The Place of Communal Land Rights in Africa's Land Reform Discourse

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Slightly over a decade ago, the African continent developed a Framework and Guidelines on Land Policy so as to guide land policy reform by countries within the continent with a view of achieving sustainable development. At the heart of the envisaged reforms was addressing the land question in Africa, with its multifaceted components. The colonial legacy, whose fundamental rationale was the disregard of indigenous or customary property rights regimes with a view to promoting individualized private tenure as the more secure and property rights regime, led to contestations, conflict and tenure insecurity. Contrary to the belief that the adoption of private tenure would solve the tragedy of the commons, it led to more tragedy. This drew from the land policies adopted during the colonial period and extended by post-colonial African Governments, after independence, whose effect was to expropriate, suppress and subjugate customary land rights in the continent.

It is for the above reason that developing a policy framework with a view to improving the governance of land within the continent must prioritize tenure reform by recognizing and mainstreaming communal/indigenous/customary land rights. This departure from the initial obtaining policy approach that focused on titling and conversion of customary to modern tenure is critical for sustainable land reform in Africa as argued by Lorenzo Cotulla and Clarke. Rethinking land reform in Africa new ideas, opportunities and challenges assesses the progress that has been made in land policy reform in the continent within the decade that the Framework and Guidelines have been in place. It also explores opportunities and challenges as well as new frontiers in the land reform discourse. Importantly, one of the themes explored in the book is communal land tenure.

Two Chapters in the book address some ideas for consideration in the pursuit of reforming communal tenure in the future. Liz Alden Wily's contribution is titled *Adjusting to New Era Agrarianism: Tackling the troubled interface of public and community property (p57-69)* while Pauline E. Peters' is *The significance of descent-based 'customary' land management for land reform and agricultural futures in Africa* (p70-83). Both explore innovative mechanisms for ensuring that the land reform trajectory aids the continent in utilizing its land resources to position itself to take advantage of emerging opportunities in the global sphere while confronting endemic and emerging challenges.

The philosophical departure in the land reform approach away from conversion of customary land rights to 'modern tenure' towards inclusive and plural tenure arrangements, with all tenure categories having equal treatment in policy and law on land is both legally and practically sound. From a legal standpoint, concerns by some scholars on whether African systems of land tenure require a special terminology have been answered by a confirmation that tenure being about who owns what interest in what land has answers in all systems, including African. Therefore customary land is property and is not require to be formalized as part of any reform process so that it can deliver on the imperatives for agricultural productivity and sustainability. Hernando de Soto had argued that unless formalization through titling occurred, customary land tenure would remain in the arena of informality. This was, however debunked as a fallacy, with one African scholar urging for the need to breath life into this argument of Hernando De Soto, which she described as based on "

dead theories". The theory has also been criticized for overly attributing the causes of under development in the third world on informality in property relations and not "in the hallowed halls of the World Bank and IMF or in the corruption-ridden chambers of municipal and federal governments" (Solomon Greene). This false narrative to land reform did not deliver its promised dividends. As Pauline documents in the book, the assumption that "'customary' status of landholdings lacked the 'security' required for agricultural investment, that it constituted an obstacle to modern agriculture, and that formal tenure through titling would provide an incentive and access to credit and trigger commercialization" (p70) did not translate to reality. Despite its being applied, "the projected outcomes of land reforms did not materialise: small farmers were not able to acquire credit with a registered title, and the process often exacerbated conflict over land, encouraged speculation, and frequently ended by displacing precisely the people supposed to benefit from the titling." (p70).

The practical logic is based on the quantum of land held under customary arrangements in the continent. As Liz Alden Wily points out in her Chapter, "community based customary tenure embraces more than 70 percent of the continent"(p57). It is, therefore, only logical that reform discourse appreciates this tenure holding as it provides an "unexpected opportunity to move into a more inclusive and equitable era of social transformation through decolonising property rights."(p57). However, the failure of the land reform discourses was not due to tenure insecurity of customary lands, but "lack of infrastructure, and other conditions essential for small to medium scale agriculture." (p71). Consequently both Pauline and Liz Alden Wily argue for a more comprehensive approach to land reform, beyond the limited fixation with tenure security. Pauline argues that this requires that policy makers and reform proponents "understand the landholding systems in place." (p71). Failure to do so leads to false analysis, a land-reform process that only delivers "dislocation, dispossession and consequent deprivation and distress" (p74). This is contrary to the aims of land reforms which should lead to poverty alleviation and improved food security, an issue that would required that there is equity in the link between addressing the land question and agricultural production based on "existing flexible social organization, including landholding, and on the skills, knowledge and visions of land users." (p74)

Liz Alden Wily sees an inclusive reform process as one that affects several aspects of communal land holding, "the status of the rights it delivers and upholds; the identity of right holders who can variously be individuals, spouses, families, clans and communities; the status of the system itself" (p58). While a lot of literature has focused on conversion of communal land to private land, she looks at the dispossession of communal land rights to public lands through the process of compulsory acquisition. She proposes that the solution lies in "fairer compulsory land acquisition" (p64) by tempering the definition of public purpose so that land should only be acquired if there is documented effort of having tried to find an alternative site for the project, the process should involve direct negotiations between the investor and the community in the presence of some mediator, and that leasing is explored before outright acquisition (Liz Alden Wily, 68). Other strategies that she proposes include proactive collaboration with communities during acquisition, participatory amicable consensus, compensation especially land to land, and "moving out of colonial-induced thinking that the state is rightfully and appropriately the majority landowner, that in all cases it must own each and every asset of even tangential public purpose." (p68). Pauline on her part proposes the solution as being extending "legal protection to both customary rights as property and the means to enforce protection to those rights" (p80) and proposes the use of "rural land maps that allow people to identify local land rights and participate in new local administrative bodies to manage disputes." (p81).

The two chapters on customary land rights in the book, Rethinking land reform in Africa new ideas, opportunities and challenges, demonstrate that despite progress in land reforms, there is still a long way to go in the quest to strengthening communal land tenure as a basis for agricultural development, food security and poverty alleviation. There is need for policy innovation so as to recognize the multiple values of land, depart from the wrong notion that customary is backward and informal, without "over-glorif(ying) traditional" (Odote 2017:143) by "building synergies" (Odote, 2017:143) amongst all the property systems in the continent. The ideas in the two papers are useful, but they do not scratch beyond the surface. While they argue that tenure security is not the greatest challenge, they end up suggesting the need for legal security of customary tenure, demonstrating the place of law in the protection of communal land rights. The lesson is that what is required is a reconceptualization of how to strengthen communal land rights and secure

tenure beyond the obtaining doctrine of titling. This requires a recognition of the unique nature of communal land rights with its nested and layered approach to rights and researching how to best capture this in policy and legislative proposals as part of the land reform discourse in the continent. This is the larger message of generating ideas that Rethinking land reform in Africa new ideas, opportunities and challenges call for and that the continent and its scholars working on land issues must pick up and urgently tackle.

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