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Horman Chitonge
Ross Harvey *Editors*

Land Tenure Challenges in Africa


Confronting the Land Governance
Deficit

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Editors

Land Tenure Challenges in Africa

Confronting the Land Governance Deficit

Editors

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Preface

This book was conceived, in a sense, right at the outset of Good Governance Africa's conceptualization. When the so-called 'Fast-Track Land Reform' programme started in Zimbabwe at the turn of the century, the distortion to what had previously been a relatively stable equilibrium was rather frightening. The regime spearheaded by the late Robert Mugabe had, of course, committed myriad atrocities already, and so perhaps it was rather unsurprising. Nonetheless, the programme unleashed a heated debate about land reform across Africa in our post-independence context. The debate is yet to be settled, but this book makes a novel contribution that emphasizes the irrevocable place of governance in effecting more secure tenure and rectifying past injustice.

At Good Governance Africa, we exist to improve citizens' lives through improved governance performance. We are convinced that the quality of a country's institutions is a determining factor for whether broad-based development occurs or not. By institutions we mean, drawing on Avner Greif's definition, the social systems—norms, values, beliefs and culture—that motivate regular human behaviour. In the broadest sense, they're the scaffolding that generates incentives for human decision-making. High-quality institutions provide checks and balances against the abuse of power, often by ensuring that the powers of government are kept separate. For instance, the Legislature should prevent the Executive from ruling by fiat. If necessary, the Judiciary should also rule against such abuse without fear or favour. When these branches of government are co-opted by the executive, the 'will of the people' is invariably trampled, and the outcomes are tragic.

Typically, strong political institutions provide the space for cogent economic institutions to arise. Key, of course, to effective economic institutions is the credible protection of investment. In other words, property rights must be honoured if development-enhancing investment is going to flow into any given country. The broad concept of property rights covers everything from land to intellectual property. But land is of course the most basic building block, and this is the focus of the book you're about to read.

There is broad consensus in the development literature that land needs to be properly governed with credible and reliable security of tenure. Where the consensus

breaks down is essentially in how to achieve this across contexts with markedly different inherited institutions; varying degrees of past conflicts over land; unstable political equilibria and sometimes bitter debates over redistribution and restitution in post-colonial contexts.

In an attempt to get to grips with the South African land debate, GGA published its first volume on the land question in 2017, authored by William Beinart, Peter Delius and Michelle Hay. We strongly encourage you to read that volume as a kind of precursor to the volume in your hands. The latter was birthed around the same time as the first book and has taken rather a long time to come to fruition, so we want to express our gratitude to all the authors who have stood with us through the process and made a serious contribution to what is often a complex debate, fraught with the reality that theory is not always congruent with *realpolitik*—vested interests, a lack of governance capacity and competing ideological positions. We are also extremely grateful to our publishers—Springer—for publishing this book as part of their *Economic Geography* series.

The authors have endured a rigorous peer review process. A special word of thanks is due to our peer reviewers, Frank Matose and Grasian Mkodzongi, who returned their chapters timeously and provided invaluable feedback on the work. On a personal note, I am extremely grateful to our chief editor, Horman Chitonge, who has taken on this project with vigour and skill, carefully reading each chapter to ensure that authors responded adequately to the peer reviewers' inputs.

Professor Chitonge also wrote the first chapter, which provides an excellent overview of the issues at stake and necessary context for the uninitiated. The first section of the book deals with general issues of land governance and tenure reforms across the continent, while the second addresses specific land tenure struggles in different contexts. Selected sections of each abstract below provide some insight into what you can expect from the book:

Part I: Land Governance and Land Tenure Reforms in Africa

Chapter 1

This chapter highlights some of the key factors behind the current shift of emphasis in land reform policy in Africa. The emphasis is now on land governance, which is partly occurred as a result of the realization that without effective land governance systems, it will be difficult to use land productively, equitably and sustainably. African governments have been implementing land reforms since the 1960s. Despite this, there are still many challenges surrounding land tenure on the continent. Land tenure issues can be complex and contentious because tenure reform fundamentally involves the redefinition and redistribution of property and power. It is therefore not surprising that land tenure challenges in Africa continue to be a topical policy issue. It is argued

in this chapter that the persisting challenges around land tenure in Africa are largely a reflection of deficiencies in land governance systems.

Chapter 2

This comparative chapter outlines the position in South Africa and explores briefly experiences in Mozambique, Kenya and Ghana in order to suggest ways forward. Tenure is important because rural and peri-urban communities are amongst the poorest and their rights should not be neglected. The chapter suggests that the rights of existing family landholdings should be prioritized. It argues that at present the land rights of millions of Africans who hold their land in customary areas, in informal settlements and on transferred land are uncertain.

Chapter 3

This chapter looks at Land Governance and reform in Southern Africa focusing on the fact that countries in this region have shared historical legacy of colonialism, inequality, tenure diversity and fragmentation. The persistence of tenure inequity, decades after independence and despite significant and repeated investments in land reform initiatives raises questions regarding these interventions. The chapter argues that successful land reforms should be predicated upon the democratic interaction of the state and the citizen; and land reform processes therefore becomes inherently part of the broader strategic challenge of democratizing the state and society.

Chapter 4

This chapter applies the concept of land governance to assess the differential manifestations of ownership and tenure rights in Namibia and Ghana. In Namibia, restitution entails the creation of a unitary constitutional system which accords equal rights to all citizens and involves, among other factors, legal and institutional reforms. In Ghana, post-colonial restitution entails constitutional recognition of customary land rights, incremental and radical approaches, compensation for compulsorily acquired land, establishment of a reliable land records system and re-conceptualisation of land as a public good.

Chapter 5

This chapter examines the fierce debates which have ensued over the past four years regarding a proposal aimed at speeding up the redistribution of land in South Africa—the expropriation of privately owned land without the payment of compensation. The proposal and its reception must be located within the complex politics of land in the post-apartheid era, in a context where land reform is widely seen as failing to live up to its promise. The chapter argues that ‘expropriation without compensation’ (EWC) offers a simple solution to the many problems facing land reform in South Africa that is critically assessed and found wanting.

Chapter 6

Land governance in Africa has, in recent decades, become a central concern, both for governments and conditionality in bilateral and multilateral agreements. This chapter

attempts to analyse land governance through the legal framework and the institutional landscape in DR Congo to understand the complexity of land governance. The chapter argues that the instrumentalization of the key laws on land management by the elite is intentional and politically shaped. Ongoing efforts to improve governance are being deeply challenged by political interests and economic stakes embedded in the current status quo to the detriment of the basic needs of the population.

Chapter 7

This chapter examines the dynamics of tobacco farming after the Fast-Track Land Reform Programme in Zimbabwe. It shows that the entrance of tobacco contract farming firms in Zimbabwe led to an increase in the number of farmers, production, and area of land under tobacco cultivation. However, this milestone achievement in the growth of smallholder production was mired by the neglect of environmental issues which threatens the viability and sustainability of smallholder tobacco production.

Chapter 8

This chapter analyses theories guiding land reforms aimed at promoting tenure security in Zambia and Ethiopia. In Ethiopia, the feudal agrarian relations targeted by the Derg regime were the core of the land question. On the other hand, in Zambia the land question continues to be linked to the colonial enclosure of urban land and the resulting dual land tenure system being statutory and customary land. The chapter argues that while there are a number of theories that a country may adopt to guide its land policy reforms, not all of them result in tenure security.

Part II: Land Tenure Struggles in Africa

Chapter 9

This chapter has examined the land reform trends in Morocco. Recent changes (2019) in the legal framework governing collectively owned land in Morocco follow neoliberal economic policies that emphasize market-driven land reform. The new collective land tenure regime also responds to rural unrest and anti-government opposition resulting from state repression, lack of economic opportunity, and land ownership inequality. This chapter argues that even though international development organizations recognize different ways of organizing rights in land, extractivist forms of capitalism prevalent in Morocco still work to prioritize commoditization and other measures that dispossess historically marginalized land owners and managers in favour of capital interests.

Chapter 10

The chapter presents the analysis of a study about how infrastructure, particularly, the development of airports in Cote d'Ivoire and Senegal, impacts on tenure rights

of local residents living on or near the land where infrastructure is developed. The chapter reports on the struggles which local residents have gone through to fight for the rights to the land. Several land conflicts are linked to the airport of the city of Bouaké, located in the centre of Côte d'Ivoire. Built on a parcel of common law land belonging to several village communities, the land rights of this public equipment are today subject to various disputes. Our analysis reveals that the main causes of the land disputes are articulated around the shortcomings of the negotiations for the acquisition of parcels from village communities, coupled to the urban expansion of the city of Bouaké.

Chapter 11

This chapter presents the results of a study on land tenure security for beneficiaries of the Fast-Track Land Reform Programme (FTLRP). Zimbabwe's implementation of a radical land reform (FTLRP) collapsed the dominant freehold tenure regime and brought about state ownership of land in the countryside. The study shows that state-based tenure post-FTLRP has inhibited land transactions, thus guaranteeing access to land for many vulnerable groups. However, it is also evident that the state poses a great danger to the tenure security of the peasantry as it facilitates large-scale agricultural and mining 'investments'. Results from this study show that while state-based tenure has led to capital flight, this study shows that, for certain crop commodities and class of farmers, private capital tends to invest under state-based tenure.

Chapter 12

This chapter addresses the numerous legal battles in which Indigenous people are engaged to restore their rights to their land. The chapter argues that claimants of ancestral land rights are not only seeking to undo the injustices of the past, but also seeking to find ways to improve their livelihoods. Finding a legal way to address their rights to their ancestral lands has evolved as an important politico-legal instrument. Reclaiming their land appears not so easy and is not so straight forward. The chapter addresses the recurrent issues, the pitfalls and the challenges that emerge during and after litigation, which is only one of the many steps in restoring rights.

Chapter 13

This chapter explores the Etosha ancestral land claim by the Haillom San. It exposes the limitations of litigation. The legal arena in Namibia is constituted by multiple legal norms and values. Statutory law operates next to customary laws and rights. The Etosha ruling, however, makes clear that legal positivism as manifested in statutory law and common law remains the predominant legal and political interpretative framework in Namibia. Other acceptable legal remedies that are available to indigenous peoples under both Namibian constitutional law and international law are ignored.

Chapter 14

This chapter exposes the realities of minorities' land rights in Africa as it shows the complexities involved in securing land rights for minorities in Africa. It presents

a case study of the Mbororo people in the Northwest Region of Cameroon. The chapter argues that for the Mbororo, land rights are still an illusionary crusade as its implementation is complex and faces denial, rejection and challenges from the Northwest population and local administrators.

Chapter 15

This chapter examines how war is sometimes employed to acquire land in several Africa countries. Using the contours of land as an invaluable asset in human history, this chapter problematizes the dynamics of access to, acquisition and ownership of land through the lens of organized crime. Albin's patron-client theory and Smith's Enterprise theory are used to aid the analysis. The findings show that land wars are triggered by an assortment of factors. In sanitizing the immorality of greed-driven land wars, legal instruments and frameworks are used to legitimize the collusive swindle.

Chapter 16

This chapter sums up the key themes on land tenure challenges in Africa emerging from the discussions in the volume. It also outlines some of the emerging land tenure issues in Africa which require further research and analysis.

Our passion at Good Governance Africa for improved governance to benefit citizens is partly realized through encouraging high-quality debate and analysis. I am very pleased to see that quality reflected in this volume, and I trust that you, our reader, will enjoy the book, digest it fully and engage with us so that we can become increasingly sharper in executing our mandate.

Lastly, we would like to thank our donors who supported this particular project. Without them, the book would never have come to fruition.

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Elizabeth Tabot is a Ph.D. student and a tutor in the Department of African Studies, University of Cape Town. Her Ph.D. thesis focuses on 'A Study on the Land Dispossession of Minorities in Africa: The Case of the Mbororos in the North-west Region of Cameroon.' She has a B.A. in History and Law from the University of Buea, Cameroon. She holds a Masters in African Studies from Dalarna University, Centre of African Studies in Sweden. Her major interest of study includes Human Rights in Africa, Land Rights in Africa and African Socio-political and economic development.

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Chapter 1

Land Governance in Africa: The New Policy Reform Agenda



Horman Chitonge

Abstract African governments have been implementing land reforms since the 1960s. Despite this, there are still many challenges surrounding land tenure on the continent. Land tenure issues can be complex and contentious because tenure reform fundamentally involves the redefinition and redistribution of property and power. It is, therefore, not surprising that tenure challenges in Africa continue to be a topical policy issue. However, it can be argued that the persisting challenges around land tenure in Africa are largely a reflection of deficiencies in land governance systems. Addressing these enduring systematic challenges would need foregrounding land governance. Fortunately, there are indications, over the last decade, that land policy in Africa is gradually shifting attention from the narrow focus on tenure security, which has dominated the land reform agenda since the 1970s, to the broader issue of land governance. This chapter highlights some of the key factors behind this apparent shift of emphasis in land reform policy in Africa. The current emphasis on land governance is partly due to the realisation that without effective land governance systems, it will be difficult to use land productively, equitably and sustainably.

Keywords Land governance · Tenure reform · Tenure security · Africa · Land policy reform

1.1 Introduction

This chapter presents an overview of the emerging central land reform policy issues in Africa. It highlights the major shifts in the land reform policy direction on the continent over time. To locate the discussion in the broader context, the chapter outlines the different schools of thought, which have informed land policy reforms in Africa. The chapter shows that while during the 1990s, land policy largely focused on reforms, which sought to strengthen land tenure security, particularly the formalisation of customary land rights, the new land policy reform programme on the continent is

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shifting the gear to highlight the importance of effective land governance. Different factors that have contributed to this shift in land policy reform direction in Africa are discussed in the chapter to identify the emerging challenges to which land policies are seeking to respond. The centrality of effective land governance is a common theme that emerges in all the chapters in this book. Although different issues have been discussed in this book from minority land rights, public infrastructure and the land rights of local people, expropriation without compensation, the state-based land tenure regime after land reform, to the prevalence of organised crime as an instrument for acquiring land, all relate to the broader issue of land governance.

From all indications, land governance has become a top land policy issue in Africa since the land grabs, sparked by the 2008/09 financial and economic crisis. The emphasis on land governance has emerged as a result of the realisation, by both donors and African policymakers, that without effective land governance structures and institutions, it will be difficult to use land resources to achieve the broader objectives of reducing poverty, ensuring equitable share and use of land, securing the land rights of vulnerable groups in rural and urban areas, resolving land conflicts, promoting inclusive economic growth and sustainable use of land and other natural resources. Chapter 6 in this volume illustrates this well.

Although the focus in the new land policy reform agenda is on promoting effective land governance, earlier issues have not been thrown away; they are integrated with land governance. In this new land policy direction, there is strong consensus among donors, African leaders and policymakers around the need to create conditions and institutions, which promote the effective governance of land and related resources in Africa (FAO 2007; GIZ 2018; Rutherford 2019). For example, it has become clear that when there is no transparency and accountability in the way land is administered and managed, no one's rights (including those with title deeds) are secure. In other words, weak land governance systems endanger the rights of everyone (Chaveau et al. 2006; Deininger and Feder 2009), especially poor households on customary land, for whom land is the only asset and means of livelihood (see Chap. 2).

The chapter is divided into six sections. The next section provides a background to land policy reforms in Africa in the past. This is followed by a section that outlines the major theories, which have informed land reform in Africa. After this, the chapter has briefly discussed the reasons why African government has embarked on reforming land policies and institutions. This is followed by a discussion of the land policy reform agenda of the 1990s including the drivers behind these reforms. The next section presents a brief discussion of the emerging land policy reform direction, focusing on land governance. This section has also discussed the factors behind the current land policy reform direction, which emphasises effective land governance as the central pillar of land reform. The last section sums up the discussion.

1.2 Background to Land Reform in Africa

Land reform is an old policy issue in Africa, which has taken different shapes and directions at different times. Although in pre-colonial times, land relations and the institutions were fairly stable (though gradually evolving), the colonisation of Africa led to the radical altering of land relations and related institutions including social practice, to an extent that some analysts refer to this experience as “a rapture” (Lund 2016). Indeed, the colonial experience around land has been a traumatic one across the continent, which many African communities are still grappling with. Although most post-colonial African states endeavoured to introduce legislation and policies, which sought to restructure land relations, the focus, especially immediately after independence, was on affirming national sovereignty over land, through various means including the nationalisation of land (Berry 2018). In the first-generation land reforms in Africa, the post-colonial state was preoccupied with consolidating control over land and other natural resources such that little was done to change land relations, policy and the institutions (Bassett 1993; Okoth-Ogendo 1993; Wily 2011; Homes 2015). Little was done to address the critical issues of land governance, for instance.

However, during the 1990s, mainly due to pressure from donors and international financial institutions (IFIs), many African countries embarked on reforming national land policies, focusing mainly on the formalisation of land rights through titling or some form of land registration. This policy direction was allegedly taken in order to strengthen and secure tenure rights for women and poor rural residents on customary land whose land rights were widely believed to be insecure and vague (Feder and Nishio 1999; De Soto 2000; Johnson 2011). Although African governments have formulated and tried to implement land tenure security programmes, the implementation of these programmes has not translated into significant changes in land relations on the ground, with land rights of the poor still vulnerable (Toulmin 2008; Wily 2011). From the past experience of implementing land reform, it has now become clear that tenure security will not be realised in a context where land governance systems are weak. This is one of the reasons why the new land reform policy agenda on the continent are putting emphasis on the broader issue of land governance.

1.3 Land Policy Reform Debates in Africa

Although land reforms have addressed several issues, the focus has been on transforming the customary land tenure system, for the simple reason that majority of the land on the continent is still under customary tenure (Wily 2011; Berry 2017), except in former settler colonies such as South Africa, Zimbabwe, Namibia, Algeria, and Swaziland and Kenya to a lesser extent (Moyo 2008). While the debates in the past focused on customary tenure, particularly on the question of whether customary

land rights were insecure or not, it has now become apparent that security of tenure is not a matter of having a piece of paper, but involves a whole range of issues, which requires effective governance of land resources. Cases studies conducted in different African countries have shown that when land governance systems are weak, no land rights are secure (Ubink and Quan 2008; Deininger and Feder 2009). Land governance in this chapter refers to the rules/laws/norms and the application of the rules and laws to the administration and management of land resources. Therefore, institutions form a crucial component of land governance.

Broadly, land policy debates in Africa have been dominated by the two schools of thought at the extreme end of what is effectively a theoretical continuum. At one end of the continuum are a set of theories that argue for some kind of preservation of customary tenure (conservation theories or school of thought), while at the other end are theories that see customary tenure as something that hinders the productive use of land, and therefore should be replaced (the replacement theories or school of thought, Hull et al. 2019:7). While debates on land policy tend to be dichotomised between these two extreme views, policy formulation and implementation usually straddle the middle section of this continuum. This is mainly due to the contestations between different groups and interests in the policy debates. In other words, while debates on land policy reform in Africa are often polarised, policy, being a practical field, is forced to move somewhere between the two extremes, though it is possible to see to which side a particular policy leans more.

1.3.1 The Conservation School of Thought

The conservation school of thought argues that customary tenure, though it is not perfect, has certain advantages, which if completely replaced can endanger livelihoods, social cohesion, social stability, erase cultural identities of people and lead to inequitable access to land (Mafeje 2003; Okoth-Ogendo 1993; Peters 2004; AU/AfDB/ECA 2010). Proponents of this view argue that in the African context, there is no evidence to support the view that individualisation and formalisation of customary land rights lead to higher investment in land, secure tenure rights and increased productivity (Bassett 1993; Migot-Adholla et al. 1991; Smith 2004; Meinzen-dick and Mwangi 2008; Place 2009). For instance, it has been observed that,

In Practice, many of the land policy reforms and titling programs of the 1970s and early 1980s failed to achieve the expected increase in agricultural investment and productivity, did not facilitate the use of land as collateral for small farmers, and often encouraged speculation by outsiders, thus displacing the very people—the local users of land—who were supposed to acquire increased security through titling (Peters 2004:1318).

It has further been observed that,

...whereas no evidence exists that agricultural production has increased by virtue of that programme [formalisation and titling], there are plenty of data to indicate that it, in general,

increased inequalities both structural and political-economic within the agrarian sector. Indeed it has led to the emergence of a relatively rich middle peasantry that enjoys much useful linkages with central bureaucracies (Okoth-Ogendo 1993:269).

Analysts who support the conservation view point to several studies conducted in Africa and elsewhere which show no evidence that formalisation of land rights results in improved investment, security of tenure and higher productivity. Bruce (1993), for instance, observed that policy reforms that seek to replace customary tenure rights tend to be ineffective in realising the intended goals and are extremely difficult to implement because they are costly. In the case of land titling in Kenya, it has been reported that many people whose land rights were formalised, did not even collect the certificates of title from the deeds office, they instead preferred to continue transacting using customary norms (Bruce and Migot-Adollah 1994). Regarding the idea that titling strengthens tenure rights and improves investment and care for the land, it has been argued that, in some cases, the “uncertainty” surrounding unregistered land leads people to invest in their land as a way of affirming their claims to the land (Berry 2018).

Although the conservation school of thought has been widely supported by researchers, policymakers in Africa prefer statutory to customary land tenure (Peters 2004). They distrust customary land tenure, which they often see as something outdated, requiring to be modernised through titling. While many African policymakers see customary land as something that needs to be phased out, most of them have not pushed policy to the point of recommending the wholesale replacement of customary land tenure, for various reasons including the practical challenge of implementing a full-fledge land titling programme. Reading through policy documents produced during the 1990s, one gets the sense that the drafters of the documents assumed that indigenous forms of tenure will “naturally” disappear as “development” spreads to the rural and peri-urban areas; that customary land tenure will eventually be replaced by modern forms of landholding. But that has not happened yet.

1.3.2 The Replacement School of Thought

Analysts who subscribed to the replacement school of thought argue that land as a factor of production, like any other factor, needs to be allocated and used efficiently, implying that customary land tenure does not promote efficient and productive land use. On the basis of this, they recommend the complete replacement of customary tenure with what they believe to be an efficient form of landholding. Supporters of this view argue that the only way to efficiently allocate land is to formalise land rights, preferably through individual titles, which can then be transacted on a market (Johnson 2011). They argue that since under customary tenure people get allocated land on the basis of being a member of a community, it is not always the case that the most efficient user of the land gets the land (Feder and Nishio 1999; De Soto 2000; Deininger 2003).

Broadly, the call to formalise customary landholding is based on the idea that formal rights to land strengthen security of tenure and as a result provide the incentive to invest and conserve the land. The other argument advanced to support the formalisation of land rights is that this enables the right holder to use land as collateral to access credit. It has, for instance, been argued that secure ownership of land “can enhance the sustainability of resource use, prevent environmental degradation, and promote the overall efficiency of land use” (Deininger and Binswanger 1999:250). It has also been argued that the only way to overcome the tenure insecurity associated with the customary land tenure system is “to provide landowners with titles, backed by a legal system capable of enforcing these property rights” (Feder and Nishio 1999:28). Analysts such as Johnson (1972, 2011), Dorner (1972), Simpson (1976), Harrison (1987), de Soto (2000), Deininger (2003) share the common view that customary land does not provide sufficient security to promote investment and increase productive use of land. The reasons why they support formalisation is that it takes customary land rights out of the realm of the informal lineage land ownership system, thus making land rights fully legal, formal and individual; “measuring precisely the boundaries of claims, recording claims in a formal, state-administered land record system...” (see Atwood 1990:659).

1.3.3 World Bank Views on Land

Views expounded by the replacement school of thought were strongly supported and popularised by World Bank officials (from the 1970s up to the mid-1990s). The World Bank argued that because customary land tenure leads to inefficient use of land, it negatively impacts economic growth and poverty reduction (World Bank 1975). However, the World Bank position on formalisation of customary land rights has shifted over time (see Deininger and Binswanger 1999). From the 1970s to the 1990s, the Bank supported the formalisation of land rights through individual titling of customary land (World Bank 1975). But from the late 1990s, the Bank’s position shifted from focusing on titling as the only way to strengthen land rights to the strategy of “recognising” land rights through existing local institutions (Deininger and Binswanger 1999; Cotula et al. 2009). This shift is reflected in the land policy documents in most African countries, where the policy emphasis has, since the early 2000s, acknowledged other ways of securing tenure. Most of the policy documents recommend the recognition of different types of land rights as valid forms of landholding, and there are emerging initiatives in Mozambique, Kenya, Botswana and Namibia where this approach has been implemented (see Chap. 2; Kaarhus and Dondeyne 2015).

1.3.4 Hybrid School of Thought

Between the two extremes views represented by the replacement and preservation schools of thought, we find a range of hybrid views. For example, there is a view that land reform policy needs to respect indigenous tenure systems by recognising and clarifying the rights of people under customary tenure (Shipton and Goheen 1992; Menzein-Dick and Mwangi 2008). We also find views that advocate for a combination of customary norms with statutory rules in the administration of land as a way of adapting customary tenure to the rapidly changing circumstance on the ground. For instance, Ubunik and Quan's (2008) work on land relations in peri-urban Kumasi shows that in people's day to day dealings with land, they attempt to find practical solutions by borrowing from the two systems. This view of land reform is commonly linked to the idea that customary land is flexible and highly adaptable to changing situations (Migot-Adolla et al. 1991), and because of this, there is no need to replace it, the tenure relations can adapt to changing circumstances. This view re-echoes analysts who have argued that customary land tenure should be seen as driven by "living customary law" (as opposed to official customary law), and therefore is dynamic and responsive to challenges on the ground (Cousins 1999).

This view is closely related to the evolutionary theory of rights, which argues that as commercialisation of agriculture increases, customary land rights spontaneously evolve towards more individual formalised rights. The emergence of property rights according to this view is essentially a response to the changing socioeconomic environment that requires a well-defined set of property rights to reduce transaction costs. According to Demsetz (1967:348), one of the key proponents of this school, "the emergence of new property rights takes place in response to the desire of the interacting persons for adjustment to new benefits-cost possibilities." What this view suggests is that policy should only provide an environment where existing rights can spontaneously evolve into formal individualised land rights.

Similar to the evolutionary theory of land rights, the adaptation theory stresses the point that it is not necessary to replace or conserve indigenous land rights; the situation on the ground dictates the adjustment to land rights regimes. It has for instance been argued that "If and when ... the efficiency gains from allowing sales increase, groups can move towards gradual individualisation and sales to the outsider at their own pace" (Deininger et al. 2014:78). According to this view, the move to formalised individual ownership of land is inevitable and can occur gradually without much intervention from the state.

1.3.5 The Influence of Land Theories on Land Policy

The theories of land rights discussed above have no doubt influenced land policies in Africa at different times. However, in the real world of public policy, land policies rarely embrace the extreme positions advanced by the replacement and preservation

schools of thought. As noted above, land reform policies in democratic states are an outcome of contending views and interests; they are often a reflection of the compromise between different interest groups. While the dominant groups often tend to shape land policies to promote their own interests (Platteau 1996), the pushback from other interest groups forces land policies to settle somewhere between the two extremes. For example, land policies developed in most African countries since the 1990s while they emphasised what has been referred to as the neo-liberalisation of land rights (Chimhowu 2019), the majority of them did not adopt the wholesale replacement of customary land rights. Although most of the policies have shown a clear bias towards statutory tenure, there have been many countries that have recognised and protected customary land rights with countries such as Mozambique, Kenya, Ghana, Uganda, Tanzania and South Africa giving customary land rights equal protection (at least in theory and law) to statutory land rights (Wily 2011).

In Mozambique, for instance, the 1995 land policy and the 1997 land law both recognise and secure customary land rights in such a way that investors who seek to lease land can negotiate with community members (Kaarhus and Dondeyne 2015; see also Chap. 2 in this volume). In Uganda, the 1998 Land Law and the 2011 Draft land policy, expanding on the 1995 Constitution, have both provided mechanisms for the recognition of customary land rights by making it possible for customary land to be registered, similar to statutory land rights. This has been achieved mainly through the programme of devolving land administration to councils and communities, a move that has made land registry services easily available in rural areas (Leeuwen 2014; Bruce 2014a). In Zambia, while the Land Act of 1995 allows for customary land to be converted into statutory tenure, the new draft policy has proposed to create what is being referred to as “customary estates,” which will enable people on customary land to register their rights and possibly lease their land to potential investors (Chitonge 2019). Similar reforms have been reported in Cote d’Ivoire in the 1998 Rural Land Law, Burkina Faso’s 2009 Rural Land Tenure Act, and Kenya’s 2016 Community land Act (see Chimhowu 2019). In Tanzania, although the state has residual rights over village land, customary land rights are recognised and can be registered just like statutory land rights.

However, while most land policy documents and laws have recognised customary land rights, the main goal of land policies in most countries is to promote the gradual development of individual formal land rights and markets (Mitchell et al. 2008). But even though policies have a strong bias towards statutory rights, land policies on the continent have embraced a hybrid approach, accommodating customary land tenure while promoting statutory tenure rights. It has thus been argued that “policy makers and development practitioners tend to take a middle position, seeing potential complementarity between statutory and customary tenure systems” (Leeuwen 2014:293). It could be argued that it is not that policymakers want to adopt a hybrid policy position; they are forced to settle in the middle of the continuum as a result of the contestations between various interest groups. Without any pushback from other stakeholders, African policymakers would outrightly go for the replacement of customary tenure in the belief that this would stimulate investment and contribute to economic growth and poverty reduction.

1.3.6 *Rationale for Land Reform*

Reasons for embarking on land reform often differ from country to country, but reforms are frequently induced by social, political, economic and ideological factors such as the need for equitable distribution of land, making land more productive to meet food supply needs, contribute to poverty alleviation, winning the support of rural masses, enhancing environmental sustainability, promoting political and social stability, and sometimes as a response to pressure from external forces including donors and multilateral institutions as the case in most African countries has been since the 1990s.¹ For whatever reasons land reform is undertaken, it essentially seeks to transform the agrarian structure and the accompanying social relations by altering the existing property ownership patterns and sometimes the use of land (Moyo 2008). Whether a particular land reform succeeds in transforming the agrarian structure or not depends on a number of factors, including the type of the programme implemented, the commitment of the state to reforms, the capacity of state institutions and the support of the programme from the people. An unpopular land reform programme is likely to be unsuccessful unless it is implemented by force as has been the case in most collectivisation land reform programmes.

Land policy reforms are part of the broader land reform agenda. Like any other public policy, land policy reforms are implemented for specific reasons. In some instances, reforms are embarked upon to address inequalities in the way land is distributed; while in other instances, the reforms' main objective may be to strengthen the rights of the various land holders and users. In other instances, the reforms are implemented to restructure the institutional arrangements around the way land is administered and managed. There are also cases where land policy reforms are implemented to address specific issues in society such as urbanisation, landlessness, the effects of climate change, promoting social cohesion, accommodating infrastructure development (see Chap. 10), economic growth and resolving and preventing conflict. In all this, land reforms fundamentally entail a re-ordering of property and power relations in response to changing circumstances in society (Lund 2016).

As such, land policy reforms are not a once-off event; the rules, institutions and views keep changing depending on the need to reconfigure property rights, interests and power relations. Because of this, land reforms, everywhere, have always been political, since they involve the re-ordering of property rights, power relations and social order. Consequently, the state, in its various manifestations, is always central, but not the only player. This is why land policy reforms in many countries have

¹ In South Africa, as else where in Africa particularly southern Africa (see Mafeje 2003), land has been at the centre of the political struggles and liberation war (Havnevik 1997). In many African countries, "control over land lost to the colonial regimes and European settlers was an important rallying point for the national movements that gained strength in Africa during the 1950s, and for the armed struggle waged by liberating forces in countries gaining independence at a later stage" (Havnevik 1997:1). Thus, the question of land reform in Africa, and South Africa in particular, is not just about livelihoods, but has political, cultural and religious dimensions to it (see Chap. 5, this volume).

tended to be messy, sometimes appearing as if they have no clear aims, contradictory, unrealistic and unattainable (Peters 2013).

As noted above, policy proposals emphasising land tenure reforms only featured prominently in most African countries during the 1990s as a result of pressure from donors who were pushing for the privatisation of customary land as the only way to strengthen tenure security and, in turn, increase the productivity of land. Although there were countries such as Tanzania, Egypt, Algeria, Ghana, Nigeria, Tunisia, DRC, Burkina Faso, Mozambique, Angola, Zambia that implemented radical land reform in the form of nationalisation of land immediately after independence, little attention and effort were given to reforming the policy, legal framework and land administrative structures prior to the 1990s. For example, in Tunisia and Algeria, the focus of land policy reforms during 1960 was on establishing state and collective farms on the land previously owned by colonial settlers (AU/AfDB/ECA 2010). In other African states, land policies that sought to reform land relations and institutions only appeared from the 1990s onwards. Examples include land policy and land law reforms in Cote d'Ivoire in 1989, Mali in 1991, Niger and Ethiopia in 1993, and Tanzania, Mozambique, Burkina Faso and Zambia all in 1995, Uganda 1998 (Wily 2003).

Prior to the 1990s, most countries simply took over what the colonialists left behind. Okoth-Ogendo (1993:3) has argued that instead of restructuring "land relations in accordance with the new development imperative, [African] countries...simply re-entrenched and sometimes expanded, the scope of colonial land policy and law." However, by the end of the 1990s, it was reported that land policy reform was in full swing in more than 20 African states (Wily 2003), with the focus being on reforming land tenure to improve tenure security and the productivity of land.

1.3.7 Types of Land Reforms

As noted earlier, land reforms are implemented for various reasons and in various forms, with different objectives. However, what is common to all land reforms, from the "Great Enclosure" in England and Wales during the sixteenth through the seventeenth century, to the de-collectivisation of farm land in former soviet Union, the Fast Track Land Reform in Zimbabwe and the proposed expropriation without compensation in South Africa (see Chap. 5) is that the state has always played a central role in the reforms. To a large extent, the success of the reforms is a function of the state's political, social and ideological commitment to land reform reforms broadly (Cox et al. 2003). Globally, although implemented in different contexts, land reforms have taken three broad forms. First is the collectivisation of land through state or collective farms as was the case in communist states including Russia during Stalin (1928–1940), Vietnam (1958–1986), Hungary (1960–1990s), as well as the non-communist states such as Israel (the Kibbutzim system). This type of land reform