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International Yearbook of Soil Law and Policy 2020/2021

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International Yearbook of Soil Law and Policy

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The *International Yearbook of Soil Law and Policy* is a book series that discusses the central questions of law and policy with regard to the protection and sustainable management of soil and land. The Yearbook series analyzes developments in international law and new approaches at the regional level as well as in a wide range of national jurisdictions. In addition, it addresses cross-disciplinary issues concerning the protection and sustainable management of soil, including tenure rights, compliance, food security, human rights, poverty eradication and migration. Each volume contains articles and studies based on specific overarching topics and combines perspectives from both lawyers and natural scientists to ensure an inter-disciplinary discourse.

The *International Yearbook of Soil Law and Policy* offers a valuable resource for lawyers, legislators, scholars and policymakers dealing with soil and land issues from a regulatory perspective. Further, it provides an essential platform for the discussion of new conceptual approaches at the international, national and regional level.

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Foreword by Keriako Tobiko, Cabinet Secretary in the Kenyan Ministry of Environment and Forestry

Land Tenure Rights and Sustainable Soil Management in Kenya

In recent decades, issues of soil and land have been raised on international platforms. Humankind is facing challenges the world over as the global population continues to grow, with cities expanding and diets changing. Land users are increasingly struggling with soil degradation, erosion, and drought. With priority placed on food security, sustainable soil management has never been more important.

Indeed, it is not surprising therefore that the United Nations adopted 17 Sustainable Development Goals with the aim of protecting the planet and ensuring prosperity for all while leaving no one behind. 9 SDGs affect land and soil management and in extension agricultural productivity and environmental resilience and sustainability. More specifically, SDG 15 Life on Land, particularly target 15.3, focuses on land by demanding action against land degradation and efforts to achieve a land degradation-neutral world. This will impact positively on food security, climate change, and several other interconnected SDGs like No Poverty, Good Health and Well-being, Clean Water and Sanitation, Affordable and Clean Energy, and Responsible Consumption and Production.

The full potential of soil must be unlocked to support food production, store and supply clean water, maintain biodiversity, sequester carbon, and increase resilience in changing climate; this requires universal implementation of sustainable soil management. Soils are the foundation of food production and many essential ecosystem services. It has been shown that sustainable soil management is linked to land tenure rights.

Whilst the World Charter contains the key principles and guidance towards sustainable soil management, it is important that it is complemented by tools, books, writings, and journals elaborating land tenure principles and practices for

incorporation into policies and decision-making especially in Africa. In Kenya for example, the economy is agriculture-based meaning that the contribution of agriculture to the GDP, employment generation, food security, and foreign exchange earnings remains unrivalled. However, for the last two or so decades the contribution of agriculture to the national GDP has continued to decline rapidly due to population explosion, rapid urbanisation, and shortage of arable land.

Like in most other sub-Saharan African countries, soil erosion and land degradation have become a major environmental concern and a formidable threat to food security and sustainable agricultural production. Livelihoods of several households have over the years been sustained by poor farming methods and pastoral systems. These are indeed linked to tenure security in the adoption of soil management practices. Decisions to invest in soil and water conservation structures will be made by farmers more secure about their land ownership and land tenure rights.

Sustainable development is specifically domiciled in Article 10 of the Kenya's 2010 Constitution. In addition to several articles on sustainable land and ecological management, one key sustainable soil management practice is mentioned in Article 69 of the CoK2010, stating that Kenya shall have a minimum tree cover of 10% of the land area in Kenya. It is worth noting that Kenya has the Agriculture (Farm Forestry) Rules, 2009. These Rules apply for the purpose of promoting and maintaining farm forest cover of at least 10 per cent of every agricultural land holding and to preserve and sustain the environment not only in combating climate change and global warming but also sustainable soil management, with the overall result being the realisation of a clean and healthy environment in line with Article 42 of the COK 2010.

I therefore expect that this timely fifth volume of IYSLP on land tenure and sustainable soil management could not have come at a better time with its critical look at the clash of modern and traditional tenure concepts, illegal or illegitimate land acquisitions in developing countries, FAO voluntary guidelines on tenure rights, and UNCCD, FAO, and African Union tools to assist effective soil governance in African states coupled with comparative studies on both soil and tenure rights law from EU, Germany, New Zealand, Iran, and India amongst other cross-cutting issues and experiences from Cameroon and South Africa. Our Land Tenure and Soil Management discourse in Africa will be enriched. Practitioners and policymakers and the general public will get the necessary guidance to work towards increasing the land area under sustainable soil management worldwide. Efforts of the

editorial team that enabled this volume are commendable, and Africa will not be left behind in implementing effective policies on land tenure and soil management.

Ministry of Environment and Forestry, Keriako Tobiko
Nairobi, Kenya

Preface

This fifth volume of the *International Yearbook of Soil Law and Management* is a remarkable one. First, it is—so to say—the "pandemic volume". It was certainly conceptualised before the pandemic, but the entire drafting, reviewing, and revising process took place during the COVID-19 pandemic, which kept the world—yes, we all know the whole world—breathless. The focus was, amongst other things, on numbers of infected persons, incidents, scary developments, new variants of the virus, and appropriate measures to deal with the unprecedented challenges. In later stages of the pandemic, the general effects on society at large and lessons learnt for other global threats, such as the climate and biodiversity crises, have been intensively discussed. This leads to the second point—why this volume is inherently special. It is the first volume in the decade during which many say that humanity as a whole, but also individual societies, must realise a socio-ecological transformation towards climate neutrality and sustainability.

The year 2021 has seen many landmark court decisions concerning climate change. The German Constitutional Court ruled that it is a constitutional responsibility of the German parliament to put in place an effective planning mechanism to achieve climate neutrality by 2045, including sector-specific targets as well as monitoring and control measures (including specified sanctions). The core argument of the Court was that it would constitute a breach of the constitutional obligations if later generations face the risk of having to bear stringent and thus disproportional restrictions on their freedoms.

The structure of the volume conforms to all previous volumes—four main parts provide relevant and recent information on soil governance topics for academics, legislators, and policymakers:

- Part I: The Theme
- Part II: Recent Developments of Soil Regulation at International Level
- Part III: National and Regional Soil Legislation
- Part IV: Cross-Cutting Topics

The theme of the volume was chosen to address how concrete forms of tenure rights can either enable or hinder sustainable soil management. By addressing this theme, we align the discussion with the requirement set by the German Constitutional Court as appropriate land tenure is a kind of precondition to the implementation of a comprehensive planning mechanism which was seen as essential by the German Constitutional Court. Moreover, we contribute to the debate around how the socio-economic transformation could be implemented on the ground. The chapters contributing to this theme address very different aspects of tenure rights, such as clash of legal systems, three countries' perspectives, illegal land acquisition, land take in general, and management options to strengthen land rights.

Part II—Recent international developments entails two chapters: one on the outcome of the last Conference of the Parties (COP) of the UNCCD, and the second provides a critical analysis of support from the international regime to achieve sustainable soil management in Africa.

Part III—Regional and national reports provide insights on soil protection governance in Africa (Kasimbazi/Yahyah), the European Union through the new Green Deal (Heuser/Itey), Iran (Faryadi), and South Africa (Ruppel/Knutton/Marivate).

Part IV—Cross-cutting issues includes contributions on many diverse topics. Firstly, the effects of the COVID-19 pandemic are analysed, particularly with regard to countries in the Global South (Sambo). A further chapter by Vanheusden/Jacobs discusses the pros and cons of the concept of soil and land stewardship. Stubenrauch addresses the interlinkages of soil health and phosphorus extraction and use. The newly established FAO SoiLEX, a database providing a fantastic overview of national soil legislation, is explained by Bhorris. Finally, the chapter by Ruppel explains the nexus of soil protection, food security, and the international regulations on climate change and trade.

At this juncture, we would like to cordially thank two colleagues, namely Prof. Emmanuel Kasimbazi, Makerere University, and Prof. Tianbao Qin, University of Wuhan, who have left our team of editors. Both of them have wholeheartedly supported the first four volumes of the *International Yearbook of Soil Law and Policy* with their outstanding expertise. We would also like to welcome our new editor, Prof. Patricia Kameri-Mbote, University of Nairobi.

Finally, we would like to express our deepest gratitude to all authors in this volume for their engagement, commitment, contributions, and, not to be forgotten, patience—unfortunately necessary due to delays caused by the pandemic. Moreover, we thank the members of the Advisory Board for providing their important insights during the review process, particularly Marc Shepard, Pradeep Singh, and Mercy Teko for conducting language reviews of about half of the chapters. Last but

definitely not least, to the publishing house SPRINGER, and Laura Hofmann in particular, for their ongoing operational support and technical assistance.

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Part I
Land Tenure Rights and Sustainable Soil Management

Clash of Modern and Traditional Tenure Concepts: An Overview

Patricia Kameri-Mbote

Abstract Modern and traditional tenure concepts are closely aligned to property and share property's complexity and dynamism. The term property defies definition, has different meanings to different people and establishes entitlements through recognition and protection. Property thus connotes different things, has a broad meaning and requires different institutions and mechanisms to actualize the property castle. At the core of property is the relationship between an individual and the community with regard to the use and exploitation of resources and is dependent on enforcement mechanisms of the state. This chapter looks at differences between modern and traditional tenure concepts arguing that property conceptions are contextual and geographically situated. Indeed while the right to exclude is viewed by many as a defining feature of property and exists in modern property systems, it does not exist in traditional property systems that allow multiple rights over property.

1 Introduction

Modern and traditional tenure concepts are closely aligned to property, and therefore, share property's complexity and dynamism. Indeed, commentators opine that the term property defies definition[1] and means different things to different people, operating 'as both an idea and an institution'.[2] According to Thomas Grey, the common notion of property is the ownership of things. He assigns the difficulty in defining property to the divergent conceptions of property from the point of view of 'specialists', such as lawyers and lay people.[3] However defined, property establishes

[1] Waldron (1988), p. 26.

[2] Alexander et al. (2009), p. 743.

[3] Alexander and Penalver (2012).

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entitlements through recognition and protection.[4] Honore's[5] incidents of property define the range of entitlements that a property owner has over their property. Change in the range of justified claims of competing public interest threatens property.[6] In the case of land, increasing concerns for sustainable development, relating largely to resources on land, has eaten into the range of entitlements of landowners.

While to the lay person property is a thing represented in the physical *res,*[7] to lawyers property comprises the 'collection of individual rights people have against one another with respect to owned things'.[8] Land can be categorized as a thing but land as property is a concept.[9] This is the meaning that law ascribes to property—a conception of the mind. Property in this sense is nothing but a basis of expectation of deriving certain advantages from a thing that we are said to possess; in consequence of the relation in which we stand towards it. Premised on this view, only through the protection of law is one able, for instance, to enclose a field as property.[10]

Property is also viewed as a "bundle of sticks"[11] granted to property owners. In this rendition, property connotes different things, has a broad meaning and requires different institutions and mechanisms to actualize.[12] The definition of property from its attributes opens the door for other conceptions: property as a place of refuge;[13] as entitlement;[14] as expression;[15] as creativity and innovation;[16] ideas;[17] to name a few. Inherent in all these meanings are the centrality of the individual; the role of contract in dealing with property and the permissible boundaries of incursions of other citizens into the property castle.[18] Boundaries are a critical factor in property and may have informed the old adage that 'good fences make good neighbours'.[19]

At the core of property are relationships between the thing and the holder of the thing; between different holders of things; between holders of things and non-holders; and between holders and non-holders of things and the agency that grants and guarantees the rights, usually the government. The right to exclude

[4] Underkluffer (2016), p. 2.
[5] Honore (1961), p. 107.
[6] Underkluffer (2016), p. 2.
[7] Munzer (1990).
[8] Alexander and Penalver (2012).
[9] Bentham (1853).
[10] Ibid.
[11] Honore (1961), p. 107.
[12] Alexander and Penalver (2012).
[13] Alexander (2018).
[14] Honore (1961), p. 107 on the bundle of sticks that a property holder has.
[15] Cornish (2019).
[16] Ibid.
[17] Ibid.
[18] Alexander and Penalver (2010).
[19] Frost (undated).

interventions is viewed by many as a *sine qua non* feature of property, yet, there are property systems that allow multiple rights over the thing and allow 'non-owners' rights to roam.[20] In a nutshell, property is the relationship between an individual and the community with regard to the use and exploitation of resources and is dependent on enforcement mechanisms of the state.

This chapter looks at the clash between modern and traditional tenure concepts. It is divided into five sections. Section 1 is the introduction while Sect. 2 provides a background to tenure. Sections 3–5 discuss traditional and modern tenure concepts respectively. Section 6 concludes and highlights the clash between traditional and modern tenure concepts.

2 Background to Tenure

Tenure is derived from the Latin word *tenere*, which means "to hold", connoting the nature of the relationship that exists between individuals in relation to a specified thing.[21] Tenure denotes the methods by which individuals or groups acquire, hold, transfer or transmit property rights in land.[22] It is a system used to determine who can use land, the period for such use and under what terms and conditions. Tenure is based on official laws and policies and even informal customs.[23] In essence, land tenure means a system that outlines how land is held by an individual or the actual user of the land.[24] It stipulates the rights and responsibilities that owners enjoy with regard to the connection with their holding.[25]

Ownership of land historically constitutes one of the main categories of property rights holding, conveying an array of rights upon the owner.[26] Property rights in land exist against other people with regard to the land, not against other parcels of land.

> Ownership of property is a creation of law whereby a bundle of sticks/entitlements are sanctioned by law against many persons. Property is that *bundle of rights and expectations in a tangible or intangible thing that are enforceable against 3rd parties including the government.* These include entitlements to possess; to use; to exclude; allow others to use; sell; give away; dispose of by will; recover from thief and compensation for damage.[27]

[20] Alexander and Penalver (2010), p. 4. Example from Sweden on pastoralists also accord one another reciprocal grazing rights to cope with droughts.

[21] Field (2005), pp. 279–290.

[22] Okoth-Ogendo (1991).

[23] Coldham (1979), pp. 615–627.

[24] Ogolla and Mugabe (1996), p. 85.

[25] Ondiege (1996).

[26] It confers the right to extract minerals from the land, to use and abuse and dispose of as the property holder wills. Megarry (1984).

[27] Blocher (2006), pp. 166 and 177.

A search for the tenure system operative in a particular society is an attempt to answer the tripartite question as to *who* holds *what interest* in *what land*.[28] Land tenure is complicated in both traditional and modern societies and systems of law because the term land has a wide connotation. For instance, the English Law of Property Act, 1925 defines land to include land of any tenure, mines, minerals whether or not held apart from the surface, buildings, or parts of buildings. From this definition, it is clear that the surface of the soil and the things on the soil are enjoyed as part of the land such as the air, water and growing trees or artificial attachments such as houses, buildings and other structures. Land also encompasses interests or rights to collect things or hunt on the land. Land tenure systems have thus wide-ranging implications.

Consequently, the notion of tenure has very wide-ranging implications and may have distorted as much as it has clarified.[29] Land tenure systems vary from community to community and are influenced by the unique historical development of each political grouping and consequent variation of legal and institutional structures.[30] Land tenure represents the relations of people in society with respect to the essential and often scarce land. It also refers to possession or holding of the rights associated with each parcel of land and ordinarily has at least three dimensions, namely, people, time and space. In so far as people are concerned, it is the interaction between different persons that determines the exact limits of the rights any one person has over a given parcel of land. These rights are not absolute since there are rules that govern the manner in which the person with tenure is to utilise their rights. While the time aspect of tenure determines the duration of one's rights over the land, spatial dimensions limit the physical area over which the rights can be exercised. The spatial dimension of tenure may be difficult to delineate in exclusive terms since different persons may exercise different rights over the same space at different times.[31]

Tenure systems are culture-specific and dynamic, changing as the social, economic and political situations of groups change.[32] They are shaped by economic, political, social and legal parameters. Under both African and Western systems of land holding, for instance, ownership can be sub-divided and lesser interests can be (and are frequently) held by different persons simultaneously. While questions have arisen as to whether the notion of legal rights as a cluster of claims, powers and immunities[33] have a place in primitive or pre-capitalist societies, it is clear that landholders in these societies have entitlements that are respected by all among whom they live.

For instance, while most African customary laws recognised a measure of individual control over the broad interests that were hosted by land, paramount or

[28] Okoth-Ogendo (1991).

[29] Bohanan (1963).

[30] Crocombe (1968) and Ojwang (1992).

[31] Fortmann and Riddell (1985).

[32] Lawry and Bruce (1987).

[33] Hohfeld (1922).

allodial title was perceived as vested in society and whatever rights any one person had to the land were subordinate to the entire community's rights.[34] Ghanaian Chief Nana Ofori opined as follows:

> I conceive that land belongs to a vast majority of whom many are dead, a few are living and countless host are still unborn.[35]

This statement captures the intra-generational and inter-generational aspects of landholding that is common to many African communities. Colonialism, however, had profound effects on African tenure systems by introducing the notions of individual and state ownership of land in a bid to promote economic development.[36] The push to reform land relations to unlock the economic potential of dead capital that land has have remained for a long time.[37] In some instances, the Torrens title system (based on statutory registration and ownership of individually demarcated plots) was introduced to replace pre-existing customary notions of land ownership.[38] The latter have, however, persisted and been informed in practice by the introduced system. Thus, Bentsi-Enchill notes that the defects of African systems of land tenure have arisen from the fact that these systems have been left to informally adapt to changed circumstances.[39]

Different societies have different ways of holding things that they value. Until the advent of technology and the knowledge associated with it, land was an unrivalled genre of property and colonial acquisitions in the 1800s had the acquisition of land for expansion of territory as the main aim. The mode of land holding among people in the colonised and the colonising spaces differed markedly. In most cases, colonisers introduced modern tenure predicated on individual holding of land with public land as the other category. Many colonised people, however, had land held by communities and not individuals. This leads to a clash between the contemporary and the traditional concepts of tenure.

Holders of land under both traditional and modern tenure fall broadly into three categories, namely, public, private and community. Public tenure is assigned to land that is held by the state or other local authorities and reserved and used for broad societal purposes such as roads, railways and so on. It also includes land abutting watercourses, ocean and national parks. In most countries, it is not amenable to alienation to private actors and is managed by public agencies. Private land tenure is assigned to land held by individuals and corporate entities, while community tenure is assigned to groups who share land in common. Commons are a genus of private land held by groups united by kinship or similar characteristics.

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[34] Maini (1967).

[35] Ollennu (1962).

[36] Fortmann and Riddell (1985).

[37] de Soto (2000).

[38] Okoth-Ogendo (1989).

[39] Bentsi-Enchill (1966).

Utilitarianism/instrumentalism has been used to justify private property rights, which include private tenure. The argument is that property institutions should be shaped to maximize net utility,[40] which over time has been reduced to 'everything that an individual might value'. This is based on individual preferences and discounts the broader moral frameworks within which property rights exist. This approach is supported by the law and economics approach, which employs a single metric value to property defined in terms of individual experience; employment of economic tools such as rational choice, and game theory to explain why property rights are granted. Economists opine that problems exist when resource allocations are inefficient or expected to leave future generations worse-off. Inefficiency results from non-transferability in the market or absence of incentives to sustainably manage resources. In their view, the person with the strongest incentives should be assigned property rights to minimise transaction costs and maximise social returns. The expectation is that the market will balance competing uses and force participants to use property in the most efficient way.[41]

Private property is seen as the standard to aim for in stemming the so-called 'tragedy of the commons'. Private property rights proponents argue that market solutions prevent the tragedy of the commons that too often results when incentives to preserve common pool resources do not exist.[42] Such arguments rely on the notion that property held in common encourages a rush by all having access to it to appropriate as much of it as possible while it lasts.[43] The desire to take as much as possible, the argument continues, is fanned by the fact that the negative effects of over-exploitation of the resource are not felt proportionately by any of the takers, and consequently, none of them feels personally compelled to stem the over-exploitation. Hence, what is everybody's property is perceived as nobody's and becomes valued at a rate proportionate to its utility only after it has been individually appropriated.[44] In this sense, private property rights provide incentives to manage resources, reduce uncertainty and ensure predictability.[45]

The major thrust of this argument is that when property rights are assigned in these situations, the market acts to properly balance competing uses and force the participants to use such property in the most efficient way. Private property rights in resources evolve only when demand for those resources makes the extra effort of defining and enforcing those rights worthwhile. They constitute the underlying basis for the operation of any economic system. The rights-holders are able to acquire rights to property and benefit from economic returns from investment in their property.[46]

[40] Bentham (1789).
[41] Hardin (1977), p. 16.
[42] Ibid.
[43] Ostrom (1977), p. 173.
[44] Ostrom (1990), p. 3.
[45] Baden and Stroup (1977), p. 229.
[46] Walden (1995), p. 176.

The assumption here is that all values ascribed to the property can be transacted in the market. With regard to land, it is critical to ask the question whether soil, a burial site for a community's ancestors, or the sentimental value associated with ancestral land, can be transacted in the market. Moreover, environmental goods such as ecosystem services, which are indirectly related to land, are for the most part consumed directly and never marketed, thus resulting in gross undervaluation of these services that are largely consumed as a public good. For instance, it is difficult to allocate a market value to soil for its role in carbon storage, which helps to reduce greenhouse gases in the atmosphere and ultimately in addressing climate change.

Traditional communitarian rights to land have utility and value to the holders and only differ from those in modern property rights' systems because their value and utility is for groups and not individuals. Some of their aspects are also difficult to transact in the market as many merge the personal aspects with the shared aspects.[47]

Deontological theories of property[48] that do not treat property as a means to an end provide a more appropriate lens for looking at traditional rights. These theories reflect underlying moral entitlements in the property that are not necessarily associated with the results they generate. For instance people who labour on an unowned piece of land and use their labour have a moral claim to the land and philosophers like Aristotle would justify their rights to property as necessary to forestall quarrels. Such property rights are instrumentally embedded within the labour and are not strictly utilitarian, according to Thomas Aquinas and David Hume. Property deals with value enhancing relationships regarding assets as the legal enforcement of property rights enhances the owner's probability of retaining possession. It could mesh with assets that are not capable of being commodified[49] as property, such as, belonging to a group for a bereaved widow, kinship and other familial ties. Indeed, the value of property increases with each additional subscriber and the utility of property draws from the network of subscribers who can keep away the free-riders. The state provides the mechanism for public enforcement of property as a public good, ensuring that the law standardizes forms of property and reduces the costs of investigating

It is the duty of law, as the expression of the will of the people expressed through the sovereign, to provide mechanisms for the protection of property in the interest of all its citizens. This duty extends to both modern and traditional tenure, bringing to the fore the conception of property as a social relationship even whilst it has an individual side. The Ghanaian Constitution captures this in the following parlance

[47] Radin (1993), p. 11.

[48] Alexander and Moore (2016).

[49] Radin (1993), p. 11 explaining the distinction between fungible (not unique and not linked to persona) that is easily amenable to transaction in the market and non-fungible property (unique and personal as part of owner's personality; sentimental, emotional link) whose value to the owner is beyond the market.

> The State shall recognise that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the State shall recognise that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in this regard.[50]

This supports the social utility theory view that law should promote the maximum fulfillment of human needs and aspirations and that legal protection of rights should ensure that.[51] The social utility theory places emphasis on the individual as the locus for the grant of rights. Within countries with plural legal entities, such as Kenya and Ghana, it is clear that there is need to include other actors (such as communities and families). Article 61 of the Kenyan Constitution provides that all land in Kenya belong to the people of Kenya collectively as a nation, as communities and as individuals, and goes ahead to delineate what land is public, community and private.[52]

3 Traditional Tenure

A lot of land in Africa is held under customary law. The exact amount of land under traditional tenure is not known but is estimated at roughly 75% of the Continent or over two billion hectares.[53]

Traditional tenure comprises a complex system of customary rights of access and use regulated by intricate rules, usages and practices. These are often based on communal solidarity, such as clan or other lineal heritage, and are unwritten. Communities and the people were governed by rules passed down from one generation to another through various forms of communication.[54] In some cases, traditional leaders (such as chiefs) allocated rights of access to and use of land to persons under their authority.[55] For many communities, land was not owned by individuals and individuals in most communities did not enjoy the right to dispose of land.[56] Land was not perceived as a tradable good as it belonged to a group and not to the individual.[57]

Scholars[58] have summarized the hallmarks of African customary land tenure as:

[50] Government of Ghana, Constitution of Ghana (1992 as amended in 1996).
[51] Kameri-Mbote (2009).
[52] Government of Kenya, Constitution (2010) Articles 62–64 of the Constitution.
[53] Wily (2017), p. 108.
[54] Lambert (1949).
[55] Abdulai (2006).
[56] Kuria (2018).
[57] Kameri-Mbote (2016).
[58] Okoth-Ogendo (1991).

- Distinction between rights of access to land and control of those rights;
- Power of control vested in recognized political authority/entity within a specific community;
- Political entity exercised these powers to allocate rights of access to individuals depending on needs and status;
- Rights of access guaranteed by political authority/entity on the basis of reciprocal duties performed by the rights' holders (even in family) to the community;
- Rights to land determined on a continuum of flexibility always adjusting and changing as circumstances demanded
- No element of exclusivity to land

As noted above, property held by communities under traditional tenure is a kind of commons (*res communis*) and not *res nullius*, representing private property for the group that controls it and whose members have access to it.[59] Sara Berry in her work among the Asante, notes that land is owned and administered as a social process and not in relation to a set of rules and enforcement mechanisms.[60] Liz Alden Wily perceives community as connoting both social and spatial sphere and in this regard notes that:

> key to the community in the customary sphere is its existence as a definable community land area, territory or domain, the limits of which are accepted by neighbouring communities ....[61]

In that process, the core elements of culture, kinship, and other social relations are recalled, redefined, and reinforced as they are asserted.[62] This differs markedly from modern tenure that has fixed rights and responsibilities for the rights holder. The state in administering traditional tenure rights must allow for the negotiation of the rights whose exercise is tied to kinship and responsibilities. Effective enforcement of traditional tenure rights requires mechanisms outside the modern administrative and judicial systems.[63]

4 Modern Tenure

Modern tenure refers to the conventional, formal and contemporary mode of land ownership, exported by European countries to their colonies. It formally recognizes two potential holders of land: individuals/legal persons and the sovereign/public. Modern tenure is influenced by the view that property is necessarily exclusive and is informed by William Blackstone's full liberal theory of property as "the sole and

[59] Okoth-Ogendo (2002), pp. 17–29.
[60] Berry (2001).
[61] Wily (2017), p. 106.
[62] Ibid.
[63] Kameri-Mbote et al. (2013).

despotic dominion over land to the total exclusion of all others".[64] It is centered on land registration and formalisation of title. Whoever is registered on the deed of title as the owner of land is the recognized proprietor of that land. Registered property owners and can fence off their property and exclude the whole world. Freehold tenure is the largest quantum of land rights an individual can hold under modern tenure.[65] Modern tenure guarantees the owner absolute rights subject only to permissible regulatory controls for planning and environmental sustainability.[66] Rights held under modern tenure can also be terminated through compulsory acquisition for a public purpose or in public interest.

The main purpose of registration of title to land is to enhance certainty in land or security of tenure and achieve simplicity.[67] This rationale for land registration proceeds from an economic postulate which holds that registration of title promotes confidence among title holders and other third parties that deal in the land that is subject of registration, thereby enhancing the value of such land and giving comfort to dealers in such land. This comfort mainly draws from the fact that registration of title usually means that the state, which is the custodian of registration, indemnifies persons who suffer loss from acting or relying on the strength of the title documents that it produces and also enforces ownership rights whenever infringed or threatened.[68] Registration has the effect of conferring upon the person(s) whose name is on the register an indefeasible title to such land, thereby dispensing with the need by third parties dealing in such land to inquire into the ownership and other interests that may lie in respect of that land. Usually, all the interests that are rightfully on a particular piece of land are to be found on the encumbrance section of the title document, and if not so found, then no right may legitimately lie (but of course, subject to the overriding interests such as customary trusts).[69]

While the certainty of title or security of tenure appears to be the chief purpose of registration, there are other interrelated and important aims of registration. They include: minimization of land disputes and easier administration of the loan system by financial institutions;[70] reduction of transaction costs in conveyancing by clarifying ownership and extinguishing competing claims;[71] enhanced access to credit by land owners since registered land may be used as collateral;[72] and encouragement of

[64] Demsetz (1967), p. 347.
[65] Ann (1966), p. 1071.
[66] Greiner (2017), p. 78.
[67] Gray and Gray (2001), p. 976.
[68] Miceli et al. (2001), p. 275.
[69] The various overriding interests are outlined under section 28 of the Land Registration Act, No. 3 of 2012.
[70] Onalo (2008), p. 178.
[71] Atwood (1990), p. 65.
[72] Besley (1995), p. 103.

investments in land due to an assurance to investors that they will have a return on their investment.[73]

Modern tenure proponents see titling and registration of land as a panacea to the perceived poverty problem among community land holders. They are of the view that the process would 'bring dead capital to life' in de Soto's words.[74] This argument has, however, been debunked by many scholars.[75]

5 Clash Between Modern and Traditional Tenure

Tenure is both dynamic and culture-specific and both modern and traditional tenure are greatly influenced by the contexts within which they have developed. In plural legal societies where both co-exist, they influence and affect each other significantly. Modern legal systems have gradually recognized customary law and other community-based norms in formal law, however, formal law tends to take precedence in the hierarchical structure in most legal systems. It follows that traditional tenure is relegated to the lower rungs in the hierarchy of laws despite the fact that it governs many property relationships in many post-colonial societies where modern tenure was superimposed on traditional tenure. This creates the stage for clashes between claimants of rights under the two systems. Colonial subjugation of traditional tenure was geared towards extinguishing the claims of prior holders. The colonisers negated the pre-existing traditional tenure rights using laws and policies granting settler communities modern tenure rights that were accorded higher status than the traditional ones. Law was used as a sword to wrest colonised communities of rights to their land.[76] The colonized communities did not comprehend the import of the modern rights, and in most cases, had to be forcefully removed to make way for the new 'owners'. In fact, a colony became the coloniser's land.[77] This marked the beginning of aggressive conversion of traditional tenure to modern tenure.[78] The introduction process was characterized by the forceful acquisition of land and the displacement of local populations.[79] Members of local communities who were unable to find places to settle were deemed squatters and sometimes enslaved to work without pay.[80] This have been the case in other colonies that were subject to the scramble and partition of Africa.[81]

[73] Barber (1970), p. 6.
[74] de Soto (2000).
[75] Cousins (2017), pp. 93–94.
[76] Fimbo (2017), p. 59.
[77] Wakoko (2014).
[78] Elias (1956).
[79] Wanyonyi et al. (2015).
[80] Government of Kenya (2013).
[81] Khamisi (2018).

The multiple layers of entitlements to land, familiar to traditional societies, were subsumed under the titled landowner's rights in total disregard of the fact that for many traditional societies, different rights could be claimed over the same land. The designation of public and private land was not part of the nomenclature of traditional communities since rights to land were assigned for a purpose, which could be for the individual, family or community, but for the overall good of the community. Okoth Ogendo notes that centuries of subjugation of African customary tenure through law and force failed to oust the force of customary norms over land occupied and used by Africans. The ubiquity of the traditional rights threatened the rights of the settlers to the land they obtained.

6 Conclusion

Both traditional and modern tenure are important for sustainable management of land. The co-existence of these tenure types is a reality. However, the clash between the two arises where one (usually modern tenure) is hoisted over the other (customary tenure) with no attempt to understand how the latter works. On the one hand, customary tenure rules are part of the body politic of the community and are accessible. They are also dynamic and responsive to changing circumstances on the ground. Modern tenure, on the other hand, is removed from the communities and has rigidities that communities are not accustomed to dealing with land that is very dear to them and from the basis of many of their activities. The assertion that the grant of title seals the fate of ownership of land is difficult to appreciate among communities for who land is inalienable.[82] For the two tenure types to contribute optimally to sustainable land management, there is need to carefully study the way they work and how they can be best applied. Considering that most land is predominantly held under customary law in Africa, for instance, ignoring customary tenure makes any applicable tenure rules ineffective as they leave out most land users.

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[82] Kameri-Mbote (2015), p. 40.

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Mutually-Reinforcing Transgressions of Justice in Large Scale Land Acquisitions in the 'Public Interest'

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Abstract (In)justice describes land governance in the global south: For centuries, accumulation of wealth has occurred through land dispossession, particularly of indigenous people, peasants and pastoralists, increasing vulnerabilities and decreasing capabilities. The wave of acquisitions from the mid-2000s though focused on the public interests of 'development,' 'human security' and 'conservation' hollows out rights, violating the fundamentals of justice. These acquisitions are for food, fuel and feed, mining, logging, carbon and coercive conservation. Using a multidimensional analysis, the chapter explores the injustice of these acquisitions, identifying layers of mutually reinforcing transgressions. It considers how power and dominant development and conservation cultures creates unjust land governance. At the heart of this is the promotion of markets through extractivism over and above the pursuit of social-ecological justice. Using a justice framework, embedded in redistributive justice, it demonstrates how these acquisitions impact on recognition, inclusion, engagement, distribution of costs and benefits, and structural opportunities of rural citizens. Transitions in the control of production, increased land inequality, and discriminatory distribution of public resources fostered by these interactions impacts on development futures as rural political- and economic-scapes are redefined.

1 Introduction

The mid-2000s marked an unprecedented spike in large-scale land acquisitions of millions of hectares (mha) of land in the global south for food, fuel and feed crops—which is well documented—as well as for mining, coercive conservation, climate

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mitigation, ecotourism and real estate from rural communities, including indigenous people.[1]

These acquisitions are different from earlier waves in that contemporary interest is, more often than not, about extracting value from land for biofuels, conservation, carbon sequestration and accessing water achieved through new financial mechanisms, commodification and marketization rather than occupation or ownership.[2] This is in contrast to earlier agricultural models that focused on integration of small producers into national economies.[3] By building on colonial legacies and narratives of modernity, swaths of territory are effectively moved from the control of smallholders (and also nations) to global capital[4]—amounting to a foreignization of space.[5] Transnational investors at inter- and intra-regional levels are key acquirers, although in some places national investors are also engaged.[6] For example, by the beginning of 2019, European Union (EU) based companies have been involved in 616 land deals encompassing 23 Mha in the global south.[7] Agrawal et al. estimate that more than 40 Mha of agricultural land in over 35 lower and middle income countries were grabbed.[8]

This trend is significant because the loss of control of land productivity by rural citizens has implications for futures in the global south including for economies, rural livelihoods, vulnerability to climate change, citizen engagement and accountability. These approaches are likely to escalate as markets in environmental goods mature, new global conservation and climate goals are set, and other neoliberal development approaches that encourage the increasing commodification of nature, like the green economy, take hold.[9] Current indications are that large conservation organizations and states, as part of the Convention on Biological Diversity's Post-2020 framework, will demand land enclosures to protect 30% of the world's land, water and oceans by 2030, in an effort to roll back the rate of species extinction which is now 100–1000 times faster than the historical background rate[10] and restore so called 'human–non-human justice'.[11] The *High Ambition Coalition for Nature and People* embracing more than 85 states, mainly from the global north and Latin America are key in driving this approach.[12] While some argue that this will convert

[1] Agrawal et al. (2019) and Borras Jr et al. (2020).

[2] Sikor et al. (2013) and Benjaminsen and Bryceson (2012).

[3] Moyo and Yeros (2005).

[4] Kumar (2020) and McKay (2017).

[5] Zoomers (2010).

[6] Cotula et al. (2014).

[7] Borras Jr et al. (2020).

[8] Agrawal et al. (2019).

[9] Larson et al. (2013) and Fairhead et al. (2012).

[10] Bhola et al. (2021).

[11] Kopnina (2018).

[12] https://www.hacfornatureandpeople.org.