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Customary tenure: remaking property for the 21 st century

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Abstract

This chapter examines contemporary customary land tenure, probably the largest tenure regime in the world in numbers of persons dependent upon this system to secure land rights and in regard to proportion of global land area held. The chapter argues that customary rights have always had incidents of property although not precisely those which state-made property relations have conventionally imposed and legally entrenched. This is changing, and quite dramatically. Reforms are sudden and recent given the long history of presumed immutable legal norms around property, most radically noticeable in Africa, the focus of this study. The implications for the shape of agrarian society are yet to be grasped.

1. INTRODUCTION

A contemporary view of customary land tenure is purposely presented in this chapter. This is because this system of landholding and regulation continues to fight for its survival in a world where non-customary systems dominate. This matters. Globally, the customary domain remains a major world tenure regime, potentially embracing more than six billion hectares held individually or collectively by more than two billion rural poor (Alden Wily, 2011). Most adherents live in agrarian economies where stable access to land is a primary concern.

However, the extent to which this reality is legally supported is dramatically more modest. For the most part, national laws rank customary rights as permissive occupancy on state lands (often termed public lands) and may be suspended virtually at will – and often are. As market-led land commoditisation globally expands, including periodic surges of large-scale capture of local lands for local or foreign enterprise, such as presently occurring in especially Africa and Asia, risks to customary rights are more immediately for rural communities ([Hall et al. 2015](#)).

This chapter therefore cannot afford to dwell upon internal customary land practices but must locate the regime within the wider socio-political and legal environment, and address impediments to legal recognition of customary rights. These lie principally in two norms: continuing state (and state law) doubts that customary interests amount to property as classically understood, combined with reluctance to administratively and legally support the vesting of governance of these rights in communities. Both have long histories as conventions, and both are inseparable from state-making, and more contemporary difficulties in the modernization of the agrarian state.

The position taken here may be stated at once. This is that customary land interests have always had founding incidents of ownership amounting to property. Although late in the day, its constructs and the community-based regime through which rights are identified and upheld deserve prompt adoption into national law as a lawful form of ownership. These rights must also be afforded the equivalent protection given to interests acquired under non-customary regimes. How precisely those incidents marry with those the land market presumes essential is discussed later.

A further thesis is pursued in this chapter. This is, that the issue of where customary rights sit in the modern world is not only a matter of just survival of traditionally born regimes on their own merits but also a pressing matter of sound social transformation. For there are elements in regimes termed customary or indigenous that are urgently needed for a safe and workable agrarian world.

Two stand out. The first is the integrated nature of customary regimes as systems of rights to land and as institutional orders governing those rights, combined with these regimes being localised at grassroots levels of rural society. These attributes tend to be taken for granted or ignored. Yet these entrenched and experienced systems offer enormous utility as institutional foundations for persisting demands for more inclusive governance, so important in environments where over-centralization of authority and trust and accountability to ordinary citizenry can be so fragile. This also has implications for corollary needed adjustment in skewed lines between matters of private and public law, this tending to be opaque in many developing economies in matters of property.

The second element of note is the collective land and resource possession by social communities that these regimes provide (indeed, to the extent that 'customary' and 'communal' are often conjoined as terms). While at danger of over-simplification, collective tenure predominantly applies at two levels; in respect of the community's entire land area (and which may be equated with radical title enjoyed by community members as a whole); and in respect of specific naturally collective resources within that domain, such as forests, rangelands, or waterlands. Both build upon the logic of land use, most visible to outsiders in regard to the latter commons. Where denial or constraint is placed upon the practice and legality of collective tenure, complex, nuanced - and sensible - rights are lost along with attendant losses to rural livelihood, the result most remarked. Where physical access to such resources is lost, including through eviction, displacement or suppression of use rights, livelihood effects may be extreme ([Neef, 2013](#), [Moreda, 2015](#)).

However, it is increasingly evident that this is not all that is lost when communities lose traditional common properties. The resources themselves can suffer demise. Retention of especially forest and wetland commons can mean the difference between resource survival and loss as conversion of these lands normally follows their taking from communities. Not surprisingly, the weak development of collective tenure in statute is of growing interest to conservationists, heightened as climate change implications come to bear ([Stevens et al., 2014](#)).

The last deserves more elaboration, as it will not be further pursued in this chapter. The links between rights and resource conservation are straightforward. It may be argued that natural resource survival is more likely in the 21st century to depend upon customary communities within whose historical or present domains these resources fall, than upon continuation of largely poor to disastrous stewardship by governments ([FAO, 2014](#)). The reason lies in differences of incentive. For many communities, the need to keep forests, waterlands and rangelands intact (and usually with long term horizons) is a matter of intertwined historical and socio-cultural imperative and livelihood and microclimate dependence.

To this is now added crystallising grievance over the loss of these lands where this occurs in the name of public interest, but which is so often not delivered or exclusive of the original customary owners, as is occurring in the face of mass clearance of customary forestlands for oil palm estates in parts of Asia ([Hall et al., op cit.](#)). Or where historical grievance has steadily mounted where forests have been taken from communities to create state-owned protected areas but which little real protection in practice ([Alden Wily, 2014](#)). Remotely administered, and dependent upon sustained political conviction, funding,

equipment, transport and staff whose connection to the area is temporary, the state conservation mission often simply cannot match that of customary owners.

The need to counteract poor natural resource governance with community participation has grown on the global agenda since Rio in 1992. New paradigms of community based management have demonstrated gains in declining rates of forest cover and quality loss where practised. Still, twenty years on, lasting differences are most demonstrated where community roles are founded upon secure ownership of the resource, a need that dovetails with legal acknowledgement of community tenure on grounds of justice ([Zimmerman, 2012](#), [Nelson and Chomitz, 2011](#), [Nolte and Agrawal, 2013](#), [World Resource Institute and Rights and Resources, 2014](#)).

The outlook of this chapter is therefore less focused upon the historicity of surviving customary regimes and rightful demand of their present-day adherents to see their land interests entrenched, than upon the serendipitous foundation customary landholding offers for better rights and resources security, fairer platforms for land-based development transformations, and by not too remote conjunction, social peace.

The key to this, it is argued, is to endow customary rights with legal force as property interests, and with explicit inclusion of the nuanced form of collective ownership that customary regimes can deliver with its integral arrangements for regulation of that right. This suggests liberation in the contextual etymology of property, long overdue. In this way the paper continues a long conversation in the literature as to the meaning of property in the customary sector, and looks to the need – and right – for community tenure to finally take its place as a prominent and actively applied *numerus clausus* of property systems.

This is no vain hope. As this chapter surveys, steps towards this have been made. Although actions have also been taken elsewhere (especially in Latin America and Oceania in respect of self-declared indigenous peoples) the framework adopted here for examining the facts is Africa. For this is a continent where ninety per cent of rural land dependents acquire, hold and transfer rights through customary regimes. If and how those rights are legally protected could not matter more to these 650 million people.

2. THE CENTRALITY OF COMMUNITY JURISDICTION IN THE CUSTOMARY DOMAIN

What *is* customary tenure? Tomes have been written on this as practised by one or other social group including island nations such as Fiji and Papua New Guinea. Foci vary enormously, such as upon women's rights, decision-making, tenancy norms, or how traditions and rules alter in response to changing conditions. On its own, the legal anthropology of customary tenure is immensely rich, including in Africa.¹ But let us be clear, writes Jacques Vanderlinden

‘... there is no such thing as pre-colonial “African law”. The laws of Africa ... reveal huge differences between the laws of people practising agriculture, commerce, fishing, gathering, hunting and pasturing ... or having adopted various types of socio-political systems (from the extended family to one form or another of pre-state political regimes). Such diversity precludes any serious generalization, even on a regional or sub-regional basis. It is often said that most lawyers (or legal anthropologists) who present the legal system of an African ethnic group necessarily limit themselves to one group (or possibly two) in the course of their career.’ (Vanderlinden, 2008:2).

¹ C.K. Meek, 1968 (1946), M. Gluckman, 1969, I. Schapera, 1970, F. G. Snyder, 1982, F. v. Benda-Beckmann, 2007 (1970), J. L. Comoroff and S. Roberts, 1981, E. Hobsbawn and T. Ranger (eds.), 1984, G. R. Woodman, 1996, M. Chanock, 1985, and R. K. Holmes (ed.), 2011 – among many others.

Vanderlinden then gives an example from his early research in the Belgium Congo. In fact, his description of the land relations of the Zande express norms that were - and still are – familiar around the continent and beyond; such as in distinctions drawn between the rights to land held by community members and outsiders; between lands that are harvested (e.g. for hunting or wood collection) and those that are transformed for other uses (e.g. homesteads and fields), and in which land clearing signals transformation in the resulting right; and in the land allocation functions of community leaders and the empowerment these trigger over time, and yet the dependence upon community consensus for that authority to be sustained.

However, it transpires that debates as to the exceptionality versus commonality of customary norms (such as the structuralism that his contemporary, Claude Levi-Strauss, proposed) were not Vanderlinden's prime concern. What his early research taught him is the difficulties of language and the in-aptness of meanings of ownership and property in European civil law and the classical Roman conceptions that shaped these. This makes him loath to interpret even the Zande term *sende* as meaning territory, although this construct of 'community land area' is, I would argue, an inseparable adjunct of any community-based system of land relations, and just as inseparable from the land use systems upon which that tenure is built.

This is so (I perhaps too bravely declare in light of Vanderlinden's warning) whether one is examining the discrete territoriality typical of hunter-gatherers, the nuanced severalty of 'our land' with different levels of possession as practised by nomadic pastoralists, the ever-tightening spatial definition of 'our land' by settled communities confronting declining land abundance, or the socio-political and spatial battles over 'our land' which confront societies where traditional land use systems overlap (such as seen in the Sahel and Central Asian drylands where settled agro-pastoralism and nomadic pastoralism commonly overlap, or in the Congo Basin and the Kalahari Desert where hunter-gatherer domains are overlaid by those of settled farmers, and who may have migrated into these areas several hundred years past (Alden Wily, 2012a).

This suggests a structural commonality in customary tenure regimes and their 'law', which although scholars such as Vanderlinden eschew, do allow key shared characteristics to be briefly drawn forth.

First, through a modern lens, customary or indigenous land systems are no more and no less than community based regimes for the ordering and sustaining of access and use of lands and resources, and thence delivering rights and for which the community itself is the surety. These systems cannot exist without social community, or without correspondent geographical space over which the community's norms apply, and which I have referred to above as 'community land area' or 'our land'.

Second, land use dictates the norms, and changing land use and its distribution alter those norms. Hence what constitutes the right to land of a community in general or of a member of the community is myriad in form to fit the land use, and may change over time. Distinctions are most definable in the extent of individuality or collectivity applies. Scarcity, threat, and polarising social relations engaging with commoditisation predictably have most influence as change agents. In general, individualism of norms and thence rights is the familiar trajectory (whether engineered by policies and law, or not, another matter; see [Platteau, 1996](#)). However, this quite often stops short of subdivision and personalization of common resources that by their nature or remoteness are most difficult to sustain on an individual basis. This tends to deliver increasingly distinct lines between family and common lands, one society to the next.

Individuation does not necessarily mean that community jurisdiction ceases to exist. On the contrary, community jurisdiction can vibrantly exist where no common land remains, a quite common phenomenon noted in highly densely and fertile areas where all lands in the area are farmed (Alden Wily, 2007, 2012a). Thus, it is often local communal jurisdiction as compared to external (state) jurisdiction that is the most consistent marker of customary regimes. It has already been observed that this is also the attribute that makes customary regimes attractive foundations for democratic decentralization of land administration, an important element of present-day reforms.

As to the meaning of ‘ownership’ and ‘property’ within customary or indigenous regimes, this too is variable, and also mutable in line with changing socio-economic, land availability, and political conditions. However, the incidents or characteristics of these rights are arguably less important *within* the regime than in the extent to which community members retain and/or are allowed to retain determination of the norms associated with possession and use.

That is, it really doesn’t matter whether or not pre-colonial customary land relations or those of the present have attributes conventionally accorded property so much as that these interests are granted equivalent levels of protection as granted to non-customary rights to land, and, additionally, that the regime through which those rights are upheld – that is, community based governance - is permitted to operate. In a rapidly changing agrarian world, customary landholders cannot afford to hold lands without state recognition and protection of their rights as other than rights of lawful ownership.

Whether the community of persons chooses to allow this acknowledged property to be a detachable commodity, whether or not the right is held by an individual, family, or in common by the community, and whether or not the right applies to the farm, house plot or to their communal rangelands and forests are matters for the community to decide.

This also applies to how far the norms by which community based tenure regimes operate are rooted in traditions or are contemporary. Without the security of the right to choose and uphold rights in accordance with their shared local rules, communities have no choice but to of tenure to secure that possession. The more worldly-wise in a community may rationally calculate that abandonment of customary norms in favour of those offered by statutory norms is the safer means to protect individually possessed lands against wilful denial of possession or access by governments, the courts, entrepreneurs, or as against acquisitive individuals and families within their own ranks. While this may save possession for individuals, albeit in altered form, it does not save community jurisdiction or community tenure.

Nor, of concern to communities, does protecting the homesteads of individuals within the customary domain save what are often the community’s most expansive and valuable resources, off-farm lands they retain as commons. For quite aside from long treatment of customary rights as less than property, have been as long legal histories that declare undeveloped resources such as waters, foreshores, forests, rangelands and wetlands, and long-mined local surface minerals, as the property of the state. Although this was in order to capture the lucrative benefits of these lands, conservation demands over the last half-century have further entrenched these laws separating the farm from non-farm lands. This has left the claims of customary communities to these lands yet more fragile.

Logically, received tenure norms cannot be rejected only in part, although as shown below, a number of new land laws do so by tackling only the insecurity of farming homesteads, and in a manner not unlike that pursued through individualization, titling and registration. With such a narrow focus and in circumstances where farmed lands usually represent a tiny minority of the community’s traditional land assets, the possession and

control over most customary land remains firmly with the state. Preferably therefore, it is the community-based regime of tenure itself that needs protection, and irrespective of the lands to which it applies.

3. THE FOCAL ISSUE: DO CUSTOMARY RIGHTS AMOUNT TO PROPERTY AS CONCEIVED IN STATE LAW?

Historically, state law has for the most part treated indigenous/customary land interests as less than property, an orthodoxy that continues. Earlier chapters in this volume elaborate how this has come about. Still, the connections between state-making deserve emphasis as competing rights between the state and its rural populations to lucrative resources remains a factor until the present in the status of customary tenure. At colonialism in particular, whole populations, and even continents (such as Africa) were (with exceptions) rendered *terres sans maîtres* or *terra nullius* until rights under the new laws were defined, and allocated to those of the new polity's choice (normally to settlers and companies and in time, local elites who measured up (nearly) to European standards (e.g. went to church, wore top hats, had glass panes in their houses, etc.) (Alden Wily, 2007:110ff)). The majority of customary owners (usually communities) became tenants at will on their own lands. The state assumed ownership in default of what is deemed to be lands empty of owners. More accurately, local tenure was necessarily denied to legitimise the state's evolving extractive purposes and for which the law was shaped (McAuslan, 2007).

Colonizers of poor continents were of course well practised in devising legal mechanisms for achieving a *tabula rasa* of ownership if not occupation in their own expanding domains (North et al., 2009:79 ff.). Lawyers in the 1600s even managed to convince the King of England that Ireland was empty of owners on grounds (among others) that Irish customary norms contained the 'backward' practice of electing land heirs rather than relying upon the 'superior' practice of English primogeniture. As a result, the expert advocate, Sir John Davies, argued, the eldest son had no certainty of land, a barbarous custom 'contrary to the public good' and therefore incapable of being deemed property in 'civilised' common law (Dorset, 2002:11-12).

The tactics were similar as industrialization and the age of empire advanced (Polanyi, 2001, Hobsbawm, 1997). From time to time in far-flung territories colonizers encountered or developed supportive feudal and tribal norms within which dominant local interests could be absorbed in ways convenient to the new state (Amanor, 2009). Broadly, the results were the same; mass subordination of indigenous rights, displacement, and festering grievance, often contributing to civil strife and war (Chabal and Dauoz, 1999, Takeuchi (ed.), 2014).

More troubling is the reality that liberation from these legal positions is far from complete, especially in Asia and Africa. On the contrary, in Africa (perhaps the most rebellious continent of all - even now 18 of 54 countries suffer insurgencies or civil war), we will see that it remains firmly in the interest of many national governments and allied private interests to eschew reforms that secure the rights of rural populations to their lands.

Why this should be so in a supposedly enlightened 21st century is not so much a mystery as complex, and which both Marxist and neo-liberal economists continue to unpack, and within which land capture at the expense of the untitled (and unentitled) rural poor is so central in non-industrial economies (North et al., op cit., Bernstein 2010, Patnaik and Moyo, 2011). The linkages are a familiar strand of African political economy, not least in their connection to shortfalls in good governance, graphically illustrated in Jean-Francois Bayart's 'The State in Africa -The Politics of the Belly' and Michela Wrong's 'Its Our Turn to Eat'.

So where do legal notions of land as property fit in when it comes to majority customary land rights around the world? Several points should suffice. Two principles that

have great force until the present in the subordination of customary rights has been first, the progressive move since the 18th century in most of Europe and the Americas towards the norm that 'land as property' only comes into existence via acknowledgement by the state, characteristically expressed initially in registered documentation of grant, purchase or sale of parcels of land (deed registration) with elision over time in most jurisdictions that, even without sale or purchase, lands that are not recorded as owned in some official manner, are unowned. The latter consolidated from especially the 19th century to support the industrial revolution in evolution of cadastral regimes that increasingly required lands to be surveyed, measured, mapped, geographic coordinates identified, and in due course, provided with a unique identification number against which ownership and transactions are recorded and evidential documentation issued (title registration).²

Second, laws and subsequent court rulings have been as equally clear that to become a legally protected owner, one must be natural or juridical person, that is, individuals or legally recognised entities such as companies, firms and cooperatives. This posed (and still poses) immense difficulties for the communalism of most indigenous tenure regimes, and as most potently in reference to shared rights over off-farm resources.

As programmes of mass titling advanced in agrarian states during the mid to late 20th century, landholders have been offered the choice of subdividing rights and lands among individuals in order to obtain protection, or to remain tolerated occupants on private or state property. It is not surprising that such programmes were termed 'individualization, titling and registration'. Nor is it surprising that their application frequently generated conflicts within families and communities and entailed massive losses of off-farm lands to the state in absence of statutory norms for collective ownership without formation of companies or other such legal entities (Bruce and Migot-Adholla (eds.), 1994).

Customary 'property' also fell short and still does fall short against classical ideas that insist that land property cannot exist without being a tradable commodity. This means that the land becomes so absolutely autonomous of the owner and the social system within which the owner operates that transactions occur entirely on paper (or computer) and in a remote and remotely regulated marketplace. Hernando de Soto famously re-enlivened this old debate in 2000 with his conviction that, by failing to place their lands within this standardised system of formal representation, millions of poor with even the tiniest of urban parcels (his target group in Peru at the time) were denying themselves the rewards of turning these assets into mobile capital through registration (de Soto, 2000). To de Soto, the very idea of communal tenure was a double anathema as a social construct inhibiting the individualism that land markets demand.

This was hardly new; the influential Land Tenure Commission for East Africa in 1956 and World Bank policy in 1975 had said as much, and with other donors had sponsored the market-based individualization and titling reforms mentioned above. By the late 1980s, the demands of structural adjustment lending programmes that governments of low and middle income economies make land more freely available in the open market to encourage local and foreign investors to kick-start flagging economies, for local and foreign investors to kick-start their flagging economies, offered a tangible agenda against which less neo-liberal land reformers could clarify their positions.

² Property mapping goes back to Roman times. The Domesday Book (1086) in England was an early cadastre. Napoleon, Hanseatic cities, the US (Public Land System, 1785) and eventually Australia (Torrens system, 1858) and Western Canada (1871) further developed map-based systems of registration or rights and transfers.

The Commission of Inquiry into Land Matters in Tanzania led by Professor of Law, Issa Shivji, set a benchmark of response to market-based land reform in its report of 1992 (United Republic of Tanzania, 1994). This would prove influential around the continent and deserves comment.

Building upon the twenty-year history in Tanzania of village identity development, Shivji's team recommended that root title to community lands be vested directly in those communities, and rights governed by their elected governments (village councils). Alarmed, the Government of Tanzania hastily enacted a new land law to protect eviction orders that had begun to quite actively be issued to communities to free up land for investors (Regulation of Land Tenure (Established Villages) Act, 1992). The courts responded through a case decision in 1994 that reinterpreted the status of customary rights in the colonial law of Tanganyika (1923) that was still in force. The Appeal Court decided that customary rights described in law as 'deemed rights of occupancy' were protected to the same extent as 'granted rights of occupancy' (documented entitlements to individuals and registered entities) and could not be extinguished without due public purpose and payment of equivalent compensation. To deny otherwise is '... to accept that most inhabitants are squatters in their country, a 'serious proposition'.³

While the court's ruling did not cause new national land policy in 1995 to relocate radical title from the President to communities, the new land laws enacted in Tanzania in 1999 established equitable status for customary tenure in most other respects, a model increasingly aspired to a slowly growing number of other Anglophone states. Critical provisions stipulated that whether a right to land was deemed or granted 'such occupation shall be deemed to be property and include the use of land from time to time for de-pasturing stock under customary tenure' (Land Act, 1999, section 4 (3)); and

'Any rule of customary law and any decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally, shall have regard to the customs, traditions, and practices of the community concerned ...' (Village Land Act, 1999, section 20 (2)).

Uganda, newly liberated from civil war (1979-1986) grasped the core nettle of where ownership of land itself is vested. Taking a leaf out of Shivji's report, its new Constitution of 1995 established that all land is directly vested in the citizens of Uganda and shall be owned in accordance with customary, freehold, *mailo*, or leasehold regimes as apply (Article 237). More or less overnight, the state unburdened itself of most of the land of Uganda and which had been yet more firmly entrenched as state land by Idi Amin's Land Decree of 1975. This along with the important principle of equity among tenure regimes were embedded in the Land Act, 1998. The effect is for example, as customary regimes do not require rights to be formally registered in order to be upheld, customary landowners in Uganda *may* apply for certificates of customary ownership – but need not necessarily do so in order to secure legal protection of that ownership.

More widely around the continent, questions remained at the turn of the century. Could customary interests be awarded legal respect as protected property without being fungible commodities? Could customary rights to land be differentiated within local systems as variously tradable and non-tradable, and if so what would be the effects upon distribution of rights among community members? Would concentration and landlessness (or capital asset-lessness) automatically result? How could this be contained in a rural world in which millions were so dependent upon secure access and use of lands? More subtle concerns arose

³ Lohay Akonaay and Another v. the Hon. Attorney-General, High Court of Tanzania at Arusha, Miscellaneous Civil Cause No. 1 of 1993 (Unreported) and Court of Appeal of Tanzania, Civil Appeal No. 31 of 1994, reported in [1995] 2 LRC 399.

as to the implications of detachment of rights from their social context and thereby social jurisdiction. Would surrender of jurisdiction to the state and its rules signal the end of social community and the social protections that operate within it?

Changes elsewhere began to be made through the 1990s, fed by slow-burning recognition that the political liberation at independence since 1957 had not been matched by liberation of customary land rights from their ‘expropriation, suppression and subversion’ (Okoth-Ogendo, 2002). Okoth-Ogendo, among others, was precise. The commons are, he wrote, not

‘...not *res nullus* (sic) but rather are *res communis*; they represent not a species of public property but of private property for the group that controls it and whose members have access to it; individual members of the group have clear rights and duties in respect of the resources comprised therein, and clear decision making structures exist for their utilisation and management. ... In sum, therefore if by ‘property’ is meant a bundle of rights in a specified *res* vested in a verifiable body of entities recognised by a legal system, then the commons were and always have been property’ (Okoth Ogendo, 2002:5).

Even the World Bank had by 1999 conceded

‘It is now recognized that formal title, under conditions of low population density, is not necessarily the most cost-effective and desirable way to ensure secure tenure and facilitate land transfers. One alternative is to award property rights to communities, which then decide on the most suitable tenure arrangements’ (Deininger and Binswanger, 1999:269).

But what are the legal options, extinction of customary rights in favour of received forms of tenure, legal pluralism, or integration of norms in law? McAuslan, put the case bluntly

‘While any state can specifically abolish customary tenure or create rights inconsistent with the continuation of rights to land under customary tenure, doing so requires payment of compensation or land, since these rights predated the existence of the state. Customary tenure is –and always has been –one of the foundational elements of the land laws of all states in Africa. It is not an add-on to received law; indeed received law is the add-on. Received law thus needs to be adapted and adjusted to indigenous law, not vice versa, and proponents of received law should be advancing the case for legal pluralism’ (McAuslan, 2006:9). How far this has been achieved may now be addressed.

4. THE CUSTOMARY DOMAIN IN AFRICA

Africa comprises nearly three billion hectares of land (excluding waters) in 54 mainland and island states. In the absence of hard data the scope of the customary estate may be estimated by excluding urban areas, terrestrial protected areas, and rural lands subject to formal non-customary entitlement (usually termed private land). Other than protected areas, government, state and public lands are necessarily excluded in light of overlap of state and customary property as diversely defined in statutory and customary systems (Alden Wily, 2011).

Some statistics continue to surprise. Despite more than forty per cent of Africans residing in towns and cities in 2015, the proportion of land absorbed by urban areas is less than one per cent of the total land area of the continent in 2009 (Schneider et al., 2009). The extent of privately titled rural lands is much more diverse, ranging from less than two per cent of country land area in twelve states and less than five per cent in 19 other states, to 86 per cent and 79 per cent respectively in Rwanda and South Africa (Alden Wily, forthcoming). A lesser proportion of the continent is subject to formally declared Terrestrial Protected Areas (TPA) at 12 per cent of the continent (Juffe-Bignoli et al., 2014). Namibia, Zambia and Tanzania are the only countries where TPA cover more than one third of country area.

When calculated in this manner, the *de facto* customary domain in Africa extends over two thirds of the continent at more than two billion hectares. In half of countries, the customary domain embraces 80 per cent or more of country land area (Alden Wily, *forthcoming*).

An important feature of this customary domain is that it mainly comprises forest/woodlands, rangelands, and smaller areas of wetland/marshlands. Permanently cultivated lands (annual and perennial crops) account for only 7.3 per cent of the total land area of Sub Saharan Africa (Jayne et al., 2014) and which proportion falls further when the five mainly desert states of North Africa are included. Much of the 43 per cent of Sub Saharan Africa considered *potential* agricultural land by The World Bank is also presently forests or rangelands, mainly located in four forest-rich Congo Basin states (*ibid*).

Land concentration and landlessness are advancing fast in a continent declared land-rich. Medium to large farmers own 85.3 per cent of cultivated lands while 85 million small farms are crammed into the remaining 14.7 per cent of this area (GRAIN, 2014). Formal expansion into unfarmed forests and other commons and establishment of new title is also almost entirely by large farmers and commercial enterprises, not by the millions of farmers who depend directly on these lands for livelihood (*ibid*). Weak to no recognition of the proprietary nature of customary rights is a main facilitator (Jayne et al., *op cit.*), a fact of rising concern in the face of the present surge in leasing and purchases by foreign governments and companies.

In practice, the 2.2 billion hectare customary domain supports the livelihood of 650 million rural Africans, expected to rise to 1.3 billion by 2050. The customary area is modest when a present per capita allotment of 3 ha inclusive of common resources is noted. This also does not consider the dependence of millions of urban dwellers who, in addition to often closely maintaining social relations, retain land rights to community lands, which they variously activate over time, suggesting patterns of rural urban connectivity unlike those of traditional industrialization-based urbanization (Kay, 2009).

5. THE LEGAL STATUS OF CUSTOMARY RIGHTS

For all the expansiveness of the customary domain in Africa, secure tenure remains elusive for most customary landholders. Massive political change continues to only partially embrace land rights. Many of the 48 new national constitutions in Africa only slightly improve provisions on property. The constitutions of Mozambique (1990), Uganda (1995), South Africa (1997) and Kenya (2010) are exceptions, each giving customary rights protection as property interests.

Around 30 states have introduced new land laws in the same 25 years, but only half of which handle majority customary land interests in new ways. Many of the land *Observatoires* or Commissions of Inquiry instituted have been sitting for years with little result (Nigeria, Zambia, Ghana, The Gambia, Chad, Cameroon and DRC). The persuasive interests of large-scale agricultural enterprise are often a discernible cause, senior policy makers caught between different sets of interests and in which many have an additional personal stake as businessmen. For example, after a decade in which framework laws promised to set some rural areas aside for communities, Gabon has now produced an alternative vision of development directly supported by its President in alliance with companies, which provides for entrepreneurs to be granted rural lands irrespective of local claims (Law No. 002 of 2014 on Sustainable Development in the Gabonese Republic).

A similar revisionism appears in respect of natural resource legislation, following a vibrant phase during the 1990s in especially the forestry sector which opened the door for communities to secure forested commons as their collective property by declaring and managing these lands as registered community forest reserves, a paradigm most expansively

developed and delivered in Tanzania (United Republic of Tanzania, 2012). Routes to conservation and to securer claim to off-farm resources by communities were enormously aided (Alden Wily, 2012b). A comparable breakthrough occurred in respect of wildlife ownership in customary lands in Namibia, and to a lesser extent in Kenya through a construct of conservancies. One or two recent laws sustain these rights-enriching approaches to off-farm lands and resources, such as recently expressed in a new forest law in DRC (2014).

However, when the continent as a whole is considered most jurisdictions have ultimately resisted changes that allow transfer significant forests, rangelands, and wetlands from state to community ownership. New natural resource legislation now reverts to paradigms designed to reduce expansion of formalization of the customary sector as inclusive of off-farm natural resources, through offering more access to decision-making, use rights and benefit shares, such as the expressed in Kenya's proposed new but essentially unchanged forest law to be enacted in 2015. Although under challenge in some domestic courts, including in the new African Court on Human and Peoples' Rights concerning a case of forest land rights brought against the Republic of Kenya, the prospect of restitution of lands which have already been converted into Protected Areas is particularly remote (Alden Wily, 2014).

Bold pledges to decentralise governance to local levels, with parallel or integral plans to devolve land administration, have also been erratically pursued since 1990, limiting real addition to the significant advances on this made by Tanzania, Ethiopia and Senegal in earlier decades in the form of village governments. Devolution almost never reaches community level in the rest of the continent, stopping short at communes or district governments. Devolution of powers over land and natural resource matters are often ambiguous or limited even to this level. Nevertheless, building blocks to community based land administration continue to be instituted in some states, such as in the form of village commissions in Burkina Faso, customary land secretariats in Ghana, or in community land management bodies promised in upcoming legislation in Liberia, Malawi and Kenya.

To examine the status of customary land rights more precisely, these indicators are applied to all states (Alden Wily, forthcoming): customary rights are judged legally secure when the national land law recognises –

- i. customary rights as a species of property due the same level of protection afforded rights acquired through non-customary systems;
- ii. the holding of lands collectively as a lawful form of ownership within the customary sector and the collective as a natural person for purposes of registration of such rights;
- iii. that customary rights apply to off-farm and undeveloped resources such as forests, rangelands, ponds, marshes and other lands and resources traditionally belonging to the community, in addition to housing and farming lands;
- iv. that customary rights are inseparable from customary jurisdiction over those rights and provision for which exercise is duly made in the law, albeit within limits of constitutional requirements for equitable and inclusive decision-making and accountability to all members of the community; and
- v. which law provides for voluntary registration of customary land interests as adjudicated by communities, without conversion into non-customary forms of tenure or loss of community based jurisdiction, and which includes the right of the community to record all its lands and resources as community property.

Before assessment against these indicators is made, brief comment is warranted. First, the indicators target weak points in legal provisions thus far, and weaknesses within the customary regime itself, such as may occur in the ordering of rights in ways contemporarily deemed discriminatory, and by closing doors to tendencies for common lands to be co-opted and/or disposed of as the personal property of traditional authorities or financially enabled elites. The indicators therefore do not pretend to be other than proactive, modernising and

majority-focused. The examples given below should help explain the rationale for these particular indicators.

Second, and likely more troubling to purists, is provision for formalization, and which act could be seen as a contradiction in terms: customary rights do not exist by virtue of formalization, and registration could spell stagnation in the nature of rights and loss of traditional control over right-holding. The counteractive measures are therefore important; that formalization is voluntary, certification is of what exists, not an act that extinguishes customary rights by replacement with received tenure norms, and that registration does not remove community jurisdiction. The position taken is that formalization provides the opportunity for customary landowners to double-lock rights that the law should also protect as a matter of principle, registered or not. This also takes account of the urgency often felt within communities facing threats to their lands for certification of their existing rights to be available and, as noted earlier, the absence of which may force the better-off and more knowledgeable among them to abandon the customary sector altogether.

The results against the five indicators are mixed. Three categories may be discerned (excluding Tunisia, Algeria, and five island states for which insufficient information is available to this writer). In summary, among the remaining 47 countries 36 per cent provide little to no protection for customary land tenure operations or the rights that these deliver; 28 per cent provide some protection; and 36 per cent provide best protection, although in no instance optimal.

Poor to No Protection: The first category includes seventeen mainland states that continue to treat customary land rights as no more than rights of occupation and access to state property or ownerless lands, and even although, as in Zimbabwe, they may ring-fence such areas as ‘communal lands’. These are Cameroon, Central African Republic, Republic of Congo (RoC), Djibouti, Equatorial Guinea, Eritrea, Egypt, Gabon, Guinea, Guinea Bissau, Libya, Mauritania, Rwanda, Somalia, Sudan, Togo and Zimbabwe.

Individuals, families and communities are accordingly at risk of their lands being lawfully allocated to others, or evicted to make way for public purpose developments without payment of compensation for other than loss of crops, trees and permanent structures. Most of these laws do not acknowledge communal rights even in permissive forms as covering uncultivated lands, often the larger proportion of the community’s estate. In order to secure tenure a customary landholder must apply as an individual for statutory title and only to visibly occupied and farmed lands. Family and collective tenure are not statutorily provided for. In short, these countries have sustained colonial norms. The situation is most deleterious in Gabon, Equatorial Guinea and Mauritania where colonial legislation is least revised. Post-independence reforms of the 1970s in Libya, Somalia and Sudan abolishing customary tenure with reallocation to favoured clans and private parties is arguably worse given the role these conditions are playing in subsequent civil wars.

Some Protection: This includes thirteen states that have partially improved the legal status of customary land rights in one way or another. They include Angola, Benin, Burundi, Democratic Republic of Congo (DRC), Cote d’Ivoire, Chad, Ethiopia, Lesotho, Madagascar, Mali, Niger, Nigeria and Zambia.

Main limitations of customary rights occur in these countries where only the rights of individuals within the customary sector are protected (Madagascar, Burundi, Lesotho); where off-farm interests are excluded (Ethiopia, Chad, Mali, Niger), or rights upheld only when formally registered, often through extinction of the right in favor of a non-customary entitlement (Benin, Cote d’Ivoire, Zambia, Angola). Most lack legal provision for communities to administer customary rights, and/or over-endow state and local authorities with decision-making and allocation authority, the case in Nigeria’s retained Land Use

Decree, 1978. The Rural Land Law, 1998 of Cote d'Ivoire offers an interesting case in that it opens the way for individuals and groups to have their rights formally recorded but then requires these owners to extinguish these rights in favour of non-customary titles in order to be recognised, and in the case of communities or groups (such as families) to form corporate entities to hold the land. Not surprisingly, not a single of the few certificates issued since 1999 (just over 800 in a country where one million titles are needed) has been converted into a title (Alden Wily, 2015). However, it was not these shortfalls or the extraordinary costs involved limiting uptake that helped bring the country to two civil wars, but the land law's restrictions upon those encouraged to settle and acquire farms as legal titleholders (ibid).

Most Protection: The third category includes a final seventeen countries notable for positive treatment of customary land rights, and in ways that most meet the indicators listed earlier. This group includes Botswana, Burkina Faso, Ghana, Morocco, Mozambique, Namibia, South Sudan, South Africa, Swaziland, Tanzania, The Gambia, and Uganda and more cautiously, Senegal and Sierra Leone. Furthermore, should drafted community land bills be enacted as scheduled in Kenya, Liberia and Malawi, the legal paradigms of these states will join this category.

Nevertheless, not a single one of the above, offer ideal paradigms, and few have been more than moderately successful in applying the norms their laws provide for, the extreme case of this being Southern Sudan, a near-failed state and at civil war.

For example, while providing for customary lands to be protected as property, neither Botswana (1968) nor Namibia (2002) provides for collective tenure other than at tribal level. This has exposed village communities to massive losses as chiefs in Namibia and tribal land boards in Botswana allocate common lands that communities assume to be their own to private ranchers without their permission. An almost similar situation prevails in Senegal where legal attempts to abolish customary tenure (1964) and to open up agro-pastoral zones to investors (2004) failed but where the vesting of land authority in local governments remote from communities allows losses to accrue, usually under the directive of Dakar. Customary landholders in Sierra Leone are also vulnerable to losses of their invaluable off-farm through wilful allocation by chiefs in whom the lands of the 149 chiefdoms are vested, and which fact has encouraged and legitimised presumptions of ownership, not custodianship of their peoples' lands, also problematic in parts of Ghana.

Technically positive but flawed arrangements also afflict the rights of customary occupants in the former homelands in South Africa. While they are protected from dispossession by a law of 1996, the 18 million rural homeland residents lack legal support for limiting chiefly prerogatives on land matters practical means through which they may secure collective rights as autonomous village entities, the Communal Property Associations Act, 1997 now barely used given its bureaucratic and expensive requirements. Homelands also remain vested in either the state or in a state-backed trust, not in themselves. Shortfalls are mainly attributed to the striking down of the Communal Land Rights Act of 2004 by the constitutional court in 2011, ironically, partly because the law left too much scope for chiefs to claim ownership.

Swaziland and Ghana offer unique arrangements in that customary regimes were never subordinated during colonialism and have remained in place since. Nevertheless in parts of Ghana and in most of Swaziland, the rights of community members are subordinate to those of chiefs and in the case of Swaziland, the king, positioning communities and members effectively as their tenants at will. No legal arrangements exist in either country for communities, clans or other customarily formed groups to secure collective customary title, although individualised customary freeholds exist, but thus far with no avenues for registration.

Legislation in Mozambique in 1997 provides for communities to secure title to mapped lands on the basis of custom, backed up by in principle protection of customary rights, whether registered or not. Over 19 million hectares have accordingly been secured. The absence of legal and administrative provision for community based land governance, combined with the terms of law that enable investors to secure large tracts of land through procedures that require minimal consultation and consent outside of a handful of leaders, handicap progress. Although not obligatory, obtaining registered title has become the only mechanism for protection.

The law (1998) in Uganda encourages individuals and families to obtain certificates of customary title with equivalent force as freehold and leasehold entitlements, and provision for communities or other customarily formed groups to register communal land associations in which to vest collective ownership (1998). However, Ugandan customary owners endure the same lacuna experienced in Mozambique of insufficiently developed legal parameters for the exercise of customary or community jurisdiction at community level, or mechanisms to uphold agreements that are expressed as formal entitlements.

An interesting experiment in majority land security is evolving in Burkina Faso under land law reform in 2012 which aims to formally recognise local practices and rights and involve customary authorities in accountable village level decision making bodies. While not compulsory, issue of certificates of rights as they precisely exist is provided for, with those for individuals many times more expensive than for such certificates issued to families and village communities. Additionally, the procedure to obtain certificates is fully localised to village and commune levels.

This Burkina Faso model has most in common with that of Tanzania, which has comprehensively secured customary rights under the aegis of village land law (1999) affecting all 14,000 rural communities around the country each of which is recognised as holding a village land area. Through agreement of this domain with neighbours and its demarcation, the village secures jurisdiction over land matters, management authority legally vested in the elected village council and which must seek approval for decisions at quarterly meetings of all community members. Formalization of rights to parcels within the village land area is provided for on the basis of community-based adjudication. However, no such rights may be registered in the village land register until such time as the community has identified and recorded the boundaries of common lands, and additionally established rules of access and use for each of these commons. It is through this latter mechanism that so many communities have set aside forested areas as village forest reserves, not to be allocated or used for any other use. In 2012, these numbered more than 800 and covered 2.3 million hectares (United Republic of Tanzania, 2012). Recorded rights and upon which certificates of customary occupancy may be issued in consultation with the district council, are accorded equivalent legal force and effect as accorded granted and registered rights in non-village lands (including urban areas), as received directly from the Commissioner of Lands.

South Sudan's new land law (2009) provided in similar ways for customary rights protection along with voluntary formalization but in failing to make local consent a prerequisite to state powers to declare investment zones, exposed communities prior to the current civil war to significant land takings by and for private investors. Kenya, Malawi and Liberia have draft community land bills in hand. These too borrow extensively from the relatively comprehensive provisions of Tanzanian village land law.

6. CONCLUSION

Although imperfect, the above cluster of 'best practice' countries do acknowledge and protect customary rights as property. They also support community mechanisms for defining rights. They also reinforce rather than undermine forms of communal tenure fit for a competitive 21st

century and which could well become a significant new entry in the *numerus clausus* of land law. In most of these countries, customary rights are lawfully held by spouses, families, groups and communities, and through stipulations that treat them as natural persons at registration, removing the onerous need for group to create legal bodies in which to vest their shared rights. Formalization itself (notably excluding Namibia) is not obligatory. Decision as to how far one or other form of customary interest is tradable is left to the community.

Their cumulative success is no mean achievement after a fraught century in which the intention and expectation has been to rid the continent of ‘primitive’ indigenous tenure and its communality in particular. The result is that potentially, nearly twenty per cent of the customary domain on the continent, that is, around 400 million hectares, is protected. Subtle shifts in what constitutes property have occurred in the process.

Nevertheless, the term ‘potentially’ secured customary land area applies. For in all seventeen countries, and most severely in ten, insufficiencies or loopholes in the law, some of which have been touched upon above, combine with lax application of the law, poor client knowledge of the law, and questionably legal practices including by governments in regard to untitled customary lands. This most afflicts off-farm common properties in the sector. Sustaining customary land rights is nothing if not a continuing struggle for those who face such threats. Of course, customary owners living in countries where little to no progress has been made to recognise their occupancy as amounting to property rights are in a worse situation, and in terms of both customary area and numbers of landholders, remain the majority.

Further, the question must be asked as to what exactly has been secured thus far? After considering land law reform in seven states (Uganda, Kenya, Tanzania, Rwanda, Mozambique, and perhaps more questionably, Somaliland, given that it is yet to be a recognized state, and Zanzibar, which regulates land matters autonomously from its sister mainland Tanzania in the union), McAuslan, for example, concludes that this has been more traditional than transformational (McAuslan, 2013: 9ff). Transformation in his analysis means legal changes designed to right past social and economic injustices and to create a regime to enable equal rights and opportunities. In contrast, a traditional approach

‘... continues the colonial approach of vesting land in the state, maintains a dual system of land tenure and at the same time adopts an overall policy perspective of moving towards a land market based on registered title to land which implies or ... expressly provides for the disappearance of customary tenure, and perhaps most important, makes no or little effort to address the inequalities and injustices of the land tenure system inherited at independence ...’ (pages 14-15).

On these grounds McAuslan decides that customary tenure will disappear in due course. Each of his case study countries indeed fails by one or several of the above measures. For example, the retention of radical title by the state in other than Uganda and Kenya has been observed above, although I would argue (perhaps of small comfort) that this is less oppressive than would be the case where this condition applies only to customary lands, the case in Cameroon and some other Francophone states. Additionally, because of new legal restraints in all the laws selected as to how the state as ultimate landlord may act, the situation in these particular countries is less severe than pre-reform. It is also indisputable that legal changes have been made by governments with clear intentions to encourage a market in land. Additionally, thus far it is only Kenya among his sample that has constitutionally and now in draft enactment (2015) explicitly bound the state to investigate and redress historical land injustices.

Nevertheless, the evidence overall suggests to this writer not that customary land tenure will disappear absolutely but that it will persist – and evolve - much as it has done in the past

to meet changing circumstances. Customary land rights are inextricably a creature of community. For as long as socio-spatial community exists – and there is no reason to presume that in agrarian economies that it will not – then the norms and determinations of community will strive to prevail. As popular politicization rises, so will its determination to set to right injustices on the matter than is among the most important to its survival, rights to the land.

Additionally, important legal precedents have been set (and notably including some of the countries which McAuslan surveys) such as enabling a community to choose to retain its entire domain (or its rights to that domain where ownership of the land itself is not afforded) as collectively owned, embracing both lands allocated to individual families and lands held for communal use. As well as resonating with provision of native title in Oceanic and American states as arrived at over a similar era, this reaches into the very roots of communality in practical ways, by affording (poorer) majorities within the community the means of protecting their interests, in effect as equal shareholders of the domain. This has contemporary importance in that poorer majorities are arguably at more risk than ever of losing rights to better-off members of the community, as market forces continue to expand in hinterlands. Even should a modern community decide to vest only off-farm lands in themselves as a group, allowing individuals to hive off their homesteads as private property (including under non-customary entitlements) an extraordinary future for the communalism of African communities still presents itself. This is not least because the retained shared lands are invaluable in their own right as forests, rangelands or marshlands, and expansive in relation to permanently farmed lands, and once secured, reinforce rather than undermine community and community-based land rights regulation; i.e. customary tenure.

Nor should the reinforcement of comparable advances in other parts of the world - which this chapter has not had space to elaborate - be ignored. On balance, I would suggest that an interesting and even exciting future awaits customary land rights globally, for rights, for the future of millions of hectares of resources lost in law to communities if not in practice, and for new paradigms of property relations between people and their governments to evolve.

REFERENCES

Alden Wily, Liz (2007) ‘‘So Who Owns the Forest’ An investigation into forest ownership and customary land rights in Liberia’, Sustainable Development Institute and FERN, Monrovia and Brussels.

Alden Wily, Liz (2011) ‘The tragedy of public lands: the fate of the commons under global commercial pressure’ International Land Coalition, Rome.

Alden Wily, Liz (2012a) ‘Land Rights in Gabon Facing Up to the Past – and Present. FERN.

Alden Wily, Liz (2012b) From State to People’s Law – Assessing Learning By Doing as a Basis for New Land Law. *Fair Land Governance How to Legalise Land Rights for Rural Development*. Jan Michiel Otto and Andre Hoekema (eds.). Leiden University Press. 85-110.

Alden Wily, Liz (2014a) ‘Communities as Owner-Conservators of Protected Forests: Can it Work?’ Opinion submitted to the African Court on Human and Peoples’ Rights in Application 006/2012 - African Commission on Human and Peoples’ Rights vs. The Republic of Kenya, Addis Ababa, November 2014.

Alden Wily, Liz (2015) ‘Time to rethink? A Critique of Rural Land Law in Cote d’Ivoire’, FERN, Moreton in Marsh and Brussels.

- Alden Wily, Liz (forthcoming) 'Res Communis in Africa: Unfinished Business' in Kaimeri-Mbote, P. & Collins Odote, *The Gallant Academic: Essays in Honour of Professor Okoth Ogendo*, University of Nairobi Press, Nairobi (2016).
- Amanor, Kojo. (2008) 'The Changing Face of Customary Land Tenure' in J. Ubink and K. Amanor (eds.) *Contesting Land and Custom in Ghana. State, Chief and the Citizen* Janine Ubink and Kojo Amanor (eds.) 55-78 Leiden University Press.
- Bayart, Jean-Francois (2009) (Second Edition) (*The State in Africa The Politics of the Belly*, Polity Press.
- Benda-Beckmann, Franz von (2007) (1970), *Legal Pluralism in Malawi: Historical Development 1858-1970*, Welforum Verlag.
- Bernstein, Henry (2010) *Class Dynamics of Agrarian Change* Fernwood Publishing and Kumarian Press.
- Bruce, John and Shem Migot-Adholla (eds.) 1994. *Searching for Land Tenure Security in Africa*. The World Bank.
- Chabal, Patrick and Jean-Pascal Daloz (1999) *Africa Works. Disorder as Political Instrument*. James Currey and Indianda University Press
- Chanock, Martin (1985) *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge University Press.
- Comoroff, John and Simon Roberts (1981) *Rules and Processes The Cultural Logic of Dispute in an African Context*, The University of Chicago Press.
- Deininger, Klaus and Hans Binswanger (1999) 'The Evolution of the World Bank's Land Policy: Principles, Experience and Future Challenges'. *The World Bank Research Observer*, Vol. 14 (2) (1999): 247-76.
- de Soto, Hernando (2000) *The Mystery of Capital Why Capitalism Triumphs in the West and Fails Everywhere Else* Black Swan, Bantam Press.
- Dorsett, S. (2002) "'Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and The Case of Tanistry'. *Melbourne University Law Review*, 3 (2002). <http://www.austlii.edu.au/journals/MULR/2002/3.html>. Last accessed on 31 January 2015.
- FAO (2014) *State of the World's Forests*, Rome.
- Gluckman, Max (1969) *Ideas in Barotse Jurisprudence*, Manchester University Press.
- GRAIN (2014) 'Hunger for land: small farmers feed the world with less than a quarter of all farmland'.
- Hall, Ruth, Max Edelman, Saturino Borrás, Ian Scoones, Ben White and Wendy Wolford (2015) 'Resistance, acquiescence or incorporation? An introduction to land grabbing and political reactions 'from below'' *The Journal of Peasant Studies* 42 (3-4): 467-488.
- Hobsbawm, Eric (1997) (1987) *The Age of Empire 1875-1914* Abacus, London.
- Hobsbawm, Eric and Terence Ranger (eds.) (1984) *The Invention of Tradition* Cambridge University Press.
-

Holmes R.K. (ed.) (2011) *Essays in African Land Law*, Pretoria University Press.

Jayne, T.S., J. Chamberlain and D. Headey (2014) 'Boserup and Beyond: Mounting Land Pressures and Development Strategies in Africa' *Food Policy* Vol. 48:1-17.

Juffe-Bignoli and others (2014) Protected Planet Report UNEP-WCMC: Cambridge, UK.

Kay, Cristobal (2009) 'Developing strategies and rural development: exploring synergies and eradicating poverty' *Journal of Peasant Studies* 36 (1) (2009) 103-137.

McAuslan, Patrick (2006) 'Legal Pluralism as a Policy Option: Is it Desirable? Is it Doable?' *Land Rights for African Development From Knowledge to Action*, CGIAR System-wide Program on Collective Action and Property Rights, Washington DC. 9-13.

McAuslan Patrick (2007) "Land Law and the Making of the British Empire" in E. Cooke (ed.) *Modern Studies in Property Law*, Hart Publishing, 239-262.

McAuslan, Patrick (2013) *Land Law Reform in Eastern Africa Traditional or Transformative?* Routledge.

Meek, C.K. (1968)(1946), *Land Law and Custom in the Colonies*, Frank Cass.

Moreda, T. (2015). 'Listening to their silence? The political reaction of affected communities to large-scale land acquisitions: insights from Ethiopia' *The Journal of Peasant Studies* 42 (3-4): 517-539.

Neef, A., S. Touch and J. Chiengthong (2013). 'The Politics and Ethics of Land Concessions in Rural Cambodia', *Journal of Agricultural Environmental Ethics* 26: 1085-1103.

Nelson, A. and K. Chomitz (2011) 'Effectiveness of Strict vs. Multiple Use Protected Areas in Reducing Tropical Forest Fires: A Global Analysis Using Matching Methods' The World Bank.

Nolte, C. and Arun Agrawal (2013) '*Linking Management Effectiveness Indicators to Observed Effects of Protected Areas on Fire Occurrence in the Amazon Rainforest*', University of Michigan.

North, Douglas, John Wallis and Barry Weingast (2009) *Violence and Social Orders, A Conceptual Framework for Interpreting Recorded Human History* Cambridge University Press, Cambridge, MA.

Okoth-Ogendo, Hastings (2002) 'The Tragic African Commons: A century of expropriation, suppression and subversion' No. 24 *Land reform and agrarian change in southern Africa*, School of Government, University of the Western Cape, South Africa.

Patnaik, Utsa and Sam Moyo (2011) *The Agrarian Question in the Neoliberal Era Primitive Accumulation and the Peasantry*. Pambazuka Press, Cape Town.

Platteau, Jean-Philippe (1996) 'The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment'. *Development and Change* Vol. 27 (1):29-86.

Polanyi, Karl (2001 edition of 1947 original) *The Great Transformation the Political and Economic Origins of Our Time*, Beacon Press Boston.

Schapera, Issac (1970) *A Handbook of Tswana Law and Customs*, McMillan and Company, London.

Schneider A., M. Friedl and D. Potere (2009) "A new map of global urban extent from MODIS satellite data" *IOP Science Electronic Journals*.

Snyder, Francis (1982) 'Colonialism and Legal Form: The creation of 'Customary Law' in Senegal' *Crime, Justice and Underdevelopment*, C. Sumner (ed.), Cambridge Studies in Criminology XLVI, Heinemann, London.

Stevens, Caleb, R. Winterbottom, Jenny Springer and Katie Reytar (2014) 'Securing Rights, Combating Climate Change', World Resources Institute Washington DC.

Takeuchi, S. (ed.) (2014) *Confronting Land and Property Problems for Peace*. London and New York Routledge.

United Republic of Tanzania (1994) *Report of The Presidential Commission of Inquiry into Land Matters*. Ministry of Land, Housing and Urban Development. Bohuslaningens Boktryckeri, Uddevalla, Sweden.

United Republic of Tanzania (2012) 'Participatory Forest Management in Tanzania Facts and Figures' Ministry of Natural Resources and Tourism.

Vanderlinden, Jacques (2008) 'Analysing Property in Different Societies', *LSU Law Center Journal of Civil Law Studies* Vol. 1(2008).

World Resources Institute and Rights and Resources Initiative (2014) 'Recognizing Indigenous and Community Rights Priority Steps to Advance Development and Mitigate Climate Change', Washington DC.

Woodman, Gordon (1996) *Customary Land Law in the Ghanaian Courts*, University Press, Accra.

Wrong, Michela (2009) *It's Our Turn To Eat* Harpers Collins New York.

Zimmerman, Barbara (2012) 'Beauty, Power and Conservation in the Southeast Amazon How Traditional Social Organization of the Kayapo Leads to Forest Protection; Xingu River Basin, Amazon, Brazil' *Protecting Wild Nature on Native Lands* Vance Martin and Sharon Shay Sloan (eds.). Vol. II: 46-57.