstructing title to real property in 21st century Zimbabwe' (2001) 30 *Common Law World Review* 36
- Chigara, B 'Land rights and human rights in transitional states' (2007) 11 *Mediterranean Journal of Human Rights* 101
- Chigara, B 'Social justice: the link between trade liberalization and Sub-Saharan Africa's potential to achieve the United Nations Millennium Development Goals by 2015' (2008) 26 *Netherlands Quarterly of Human Rights* 9
- Chua, A (2003) *World on fire* London: Heinemann
- Cincotta, R, Engelman, R & Anastasion, D (2003) *The security demographic - population and civil conflict after the Cold War* Washington: Population Action International
- CLEP (Commission for Legal Empowerment of the Poor) (2008) *Making the law work for everyone* New York: UNDP
- Coase, RH 'Problem of social cost' (1960) *Journal of Law & Policy* 1
- Cohen, MR 'Property and sovereignty' (1927) 13 *Cornell Law Quarterly* 11-14
- COHRE (Centre on Housing Rights and Eviction) (2009) *Legal resources for housing rights: International and national standards* Geneva
- Coldham, S 'Land-Tenure Reform in Kenya' (1979) *African Studies Journal* 615
- Colonial Office (1950) *Bibliography of published sources relating to African land tenure* London: HMSO
- Colson, E 'The impact of the colonial period on the definition of land rights' in Turner, V (ed) (1971) *Colonialism in Africa 1870-1960, Vol. 3, profile of change: African society and colonial rule* Cambridge: University Press
- Comaroff, JL & Roberts, S (1981) *Rules and processes: the cultural logic of dispute in an African context* Chicago: University Press
- Connah, G (1987) *African civilizations: Pre-colonial cities and states in tropical Africa: an archaeological perspective* New York: Cambridge University Press
- Cooper, F (1980) *From slaves to squatters: Plantation labour and agriculture in Zanzibar and Coastal Kenya, 1890 - 1925* New Haven: Yale University Press
- Cornell, D (1992) *The philosophy of the limit* London: Routledge
- Cotterrell, R (1995) *Law's communities* Oxford: Clarendon
- Cottrell, J 'Third generation rights and social action litigation' in Adelman, S & Paliwala, S (eds) (1994) *Law and crisis in the third world* London: Hans Zell

- Cotran, E 'Integration of court and application of customary law in Tanzania' (1965) 5 *East African Law Journal* 108
- Cotula, L *et al* (2008) *Land grab or development opportunity? Agricultural investment and international land deals in Africa* London: IIED, FAO & IFAD
- Craigwell-Handy, ES 'The religious significance of land' (1939) 38 *Royal Africa Society* 114
- Dagan, H & White, JJ *Governments, citizens, and injurious industries* (2000) 75 *New York University Law Review* 411
- Dagan, H 'Compulsory acquisition and distributive justice' (1999) 85 *Virginia Law Review* 772
- Dale, PF (1976) *Cadastral surveys within the Commonwealth* London: HMSO
- Darian-Smith, E & Fitzpatrick, P (eds) (1999) *Laws of the postcolonial* Ann Arbor: University of Michigan Press
- Davidson, B (1992) *The black man's burden* Oxford: James Currey
- Davy, B 'The poor and the land: poverty, property, planning' (2009) 80 *Town Planning Review* 227
- Debreu, G 'Valuation equilibrium and pareto optimum' (1954) 40 *Proceedings of the National Academy of Science* 58
- Debusmann, R & Arnold, S (eds) (1996) *Land law and land ownership in Africa: Case studies from colonial and contemporary Cameroon and Tanzania* Bayreuth: Bayreuth African Studies
- Deininger, K (2003) *Land policies for growth and poverty reduction: A World Bank Policy Research Report* Washington & Oxford: World Bank & OUP
- Deleuze, G & Guattari, F (1988) *A thousand plateaus: Capitalism and schizophrenia* London: Athlone
- Derman, B, Odgaard, R & Sjaastad, E (2007) (eds) *Conflicts over land and water in Africa* Oxford: James Currey
- Derrida, J (2006) *Specters of Marx: the state of the debt, the work of mourning and the New International* London: Routledge (translated from French)
- De Soto, H (1989) *The other path: The invisible revolution in the third world* New York: Harper & Row
- De Soto, H (2000) *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else* London: Black Swan
- De Soto, H 'Are Africans culturally unsuited to property rights and the rule of law?' in Banik, D (eds) (2008) *Rights and legal empowerment of the poor* Surrey: Ashgate
- Dias, CJ *et al* (eds) (1981) *Lawyers in the third world: Comparative and developmental perspectives* Uppsala & New York: Scandinavian Institute of African Studies and International Centre for Law in Development
- Dillon, R (1990) *Ranking and resistance: A precolonial Cameroonian polity in regional perspective* Stanford, California: Stanford University Press
- Diop, MC & Diouf, M 'L'Administration Sénégalaise, les confréries religieuses et les paysanneries' (1992) 17 *Africa Development* 65
- Dixon-Gough, R & Mansberger, R (eds) (1999) *Transactions in international land management* (vol 4) Aldershot: Ashgate
- Donaldson, JW *Marking territory* (Unpublished PhD thesis, Durham University, 2010)
- Donaldson, JW 'Pillars and perspective: demarcation of the Belgian Congo-Northern Rhodesia boundary' (2008) 34 *Journal of Historical Geography* 485
- Donaldson, JW 'Where rivers and boundaries meet' (2009) 11 *Water Policy* 629

- Donaldson, JW & Williams A 'Delimitation and demarcation' (2008) 13 *Geopolitics* 687
- Dowson, E & Sheppard, VLO (1956) *Land registration* London: HMSO
- Driesen, DM 'The societal cost of environmental regulation: Beyond administrative cost-benefit analysis' (1997) 24 *Ecology Law Quarterly* 579 - 580
- Dubow, S (1989) *Racial segregation and the origins of apartheid in South Africa 1919-36* Oxford: Macmillan
- Dugard, J & Roux, T 'The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004' in Gargarella, R, Domingo, P & Roux, T (eds) (2006) *Courts and social transformation in the new democracies* (2006) Aldershot: Ashgate
- Durand-Lasserve, A & Royston, L (eds) (2002) *Holding their ground: Secure land tenure for the urban poor in India, Brazil and South Africa* London: Earthscan
- Dworkin, R (1990) *Law's empire* London: Fontana Press
- Dworkin, R (1991) *Taking rights seriously* London: Duckworth
- Edge, I (ed) (2000) *Comparative law in global perspective: Essays in celebration of the fiftieth anniversary of the founding of the SOAS Law Department* London: Transnational
- Edwards, M (2004) *Civil society* Cambridge: Polity Press
- Elias, TO (1956) *The nature of african customary law* Manchester: University Press
- Ellickson, RC (1991) *Order without law: How neighbors settle disputes* Cambridge, Mass: Harvard University Press
- Epstein, RA (1985) *Takings: Private property and the power of eminent domain* Cambridge, Mass: Harvard University Press
- Ergas, Z (ed) (1987) *The African state in transition*. London: Macmillan
- Evers, S, Spierenburg, M & Wels, H (eds) (2005) *Competing jurisdictions: Settling land claims in Africa* Leiden: Brill
- Fair, L (2001) *Pastimes & politics: Culture, community and identification in post-abolition urban Zanzibar, 1890 - 1994* Athens: Ohio University Press
- Famoriyo, OA 'Administration of land allocation in Nigeria' (1985) 1 *Land Use Policy* 103
- Faundez, J (ed) (1997) *Good government and the law: Legal and institutional reform in developing countries* New York: St Martin's Press
- Faundez, J 'Legal technical assistance' in Faundez, J (ed) (1997) *Good government and the law: Legal and institutional reform in developing countries* Basingstoke: Macmillan
- Faundez, J, Footer, ME & Norton, JJ (eds) (2004) *Governance, development and globalisation: A tribute to Lawrence Tshuma* London: Blackstone Press
- Feder, G & Noronha, R (1987) 'Land rights systems and agricultural development in Sub-Saharan Africa' (1987) 2 *Research Observer* 142
- Fischer, FC 'The arbitration of the Guatemala-Honduran boundary dispute' (1933) 27 *The American Journal of International Law* 414
- Fischel, WA 'Introduction: Utilitarian balancing and formalism in taking' (1988) 88 *Columbia Law Review* 1581
- Fischel, WA & Shapiro, P 'Takings, insurance, and Michelman: Comments on economics interpretations of "just compensation" law' (1988) 17 *Journal of Legal Studies* 269
- Fisiy, FC (1992) *Power and privilege in the administration of law: Land law reforms and social differentiation in Cameroon* Leiden: African Studies Centre
- Fitzpatrick, P (2001) *Modernism and the Grounds of Law* Cambridge: University Press

- Flint, JE 'Chartered companies and the transition from informal sway to colonial rule in Africa' in S Forster *et al* (eds) *Bismarck, Europe, and Africa* Oxford: University Press
- Forman, G 'Settlement of the title in the Galilee: Dowson's colonial guiding principles' (2002) 7 *Israel Studies* 61
- Fourie, C 'Land readjustment for peri-urban customary tenure: The example of Botswana' in Home, RK & Lim, H (eds) (2004) *Demystifying the mystery of capital: Land tenure and poverty in Africa and the Caribbean* London: Cavendish
- Franck, T (1990) *The power of legitimacy among nations* New York: Oxford University Press
- Franklin, AS (1995) *Land law in Lesotho: The politics of the 1979 Act* Aldershot: Ashgate
- Freudenberger, MS (1994) *Land tenure, local institutions and natural resources in Senegal* Madison, Wis: Land Tenure Centre
- Friedman, M (1962) *Capitalism and freedom* Chicago: University of Chicago Press
- Frishman, A 'The impact of Islam on the urban structure and economy of Kano, Nigeria' (1986) 7 *Journal of the Institute of Muslim Minority Affairs* 464
- Gathii JT 'Geographical Hegelianism in territorial disputes involving non-European land relations (2002) 15 *Leiden Journal of International Law* 581
- Geertz, C (1993) *The interpretation of cultures* London: Fontana Press
- Geertz, C (1983) *Local knowledge* New York: Basic Books Inc. Publishers
- Genugten, W 'Protection of indigenous peoples on the African continent' (2010) 104 *American Journal of International Law* 29
- Ghai, YP 'Law and lawyers in Kenya and Tanzania: Some political economy considerations' in Dias, P *et al* (1981) *Lawyers in the third world* Uppsala & New York: SIAS & ICLD
- Ghai VP & McAuslan, J (1970) *Public law and political change in Kenya* Nairobi: OUP
- Gilbert, A 'On the mystery of capital and the myth of Hernando de Soto: What difference does legal title make?' (2002) 24 *International Development Planning Review* 1
- Gilbert, J (2007) *Indigenous peoples' land rights under international law: From Victims to Actors* Ardsley, NY: Transactional
- Gilbert J, 'Historical indigenous peoples' land claims' (2007) 56 (3) *International and Comparative Law Quarterly* 538
- Girvin, SD 'The architects of the mixed legal system' in Zimmermann, R & Visser D (eds) (1996) *Southern cross: Civil law and common law in South Africa* Oxford: University Press
- Glenn, HP (2000) *Legal traditions of the world: Sustainable diversity in law* Oxford: University Press
- Gloppen, S, Gargarella, R, & Skaar, E (eds) (2004) *Democratization and the judiciary: The accountability function of courts in new democracies* London: Frank Cass
- Graham, RN 'Moral contexts', (2001) 50 *University of New Brunswick Law Journal* 77
- Griffiths, J 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 6
- Griffiths, I (1995) *The African inheritance* London: Routledge
- Golan HE 'Land tenure reform in the peanut basin of Senegal' in Bruce, JW (ed) (1994) *Searching for land tenure security in Africa* Iowa: Kendall/Hunt Publishing Company

- Government of Tanzania *Report of the Presidential Commission of Enquiry into Land Matters* (1991)
- GTZ (1998) 'Property regimes in land – a socio-economic analysis' in *Land tenure in development cooperation: Guiding principles* Wiesbaden: GTZ
- Hale RL 'Coercion and distribution in a supposedly non-coercive state' (1923) 38 *Political Science Quarterly* 470
- Hamidin, HA 'From bad to worse: The implementation of the land titles ordinance in coastal Kenya, 1908-1960s' (2003)
- Hammond-Tooke, WD (1997) *Imperfect interpreters: South Africa's anthropologists 1920-1990* Johannesburg: Witwatersrand University Press
- Hanretta, S (2009) *Islam and social change in French West Africa: History of an emancipatory community* Cambridge: Cambridge University Press
- Harrington, JA & Manji, A "'Mind with mind and spirit with spirit": Lord Denning and African legal education' (2003) 30 *Journal of Law and Society* 376
- Harrington, JA & Manji, A 'The emergence of African law as an academic discipline in Britain' (2003) 102 *African Affairs* 109
- Hasian, MA (2004) *Colonial legacies in postcolonial contexts: A critical rhetorical examination of legal histories* New York: Peter Lang
- Heller, MA & Krier JE 'Deterrence and distribution in the law of compulsory acquisition' (1999) 112 *Harvard Law Review* 998
- Hertslet, E (1909) *The map of Africa by treaty* London: HMSO (3rd ed)
- Hicks, JR 'The foundations of welfare economics' (1939) 49 *Economic Journal* 696
- Hill, RP *et al* 'Global consumption and distributive justice: A Rawlsian perspective' (2001) 23 *Human Rights Quarterly* 171
- Hindson, D (1987) *Pass controls and the urban African proletariat in South Africa* Johannesburg: Ravan Press
- Hindson, D & McCarthy, J (eds) (1994) *Here to stay: Informal settlements in KwaZulu-Natal* Daldridge: Indicator Press
- Hirsch, SF (1998) *Pronouncing and persevering: Gender and the discourses of disputing in an African Islamic Court* Chicago: University Press
- Hitchcock, R & Vinding, D (eds) (2004) *Indigenous people's rights in Southern Africa* Copenhagen: International Work Group for Indigenous Affairs
- Hohfeld WN 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale Law Journal* 16
- Home, RK (1997) *Of planting and planning: The making of British colonial cities* London: Spon
- Home R 'Scientific survey and land settlement in British colonialism, with particular reference to land tenure reform in the Middle East 1920 – 1950' (2006) 21(1) *Planning Perspectives* 1
- Home, RK 'From barrack compounds to the single-family house: planning worker housing in colonial Natal and Northern Rhodesia' (2000) 15 *Planning Perspectives* 327
- Home, RK & Lim, H (eds) (2004) *Demystifying the mystery of capital: Land titling and peri-urban development in Africa and the Caribbean* London: Glasshouse Press
- Home, RK 'Land titling and urban development: The challenge of Hernando de Soto's *The Mystery of Capital*' (2003) 2 *Journal of Commonwealth Law and Legal Education* 73
- Home, RK (2007) 'Land readjustment as a method of development land assembly: A comparative overview' (2007) 78 *Town Planning Review* 459

- Hunter, D, Salzman, J & Zaelke, D (eds) (2002) *International environmental law and policy* New York: Foundation Press
- Human Rights Watch (2001) 'Rights at risk, issues of concern for Kenyan children' New York: Human Rights Watch
- Human Sciences Research Council 'The impact of HIV/AIDS on land. Case studies from Kenya, Lesotho and South Africa' (2002) Cape Town: HSRC
- Imparato, E 'Security of tenure in São Paulo' in Durand, AL & Royston, L (eds) (2002) *Holding their ground* London: Earthscan
- International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (4A)* (1988) Geneva: ILO
- International Labour Office, ILO Convention on Indigenous and Tribal Peoples 1989: A Manual (2000) Geneva: ILO
- Islamoglu, H (ed) (2004) *Constituting modernity: Private property in the east and west* London & New York: IB Tauris
- Jackson RH & Rosberg C 'Sovereignty and underdevelopment' (1986) 24 *Journal of Modern African Studies* 2
- James, RW (1971) *Land tenure and policy in Tanzania*
- Jensen, AR 'How much can we boost I.Q. and scholastic achievement?' (1969) 33 *Harvard Educational Review* 1
- Jochnick, C 'The human rights challenge to global poverty' in Van Genugten, W & Perez-Bustillo, C (eds) (2001) *The poverty of rights: Human rights and the eradication of poverty* London & New York: Zed Books 159
- Joireman, SF 'Inherited legal systems and effective rule of law' (2001) 39 *Journal of Modern African Studies* 571
- Jones, C 'The evolution of Zanzibar land law from colonial times to present' in Debusmann, R & Arnold, S (eds) (1996) *Land law and land ownership in Africa: Case studies from colonial and contemporary Cameroon and Tanzania* Bayreuth: Bayreuth African Studies
- Jones-Pauly, C 'Old problems and new ideologies in land reform in Tanzania in *Land tenure in development cooperation: Guiding principles* (1998) Wiesbaden: GTZ
- Jones, SB 'Boundary concepts in the setting of place and time' (1959) 49 *Annals of the Association of American Geographers* 241-255
- Juma, C & Ojwang, JB (eds) (1996) *In land we trust; environment, private property and constitutional change* Nairobi: ACTS
- Jumare, I '*Land tenure in Sokoto Sultanate Northern Nigeria*' (unpublished PhD thesis, York University, 1995)
- Kahn-Freund, O 'On uses and misuses of comparative law' (1974) *Modern Law Review* 1
- Kaldor, N 'Welfare propositions of economics and interpersonal comparisons of utility' (1939) 49 *Economic Journal* 549
- Kallipein, E & P Zeleza (eds) (1999) *Sacred spaces and public quarrels* London: Africa Press
- Kane, O 'Moderate revivalists: Islamic inroads in sub-saharan Africa' (2007) *Harvard International Review* 64
- Kanyinga, K (1998) *Struggles of access to land: The 'squatter question' in coastal Kenya* Copenhagen: CDR
- Karsten, P (2002) *Between law and custom: 'High' and 'low' legal cultures in the lands of the British Diaspora - US, Canada, Australia, New Zealand 1600-1900* Cambridge: Cambridge University Press

- Kealeboga, N & Wachira, GM 'Protecting indigenous peoples in Africa' (2006) 6 *African Human Rights Law Journal* 382
- Keck, M & Sikkink, K (eds) (1998) *Beyond borders: Advocacy networks in international politics* Ithaca: Cornell University Press
- Kedar, S 'On the legal geography of ethnocratic settler states: Notes towards a research agenda' (2002) 5 *Current Legal Issues* 401
- Kelsen, H (1949) *General theory of law and state*
- Kenya Land Alliance 'The National Land Policy in Kenya' (2004)
- Kenya 'National Policy on Orphans and Vulnerable Children' (2005)
- Kenya Government *Population and Household Census highlights* (2009)
- Kettani, H 'World Muslim population: 1950 – 2020' (2010) 1(2) *International Journal of Environmental Science and Development* 1
- Kirk-Greene, A (1965) *The principles of native administration in Nigeria: Selected documents 1900 - 1947* London: University Press
- Kironde JM 'Understanding land markets African urban areas: the Case of Dar es Salaam, Tanzania' (2000) 24 *Habitat International* 151
- Klabbers, J & Lefeber, R 'Africa *possidetis*' in Brolmann, C (ed) *Peoples and minorities in international law* (1993) Dordrecht: Martinus Nijhoff
- Klabbers, J 'No more shifting lines?' (1994) 43 *International and Comparative Law Quarterly* 908
- Klare, K 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 146
- Knox, A & Giovarelli, R 'Land tenure, property rights, and HIV/AIDS' (2010) Nairobi: UN-Habitat
- Kofele-Kale, N 'Response of the Bakweri Land Claims Committee to the Reply Presented by the Government of Cameroon on the Exhaustion of Local Remedies' (2003) available at http://www.blccarchives.org/files/2003_kalesubmissionachpr.pdf
- Koskenniemi, M (2002) *The gentle civilizer of nations* New York: Cambridge University Press
- Kopytoff, I (1987) *The African frontier* Bloomington: University of Indiana Press
- Kramer, MH (1997) *John Locke and the origins of private property: Philosophical explorations of individualism, community and equality* Cambridge: Cambridge University Press
- Kristof, LKD 'The nature of frontiers and boundaries' (1959) 49 *Annals of the Association of American Geographers* 269-282
- Lalonde, S (2002) *Determining boundaries in a conflicted world* Montreal: McGill-Queen's University Press
- Landman, K 'Exploring the impact of gated communities on social and spatial justice and its relation to restorative justice and peace-building in South Africa' in Van der Spuy, E, Parmentier, S & Dissel, A (eds) (2007) *Restorative justice: Politics, policies and prospects* Cape Town: Juta
- Last, M (1977) *The Sokoto caliphate* London: Longman
- Lemmen, C (2010) *The social tenure domain model* Copenhagen: FIG
- Leo, C (1984) *Land and class in Kenya* Toronto: University Press
- Levmore, S 'Just compensation and just politics' (1990) 22 *Connecticut Law Review* 306
- Levmore, S 'Compulsory acquisition, torts, and special interests' (1991) 77 *Virginia Law Review* 1344

- Levtzion, N & Pouwels, R (eds) (2000) *The history of Islam in Africa* Athens: Ohio University Press
- Lindley, MF (1969) *The acquisition and government of backward territory* New York: Negro Universities Press
- Lloyd, PC (1962) *Yoruba land law* Ibadan: Oxford University Press
- Locke, J (2004) *Second treatise on government* Oxford: Blackwell
- Lodhi, AY 'The Arabs in Zanzibar: From the Sultanate to the People's Republic' (1986) 7(2) *Journal of Institute of Muslim Minority Affairs* 404
- Loimeier, R & Seesemann, R (ed) (2006) *The global worlds of the Swahili: Interfaces of Islam, identity and space in nineteenth- and twentieth-century East Africa* Berlin: LIT
- Luckham, R 'Imperialism, law and structural dependence: The Ghana legal profession' in Dias, CJ *et al* (1981) (eds) *Lawyers in the third world: Comparative and developmental perspectives* Uppsala & New York: Scandinavian Institute of African Studies and International Centre for Law in Development
- Lugard, FD (1919) *Revision of instructions to political officers on subjects chiefly political and administrative 1913-1918* London: Waterlow
- Lugard, L (1922) *The dual mandate in tropical Africa* London: Frank Cass
- Lydon, G (2009) *On trans-saharan trails: Islamic law, trade networks, and cross-cultural exchange in nineteenth-century Western Africa* Cambridge: Cambridge University Press
- Macpherson, CB (1962) *The theory of possessive individualism* Oxford: University Press
- Mamdani, M (1996) *Citizen and subject: Contemporary Africa and the legacy of late colonialism* Princeton: University Press
- Manji, A 'Land reform in the shadow of the state: the implementation of new land laws in Sub-Saharan Africa' (2001) 21 *Third World Quarterly* 327
- Mansell, W, Meteyard, B & Thomson, A (1999) *A critical introduction to law* London: Cavendish
- Mantena, K 'Law and "Tradition": Henry Maine and the theoretical origins of indirect rule' in Lobban, M & Lewis, A (eds) (2004) *Law and History* Oxford: University Press
- Mayer, P (1961) *Townsmen or tribesmen: Conservatism and the process of urbanism in a South African city* Cape Town: University Press
- Mbembe JA 'At the edge of the world (2000) 12 *Public Culture* 263
- Mbembe, JA (2001) *On the postcolony* Berkeley: University of California Press
- McAuslan, P (1985) *Urban land and shelter for the poor* London: Earthscan
- McAuslan, P (2003) *Bringing the law back in: Essays in land, law and development* Aldershot: Ashgate
- McEwen, AC (1971) *International boundaries of East Africa* Oxford: Clarendon
- Meek, CK (1968) *Land law and custom in the colonies* (reprint) London: Frank Cass
- Meek, CK (1957) *Land tenure and land administration in Nigeria and the Cameroons* London: Her Majesty's Stationery Office
- Meinzen-Dick, R & Pradhan, R (2002) *Legal pluralism and dynamic property rights* Washington DC: IFPRI
- Merryman, JH 'Comparative law and social change: On the origins, style, decline and revival of the law and development movement' (1977) 25 *American Journal of Comparative Law* 457
- Michelman, FI 'Tutelary jurisprudence and constitutional property' in *Liberty, property and the future of constitutional development* (1990) 127

- Michelman, FI 'Possession vs distribution in the constitutional idea of property' (1987) 72 *Iowa Law Review* 1319
- Michelman F 'The common law baseline and restitution for the lost commons: A reply to Professor Epstein' (1997) 64 *University of Chicago Law Review* 69
- Michelman, F 'Property, utility, and fairness: Comments on the ethical foundation of "just compensation" law' (1967) 80 *Harvard Law Review* 1165
- Middleton, J (1961) *Land tenure in Zanzibar* London: HMSO
- Migot-Adholla, S & Hazell, P (1991) 'Indigenous land rights system in Sub-Saharan Africa: a constraint on productivity?' *World Bank Economic Review* 155
- Miles, J 'Customary and Islamic law and its development in Africa' (2006) 1 *African Development Bank Law for Development Review* 81
- Miles, WFS (1994) *Hausaland divided* Ithaca: Cornell University Press
- Miller, D (1999) *Principles of social justice* Harvard Massachusetts: Cambridge University Press
- Morris, H & Read, J (1972) *Indirect rule and the search for justice: Essays in East African legal history* Oxford: Clarendon
- Motha, S & Perrin, C 'Deposing sovereignty after Mabo: Special issue' (2002) *Law and Critique* 13
- Mostert, H & Fitzpatrick P 'Living in the margins of history on the edge of the country' – Legal foundation and the Richtersveld community's title to land *JSA Law* (2004) (2) & (3) 309 and 498
- Moyo, VN 'The National Land Policy 1995, the Land Acts 1999 & the Presidential Commission of Inquiry into Land Matters: Contradictory perspectives on land reforms and securing rights of disadvantaged Tanzanians' (2002)
- Muciai-Kattambo, V, Kabeberi-Macharia, J & Kameri-Mbote, P in Kabeberi-Macharia J (ed) (1995) *Women, laws, customs and practices in East Africa – laying the foundation* Nairobi; Women and Law in East Africa
- Mullin, D 'Land reforms, poverty reduction and HIV/AIDS' (2004)
- Murray C & O'Regan C (eds) (1990) *No place to rest: Forced removals and the law in Southern Africa* Cape Town: Oxford University Press
- Mussen, PH *et al* (ed) (1984) *Child development and personality* London: Harper and Row Publishers itchcoHH
- Mutale, E (2004) *The management of urban development in Zambia* Aldershot: Ashgate
- Mwaisondola, GM 'The modern law of mortgages in Tanzania: The role of the Land Act, 1999' (unpublished PhD Thesis, University of Birmingham, 2007)
- Ng'ong'ola, C 'Land problems in some peri-urban villages in Botswana and problems of conception, description and transformation of tribal land tenure' (1992) 36 *Journal of African Law* 140
- Ng'ong'ola, C 'Customary law, land tenure and policy in some African countries at the threshold of the twenty-first century' in Van Maanen, GE & van der Walt, AJ (eds) (1996) *Property law on the threshold of the 21st century* Apeldoorn: Maklu
- Nijman, J & Nollkaemper, A (2007) *New perspectives on the divide between national and international law* Oxford: University Press
- Njoh, AJ 'The political economy of land reforms in a post colonial state' (1998) *International Journal of Urban & Regional Research* 22
- Njoh, AJ 'Continuity and change in Cameroonian land policy' (2000) *Planning Perspectives* 15
- Njoh, AJ 'Development implications of colonial land and human settlement policies' (2002) *Habitat International* 26

- Njoh, AJ (2003) *Planning in contemporary Africa: the state, town planning and society in Cameroon* Aldershot: Ashgate
- Nonet, P & Selznick, P (1978) *Law and society in transition: Toward responsive law* New York: Harper & Row
- Norton, G (2008) *Land, property, and housing in Somalia* Oslo: NRC
- Nozick, R (1974) *Anarchy, state, and utopia* Oxford: Blackwell
- Ntsebeza, L 'Land redistribution in South Africa: the property clause revisited' in Ntsebeza, L & Hall, R (eds) (2007) *The land question in South Africa: The challenge of transformation and redistribution* Cape Town: HRSC Press
- Nunes, R (2002) *do Usucapiao* (in Portuguese) Rio: Editora Forense
- Nwabueze, BO (1974) *Presidentialism in commonwealth Africa* C. Hurst & Co
- Obi, C 'Globalisation and local resistance: The case of the *Ogoni v Shell*' (1997) *New Political Economy* 137
- Ochonu, M 'Colonialism within Colonialism: The Hausa-caliphate imaginary and the British colonial administration of the Nigerian middle belt' (2008) 10(2) *African Studies Quarterly*
- Offer, A 'The origins of the law of property Acts 1910-1925' (1977) 40 *Modern Law Review* 505
- Office of the Geographer, United States Department of State 'No 119 Angola-Zambia Boundary' (1972) *International Boundary Study* 4
- Ogendo, O (1991) *Tenants of the crown; evolution of Agrarian law and institutions on Kenya* Nairobi: ACTS, Nairobi
- Okello, J (1967) *Revolution in Zanzibar* Nairobi: East African Publishing House
- Okuro SO 'Spoiling property' (2002) 11 *African Sociological Review* 108
- Omotola, JA 'The quantum of compensation for oil pollution' in JA Omotola (ed) (1990) *Environmental Laws in Nigeria including Compensation for Pollution* Lagos: University Press
- Onyango, L *et al* (2007) 'Coping with history and hydrology: How Kenya's settlement and land tenure patterns shape contemporary water rights and gender relations in water' in Van Koppen, B; Barbara, CP & Giordano, M (eds) (2007) *Community based water law and water resource management reform in developing countries* Oxfordshire: CABI
- Onyango, LA 'Poverty, livelihoods and property rights in the Nyando basin, Kenya; a case for integrated approaches to development planning' (unpublished PhD thesis, Maseno University, 2008)
- Packer, I (2001) *Lloyd George, liberalism and the land: The land issue and party politics in England, 1906-1914* Woodbridge: Boydell
- Pakenham, TF (1991) *The scramble for Africa* London: Weidenfeld & Nicolson
- Payne, G (ed) (2002) *Land, rights and innovation: Improving tenure security for the urban poor* London: ITDG
- Pew Research Centre *Mapping the global Muslim population: A report on the size and distribution of the world's Muslim population* (2009)
- Pierce, S (2005) *Farmers and the state in colonial Kano: Land tenure and the legal imagination* Bloomington: Indiana University Press
- Pierce, S 'Farmers and "prostitutes": Twentieth-century problems of female inheritance in Kano Emirate, Nigeria' (2003) 44 *Journal of African History* 463
- Pigou, AC (1912) *Wealth and welfare* London: Macmillan
- Pim, A (1946) *Colonial agricultural production* London

- Pinheiro, PS (2007) *Housing and property restitution for refugees and displaced persons: Implementing the 'Pinheiro principles'* UN (joint FAO, IDMC, OCHA, Habitat, UNHCR)
- Platteau, JP 'The evolutionary theory of land rights as applied to Sub-Saharan Africa: A critical assessment' (1996) 27 *Development and Change* 29
- Platteau JP *et al* (2000) *Marriage system, access to land, and social protection for women*
- Plaut, M 'The conflict and its aftermath' in D Jacquin-Berdal & M Plaut (eds) (2005) *Unfinished Business* Lawrenceville: Red Sea Press
- Poole, T 'Harnessing the power of the past? Lord Hoffmann and the Belmarsh detainees Case' (2005) 32 *Journal of Law and Society* 534
- Porter, L (2010) *Unlearning the colonial cultures of planning* Aldershot: Ashgate
- Porier, MR 'Compulsory acquisition and natural hazards policy: Public choice on the beachfront' (1993) 46 *Rutgers Law Review* 260
- Pouwels, RL (1992) *Horn and crescent: Cultural change and traditional Islam on the East African coast* Cambridge: Cambridge University Press
- Prescott, JRV & Triggs G (2008) *International frontiers and boundaries*
- Pue, SS & Sugarman, D (eds) (2003) *Lawyers and vampires: Cultural histories of legal professions* Oxford & Portland: Hart
- Rajagopal, B (2003) *International law from below: Development, social movement and third world resistance* Cambridge: Cambridge University Press
- Radin, MJ (1993) *Reinterpreting property* Chicago: University Press
- Radin, M 'Property and personhood' (1982) 34 *Stanford Law Review* 957
- Radin MJ (1996) *Contested commodities* Cambridge, Mass: Harvard University Press
- Ranger, T 'The invention of tradition in colonial Africa' in Hobsbawm, E & Ranger, T (eds) *The invention of tradition* (1983) Cambridge: Cambridge University Press
- Ratner SR 'Drawing a better line' (1996) 90 *American Journal of International Law* 607
- Ratner SR 'Land feuds and their solutions' (2006) 100 *American Journal of International Law* 814
- Rawls, J (1971) *Theory of justice and political liberalism* Cambridge, Mass: Belknap Press
- Rawls, J (1999) *A theory of justice* Oxford: Oxford University Press
- Reich, CA 'The new property' (1964) 73 *Yale Law Journal* 771
- Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities submitted in accordance with 'Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005)
- Resiman, M 'Protecting indigenous rights in international adjudication' (1995) 89(2) *American Journal of International Law* 354
- Richards, A (1939) *Land, labour, and diet in Northern Rhodesia: an economic study of the Bemba tribe* Oxford: University Press
- Rivers, J 'The interpretation and invalidity of unjust laws' in Dyzenhaus, D (ed) (1999) *Recrafting the rule of law: The limits of legal order*, Oxford: Hart Publishing
- Roberts, R & Mann, K (eds) (1992) *Law in colonial Africa* London: James Currey
- Robertson M 'Dividing the land: An introduction to apartheid land law' in Murray, C & O'Regan, C (eds) (1990) *No place to rest: Forced removals and the law in Southern Africa* Cape Town 122

- Robinson, D (2000) *Paths of accommodation: Muslim societies and French colonial authorities in Senegal and Mauritania, 1880-1920* Athens: Ohio University Press
- Robinson, D 'France as a Muslim power in West Africa' (1999) 46(3) *Africa Today* 105
- Robinson, D (2004) *Muslim societies in African History* Cambridge: Cambridge University Press
- Robinson, JB (1996) *The power of apartheid: State, power and space in South African cities* London: Butterworth-Heinemann
- Rose, L 'Children's property and inheritance rights and their livelihoods' (2006)
- Roux, T 'Pro-poor court, anti-poor outcomes: Exploring the Performance of the South African Land Claims Court' (2004) 20 *South African Journal of Human Rights* 511
- Rowling, CW *Report on land tenure: Kano Province* (1939)
- Royal Geographical Society 'The Barotse Boundary Award' (1905) 26 *Geographical Journal* 201 - 204.
- Rubinfeld, J 'Using' (1993) 102 *Yale Law Journal* 1077
- Ruggie JG 'Territoriality and beyond' (1993) 47 *International Organization* 139-174
- Russell, PH (2005) *Recognizing Aboriginal title: The Mabo case and indigenous resistance to English-settler colonialism* Toronto: University of Toronto Press
- Sachs, JD (2005) *The end of poverty: how we can make it happen in our lifetime* London: Penguin
- Sait, S & Lim, H 'Accidental Islamic feminism: Dialogical approaches to Muslim women's inheritance rights' in Lim, H & Bottomley, A (eds) *Feminist Perspectives on Land Law* (2007) 133
- Sait, S & Lim, H *Land, law and Islam: Property and human rights in the Muslim world* (2006)
- Sait, S & Lim, H 'Islamic inheritance laws and systems' (2010)
- Sait, S *The relevance of Islamic land law for policy and project design* (2008)
- Schapera, I (1943) *Native land tenure in the Bechuanaland Protectorate* London: Lovedale
- Sallis, J (1987) *Deconstruction and philosophy, the texts of Jacques Derrida*, Chicago: University of Chicago Press
- Santos, BS 'The law of the oppressed: the construction and reproduction of legality in Pasargada' (1977) 12 *Law and Society Review* 5
- Secretariat of the CBD *Akwé: Kon Guidelines* (2004).
- Shaw, F *A tropical dependency: An outline of the ancient history of the Western Sudan, with an account of the modern settlement of Northern Nigeria* (1905) London: James Nisbet
- Shaw, MN (1986) *Title to territory in Africa* Oxford: Clarendon
- Shaw, MN (1997) *International law* London: Hodder
- Shelton, D (1999) *Remedies in international human rights law* Oxford: University Press
- Shipton, P 'The Kenyan land tenure reform: Misunderstandings in the public creation of private property' in Downs, RE & Reyna, SP (eds) (1988) *Land and Society in Contemporary Africa* Hanover: University Press of New England
- Shivji, IG (1998) *Not yet democracy: Reforming land tenure in Tanzania* Dar es Salaam: IIED
- Sibley, D (1995) *Geographies of exclusion: Society and difference in the West* London: Routledge

- Siegan, BH (1997) *Property and freedom: The constitution, the courts, and land-use regulation*
- Simpson, JR (1976) *Land law and registration* Cambridge: University Press
- Singer, JW & Beerman, JM 'The social origins of property' (1993) 6 *Canadian Journal of Law & Jurisprudence* 245
- Slaughter, MM 'American Indian tribes: 'Not as belonging to but as existing within' (2000) *Law and Critique* 11
- Smits, J (2002) *The making of European private law: Towards a Ius Commune Europaeum as a mixed legal system* Antwerp-Oxford-New York: Intersentia
- Smith, ML 'Sir Percy Girouard: French Canadian proconsul in Africa 1906 - 1912' (unpublished MA thesis, McGill University 1989)
- Snyder, F 'The failure of "law and development"' (1982) *Wisconsin Law Review* 373
- Soper, JPH 'Arbitrations and analysis' *Estate Gazette* (1965) 132
- Stephenson, MA & Ratnapala, S (1993) *Mabo: A judicial revolution* Brisbane: University of Queensland Press
- Steiner, H (1994) *An essay on rights* Oxford: Blackwell
- Stephenson, MA & Stephenson, SR (1993) *Mabo: A judicial revolution* Brisbane: University of Queensland Press
- Stokes, E (1959) *The English utilitarians and India* Oxford: Clarendon
- Sunstein, CR 'On property and constitutionalism' (1993) 14 *Cardozo Law Review* 914
- Syagga, P 'Land ownership and land use in Kenya' (2005)
- Tande, D 'Bakweri armed resistance to German colonialism, 1891- 1894' (online) <http://www.blccarchives.org>
- Taylor, C (1985) 'Atomism' in *Philosophy and the Human Sciences* Cambridge: Cambridge University Press
- The report of the working group: *Advisory Opinion of the ACHPR Concerning the UNDRIP*, adopted at the 40th Ordinary session of ACHPR, in May 2007, Accra, Ghana
- Thome, JR 'Land rights and agrarian reform: Latin American and South African perspectives' in Faundez, J (ed) (1997) *Good government and law: Legal and institutional reform in developing countries* Basingstoke: Macmillan
- Thompson, BH 'The Endangered Species Act: A case study in compulsory acquisition and incentives' (1997) 49 *Stanford Law Review* 361
- Tobi, N (1996) *Sources of Nigerian law* Lagos: MIJ
- Torhonen, MP & Goodwin, DP 'Would a registry map hang comfortably in a round mud hut? A register of titles for Zimbabwe's communal areas: philosophical and technical considerations' in Dixon-Gough, R & Mansberger, R (eds) (2002) *Transactions in international land management* Aldershot: Ashgate
- Toulmin, C & Quan, J (eds) (2000) *Evolving land rights, policy and tenure in Africa* London: IIED & NRI
- Touval, S 'The Organization of African Unity and African borders' (1967) 21 *International Organization* 102
- Triaud, JL 'Islam in Africa under French colonial rule' in Levtzion, N & Pouwels, R (eds) *History of Islam in Africa* (2000) Athens: Ohio University Press 169
- Trimingham, JS (1964) *Islam in East Africa* Oxford: Clarendon
- Tvedt, T (1998) *Angels of mercy or development diplomats: NGOs & foreign aid* Oxford: James Currey

- Tshuma, L (1997) *A matter of (in)justice: Law, state and the Agrarian question in Zimbabwe* Harare SAPEs
- Tsikata, D 'Securing women's interests within land tenure reforms: Recent debates in Tanzania' (2003) 3(1) *Journal of Agrarian Change* 149
- Twining, W (1964) *The place of customary law in the national legal systems of East Africa* Chicago: Chicago University Press
- UN 'Award of 30 May 1905: The Barotseland Boundary Case (Great Britain, Portugal)' (1905) XI *Reports of International Arbitral Awards* 69
- UN-HABITAT (2010) *Land inventory in Botswana: Processes and lessons* Nairobi: UN-HABITAT
- UN-HABITAT (2010) *Land, property and housing rights in the Muslim world: A guide for facilitators* Nairobi: UN-HABITAT
- UN-HABITAT (2010) *Land and natural disasters: Guidance for practitioners* Nairobi: UN-HABITAT
- UNICEF 'Children and youth in history' (2010) at <http://chnm.gmu.edu/cyh/primary-sources/293> (accessed 27 September 2010)
- Unruth, JD 'Land rights in post-war Liberia (2009) 26 *Land Use Policy* 428
- Van Der Walt, AJ (2009) *Property in the margins* Oxford & Portland: Hart
- Van Genugten, W & Perez-Bustillo, C (eds) (2001) *The poverty of rights: Human rights and the eradication of poverty* London & New York: Zed Books
- Van Maanen, GE & van der Walt, AJ (eds) (1996) *Property law on the threshold of the 21st century* Maklu: Apeldoorn
- Uzoigwe, GN 'European partition and conquest in Africa in Boahen, AA (ed) *General history of Africa VII* (1985) Geneva: UNESCO 31
- Wa Mutua, M 'Why redraw the map of Africa (1994-95) 16 *Michigan Journal of International Law* 1113
- Walker, C 'Redistributive land reform: for what and for whom?' in Ntsebeza, L & Hall, R (eds) (2007) *The land question in South Africa: The challenge of transformation and redistribution* Cape Town: HRSC Press
- Wambui, K *et al* 'The impact of HIV/AIDS on land issues in Kenya' (2002) Ottawa: IDRC
- Warhurst, P 'A troubled frontier 1898-1906' (1978) 77 *African Affairs* 214
- Watson T 'From legal transplants to legal formants' (1995) 43 *American Journal of Comparative Law* 469
- Weber, H *et al* (eds) "Never drink from the same cup: Proceedings of the conference on indigenous peoples in Africa" (1993)
- Weiss, T & DS (eds) (2007) *The Oxford handbook on the United Nations* Oxford: University Press
- Welch, CE & Meltzer, RI (eds) 1984 *Human rights and development in Africa* Albany: Suny Press
- Welch, CE (1995) *Protecting human rights in Africa: Roles and strategies of non-governmental organizations* Philadelphia: University of Pennsylvania Press
- Welsch, W 'Transculturality – the puzzling form of cultures today' in Featherstone, M & Lash, S (eds) (1999) *Spaces of culture: City, nation, world* London: Sage
- Werbner, RP 'The quasi-judicial and the experience of the absurd: remaking land law in North-Eastern Botswana' (1980) 24 *Journal of African Law* 131
- Werbner, RP (ed) (1982) *Land reform in the making: Tradition, public policy and ideology in Botswana* London: Rex Collings

- Westerlund, D (1980) *Ujamaa na dini: A study of some aspects of society and religion in Tanzania, 1961 - 1977* Stockholm: A & W International
- Westlake, J (1894) *Chapters on the principles of international law* Cambridge: Cambridge University Press
- Williams, P & Chrisman, L (eds) (1994) *Colonial discourse and postcolonial theory* New York: Columbia University Press
- Woodman, GR 'The idea of legal pluralism' in Dupret, B (ed) (1999) *Legal pluralism in the Arab world* Hague: Kluwer Law International
- Woodman, GR (1996) *Customary land law in the Ghanaian courts* Accra: Ghana Universities Press
- World Bank (2009) *Systems of cities: Harnessing urbanization for growth and poverty alleviation* Washington
- Yakubu, MG (1985) *Land law in Nigeria* London: Macmillan
- Yamano, T & Deininger, K 'Land conflicts in Kenya' (2005)
- Yeoh, B 'Historical geographies of the colonised world' in Graham, B & Nash, C (eds) (2000) *Modern historical geographies* Harlow: Longman
- Yusuf, I 'Islam and African socialism: A study of the interactions between Islam and Ujamaa socialism in Tanzania' (unpublished PhD Thesis, Temple University, 1990)
- Young, R (2001) *Postcolonialism: An historical introduction* Oxford: Blackwell
- Zerbe, N 'Biodiversity, ownership and indigenous knowledge' (2005) 54 *Ecological Economics* 493