

# THE LAST COLONIAL QUESTION

: an essay in the pathology of land administration systems in Africa

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## 1. Prolegomenon

The land question, many now believe, is the “last colonial question” which Sub-Saharan Africa must resolve in order to break the gridlock that continues to impede the development process more than four decades after the end of colonialism. For land is, and will for a long time, remain an important factor in the search for pro-poor development in the region. This address examines the origins, nature and pathology of that question and evaluates current efforts directed at resolving it. In doing so, I will focus mainly on the manner in which that question has structured contemporary land administration systems and how this has impacted on the development of the land sector.

## 2. **The Land Question in Sub-Saharan Africa**

### 2.1 Its origins

When Otto von Bismarck, the German Chancellor convened the Africa – Congo conference between 1884 –85, it was to set out rules for the “orderly partition” of Africa among European powers whose citizens, trading companies and church missionaries had already established some sort of presence in various parts of the region. The importance of that Conference was that it led rapidly to the establishment of direct administration by Great Britain, Germany, Italy, Spain, France, Belgium and Portugal over specific spheres throughout the region.

To consolidate that administration the European powers needed to resolve two basically legal issues relating to access to and control of what was essentially foreign territory. The first of these was whether the assumption of political jurisdiction, *per se* gave the colonial power proprietary rights over the land itself and the second, whether these powers could grant legitimate rights to individuals and other legal entities over such land.

In the absence of established principles of international law, the European powers took the view that political sovereignty in and of itself vested radical title to land comprised in the subject territory in much the same way as it would have done had such land been part of

their domestic possessions. That meant that the colonial power would have the right to confer property rights of any specie on whomever it may choose. Thus these powers issued decrees and/or proclamations soon after the Berlin conference, declaring that they had acquired both the territory under jurisdiction, and all the property comprised therein hence the further capacity to create subsidiary rights therein. Specifically, those decrees/proclamations purported to convert all land under their various jurisdictions, ownership of which could not be established by documentary evidence, into the private property of their respective sovereigns. Thus by the mere stroke of the pen, title to all land in undocumented Africa, was appropriated to colonial authorities.

That imposition was everywhere enforced by a complex regime of property law founded on the common or Roman – Dutch law doctrines.

## 2.2. Its contemporary manifestations

The application of that regime in the determination of access to and management of land resources during and after colonialism, created a system that is characterised by serious inequities and distortions throughout the region. Although colonialism took many forms between and among subject territories, it is remarkable how similar these characteristics turned out to be. The most evident of these are –

- a complex, overlapping and insecure system of land rights,
- the dislocation of land resources from the social, cultural and spiritual life of indigenous inhabitants,
- the suppression and subversion of indigenous land governance structures, institutions and laws.
- emergence of the state and its agents as the dominant factor in land relations.
- Skewed distribution destitution of land resources among various social and political classes,
- the virtual disappearance of common property resources as a result of the drive towards privatization, and

- marginalisation of social and economic minorities especially women, pastoral communities and spontaneous settlers in rural and urban areas.

The implication of these characteristics for land sector development has been examined in many fora and need not be presented here.

To facilitate superintendence over that land system colonial authorities put in place, and independent governments perpetuated, an elaborate structure of land rights administration while over the years has grown into a costly and inefficient bureaucracy. We examine below the nature and pathology of that bureaucracy and outline recent attempts to re-engineer it, as an instrument for land sector development.

### **3. Land Administration Systems in Africa**

#### 3.1 Evolution and functions of land administration system

Land administration systems in Africa may be classified into two categories: State maintained and community based.

##### 3.1.1 State maintained systems

Under colonialism, the functions of land administration structures was quite limited. These were mainly juridical and cadastal. The judicial function was designed to ensure that property rights granted or created under imposed foreign law were clearly defined and their boundaries maintained. For this reason, land registry systems were established and operated on the basis of deeds or title registration. Appropriate mechanisms were further put therein to facilitate the delivery of land rights services to the limited number of individuals and organizations granted rights under that regime. The concern therefore was to ensure that land rights so granted were secure or ascertainable, transactions in their documented on a routine basis, and conflicts between grantees of land rights efficiently managed.

Because of the state of technology throughout the colonial period and long after, land administration structures performed that juridical function manually and in paper form. A great deal therefore depended on the availability of storage facilities, management capacity and accessibility of land registries. As a general rule, therefore, the land registry system was, and in many jurisdictions, remains highly bureaucratic and centralized.

The cadastral function was concerned mainly with the adjudication, demarcation and survey services required to support the land registry system. The information gathered as a result of these services was rarely organized in a form that could easily be retrieved or utilize for other purposes such as planning or land use management. Because of that limited focus, cadastral information attached to land parcels in registries were rarely disaggregated in terms of nature, quality or production characteristics, nor updated in response to changes in resource characteristics as a result of use, population pressure and technological change. Consequently that information was often inaccurate and of little use even for the purposes of land registry management.

Over time, and as currently managed, however, land administration structures have come to perform much wider functions including fiscal management, adjudication, and more recently governance. The first of these is assuming an important role in land administration as governments in Africa seek to maximise the revenue potential of land. Nonetheless, because of resistance from the land elite (both foreign and local), lack of proper valuation procedures and lack of organized land information systems, the operation of this function remains largely rudimentary and mainly restricted to urban areas.

The second, i.e. adjudication, has always been assigned to judicial institutions particularly at the level of courts of record. The expansion of state registration systems to undocumented land has led, however, to the need to confer adjudicative jurisdiction to land administration structures especially as regards determination of boundaries and rectification of information entered in land registries. The operation of this functions is, nonetheless, complicated by the fact that adjudication of disputes over land in rural Africa, remains an important social and cultural process and therefore not easily capable of reassignment to state structures. For this reason, this function continues to be exercised in many African jurisdictions through

informal mediation, traditional courts, administrative tribunals and land boards, irrespective of what land administration structures, sticto sensu, may choose to do.

The third, i.e. the governance function has emerged from the general discourse on the democratic process in Africa. Whereas control of land resources was often used under colonialism as an instrument of public (i.e. political) administration, it is now being appreciated that this can also be converted into an important vehicle for the consolidation of democracy. For this to happen, land administration structures will need to be decentralized and their essential functions turned over to communities who manage land resources on day-to-day basis. This, as we indicate below, is already the subject of widespread policy debate in Africa.

### 3.1.2 Community based systems

Because of the multiplicity and complexity of property regimes in Africa, state maintained land administration structures continue to operate side by side with indigenous, community based processes. These operate not only in respect of land held under customary (i.e. undocumented) tenures, but also informally in respect of land converted to state registration systems. These processes operate as part and parcel of the social organization of territorial communities hence are imbedded in cultural structures and institutions. Community based land administration structures are thus inseparable from social and cultural perceptions of land as a social, economic and ontological asset. No mechanisms therefore exist specifically to discharge land administration functions. For reasons that need not detain us here, community based land administration structures are everywhere ignored and suppressed in African jurisdiction.

It should be clear from what has been presented above, that land administration structures, whether state maintained or community based have become important components of integrated land resource management. They must therefore be properly designed and efficiently operated in tandem with other components of the land system.

## 3.2 The Pathology of Land Administration Systems

### 3.2.1 Systemic Factors

At least six factors of a systems nature explain why land administration systems whether state maintained or community based, have not been so designed or operated.

The first is historical. Because of their derivation, land rights administration systems in Africa vary by tenure regimes, land categories and even resource characteristics. Because these systems overlap and/or intersect at various points in the course of property and resource governance relations, an intricate web of economic, social and political practices have developed in the land sector over a considerable period of time. The result is substantial confusion and ambiguities in the nature and scope of land rights under both indigenous and imposed law. This is a fundamental cause of persistence of insecurity of tenure over land held under these two regimes.

The second is conceptual and derives from the assumption that land administration structures and infrastructure are factors which are external to the institution of property in land. The view here is that once the incidents of property have been settled by an appropriate legal regime (whether indigenous or imposed), the framework for its administration may take any form. Consequently, land rights administration issues are rarely addressed in mainstream land policy statements. Very often these will, instead, be found in strategies forming part of the management of specific land use sectors.

The third is political and has to do with the link between land administration structures and infrastructure with the investment which political elites in all countries have in land resources. Because the land rights administration system is the gateway to access and accumulation of property in land, political elites have always sought to control it. This is particularly the case in respect of public land resources which are generally regarded as an important source of quick enrichment. Consequently: there has always been resistance to land rights administration reform in most countries.

The fourth is operational and relates to the fact that in most jurisdictions land administration is often seen as part and parcel of routine public (or civil service) administration. The land

rights administration system is thus saturated by personnel who manage land essentially as political services rather than as proprietary or economic resources. This partly explains the absolute concentration of land rights administration services in government or quasi-government agencies.

The fifth is systematic and has already been alluded to, namely, that the land administration system, especially in relation to land under indigenous law, is an integral part of democratic governance for agrarian communities. The design and operation of land rights administration structures and infrastructures that do not take this linkage into account are unlikely to be internalized at that level. That, unfortunately is the reality in most African jurisdictions.

The sixth is technological. Most African jurisdictions still lack the technology or expertise to manage all or most of the functional components of the land rights administration system. For example none of them have developed functional land information systems or efficient land dispute processing mechanisms. Indeed attempts to build capacity in these areas have in most countries gone no further than the level of policy pronouncements.

### 3.2.2 Operational Consequences

The combined effect of these factors is that land administration systems in Africa are beset by a number of malfunctions including a high degree of disuetudo, bureaucratic complexity, managerial opacity, inefficiency and high transaction costs. Disuetudo is most evident in regard to mechanisms designed to facilitate the juridical and cadastral functions of land administration. In most jurisdictions in Africa, land delivery, demarcation and survey, registration and records-keeping, and cadastral mapping procedures and processes are not merely operated without the benefit of computerized technology, storage facilities and support services are often inadequate and under-funded thus resulting in avoidable inaccuracies and management lapses. This is particularly endemic in respect of state maintained systems of land administration, which insist on complex and precisely determined operational procedures.

The problem of bureaucratic complexity arises not merely from the often-bloated establishments purportedly performing the various land administration functions, but more fundamentally from multiplicity of tenure regimes introduced by imposed law. In some jurisdictions land rights delivery procedures are so lengthy, involving as they do elaborate paper work and official certification, that the acquisition of documents of title can take months if not years. In others, the cost of completing a simple transaction is not worth the time one must spend on and returns to be derived from it. As a result most statutory land administration systems are inaccessible to the ordinary land rights seeking public for whose benefit they are designed and or established.

Managerial opacity is a function both of inaccessibility and the fact that most land administration functions are generally shrouded in secrecy. Even the most simple and routine information is often hidden behind “confidential” or “secret” files; not to mention transactional procedures, which are often couched in undecipherable legalese. In many cases, even the most adept lawyer might find those procedures impenetrable. This, in turn often leads to operational inefficiency as well as very high transaction costs. It is not surprising that thousands of documents lie uncollected in land registries in many jurisdictions throughout Africa.

These malfunctions have, in turn, tended to impede land sector development. Specifically they have contributed to serve land rights insecurity as a result, *inter alia*, of lack of proper record keeping, persistent inaccuracies in land registry information, and general distrust of land administration procedures. That, in turn, is a major cause of land market imperfection at all levels and in respect of all tenure regimes.

#### 4. Reforming Land Administration Shift

##### 4.1 A new Paradigm Shift

The preceding pages have concluded that land administration systems in Africa have generally failed to provide impetus to integrated land sector development. Until recently this fact does not appear to have been recognized in the discourse on land policy reform in most jurisdictions even though land reform issues have been on the development agenda for nearly fifty years.

A new paradigm shift is however emerging. This now focuses on the re-engineering of land administration functions alongside attempts at the resolution of the main characteristics of the land question outlined at the beginning of this address. The reason for that shift is appreciation of the fact that unless that happens, the land sector will continue to suffer under a management framework incapable of facilitating sustainable development.

#### 4.2 Design Principles

Several principles will need to be taken into account in efforts at re-engineering land administration systems. The first is the restructuring of all aspects of that function so as to achieve a number of higher values. These include-

- a simplified legal framework
- efficient administrative processes;
- modernized technological services;
- user-friendly dispute processing arrangements and
- more business –like procedures.

The second is the democratization of the land administration function by ensuring full and informed participation therein of the land rights seeking public at large. Such a process should, at the very least, involve the integration of community knowledge into, and the participation of stakeholders in all aspects of the land administration function. The goal here is to re-integrate the land administration function. The goal here is to re-integrate the land administration function into social, economic and even ontological processes.

The third, is the devolution of significant aspects of the land administration function to stakeholders and conferment of power to discharge them on the basis of subsidiarity. This is

particularly necessary for the efficient and cost-effective operation of the juridical and adjudicative components of the land administration function. Land rights security is clearly not possible if the elements which are supposed to confer it are divorced from the social, economic and cultural milieu in which those rights are to be enjoyed. This would also resolve the problem of persistent political interference in the execution of the land administration function.

#### 4.3 Assessment of Progress

Throughout East, Central and Southern Africa, evidence abounds to the effect that the state through its public service institutions is an inefficient and wasteful manager of land resources. Even in countries such as Malawi and Tanzania where the law clearly imposes a duty of trusteeship on the state with respect of the allocation and utilization of land resources, the so-called trustee has often ended up as the beneficiary. Where no public trust is imposed on the state, as is the case in Kenya and Zambia, plunder of land resources by the elite is the rule rather than the exception.

The dominant land administration paradigm emerging from this region, therefore, points to the need for the divestiture of land administration functions to new structures independent of government or political administration. These may be single or multiple function structures depending on the complexity of the land administration problematique in each jurisdiction.

In addition, many countries are considering the privatization of land administration services under general supervision and monitoring by public agencies. That would ensure cost-effective access to those services by the land using public.

The implementation of new land administration systems is, however, likely to face many impediments. These include –

- resistance by departments of line ministries and other authorities which now administer various aspects of the land sector;

- political objection by cadres with vested interests in the status quo
- lack of the human, financial and technical resources required to establish and operationalise the new system;
- an absence of a social ideology supporting public participation in decision-making about the control, allocation, management and utilization of land resources;
- failure to establish a truly decentralized (or devolved) system of public (political) administration to support the new system; and
- delay in legislating the new system.

It is important therefore that adequate lead-time be created for the removal of these impediments. Of priority is the reorganization of the structure of government so as to ensure effective democratic governance at all levels of society. This will not be achieved simply by creating decentralized or devolved structures. These structures must be supported by public and political commitment to a process based on informed public participation in the management of public resources. Once that democratic base is laid, steps must then be taken to build the capacity – human, financial, institutional and technological – which the sustainable management of the new land administration system will require.

## 5. Conclusion

As long as land remains central to development in Africa, any hope of meaningful economic recovery, poverty reduction and restoration of political stability in the region hangs largely on how and when the land question will be resolved. We are persuaded that a fragmentary approach to land reform is unlikely to resolve that question.

Reform must be directed at the land sector as a whole. To assume, therefore, that a programme of land reform can be successfully undertaken and operationalised without specific focus on land administration is, therefore, a fundamental error of both design and policy-making.

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