

‘Customary Land Tenure’ in Sub-Saharan Africa Today: Meanings and contexts

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PREAMBLE

This short chapter is structured around a single question: today, what exactly do we (and others) mean by the term ‘customary land tenure’? Simple though it may sound, the question stands central to any discussion on land and land rights in relation to conflict. Now that land scarcity and conflict over land are increasing in Sub-Saharan Africa a clear understanding of what stakeholders mean by ‘customary land tenure’ becomes compelling. The case for reflections on the term is enhanced by the fact that concepts like ‘custom’ and ‘customary practice’ are currency in contemporary policy debates – even though their users may not always be clear on what exactly these concepts denote; ¹ after all, their appropriateness has been the subject of animated debate for over four decades.²

My starting point is that much of what we know about customary land tenure has come to us via ‘native courts’ in the colonial era; courts that were not ‘equipped to deal with the perplexing array of customary land rights, and the flexibilities embedded in them’.³ The colonial courts simplified by removing all reference to flexibilities and ambiguities, and ignored that negotiation was part and parcel of local ways of allocating and using land. Today, crucially, contemporary policy arenas also embrace simplification, which they do by espousing *evolutionary models* of customary land law. These models miss out on the ongoing dynamic of contemporary claims and counterclaims.

How then should we approach the concept of ‘customary land tenure’ in deliberations on land and conflict? To appreciate the ongoing dynamic of contemporary claims and counterclaims to land, we need to develop, amongst other things, an understanding of the trajectory the concept of ‘customary land tenure’ has travelled since the onset of colonialism. What needs examining is the intellectual status of our knowledge base concerning customary rules and practices. Such an examination implies paying attention to *the context* in which the term ‘customary land tenure’ has emerged and been used. Equally important, examining our knowledge base is likely to make us aware that codifications of customary law – static though they are – do not mean that customary claims today have lost their ‘flexibilities’ and emphasis on negotiation.

One specific challenge I shall address is how to understand land rights. Whatever ‘customary land tenure’ has meant in the past and still means today, caution is advised when reading ‘rights’ into customary rules and practices. The issue matters, because many land-related conflicts originate from agreements made long ago, agreements made either in the name of tradition or on the assumption that they would not harm the subsistence and security of the granting group. Against this backdrop we need to ask to what extent customary law dealt/deals with rights in the legal sense. I begin this chapter with a longitudinal reflection on land rights, one that goes back to pre-colonial times.

THE NATURE OF (PRE-COLONIAL) CUSTOMARY LAND RIGHTS

The realization that land is socially embedded should invite us to think of land as a site of complex, interlocking tenurial rights.⁴ Such rights frequently have to do with the rights of individuals to particular plots, but also with rights to land held collectively. Crucial to our deliberations on land tenure and conflict is Fiona Mackenzie’s (documented) assertion for Murang’a district, Kenya, that rights ‘allocated according to custom’ are not necessarily free of struggle. This has been the case for quite some time. Struggles were very intense in colonial times, partly because ‘custom’ was being written up (and sometimes invented), and even pre-colonial land allocations were not devoid of tension. Mackenzie spells out the details:

Prior to colonialism, security of tenure in Murang’a depended on the resolution of two sets of tensions. The first was between individual and collective rights to land of the (male) kinship group and the second was between women, as wives and producers but non-members of the kin collectivity, and men, non-producers (as far as basic crop production was concerned) ... Rights to land were, in both situations, subject to negotiation.

Under colonial rule, customary law provided the means through which individuals or groups, differentiated by race, class, and gender, negotiated access to and control of land. (...) Here, customary law became “an ideological screen of continuity,” a “language of legitimation”.⁵ It may have provided the political space through which Africans resisted colonial rule, but the reworking of customary land law by African men privileged not only male rights, but also the interests of wealthier men.⁶

One of the better known examples showing how recourse to customary law has ambiguities or loopholes prone to result in struggle is the Jahaly-Pacharr irrigation scheme in The Gambia. Following the launch of this supposedly gender-friendly project, for which land ‘customarily’ controlled by women was used, men reacted by changing the discourse

of custom, thereby re-labelling the project plots women cultivated as *private land*.⁷

Examples like the Jahaly-Pacharr scheme have led some anthropologists to argue that analysts must not over-celebrate the agency or initiative of subordinate groups. As Pauline Peters⁸ contends, the ethnographic tendency to put the spotlight on 'the ability of "small acts" and small people to out-manoeuvre the powerful must be complemented and modified by stories of differentiation, displacement and exclusion'. Among the many examples she reviews is Zimbabwe, where private individuals are regularly 'annexing parts of communal woodlands or grazing lands by enclosing them with a fence'. Unsurprisingly, such moves cause 'considerable ... tension' among others who have been using the common resources.⁹ Responsible for this uneven appropriation are 'local and national elites, some [working] in collaboration with transnational networks' or international development agencies.¹⁰ It makes one wonder what meanings those involved in the struggle attribute to 'communal land' and 'our tradition'. Whatever the answer, a range of meanings, some contradictory no doubt, is likely to emerge.

Contested meanings today stem from the fact the concepts like 'customary law' and 'customary tenure' do not refer to a pre-colonial culture and time when every land-related issue was clear-cut. These concepts, rather, have been produced out of colonial encounters (often misunderstandings) that promoted politically expedient appropriations of land.¹¹ Peters reminds us of

*Elizabeth Colson's incisive critical assessment¹² of the creation of 'customary law' (up through the 1930s), [which] showed how colonial rulers confused territoriality with sovereignty, and conflated African ritual roles, whose authority lay in rain-making or fertility of the land, with political roles exerting authority over people in lineage, clan and chiefdom. Where the colonial rulers could not identify an appropriate 'chief', they created one.*¹³

The colonial encounter in Congo, Central Africa, provides us with ample examples of outsider confusion, as Koen Vlassenroot and Chris Huggins demonstrate in their contribution to this volume.

In pre-colonial Africa, land was mostly conceived of as an unbounded resource to be used; not as a commodity to be measured, plotted, subdivided, leased, pawned or sold.¹⁴ Using land – as opposed to holding it – implied the absence of strict boundaries and landlord-type authorities. Ritual leaders might have had responsibility for the correct spiritual management of land, but they were 'leaders of ritual and not allocators of land or rulers of men'.¹⁵ It was only later, under the impact of European colonialism that ritual leaders were made 'into landlords on the grounds that they were community leaders and therefore holders of the land rights of the community'.¹⁶ It was a terrible misreading, a reasoning wholly absent from the pre-colonial scene.

For most of pre-colonial Sub-Saharan Africa, with its low population densities and relatively limited population movements, land was a resource that all community members should have access to in order to subsist. Community members had a ritual relationship to land, and did not differentiate between land for agricultural and 'other' purposes. Likewise, land use was the concern of the living and the dead, as well as the unborn. Colson quotes a Nigerian chief at the beginning of the twentieth century: 'I conceive that land belongs to a vast family of which many are dead, few are living and countless members are still unborn'.¹⁷ Under these conditions (ample land, low population rates and movements), *land rights were rarely defined since they were rarely questioned*.¹⁸ The exceptions were some densely populated, economically vibrant areas in West Africa, and areas of high agricultural fertility in East and Central Africa. The absence of clearly defined rights persuaded anthropologist Paul Bohannan that the term 'tenure' – a Western concept – should not be applied to pre-colonial Africa.¹⁹

Whatever the range of regional variations on the ground, pre-colonial land systems were run on two basic principles: first, that

*each citizen should have the right of direct access to the resources of the territory controlled by the political unit to which he belonged.*²⁰

The second principle, which Colson referred to as 'probably equally ancient',

*recognized an individual's right to anything he had created, whether this be an office, a pot, a homestead, or a field. Such a right could be inherited according to the regular rules of inheritance of private property. Rights in improved land could thus become the particular rights of an individual or of a small family corporation which might also be a section of the political community if descent groups had a political function. The originator of such a right could transfer it during his lifetime to another person, either as a gift or for some consideration.*²¹

Colson maintained that the two principles – of general rights based on citizenship and of particular rights based on creative pre-emption – did not clash as long as land was plentiful, and, we should add, as long as subsistence remained the main motive for accessing land. Disputes about land boundaries were insignificant. This is also suggested by the lack of violence associated with expansion of land claims by particular groups in Ituri, eastern DRC, prior to colonial times, as discussed by Vlassenroot and Huggins later in this volume.

COLONIAL IMPACTS: THE (SIMPLIFYING) CODIFICATION OF COMPLEX APPROACHES TO LAND ACQUISITION AND USE

Even where they pledged to respect and preserve existing customs and rights, colonial governments did impinge upon land rights. They did so

by encouraging a modicum of economic development that diverted some land to new uses, and by stimulating an appetite for imported goods that could be met only by the exploitation of land in cash cropping. These changes 'had an impact on local systems of land rights as men began to evaluate the land they used in new ways. They also led to an increasing number of legal battles over land; for men were encouraged to establish long-term rights in particular holdings either for immediate use or for subsequent gain'.²² Coupled with rapid population growth, these changes of vision resulted in the emergence of a flurry of court activity directed at considering land claims. Colson makes a crucial observation here:

*Land claims ... came to be tested in the courts, where adjudication encouraged the rapid development of fairly comprehensive bodies of customary, though untraditional, law which governed the allocation and use of land. This drive to formulate more precise rules ... occurred spontaneously as soon as men became aware of a clash of interests. But once the colonial period had begun, the resulting formulations rarely reflected only local decisions. Even customary courts were under the ultimate jurisdiction of colonial officers who expected the courts to enforce long-established custom rather than current opinion. Common official stereotypes about African customary land law thus came to be used by colonial officials in assessing the legality of current decisions, and so came to be incorporated in 'customary' systems of tenure.*²³

The consequences are still with us. When today we refer to customary land tenure, we may be referring in part to a feat of social engineering that allowed western legal concepts to slip in through the backdoor of so-called 'native courts'. European concepts of legal tenure, assumed to be universal, became central to the land laws of every colony. In particular, the colonial authorities assumed that the European concept of proprietary ownership covered the full range of customary land rights in Africa. The implications were huge: 'If no private person appeared to hold such rights over a given area, then they assumed that the rights must vest in the political unit whose members used the region. Failing this, they belonged to the newly created [colonial] government which could then alienate the land on its own terms to commercial corporations or to European settlers'.²⁴

Where colonial regimes accepted to rule indirectly through traditional authorities, their officers ended up recognizing chiefs and rulers where none had existed before. It is a phenomenon generally described as 'the invention of Africa'.²⁵ Colson:

The official search for the owners of all land encouraged the confusion of sovereignty proprietary ownership and the creation of systems of communal tenure came into being with precisely defined rules. (...) The newly created system was described as resting on tradition and presumably derived its legitimacy from immemorial custom. The degree to which it was a reflection of the contemporary situation and the joint creation of

*colonial officials and African leaders, more especially of those holding political office, was unlikely to be recognized.*²⁶

The colonial context demanded that custom should have clear rights and clear authorities over land. What also changed in the process was that social groups came to be regarded as essentially territorial units. Paul Bohannan put it thus:

*Man-man relationships in space, with concomitant rights to exploit the environments are being replaced by legally enforceable man-thing units of the property type, the man becoming a legal entity and the thing a surveyed parcel of land. Rights of people are being made congruent with rights in specific pieces of land so as to accord with surveys and legal procedure. Property and contract are becoming the basis of social life in places that were once governed by considerations of status.*²⁷

The concept of customary 'rights' in land must thus be seen for what it is: a corruption (read: excessive standardization and some misreading) of basic African approaches to land and people; approaches in which 'rights' were attributes of persons against other persons.²⁸ Regarding the colonial experience in Malawi and Zambia, Martin Chanock²⁹ has this clear statement on the changes wrought by colonialism:

*In pre-colonial society, (...) people were linked to land through their membership of groups. It was their group standing which gave them access to land and consequently their concern was with maintaining their position linked to other persons rather than with rights in land. (...) Links to and rights in persons through whom land was acquired and by whom it could be used were crucial, not rights to land as such. But [during the colonial period], rights in people as a resource were becoming less enforceable and negotiable, which meant that rights in property had gradually to be differentiated from rights in persons.*³⁰

Even in territories governed on the basis of indirect rule (colonial Britain, the Belgian Congo), colonial development policy converted 'use' into 'ownership', 'users' into 'owners', and 'rights as persons' into 'rights to specific pieces of land'. The Belgian Congo can serve as an example of how 'ownership' was routinely misread. In colonial Congo, where administrators were often conscious of the excesses of King Leopold's Free State, owners had to be found for all land, including vast stretches of empty land. Before empty land with no apparent owner could be claimed as waste land for state or private exploitation, it had to be assigned. Usually this meant assigning the land to a political community.

The colonial desire/policy to assign all land resulted in political communities becoming owners in a Western legal sense. Being in charge of 'native affairs', the colonial power could then declare that all land was collectively owned. The Congo illustrates this well. By the end of colonial rule it was a known 'fact' (which we now regard as a misreading) that

*According to Congolese native law, individual land ownership does not exist; there is only collective ownership. The land belongs to the clan, a community made up of family groups consisting of all the descendants – living and dead – of a common ancestor, and in theory, all the generations to come.*³¹

It is a view adopted also by Daniel Biebuyck, who has written: ‘Vacant land or land without title-holders is unknown, although vast tracts may be uninhabited and only very extensively used’.³²

Colonial policy, however, also dictated – and crucially so – that it was desirable for (certain) communally owned lands to be used for the profit of the colony where this was commercially feasible. Landowners – i.e., often former ritual leaders vested with powers previously unknown – were now ‘permitted to dispose of their rights to government either by sale or by lease’.³³ The outcome was that

*the possibility of profit from sale or lease [and the influence of new religious authorities]... rapidly changed men’s views of the nature of land. Communities sought to extend the boundaries of their holdings and sued one another over land that both had formerly ignored. Members of a community found themselves bound to their fellows in a new fashion, since they now had an hereditary interest in the cash to be derived from the land of the community.*³⁴

That colonial intervention resulted in the creation of a new type of local authority, with unprecedented powers and little need for accountability, has been documented by historians and anthropologists alike. James Fairhead³⁵ gives us this (unpublished) account for Eastern Congo. In 1918, Belgium radically altered the political scene in eastern Congo through the creation of a ruthless ‘traditional’ structure capable of extorting labour at very low rates of pay. Some existing chiefs were endowed with vastly enhanced powers, others appeared to come from nowhere. This policy regime of invented tradition resulted in the creation of powerful Bami (kings) throughout the region. Some of these new kings

*were able to sell not only the land of their own people, but also land previously under the jurisdiction of chiefs whom the Belgian authorities did not favour. Thus Ndeze II, who came to rule all of Bwisha following his elevation to mvami in 1929, saw fit to colonize Bwito. He ousted Bwito’s Bahunde chiefs and installed his own Bahutu delegates. To protect Bwisha and destroy his enemies in Bwito, Ndeze II asserted vacancy and sold large areas of Bwito for personal gain.*³⁶

To facilitate the state-sponsored migration and settlement of tens of thousands of Rwandans into Eastern Congo, the Belgian authorities obtained signed lease agreements from ‘autochthonous’ chiefs, who were *personally* financially rewarded. The arrangement was

not too problematic in the less densely populated areas, including Masisi, but it was more difficult in Rutshuru, where the older plantations were

located. Here there was 'confusion of land rights between plantations and the new immigrants'³⁷; a confusion aggravated by the influx of Bwisha highlanders who were seeking to be relocated. (...)

The crisis [had] its first climax in the deregulatory aftermath of Congo's independence, when autochthones voted with their feet and entered the Banyarwanda settlements to reclaim their 'inheritance'. Throughout Kivu, those who considered themselves to be the rightful inheritors of land began to (re?)claim what they considered to be inalienable, ancestral land.³⁸ The outcome was that the Rwandan immigrants and their descendants, who believed they had been allocated land on an inheritable basis, came to be 'redefined as "imposters" who had no long-term rights'.³⁹ Banyarwanda migrants thus became targets for confrontation because of their [remembered!] 'foreignness'.⁴⁰

In eastern DRC, the complex interlinkage between *land, identity and memory* came into play following Mobutu's announcement in April 1990 that the country was to be democratised. At this point, as Vlassenroot and Huggins show, local politicians were forced to build for themselves strong power bases, which they routinely did by playing the ethnic card and turning economic struggles over land into ethnic struggles. For example, the Hunde chiefs who had sold off customary land to immigrant groups of Rwandan origin were quick to turn popular frustration over growing landlessness into ethnic hatred towards the (prosperous) immigrants.⁴¹ And just like these 'immigrants' were suddenly reminded of their foreign status, so people without a strong historical interest in land ownership were told by groups with a different history that they should forget their rights in land. The ethnic discourse sharpened. Thus in South Kivu, ethnic tension increased between Babembe and Babuyu 'when the "indigenous" community of Babuyu rejected the land rights of the "exogenous" community of Babembe on the premise that historically, they were the sole owners of the land'.⁴²

It is important to note here that land-related arrangements are mostly 'secured through verbal contracts and testimony through neighbours and customary leaders, and titles generally do not exist' (see Vlassenroot and Huggins, this volume). Under these conditions, sharecroppers and tenants are easily 'relabelled' at a later stage, and existing arrangements overturned. The same fate has befallen the Banyamulenge, who despite living in South Kivu for over a century, came to be re-labelled as ungrateful immigrants from Rwanda before being chased off their lands. Whether it happens in the Kivus or in Rwanda (see Musahara and Huggins, this volume) the re-labelling of social identities is a powerful device for economic exclusion and political domination. Power-hungry politicians never encounter great problems when the 'ethnic other' needs to be reconfigured for the sake of political and economic reward.

In sum, what we call customary land tenure is in fact 'customary' tenure, i.e. codified and untraditional. Rules of access and use, as they

existed in pre-colonial times, had principles but no rigid rules or rights; codified tenure, imposed during colonialism, had rigid (and occasionally invented) rules to suit the opportunistic climate of modern times.

Martin Chanock⁴³ provides several illustrations from East Africa to show how corrupt notions of 'our tradition' took shape at the very point where land became an important source of wealth.

*Iliffe observed of developments in the coffee-growing areas of North Tanganyika that Chagga customary law on the subject of land was 'vague, contentious and mutable'. But as the land hunger of the commercial farmers grew, so land disputes multiplied in local courts, as did claims that freehold tenure was traditional. People in Kenya, Kitching writes, had by the early 1930s come to conceptualise past and current use of land in terms of ownership, purchase, sale and tenancy.*⁴⁴

In more recent times, as just seen for eastern DRC, communities and individuals have reminded themselves of the artificiality of customary law as upheld by the courts. They have done this especially by questioning the legality of certain land transactions in colonial times. The troubles in North Kivu in the early 1990s, for which Vlassenroot and Huggins provide conclusive data, reveal how so-called autochthonous ('indigenous') people (which is not an unproblematic category) were made exceedingly aware that certain leases or sales involving the colony and 'fake' local authorities had been violations of tradition.

RETURN TO THE CUSTOMARY: RIGHTS-BASED DISCOURSES ON LAND REFORM

In policy circles today,

*there is an emerging consensus among a range of influential policy institutions, lawyers and academics [that] the potential of so-called customary systems of land tenure ... [can be harnessed] to meet the needs of all land users and claimants. This consensus ... is rooted in modernizing discourses and/or evolutionary theories of land tenure and embraces particular and contested understandings of customary law and legal pluralism.*⁴⁵

Nonetheless, policy discourses that advocate land reform – whether they come from the World Bank or Oxfam GB or the London-based IIED institute – increasingly envisage that custom can be 'modified' through appropriate intervention. A 'modified customary system' has a role to play in local-level land management.

*For the World Bank, the policy is to encourage these [customary forms of ownership] to evolve; for the independent land policy advocates, more democratically accountable management systems are to be introduced to build upon what already exists locally.*⁴⁶

While the two policy approaches differ to some extent, they share the view that land reform is to be promoted and based on customary law, as if the latter were a homogenous and clearly defined *body of rights*.

In their chapter on Rwanda, Musahara and Huggins offer a taste of this emerging consensus where they reveal that certain policymakers have recently claimed that Rwanda does not know any absolute landlessness 'in the true sense of the word'. Landless people, these policymakers argue, 'can still operate a plot of land from the extended family through the traditional mutual help schemes'. A range of customary practices are invoked (*kwatisha*, *ingaligali*, etc.) to make the point that custom provides some kind of safety net for the poor, albeit a not very reliable one (on *ingaligali*, for example, see Pottier and Nkundabashaka).⁴⁷ Other evidence of a 'return to the customary' exists in the way international policymakers in Rwanda (from FAO and the World Bank) have recuperated the 'traditional' concept of patrimony (Musahara and Huggins, this volume).

The 'harnessing' of so-called customary systems of land tenure may sound like a fine idea, but what have anthropologists and historians learned from field research? As already mentioned, colonial authorities moulded a customary world to suit their own purposes. What they created and sustained was later passed on to post-colonial states (see e.g. Okoth-Ogendo⁴⁸; Berry⁴⁹; Shipton and Goheen⁵⁰; Moore and Vaughan⁵¹). The result was a perception that customary law was coherent, static and overly legal. In other words, distinct meanings in Western law were used to describe the characteristics of customary *systems*. Customary law, as it emerged as a concept, was thought to be 'a different kind of primarily legal system carrying out many of the same functions as formal [Western] law'.⁵²

It is this kind of perception that some influential policymakers and policy-making bodies are rediscovering today. They are hunting for clear principles and clear rights, but refuse to face those aspects of customary land use – the ambiguities, the negotiations – that the simplified, colonial readings of past practice chose to disregard. Contemporary policymakers in Rwanda, along with the country's politicians, are firm in this refusal: 'one should avoid being trapped by cultural considerations,' they claim (see below).

In contrast to the simplifying, overly legalistic approach to customary land tenure in some policy circles today, anthropologists and historians acknowledge that many diverse practices exist regarding land and access to land, and appreciate their built-in plasticity and scope for negotiation. There is broad agreement

that African systems of land access were (...) created by use and negotiated, and that to some extent they remain so today. ... [C]ommunity-level patterns of land access were not rigid, but flexible and negotiable. ... Within kinship groups and households, claims to use were made by men and women for land inherited within these social groups, while between

them, claims could also be made on a number of bases. Pawning, pledging and loaning provided access to land for use without undermining the flow of land through inheritance and most communities also had ways in which in-migrants could make claims to land that was not already assigned⁵³.)

Importantly, anthropologists and historians did not regard local-level systems of dispute settlement as “law”; the practices they recorded were processual as well as socially embedded.⁵⁴ This explains their scepticism when policy advocates use a ‘rights language’ to describe land claims in ‘indigenous’ systems.

‘Rights’ in customary law need to be seen in context, i.e. no precise legal meanings were attached, and existing rules and practices occurred mostly in situations where land was plentiful. Sally Falk Moore⁵⁵ illustrates this with reference to West Africa’s long tradition of welcoming ‘strangers’ into local, so-called autochthonous communities. Moore:

Under conditions of land plenty and an absence of land markets, villagers were often generous. There are many communities in West Africa where ‘strangers’ who asked to settle locally were offered a plot to cultivate. It is seldom clear, [however,] under precisely what ‘legal’ conditions these loans or gifts of land were made. (...)

One often hears it said that in the past the moral precepts of African culture presupposed that everyone had a right to the use of a piece of cultivable land. (...) Under the same principle, ‘strangers’ or migrants’ who ask for permission to cultivate should not be refused if there is sufficient land to share with them. (...) But the question whether this was a matter of right remains. Was there ever such a right in the rule-minded, legal, human rights sense of today? Or are we talking about the frequent practice of generosity in the presence of land plenty, the helping of strangers having been at one time an affordable moral ideal? ⁵⁶

Today, under changed conditions – dramatic population increase, disputed land boundaries, in-migrants outnumbering the original population, land degradation, drought, etc. – autochthonous groups are reclaiming lands previously made available to in-migrants. Mostly, however, the situation poses an intractable problem: ‘who has the greater right, the original inhabitant or the needy migrant? Do both have legitimate claims? Who is to decide that question and who is to enforce the decision?’⁵⁷ Knowing that rival populations claiming the same land may both have good grounds for their claims, Moore recognises that matters may need to be ‘resolved by supervised negotiation’.⁵⁸ Differently put: ‘Agencies are needed which can ascertain the legitimacy of claims, and then address them without being confined to a legalistic, adversarial, either/or solution’.⁵⁹ What Moore describes for the West African Sahel region has also occurred in eastern Congo, as we have seen above.

Another contested issue is the strength of women's claims to land. Many authors have reported that the way women access land is through marriage. Husbands devolve land to their wives for farming. As others have argued, however, such a view is restrictive: it is not the husband (an individual) we need to focus on but the husband's kin group. It is from the latter

that wives get land and it is this kin group that may in some circumstances protect her claims. Women often also retain some residual land claims in their own kin groups as well as frequently obtaining land by loan or gift from a wider circle of social ties. That women get land through many social relations bears emphasis because some policy discussions assert that women get access to land as wives and go on to argue that their claims are weak because of this.⁶⁰

Those who view women's claims to land as invariably weak make the following assumptions: first, 'traditional' land holding systems universally prioritised the rights of male household heads over the rights of women; second, these 'traditional' systems are now evolving into individualized tenure arrangements with private transfers being made exclusively by and to male household heads.⁶¹ This kind of evolutionary thinking, now adopted in the rhetoric of a diverse range of policymaking bodies, has rendered women's customary land claims invisible (see Whitehead and Tsikata 2003 for a review). Evolutionary theories of landholding are 'blind' to women's *struggles and successes* as they attempt to maintain access to land.

To explain this gender blindness, Ingrid Yngstrom argues that the evolutionary thinking on customary land practices, as propagated by Jean-Philippe Platteau⁶², for example, has overly relied on a narrow reading of Fiona Mackenzie's historical study of land titling in Murang'a. Platteau holds that customary tenure systems are invariably male dominated and 'geared towards increased individualisation of tenure rights and increased transferability of land'.⁶³ Yngstrom comments:

Platteau's argument draws principally on studies of titling which took place in Kenya in the 1950s, including that of Fiona Mackenzie. In Mackenzie's historical study of land in Central Province of Kenya, debates over what constitutes "custom" had been intense over the course of this century and have been profoundly shaped by colonial attempts to codify "customary law" in the 1920s. In the codification process, male right to allocate land "pre-empted the previous visibility and legal significance of rights to usufruct" held by women.⁶⁴ Drawing on this "historical" precedent of custom, men found they were able to manipulate "custom" in order to exercise greater control over land to the detriment of women.⁶⁵

Mackenzie's study, however, also provided ample evidence to challenge the idea that women only had "secondary" rights as wives. Even though they were unable to inherit land, Murang'a women acquired strong

usufruct rights upon marriage; rights secure enough for women to maintain considerable control over subsistence production and its products.⁶⁶ In a later publication, Mackenzie (1998) addressed the issue of male and female rights in land under customary law. She concluded:

'Both (male) rights to allocate land and (female) rights of access ... had legal visibility under customary law'.⁶⁷ The (male) right to allocate was subject to the economic functions of (female) rights to cultivate it. This ensured that 'women's "proprietary position" in an economy that relied so heavily on their labour was a strong one'.^{68, 69}

Context is all-important here. As Yngstrom demonstrates by drawing from a wide range of illustrations, including her own research in Tanzania, the problem with the (evolutionary) argument that private claims on land will eventually replace those made on the basis of kinship is that,

in many parts of Africa, this does not appear to be occurring. Although increased commercialisation may have provoked private claims on land, evidence shows that these processes simultaneously provoke a proliferation of customary claims and counter-claims over land, and struggles over how "custom" is defined. Thus, even in areas of commercial agriculture where there is evidence of land markets, landholding systems remain tightly bound up with kinship structures.⁷⁰

The all important point is that we – analysts and policymakers alike – must get beyond the currently popular, but excessively restrictive view that women's customary claims to land are always "secondary" to men's. Without in any way diminishing the severe insecurities that women face, it must be recognised that the notion of a gradual weakening or extinction of women's rights in land is by no means inevitable. We must abandon such evolutionary thought, and instead pay full attention to the proliferation of claims and counter-claims that can be made – and are being made – in the name of custom. Like the colonial courts, contemporary policy arenas that espouse evolutionary models of customary land law are missing out on the ongoing dynamic of claims and counterclaims.

DIRECTIONS OF CHANGE: CUSTOMARY LAND TENURE TODAY

Drawing upon her field research in Tanzania's Dodoma region, Yngstrom argues most persuasively that 'to understand changing tenure systems, we need to look at the organisation of land holding within kinship institutions and their processes of integration into wider markets. Gender is critical to understanding how these processes unfold'.⁷¹ If analysts are to avoid the trap of an approach that hides behind stereotyped views of household organisation and ignores local power dynamics, they must

come to grips with wider contexts. This includes an appreciation of historical developments in gender relations. In particular, more attention must be given to the way land and labour intersect. Yngstrom:

In a context where labour is frequently a key limiting factor of production, and where women can and do provide a significant share of this, especially in terms of household food provisioning, the obligation by men to acknowledge their wives' contribution and to provide land for food is critical to the farming and household enterprise. Particular circumstances can nevertheless create conditions for these claims to be weakened and ultimately lost, as Fiona Mackenzie's study from Kenya shows.⁷²

The land-labour interface can be so important to members of a community that lineage authorities may override decisions made by uncooperative husbands, as Kevane and Gray⁷³ demonstrate for Burkina Faso. Here, should husbands be unwilling to provide wives with land, members of the husbands' lineage may come to the rescue. This situation exists because

women's rights are considerably more complex than the simple right to fields from their husbands. First [and foremost], women's rights to property obtained from men may be coupled with other rights and obligations. In many ethnic groups [in Burkina Faso] women have share rights to the harvests of their husbands.⁷⁴

Crucially in this respect, research has shown that 'norms about rights and duties are shaped at the extra-household level'.⁷⁵ They reveal that

women are typically not "owners of land" but "owners of crops." ... Women's ultimate rights to use land are associated with their position towards men – as mothers, wives, sisters and daughters.⁷⁶

It is this recognition of women's multiple positions and roles that entitles them to help from their husbands' lineage should husbands fail to provide access, as Jean-Yves Marchal has also shown for some of Burkina's Mossi communities.⁷⁷ Moreover, new institutions may arise that, unexpectedly perhaps, strengthen women's ability to access land. The research Kevane and Gray conducted in south-western Burkina Faso, for example, has shown that where land scarcity makes the value of land rise, thus creating a market for land, some women may see their ability to obtain land strengthened.⁷⁸

Another example of the need/benefit of analysing women's claims in a broad, extra-household context can be found in Ghana, where the Intestate Succession Law (1985) has strengthened women's traditional claims. On the basis of her extensive, long-term fieldwork, Agnès Quisumbing counters the oft-heard complaint that Akan inheritance practice 'implies that wives do not have secure rights to their husbands' land in the case of death or divorce'.⁷⁹ The situation, she argues, is currently changing in women's favour:

Recently, [Akan] husbands have increasingly transferred land to their wives and children as a gift during their own lifetime if their wives and children, especially wives, have helped in planting [cocoa] trees. The individualization of land-tenure institutions was strengthened further by the Intestate Succession Law (ISL; PNDCL 111) in 1985, which provides for the following division of the farm: three-sixteenths to the surviving spouse, nine-sixteenths to the surviving children, one-eighth to the surviving parent, and one-eighth in accordance with customary inheritance law. However, the common interpretation of the ISL is one-third each for the spouse, children, and maternal family. We postulate that the inheritance of gifts increases in areas where matrilineal inheritance is practised in order to strengthen individual land rights.⁸⁰

Quisumbing *et al* speculate that the increases reflect recognition of women's labour input:

*Cocoa-tree planting and subsequent tree management are labour-intensive activities that require the work of the wife and children, particularly in weeding. Thus, it is likely that the [increasingly] strong rights are conferred to reward the effort of wives and children to plant and grow trees.*⁸¹

The observed change in 'custom' has convinced Quisumbing and her team of researchers that 'one cannot generalize that individualization of land rights necessarily leads to weaker rights for women'.⁸² To understand meanings of 'customary land tenure' today, which are always localized, we need to appreciate that circumstances do change over time. Yngstrom provides the conceptual tools:

*In terms of institutional arrangements regarding rights and responsibilities in land and production, the conjugal unit needs to be understood in the context of wider sets of relationships among groups organized on the basis of descent and the gender ideologies implied therein. As landholding systems have been integrated into wider economic systems, women and men have worked both within and around the constraints of these institutions in order to exercise claims both on land and on each other for the means to work it. In the process, these institutions have transformed, as have the rights and claims that individuals and groups can exercise through them.*⁸³

These various reflections on the continuing relevance of customary rights to land have taken us quite some distance beyond the essentialist view that women are invariably to be regarded as members of household who command "secondary" rights at best, diminishing "secondary" rights more likely. Above all, we need to appreciate that women and men continue to negotiate claims – albeit as non-equals. Sometimes women lose out, as in Dodoma, where a historically situated decline in livestock first resulted in 'a decline in access to labour for senior men', which in turn led to men underplaying women's historical claims on

lineage land.⁸⁴ Impoverished men sometimes behave that way, but not necessarily so.⁸⁵ In other contexts, changing economic circumstances and new institutions have strengthened women's claim to land, as documented for Ghana and Burkina Faso.

What should matter to us/researchers is not what *really* happened in the past (in many situated contexts we shall never find out), but how customary institutions function *within* the modern state. Thankfully, we do have a few studies that show that statutory law and so-called customary laws are more interconnected than is generally realized. What emerges, Mackenzie tells us, is 'a complex picture in which *people contest rights to land by drawing ... on which ever legal resource they can*'.⁸⁶ (Emphasis added). The point here is that in everyday life, men and women 'sustain their claims to resources by employing arguments from both the statutory and so-called customary law'.⁸⁷ The outcomes do not always favour women, since there is much gender bias in legal cultures and statutory law, but other outcomes, as seen above, are also possible. It deserves emphasizing that we need to learn more about how claims are made with reference to both 'systems' simultaneously.

ACKNOWLEDGING MEMORY

Despite the colonial codification exercise during which certain aspects of land tenure were re-written, i.e. written up with a (male) bias or even invented, the concept of customary land tenure lives on and testifies to the 'negotiation' and 'flexibility' found in pre-colonial approaches to land allocation and use. Moreover, although we shall probably never know the finer details of the scope for negotiation that existed in pre-colonial times, people today have memories – and they can be extremely imaginative in what they *choose* to remember. This observation is critically important to situations like Eastern Congo (as seen) or in Rwanda, where a Land Policy and Land Law have been long in the making.

The role of memory warrants a final reflection. In Rwanda, as elsewhere in Africa, much of what we know about history has come to us through the filter of 'collective memories' (Huggins and Musahara, this volume). In modern times, there are two episodes during which 'collective memory' played a key role in the creation of perceptions of the past. Firstly, the 1950s, when scholarly research created a romantic, socially harmonious image of pre-colonial relations based on the 'collective memory' of aristocratic Tutsi; secondly, the early 1990s, when 'Hutu Power' resurrected the 'collective memory' of Tutsi privilege to suit their own brutally selfish aims.⁸⁸ Today, ten years down the line, we see the awesome power of 'collective memory' at work in Rwanda's Land Policy where it 'glosses over the important issues of inequality and imposition of tenure regimes through conquest, describing the land system as stable and harmonious' (Musahara and Huggins, this volume); a harmony later shattered by European colonial rule.

Among the reform measures proposed in Rwanda's Land Policy is land registration. The measure has already produced widespread anxiety and controversy, because, as Musahara and Huggins point out, 'tenure security' means different things to different people. What peasant farmers want is 'security from land disputes'; what Government has in mind is security through land registration. Worryingly, the poor fear 'that those with land holdings smaller than 1ha, or unable to afford the [registration] fee, [will] not be able to register, and [will] be forced to give up land for consolidation'. Knowing how fear can be manipulated, and was manipulated in the run-up to the 1994 genocide, I agree with the authors that popular fears surrounding land registration need to be addressed by the authorities as a matter of urgency.

Equally worrying, and here we touch on a research issue of enormous magnitude, is that the Land Law will abolish customary systems. Essentially, the Land Law

abolishes the dual nature of the Rwandan land tenure. Due to the restriction on subdivisions, the long practised system of inheritance will cease and access by lineage ubukonde will also be abolished.

The architects of the Land Policy and Land Law have taken the view that cultural aspects of land access are insignificant – "One should avoid being trapped by cultural considerations" – and that, in any case, those cultural aspects are the same throughout Rwanda. This is a serious misreading of the pre- and early colonial situations, when the north-west and the rest of the country were governed by regionally/culturally distinct approaches to land access. Two comments are in order. First, the history of Rwanda's cultural/regional difference is well documented. Policy makers must not ignore this. Second, while no one suggests that this difference has remained static (and there is a lack of recent research), *the memory of that difference lives on* and can be reactivated and distorted for specific, possibly harmful political purposes.

While not many people in Rwanda today will have a clear picture of what 'remains' of the pre-1920s difference, 'from a conflict point of view, the cultural aspects of land access [remain] highly significant' (Musahara and Huggins, this volume). My point, which is also a deep concern, is that *remembered* land systems (*igikingi, isambu, ubukonde*) can be used to forge or exaggerate social difference *today*. The Land Policy gives us a rosy, homogenous picture of the pre-colonial past, claiming that 'in the pre-colonial period, "the ruler of the time accorded plots to any who acquired one"'. This significantly understates,' as Musahara and Huggins point out, 'the class-based social differentiation which governed land access'. I fully agree: 'some aspects of customary practices will continue to have an influence.' What matters, too, and here I would go further than the authors have done, is that such a watering down of pre-colonial complexities may become an invitation for political opponents of the present government to launch an accusation of cultural insensitivity. The Land Policy should not give demagogues ammunition to exaggerate the importance of past differences.

CONCLUSION

In the early 1960s, when social scientists still stood close to the colonial era, anthropologists already pointed out that the colonial discourse on customary land tenure was muddled because wrong assumptions had been made and imposed. Paul Bohannan was explicit: 'there exists no good analysis of the concepts habitually used in land-tenure studies, and certainly no detailed critique of their applicability to cross-cultural study'.⁸⁹

The critique that has now emerged, and which I have reviewed in this chapter, contains conclusive evidence to argue that pre-colonial land rights never were 'rights' in a clearly defined, legal sense. But they came to be regarded as such following codification (simplification, standardization) in colonial times. Despite the vast impact that codification has had, and despite evidence that contemporary policy making continues in the same simplifying/standardizing manner, 'customary land tenure' is alive and well, and changing. It takes many shapes, allows for the re-writing (and even invention) of past practices, and remains open to hard bargaining. It is this dynamic quality of customary land tenure – with its implicit recognition that there is nothing static about 'custom' – which, analytically speaking, should be valued above overly facile, legalistic interpretations. An appreciation of the dynamic quality of 'customary land tenure' should include an acknowledgement that customary law as practised today – i.e. as practised through the 'small talk' and actions of millions of farmers – is not only closely entwined with statutory law, but needs to be understood in the context of recent changes in the realm of kinship and descent organization.

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