

FORMALISING “INFORMAL” PROPERTY SYSTEMS

The problem of land rights reform in Africa

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**The views expressed in this paper are those of the author and do not
necessarily reflect the views of
the Commission on Legal Empowerment of the Poor**

EXECUTIVE SUMMARY

The concern of this paper is to explore the main assumption underlying the work of the Commission for the Legal Empowerment of the Poor (the Commission) namely, that formalisation of “informal” or “extra-legal” relations is the way to economic development and poverty reduction in third world countries. That assumption is interrogated in the context of the nature, structure and dynamics of Africa’s pluralistic and multiplex systems of property in land. That interrogation is conducted in four parts. The first, comprising the introduction, sets out in some detail, the Commission’s conceptual framework and underlying assumptions. The concepts of “informality” “formality”, “legality”, “extra-legality” and “illegality” are briefly explored at this stage. The second part examines those concepts as applied to the classification of legal systems and addresses some of the ideological implications of that classification. Part three looks specifically at property relations and offers an in-depth analysis of systems of property in land in Africa. Part four then looks at attempts to “migrate” informal property to the realm of “formality” across Sub-saharan Africa with emphasis on modalities and processes and assesses emerging impacts from those exercises. Particular attention is paid in this last part to experience with land reform in Kenya.

The paper concludes that not only is the theory behind the Commission’s assumption – namely that formalisation through documentation has inherent properties which the development process requires – flawed, but that empirical assessments of formalisation of indigenous (i.e. undocumented) land rights systems in rural and urban Africa do not confirm that expectation. Those assessments show further that not only are livelihood systems affected by new and socially disruptive property relations, the poor will very often lose through the operation of the market. In addition the paper suggests that formalisation is most likely to work against the poor unless it is accompanied by support

services infrastructure. The political economic advantages, if any, of formalisation may, therefore, have been overrated.

1. INTRODUCTION

1.1 The Commission's Hypothesis

The broad hypothesis guiding the work of the Commission on Legal Empowerment of the Poor (the Commission) is derived from the assertion that –

... most of the World's poor live day-to-day outside the law in the so-called informal or extra-legal sector... without legal rights or protection, they are in a continual state of legal and political vulnerability. Informality limits the opportunity for economic and social development for individuals, families businesses, communities and entire nations (the commission, January 2006).

Consequently, the Commission argues that until the poor are able to “migrate” to the “formal” sector i.e. the sector in which the “rule of law” operates, they will continue to wallow in misery. The process of migration, the Commission explains, might involve reforms designed to give legal recognition to important areas of social and economic life such as commerce, property and conflict resolution.

The Commission is particularly concerned with what appears to be a very large quantum of “dead capital” locked up in the informal sector in the form of real assets such as land, houses, and associated resources. Of special significance for Africa is vast land resources which remain undocumented and, in the Commission's view, outside the domain of the formal legal system.

1.2 The Underlying Assumptions

Underlying the Commission's hypothesis is a number of explicit and implicit assumptions. The first is that "informality" is primarily a Third World problem. Although the Commission concedes that informality is growing in all societies, the claim is made that Third World countries are particularly afflicted by it. The second is that informality is inextricably linked to poverty. Says the Commission,

Despite the fact that informality is a complex phenomenon and causalities are often difficult to prove, it is clear that informality foments poverty. In poorer countries the informal sector thrives and often dwarfs the formal economy, and informal economies lack the healthy core of small and medium-sized enterprises that have proven to be critical engines of economic growth in wealthy nations (ibid)

The third assumption is that formality is an incident of written rules and principles, rather than of a system of governance based on norms and values accepted as authoritative and binding in society. The "rule of law" which the Commission associates with formality, is thus no more, and no less than "the rule of written laws"! The fourth follows from the third and is that conduct or relations not defined by written law is extra-legal hence lacking legitimacy and is without protection, And the fifth, and final assumption, is that the technical act or process of formalisation, per se will liberate the dead assets locked up in the informal sector and convert them into capital for development.

1.3. The Nature of Interrogation

This paper will interrogate the Commission's hypothesis in the context of the structure and incidents of land rights systems in Africa. That interrogation will be structured around a number of conceptual and empirical questions. The first is whether the Commission's definition or description of social systems as "informal" or "formal" is sound. Can the complexity of social systems be reduced to such dichotomies? The second is whether the incidents of property in land in Africa can be radically transformed through a technical process of "migration". The third is whether current processes of land rights reform most

exemplified by Kenya have registered examples of successful “migration”. And the fourth is whether alternative strategies for the dynamics of property systems in Africa are available.

The paper argues that the Commission’s hypothesis may be of little assistance in the analysis of the dynamics of the inherently multiplex property systems which characterise most African jurisdictions. Transformation may not therefore lie along a linear path marked by “migration” from informality to formality. Rather, it may well occur in the recognition and consolidation of the core values and institutions which make property rights socially (hence legally) secure.

2. INFORMAL AND FORMAL LEGAL SYSTEMS

2.1 The Heuristic Framework

The Commission does not define “informality and “formality;” it merely describes them. Informality is described as a condition in which activities are conducted without legal recognition or in the absence of legal regulation. Such activities, the Commission adds, may even be illegal even though they may be tolerated. Formalisation, however, is the process by which “informal activities, participants and entities obtain legal recognition “(ibid)”. In the Commission’s view, therefore, the defining characteristic of either concept is the absence or prevasence of “legal” regulation. Although the Commission does not elaborate on what constitutes “legality”, “illegality” or “extra-legality,” it is clear that what they mean is a regime of codified (i.e. written) rules and principles. What needs interrogation is whether that view of law or legal regulation is adequate. Is the Commission suggesting that the vast array of activities conducted without documentation in virtually all jurisdictions are “illegal” or “extra-legal” hence essentially informal? Is the state legislative process the only source of legality?

There is little doubt that apart from the domain of the criminal justice system, whether an activity is “legal” “illegal” or “extra-legal” is a function of a combination of many and complex factors. Some of these are juridical while

others are social, cultural or even political. The most important juridical factor is the manner in which the State Constitution defines the content of a country's legal system. Any regime of social or economic regulation recognized by the State Constitution as part of a country's legal system cannot therefore be characterized as "illegal" or "extra-legal", Nor should conduct governed by any component thereof, be so characterized.

As an empirical matter, no country in Africa except perhaps Eritrea, has yet taken the radical step of declaring the vast body of undocumented customary law illegitimate unless re-enacted as part of positive law. Indeed African constitutions recognize as legitimate, the operation of a plurality of regulatory regimes as a basis of national legal systems. That plurality draws its content from many sources including –

- Anglo – European law (both written and unwritten)
- Indigenous (or customary) law,
- Islamic law, and
- Indian law (in some English-speaking African countries).

The operation of that plurality is further complicated by the fact that activities of individuals or communities may draw on the principles of any of those sources simultaneously depending on the issue in contention.

Since the legitimacy of rights under any of these sources derives from their recognition as a component of the national legal system, it follows that activities authorized by any of them meet the criteria of "formality" set even under the Commission's own description.

2.2 The Ideological Message

But we miss an important point if the Commission's hypothesis is interrogated on the basis of its heuristic value (or lack of it) only. Underneath the proposition that "formal" (i.e. documented) systems of exchange and transactions are a more efficient engine of development than "informal" relations, is an ideological message which has been

prosecuted in Africa and elsewhere for centuries. The persistence of that message is evident in the evolution of feudalism and imperialism and is reflected in the structure of domination of the political economies of the South by those of the North.

In Africa that message was pursued to explain, impose, and sustain a system of law, administration and property relations which was not simply alien, but which grew to oppress, destabilize and stultify the evolution of indigenous social systems (Okoth-Ogendo, H. W. O. 2005).

This was pursued through policies which denied the legitimacy or even existence of indigenous legal systems and the jural character of relations of property over the land indigenous communities occupied. And because colonial authorities sometimes operated on the assumption that indigenous communities had no law, they proceeded, as a matter of course, to impose Anglo-European law, as the residual law of their respective possessions. It is interesting to note that comprised in that imposed law was a large body of undocumented custom and practices of metropolitan societies. In consequence, indigenous systems and values were subordinated to or even replaced by the law of the metropolitan power. And on the further assumption that indigenous societies had no notion of property in land, colonial authorities were able to appropriate large areas of productive land and associated resources through, inter alia,

- the transfer of radical title to land from indigenous communities to the colonial sovereign, and
- the grant of private rights to foreigners under an Anglo-European property regime.

Indeed some of the earliest decrees issued by imperial France and Germany in Africa proclaimed that all land; “ownership” of which could not be established by documentary evidence, was, automatically appropriated to the sovereign. Imperial Britain arrived at that conclusion by simply declaring land occupied by indigenous communities “waste” or “unoccupied” hence the property of the sovereign! (Okoth-Ogendo, H. W.O. 1991) It is interesting that even as recently as 1971, the Government of the Sudan, in an effort to

control the oil fields of Southern Sudan, was bold enough to legislate that any “unregistered” land automatically vested in the State!

From an ideological perspective, therefore, documentation (or formality) has always operated as an important vehicle for the establishment and assertion of claims over resources whether corporeal or incorporeal. As was the case in colonial Africa, formality enjoys the backing of the state in terms of elaborate support services infrastructure, and operates on the basis of rules and principles understood by and supporting the interests of the political classes, both nationally, and internationally.

3. INFORMAL AND FORMAL PROPERTY IN LAND

3.1 The Persistence of Ideology

The notion that documentation is an important process in the conferment of formal or legal status to social and economic relations, has survived the decolonisation process. It has, indeed, become an important pillar in development theory i.e. that third world countries will not eliminate poverty unless they embrace the juridical language and practices of the global economy.

Thus in the domain of property law, important features of that ideology remain. “Undocumented” land remains the property of the state or is held in trust for their occupiers by agents of the state. Anglo-European property law remains the regime of choice as the medium of exchange and transactions. And state policies in most of these countries is either ambivalent about indigenous property systems or would wish to migrate them from the realm of informality, to formality. A detailed interrogation of the Commission’s hypothesis in relation to the manner in which land rights are acquired, held, used and transacted in Africa confirms this perspective.

3.2 Systems of Property in Land

Note has been taken of the fact that an important legacy of colonialism and one which has been entrenched in contemporary Africa, is a broadly dualistic and in some jurisdictions triadic legal system. We say “broadly” because, internally, that system is pluralistic,

interactive and fairly complex. Nonetheless, or Islamic at least two distinct domains of legal regulation, namely Anglo-European and indigenous, are in force. That duality is or (triadism) particularly evident in relation to jurisdiction over land . This much is clear from an analysis of the structural features of that system and its: internal dynamics.

3.2.1 The Structural Features of the Law of Property in land.

(a) Anglo-European Law

Anglo-European property Law is an extensively documented system. Its structure consists of two basic features. The first is a set of rules and principles of substantive law codified from either the common law of England, or Roman-Dutch Law. These are augmented in the course of judicial administration by unwritten rules drawn from those sources. In English speaking Africa, those rules and principles are patterned after the 1925 English Property Statutes, while in French-speaking jurisdictions, these follow the Code Napoleon. Specific matters covered by this body of law include –

- general principles regarding modes of proprietorship
- estates that may be created including, freehold, absolute proprietorship, transport and leaseholds, and their respective contents,
- the mode of alienation of property rights, and
- creation of secondary property rights including servitudes and encumbrances

The second is a complex body of procedural law accompanied by a number of technical and administrative processes, among which are formal planning, demarcation or survey and registration. The last of these is in terms of certification of either the document evidencing ownership or of the title itself. While registration of documents is the primary system of certification in Roman-Dutch systems, English common law jurisdictions recognize both. These processes are increasingly being modernized through computerization and electronic management systems.

That body of procedural law is supported by a large administrative bureaucracy managed by and based in central government offices.

In Kenya, which is representative of ex-British Africa, three sources of imposed substantive property law are in operation. These are embodied in –

- The Transfer of Property Act of India 1882
- The Registered Land Act 1963
- The common law of England, the doctrines of Equity and the statutes of general application in force in England on the 15th August 1897.

Sources of procedural law are in turn embodied in at least five statutes. These are

- The Registration of Documents Act
- The Registration of Titles Act
- The Government Lands Act
- The Registered Land Act
- The land control Act.

As a general rule, Anglo-European law applies mainly in respect of private or state property and functions as the medium through which commodity relations in land are conducted. It is also the system generally engaged in the adjudication of land disputes irrespective of their origin. Entry into that system is by way of grant, allocation or inter-vivos transfer.

The imposition of Anglo-European law, particularly in relation to property in land, has been criticized on many grounds and this despite the fact that its protagonists consider it to be colonialism's most precious contribution to "civilization" in Africa (Allot, A. N. 1960; Burman, S. and B. Harrel - Bond 1979). Four such criticisms are outlined here.

The first has to do with the uniquely cultural embeddedness of its structures and content. As a system of law that evolved over centuries in response to social, economic and political struggles in Europe, many of its fundamental doctrines are clearly not suitable for Africa. The doctrine of tenure which reflects the evolution of feudal relations by

vesting radical title to land in the sovereign in virtue of the exercise of political control is one such doctrine. Its application in Africa remains a serious impediment to land management (Okoth-Ogendo, H.W.O. 2004). Other doctrines including perpetuities, and accumulations, equitable trusts of land are similarly unsuitable as mechanisms for the management of land rights in the African social milieu.

The second is that the principles of Anglo-European law are not always able to deal with relations of production unknown to or no longer predominant in the societies of the North.. Access to pastoral lands and community commons, are issues in respect of which Anglo-European property law has no clear rules or principles. The result is that when confronted with these and similar issues, the typical response of imposed law is either to eliminate (or privatize) them or to treat them as matters of public administration not proprietary relations.. The extension of trusteeship or representational management principles to land not yet privatized bear credence to lack of substantive law in respect of these economic and social formations.

The third is that by presenting the principles and norms of Anglo-European law as a complete, autonomous and “rational” system, it is often forgotten that it is unlikely to thrive without an enabling social, economic and cultural substructure. The expectation that that system can be successfully manured on foreign soil through the continuous reception of precedents developed in the courts of erstwhile metropolitan centers, has not passed the test of time. Indeed, as we suggest later, in that expectation lies the Achilles Heel of Anglo-European property law in Africa.

The fourth criticism is that as a body of technical rules and principles, Anglo-European property law is a complex and expensive system to operate. Consequently its day-to-day usability depends not only on specialized information and meticulous attention to detail, but also on access to substantial resources. It is for this reason that only the small enclave of foreign or corporate property owners and political elites whose properties is protects can enjoy rights under it. The vast majority of the people, even though technically covered by it, remain outside its operational purview.

(b) Indigenous Property Law

Indigenous property law is a more nuanced and panoptic system. It reflects, for the most part, a system of interpersonal and transgenerational rights and obligations, resource governance principles, and aspects of social stratification which create and sustain It is thus as much a juridical, as an integrated social system. From a structural point of view, indigenous property law operates on the basis of two organizing principles. The first is that access to land is an incident of membership in a specific community or social group. The quantum and nature of access rights will, in turn reflect specific resource use functions recognized by that group. The second is that control and management of land resources is a power vested in the governance organ of that community or group. That power is exercised at various levels of community organization and is available for the sole purpose of guaranteeing the access rights conferred by the community upon its members (Okoth-Ogendo, H.W.O. 1989).

The substantive content of rights conferred or obligations imposed by indigenous systems of property cannot therefore be elucidated in terms of “tenure regimes” or the doctrine of ownership. Similarly its procedural principles cannot be isolated from the social, cultural and governance context in which land relations are conducted.

As a general rule, indigenous property law applies to areas of land to which it is specifically designated. That designation is either entrenched in constitutional provisions or elaborated in statutory law. Historically, indigenous property law governed land which was either reserved for “native” (read” African’) occupation or which was not brought under effective colonisation. Examples in the former category still persist in Namibia, South Africa, Zimbabwe, Malawi and Kenya and in the latter in Swaziland, Lesotho, Tanzania and South Sudan. In the post-colonial area, the scope of application of indigenous property law has expanded or shrunk depending on the land reform policies adopted in particular jurisdictions. Thus while countries like Uganda, Tanzania, Botswana, South Africa, Swaziland, Lesotho, South Sudan Djibouti, and Mozambique,

have expanded the domain of indigenous property law by statute, others such as Kenya, Zambia, Malawi, Rwanda, and Eritrea, are still generally ambivalent about it.

The fact that so many jurisdictions in Africa recognize indigenous laws, as a legitimate basis for property relations in either their constitutions or statutory law, should put to rest any notion that it is somewhat “informal” or “extra-legal.” That the specific incidents of that body of law i.e. how it governs acquisition of rights, their use, alienation and transmission, are seldom codified, does not, in our view, consign it to the pigeon-hole of informality!

The recognition or persistence of indigenous law alongside imposed law though a pragmatic response to social reality, has been criticized on a number of grounds (Okoth-Ogendo, H.W.O. 1989). Three of these are relevant to the issue of property in land.

The first is that despite constitutional or legal recognition, indigenous property law is a vanishing feature in the African legal landscape. For one, it is and will always be subject to the application of written law; which continues to impose Anglo-European principles and doctrines. For another, the territorial reach of indigenous property law is daily shrinking through either privatization or conversion to Anglo-European property regimes. Legislative mechanisms that will hasten that shrinkage, it is pointed out, are already in place in Eritrea, Uganda, Kenya, Zambia and South Africa, to mention but a few. Intellectual effort in support of indigenous property law it is argued is thus not only misguided, but is clearly retrogressive!

The second is that indigenous property law has inherent defects that render it unsuitable as a framework for social and economic regulation. It is said to be repugnant to contemporary human rights values on account that it “discriminates” against or accords no security of women and children in respect of access to property through transfers or transmission. Because ownership of land under that law is perceived of as “communal” hence can only be collectively asserted, it is said that it inhibits the development of a land market while at the same time encouraging unproductive subdivision of land.

The third is that rules of indigenous property law are, in any event, vague, difficult to ascertain or document and have no application across cultures or communities. They are vague because they are essentially a reflection of “custom” rather than “settled law”; are difficult to ascertain because their discovery depends on the fading recollections of community octogenarians; and their content varies, in any event, from one community to another. Without certainty, universality or uniformity and “rationality”, the rules and doctrines of indigenous property law cannot be relied on as a framework for the development of a modern economy.

3.2.2 Dynamic Interactivity of property systems of

The structural features of property law outlined above can be misleading if read to mean that those systems operate within parallel and exclusive spheres without contact or interaction. There are several levels at which dynamic interaction or interpenetration occurs.

First as a technical matter most legal systems deal with possibilities of internal conflict arising from application of multiple systems of law, by legislating a juridical hierarchy which subordinates indigenous law to other sources of law. This applies to all areas of social regulation including contestation over rights to land of whatever category. Kenya’s Judicature Act, which is typical of many in English-speaking Africa provides, for example, that

- (1) The jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with-
 - (a) the Constitution
 - (b) subject thereto, all other written laws ...
 - (c) subject thereto and so far as those written laws do not extend and apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on 12th August 1897 and the

procedure and practice observed in courts of justice in England at that date

...

- (2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.

That subordination is not merely a clear expression of preference for documented systems of law but also of the continuous growth of Anglo-European law at the expense of its indigenous counterpart. Recent judicial pronouncements (even in Kenya, but especially in South Africa) suggest, however, that indigenous law cannot be subordinated technical fiat to unwritten doctrines of other regimes; nor should it be shot down on the basis of such a vague and value-laden test as “repugnancy.”

Second, the system of resolution of disputes over land is structured in such a way as to permit a cross-over from one regime to another. These occur as disputes which originate within the domain of indigenous law progress by way of appeal or review to higher tribunals applying principles and doctrines of Anglo-European law. That progression often leads to the injection of doctrines drawn from the latter into the interstices of the former.

Third, because many jurisdictions are generally unable to enforce new rules of personal law especially those governing the transmission of land in, mortis causa, numerous claims over land, irrespective of the governing legal regime, continue to be resolved by families and communities on the basis of indigenous law. What prevails in those contexts is not the technical legal rules applicable under written or unwritten law, but rather the values and norms upon which social organization survives. Depending on the relative social strength of parties under such contexts, such disputes eventually end up in state tribunals and courts.

That Anglo-European and indigenous bodies of law are in constant interaction is not, therefore, in dispute. But because of its unstructured and asymmetric nature, that interaction tends to distort both systems of law. That as, we explain later, is at the heart of the problematique of land rights reform in Africa.

4. FORMALISING PROPERTY RIGHTS IN LAND

4.1 The Problematique in Land Rights Reform

Land rights systems have been the target of reform in Africa for nearly a century. Until recently, however, reform processes focused mainly on property rights (or lack thereof) in land held under indigenous law. The reason, of course, is that state policy considers that the system of property defined by Anglo-European law offers the most efficient leverage for economic change and development. Migrating indigenous property systems to the domain of Anglo-European Law therefore becomes a political and economic necessity for development elites.

4.1.1 Theoretical foundations

Reform of indigenous property systems is premised on a two-pronged theory. The first is that conversion to a documented system of management will eliminate the diffuseness in indigenous property systems by clarifying the essential incidents of property in land currently held under indigenous law. The second is part of an ancient orthodoxy; namely that only privatization offers the security required for property rights to power economic development.

The former is central to the Commission's hypothesis. It argues that it is the technical exercise of documentation which will "migrate" informal property relations to the realm of formality. That realm consists, inter alia, of a statutory system of registration comprising procedures and processes for the creation, transfer and extinguishment of property rights. Migration to that realm, according to this view, will capitalize property by releasing its exchange value in the form of credit which the development process needs. How that broad-spectrum affect is generated is, however, not fully explored. It is

the technical process of migration rather than the inherent properties of formality which is the focus of analysis.

The later argues that “property rights, meaning private rights or rights analogous to them, are in the last analysis the only power by which men can execute positive plans for the use of land and natural resources “ (Denman, D.R, 1969).

The English economist and moral philosopher, Adam Smith, one of the earliest proponents of this view extolled private property thus –

A small proprietor ... who knows every part of his little territory, who views it all with the affection which property, especially small property naturally inspires, and who upon that account takes pleasure not only in cultivating but in adorning it, is generally of all improvers, the most industrious, the most intelligent and the most successful (Smith, A, 1961 Edition)

On the basis of this perspective indigenous property systems are considered inherently retrogressive. Making the case for privatization, a Royal Commission appointed by British colonial authorities to advice on steps needed to reform agricultural practices in East Africa (i.e. Kenya, Uganda and Tanzania) commented as follows –

Individual tenure has great advantages in giving individuals a sense of security in possession and in enabling by purchase and sale of land an adjustment to be made by the community from the present unsatisfactory fragmented holdings to units of economic size (E.A. Royal commission, 1955)

That recommendation was the basis of the comprehensive indigenous land tenure reform now going on in Kenya.

The underlying expectation in both of these prongs, however, is essentially the same; namely that reform through public legal processes designed to convert land holding and use from an indigenous to an Anglo-European property regime, is what the development

process requires. In the context of agriculture the landscape expected after reform would look somewhat like this:

- neatly fenced and consolidated holdings, hence a tabula rasa for planning and technological innovation,
- exclusive ownership by individuals with high motivation and incentive to develop their parcels,
- negotiable titles providing a basis for credit generation through mortgages and charges,
- quietitude of possession by reason of resolution of ambiguities in the land rights system, and
- abundant labour, as a result, especially of displacement from land and exit from agriculture through an active land market (Okoth-Ogendo, H.W.O. and W. Oluoch – Kosura

Beyond agriculture, that landscape would facilitate capital formation through exchange relations in other sectors such as urban development and natural resource management.

4.1.2 The processes of formalisation

The processes of formalization under both perspectives is thus essentially technical, rather than social. It may take one of three forms, namely, conversion by legislative fiat, recognition of emerging new order rights, and simple certification not involving the creation of new order rights –

Formalization by legislative fiat has been attempted in very few countries. Perhaps the most drastic example is Eritrea where indigenous property regimes have been decreed out of existence and replaced with individual “usufructs”. In Zanzibar and Malawi legislation conferring private property upon voluntary conversion has been in operation for more than three decades. And in Uganda, the Land Act, 1998, contemplates a process of conversion of indigenous land rights to Anglo-European “freeholds” through simple application to relevant Land boards.

Formalisation through statutory recognition of emerging “new order rights” is the theory behind Kenya’s comprehensive indigenous land tenure reform programme. It is based on the belief that since rights “amounting to (private) ownership” are already emerging in indigenous society, these should be recognized in state law.

That process is conducted in three stages. The first involves adjudication of rights with a view to determining who owns what Interest in what land. Although adjudication is supposed to be conducted within the juridical framework of indigenous law, its outcome always results in the recordation of rights unknown to that law. The second is consolidation of holdings into units of “economic size” This is conducted either through voluntary exchange of fragmented parcels or by way of a predetermined area plan. The third, is registration of consolidated parcels in a state maintained register. The registration is modelled after the Australian systems which confers finality to records entered under it. The register thus not only excludes all facts not related to the registered parcel but is intended to mirror and guarantee the accuracy of all future entries in it.

The recognition of new order rights may be sporadic or systematic. Sporadic exercises have been conducted by way of experimentation in Uganda, Zambia and a few English – speaking West African jurisdictions. In Kenya where this process has been going on since 1955, it has now assumed the character of formalisations by legislative fiat!

Because its target is the privatization of property, this process has little room for the recognition of collective rights unless these are subjected to a trust, associational or concurrent management regimes.

It is important to emphasize that whether formalization is by fiat or so-called recognition of new order rights, it is the act of registration which “migrates” property from informality to formality. The juridical incidents of property rights after migration are often defined by the relevant statute. Thus Kenya’s Registered Land Act (Cap 300 of the Laws) stipulates inter alia, that

The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto... and the rights of a proprietor whether acquired on first registration or subsequently for vulnerable consideration ... shall be rights not liable to be defeated except as provided in (the) Act and shall be held by the proprietor ... free from all other interests and claims (not shown on the register). (Sections 27 and 28)

Formalisation through simple certification, not involving the creation of new order rights, is a more recent development. It proceeds on the basis that documentation will contribute to the clarification of particular juridical or factual aspects of the land rights system. Certification to be affective is then institutionalized through special registry procedures usually managed at local or community levels. Certification processes have been introduced in Eritrea, Mozambique, South Africa, Uganda and Tanzania. The relevant legislations establishing them usually provide for their tradeability irrespective of the nature and quantum of the rights they record.

4.2 A Shift in Paradigm

4.2.1 Focusing on development not property rights per se

Excessive fixation with the formalisation of indigenous property systems, however, is now giving way to a new land rights reform paradigm. That paradigm argues that what is needed is comprehensive reform of Africa's property framework rather than only one (although important) component of it. It is based on evidence which shows that despite their formality and apparent rationality, the very complexity of Anglo-European systems of property is itself a serious impediment to economic change and development. Contemporary research is beginning to expose not merely systemic multifunctions in those systems but also the fact that without radical reform, they are unlikely to become an integral part of Africa's political economies.

The basic philosophy in this shift is that a framework must be created to enable the land sector to contribute to overall national development. That framework must respond to contemporary development concerns in Africa including –

- enhancement of productivity in the rural sector
- poverty eradication
- restoration of justice through equitable distribution of land resources
- strengthening democratic governance and
- management of internal and transboundary conflicts

The focus of the new paradigm therefore is to create a land system that will, inter alia

- empower the poor to transform their livelihoods,
- provide infrastructure and services for the rural areas,
- manage excessive population growth and migration to the urban areas
- eliminate gender discrimination
- strengthen the tenure rights of ministries, the marginalized and pastoral communities
- secure the confidence of communities in the management of land resources and resolution of disputes, and
- leverage development in other production sectors

Thus throughout Sub-Saharan Africa, countries are engaged in comprehensive land policy development designed to reform all aspects of the property system and not just a specific area of property law. The main issues being examined include the role of the state in land relations, design of appropriate tenure systems, land rights administration, land use management practices, and regional or trans-national land management. (Okoth – Ogendo, H.W.O. 1998).

Regarding the first of these, policy development is now questioning the overwhelming power of the state and its agencies in land relations. Specifically, a number of jurisdictions such as Uganda and Ethiopia have succeeded in divesting the state of radical

title to land and vesting it in the citizenry at large. This radical step will hopefully ensure that the state does not arrogate to itself the power to dispose of public (or government) land at will. The role of the state is then confined to standard-setting (or quality assurance) policy-making, and supervision; activities which are consistent with the exercise of its eminent domain and the police powers, both of which are acknowledged.

As regards land tenure, policy development is concerned inter alia with

- the simplification of imposed property systems,
- the recognition and legitimization of indigenous property systems,
- the elimination of discriminatory practices in respect of access to and transmission of property rights
- the design of appropriate tenure arrangements for pastoral land use systems and
- the development of commodity relations in specific land use sectors particularly in urban settings.

Those concerns are not based on the supposition that any tenure regime (whether individual, collective or community-based) is inherently superior to the other. Rather they represent attempts at ensuring that the tenure diversity which characterizes African jurisdictions is rationally and efficiently managed.

As regards land rights administration, policy development has exposed a deep-seated culture of inefficiency, over-bureaucratization and opacity. For the land sector to contribute to eradication of poverty and the development of associated sectors, these maladies must be cured. Consequently the concern here is to –

- simplify and strengthen land rights administration procedures
- ensure cost-effectiveness,
- democratise land rights administration systems through effective devolution and incorporation of community land governance structures, and
- build capacity and confidence in the management of those systems.

The concern in this area, therefore, is to ensure that land rights administration systems serve the land using public in general and not just land owning elites.

As regards land use management, the concern of policy development is to ensure that an autonomous, integrated and sustainable framework for the utilization and conservation of land and associated resources is in place. Consequently, major policy development concerns in this area are revolving around –

- land quality assurance,
- the management of land needs,
- physical development planning and
- environmental management

Because numerous legislations already exist in respect of these concerns, policy development is expected to audit and improve on their effectiveness and affordability.

Finally, it is clear that the operation of property systems in any one country may sometimes create transnational effects. This is particularly the case in respect of shared natural resources such as river basins and pastoral lands. The objective of policy development in this area therefore is to design domestic property systems which would permit consultative management across two or more jurisdictions that share land resources. This is particularly crucial for jurisdictions which share the Lake Victoria basin and major international rivers such as the Nile, Niger, Zambesi and Limpopo.

The broad goal informing this paradigm shift is the need to ensure that a responsive legal and institutional regime for the sustainable management of land, the eradication of poverty and the development of other sectors, is in place.

4.2.2 Progress in land policy development

Currently, the following jurisdictions have undertaken comprehensive land policy development, namely –

- Tanzania, 1995
- Mozambique, 1995
- South Africa 1996/97/98
- Ghana, 1998
- Zimbabwe, 1998
- Zambia, 1999
- Rwanda, 2000
- Malawi, 2001
- Swaziland, 2001
- Lesotho, 2001
- Kenya, 2006

Others in the process of land policy development include Uganda and Angola.

The expectation is that once consensus is arrived at in respect of country – specific policies, these will be implemental through the enactment of a basic(i.e. national) property law followed by complementary legislation designed to –

- recognize and legitimizes all socially – embedded property systems,
- empower land users in the day-to-day management of land resources,
- balance individual interests with public concerns, and
- enables the state to avail adequate infrastructure and services to land users irrespective of tenure status.

For the rural and urban poor, these reforms are expected to make land more accessible and to enable them improve capacity to manage their livelihood systems.

Apart from Botswana, South Africa, Mozambique, Rwanda and Tanzania, few countries have taken land policy development to that level. What exists in many jurisdictions, therefore, are policies that are yet to be operationalised in terms of new laws. The

process of “formalisation” of land rights pursuant to this paradigm shift is, therefore, largely incomplete.

4.3 Assessing the Effects of Formalisation

The formalisation of land rights systems in Africa has been complex, sometimes protected and certainly very expensive in human and financial resource terms. An assessment of those effects therefore involves some speculative but intelligent predictions. Two parameters are explored here; namely the intrinsic value of formalisation, and its “trigger” effects on the political economy.

4.3.1 Intrinsic value of formalisation

An important plank in the Commission’s hypothesis is that formalisation through documentation per se will add value to property rights by enhancing their tradeability in domestic and international markets. That value will be further enhanced in an environment in which the “rule of law” prevails i.e. where state bureaucracies function on the basis of clear rules and principles and dispute processing mechanisms are accessible.

Intriguing ambivalence surrounds the issue of the intrinsic merit(s) of documentation of land rights in Africa. On the one hand, broad agreement is now emerging that documentation, especially where it simply confirms, does not distort or redefine the essential incidents of rights as created under socially internalized property regimes, is valuable in and of itself. That value derives not only from the fact that it is good evidence in the context of disputes, but also from the fact that the state supports it. Many African governments have instituted documentation or certification schemes precisely for that reason. The most ambitious of these is about to start in Southern Sudan where decision has been made to document, harmonise and codify the entire corpus of customary law especially land law.

On the other hand, there is evidence, which suggests that documentation of whatever kind is sometimes seen as a process of expropriation rather than certification of land rights. This is particularly the case where customary land users do not trust the state. For this reason, voluntary certification is generally slow, and systematic conversion actively resisted in many jurisdictions (Adoko, J. 2004). These fears are not always without foundation. Research conducted in Kenya and elsewhere indicates that many families have lost property through illegal or clandestine transactions involving documents of title. Others have lost property through distress sales, foreclosures or collusion with land registry personnel. Very often it is the poor, victims of HIV/AIDS and widows and children who bear the brunt of such mischief. It is largely for this reason that thousands of documents of title lie uncollected in land registries throughout Kenya.

4.3.2. The trigger effects of formalisation

The expectation that documentation will trigger radical changes in the political economy is founded on the view that confidence and transactional mobility will be created and sustained. Specifically it is argued that documented property –

- stimulates the growth of factor markets (credit, inputs and new technologies),
- releases social energy,
- minimizes transaction costs, and
- controls externalities

Empirical assessments are now available which indicate that these effects may not be immediate or even obvious. What is emerging from studies conducted in Latin America, Asia and Africa is that the effects of formalisation are at best eclectic and at worst severely disruptive of political economic relations (Durand – Lesserve, A 2005, Gravois, J. 2005 (Hunt, D. 2004)

In a study conducted on the effects of more than two decades of land tenure conversion in Kenya (Okoth – Ogendo, H.W.O. 1985) it was reported that although land titling had

stimulated a limited land market among small-holders in some parts of the country, the net effect was to impoverish rural society. Specifically, the study demonstrated, inter alia, that

- credit generated through mortgages and charges went primarily into the development of non-agricultural enterprises,
- social and political elites often took advantage of documentation processes to expropriate rural properties,
- documentation processes were often distorted and abused by influential family members to deprive others (and especially widows and orphans) of their entitlements under indigenous law, and
- the fact that new order rights were routinely ignored by society sometimes lead to further instability in property relations.

In other words documentation may so distort the social organization of property as to prevent individuals and communities from drawing anticipated benefits from it. This is particularly likely where the state provides little or no support services infrastructure for the new tenure regime.

Recent studies conducted in rural and urban centers in South Africa support that conclusion. They caution, in particular, that formalisation, per se

- does not necessarily enhance security
- is unlikely to generate credit flows to the poor,
- is most likely to expose property held by the poor to expropriation by elites, and
- is not only expensive but difficult to maintain

Distortions arising from inaccurate and obsolete formalisation processes may further inhibit the growth of the land economy (Kingwill, R. B. Consins, T. Consins, D. Hornby, L. Royston and W. Smit, 2006).

4.3.2 An explanation

Legislating rights is always risky business. But legislating land rights for the poor is particularly risky! Whether the objective is the creation of new order rights or the repackaging, confirmation, or clarification of existing rights, the legislative process operates on at least three assumptions, namely that –

- there is demand for and capacity to deliver new order or repackaged rights,
- social infrastructure exists for the internalization of rights, and
- the new or repackaged system of rights will enhance livelihoods.

These assumptions are not always realistic.

For a start because demand for new or repackaged rights is difficult to ascertain, this assumption very quickly degenerates into a fixation by the state. For example tenure conversion processes in Kenya, Uganda and Zambia were initially premised on the view that demand in terms of private land rights had indeed emerged in indigenous property relations. More than half a century later, the prosecution of that processes in Kenya is no longer based on that view. It has become little more than an ideological plank in the country's economic policy. Further, state agencies do not always possess the capacity to deliver (or make available) new rights. An important factor is the inefficiency with which land rights delivery systems are conducted; another is lack of resources to manage the very large body of instruments which the delivery of formal rights require.

The assumption that social infrastructure exists for the internalization of rights, implies that beneficiaries have the capacity to receive and draw full benefits from the system of rights legislated. That capacity is itself a function of social structures especially the level of information management, resource availability, access to conflict resolution mechanisms, and responsible governance. Experience in many African jurisdictions suggests that no such infrastructure is in place. New order rights are often treated with scepticism or even hostility once it emerges that they may confer differential advantages to social classes. Besides, the fact that the level of information management among the poor is still quite low means that capacity to handle the enormous documentations that

comes with formalisation hardly exists. Indeed that inability quite often opens up opportunity for fraudulent manipulation of the poor.

The assumption that the new system of rights will improve livelihoods is, as we have indicated, the primary reason for reform of land rights systems in Africa. The expectation is that reform will not only increase a sense of security in resource control but will also make available material benefits that are not available under existing land rights systems. What appears fallacious is the belief that these advantages will flow from the intrinsic qualities of new order rights. Rigorous interrogation of this belief will show that without infrastructure and services, rights per se have little potential in generating these advantages. It is now clear, for example, that so-called insecurity of indigenous property systems is more a function of neglect and sub-ordination in public policy and law than of their essential characteristics. (Okoth-Ogendo, H.W.O. 2006)

5. CONSLUSION

As an ideology, the belief that formalisation of property rights has inherent qualities that are superior to undocumented systems, remains strong among development theorists and practitioners. Indeed questioning the value of formalisation is sometimes met with the rejoinder that it is not the theory, it is the society, which has problems!

We are persuaded that the political economic advantages of formalization in the context of the social, cultural and historical complexities of land rights systems in Africa, have been overrated. Social engineering rarely occurs through legislative or administrative fiat; not, in any event, where the alternative paradigm is as radical as the extension of Anglo-European property norms, concepts and procedures to indigenous land relations. We agree with others who have examined this issue, that more efforts should be directed at supporting “existing social practices that have widespread legitimacy (than) developing expensive solutions to replace them” (Kingwill, R. et. al, op. cit)

REFERENCES

1. Adoko, J. and S. Devine (2004) Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens them, CSOPNU
2. Allot, A.N. (1960) The Future of Law in Africa , Butterworth, London
3. Burman, S. and B. Harrel - Bond (1979) The Imposition of Law Academic Press, London
4. Denman, D.R. (1969) Land Use and the Consitution of Property An Inaugural Lecture, Cambridge University Press, Cambridge
5. Durand – Lesserve, a. (2005) “Market Driven Displacements and the perpetuation of Informal settlement in Developing Cities “(cited in Kingwill, R. et. al infra)
6. Gravois, J. (2005) “The De Soto Delusion,” (cited in Kingwill, R. Et.al. Infra)
7. Hunt, D. (2004) “Unintended consequences of land rights reform: the case of the 1998 Uganda Land Act” Development Policy Review, 22(2)
8. Kingwill, R. B. Cousins, et. al “Mysteries and Myths: De Solo, Property and Poverty in South Africa”, Gatekeepers Series, IIED, No. 124.
9. Government of Kenya, “The Judicature Act (Cap) and the Registered land Act (Cap. 300)
10. Government of the United Kingdom (1955) Report of the East African Royal Commission.
11. HLCLEP (2006) “Overview Paper”
12. Okoth-Ogendo, H.W.O. (2006 a) “Land Rights in Africa, Inteerrogating the tenure security discourse” paper for the IFAD/MLHUD/UNOPS workshop on Land Tenure Security in Eastern And Southern Africa, Kampala, Uganda.

13. _____ (2006) “Land in Indigenous Law in Africa” (Draft chapters 3 in the proposed publication Land Power and Custom, Controversies Generated by the Communal Land Rights Act, 2004 to be edited by Classens, A. and B. Cousins)
14. _____ (2005) “The Tragic African Commons A century of expropriation, suppression and subversion” (originally published as occasional Paper No. 24 of the Programme for land and Agrarian studies PLAAS, School of Government University of Western Cape Republic of south Africa)
15. _____ (2004) “Re-Engineering Land administration in Kenya: The case for a National Land Commission “ Technical paper prepared for the Kenya Land Alliance.
16. _____ (2002) Legislating Land Rights for the Poor : A preliminary Assessment of the Uganda Land Act 1998” in Rugadya, M. H Businge Gender Perspectives in the Land Reform Process in Uganda, Uganda Land Alliance
17. _____ (1998) “Land Policy Reforms in East and Southern Africa: A comparative Analysis of Drivers, Processes and Outcomes Paper for the International Conference on Land Tenure, Cape Town, South Africa.
18. _____ (1995) (with W. Oluoch – Kosura) Land Tenure and Agricultural Development in Kenya” A report to the Government of the Republic of Kenya.
19. _____ (1991) Tenants of the Crown :The Evolution of Agrarian Law and Institutions in Kenya, ACTS press, Nairobi

20. _____ (1985) “Development and the legal process in Kenya: an approach to the analysis of law in rural development administration” International Journal of the Sociology of law, 12
21. _____ (1980) “Some Issues of theory in the study of tenure relations in African agriculture” AFRICA, 69.
22. _____ (1976) “African Land Tenure Reform” in Heyer, J., W. Senga and J. Maitha, Agricultural Development in Kenya: An Economic Assessment, Oxford University Press, Nairobi.
23. Smith, A (1961 Edition) The Wealth of Nations, Matheu, London.