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Africa's recent land reforms: lessons for East Timor (updated 2011)

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Introduction

The paper explores some of the present debates over access to land in Africa, with a view to informing similar debates that are ongoing in East Timor. When this paper was written in 2007, the former government has yet to formulate and fully implement comprehensive systems of legislation, or even to survey land holdings and boundaries. The estimated cost of this operation was \$10million (USAID 2006). By 2011 a draft land law had been formulated and some work had been done in Dili and the districts on cadastral survey and negotiating allocation of property rights. The growing population of the country, episodes of civil conflict (some of them expressed as battles for property and territory) and the uncertainties generated by four different governance regimes over the last 500 years, makes equitable decision-making on land tenure essential. Meanwhile in sub-Saharan Africa, the 1990s was a decade that saw overhaul of land legislation in many countries and considerable debate over systems of property rights. There are important comparative lessons to be learned from this experience.

Land is still *the* critical resource in sub-Saharan Africa. Much of the continent is still occupied by land-based households practising farming and pastoralism alongside other activities. The population of West Africa, for example, is about 65% rural. Nonetheless, in rural areas of the continent, the trend has been towards diversification of livelihoods rather than a reliance of farming and pastoralism alone (Bryceson et.al., 2000). Diversification has occurred as rural populations have grown, placing increasing pressures on cultivable land and pastures, and at the same time cash income has become more important. The growth of Africa's urban centres since colonial times has provided further opportunities for employment and other opportunities (Cour & Snretch, 1998; Baro and Batterbury, 2005). In addition, African rural land, particularly in peri-urban locations, is increasingly becoming a commodity which can be transacted through

sales, rentals, loans, pledging, and share-cropping. In several countries, this process is now well advanced. The commoditization of land may provide security for the owners, but it can undermine its social and spiritual significance, as a wider range of actors participate in these transactions than they have done in previous generations.

In almost all cases, gaining some form of 'security of tenure' is critical for rural people, especially to protect those who are more vulnerable to being deprived of access to land and its economic benefits. "Social tenures" (Wallace, this volume) need not occur only through land users "owning" land through formal titles or deeds, given the range of traditional systems by which Africans have maintained stable access to land for centuries (Berry, 2004).

Whereas urban management in Africa has tended to adopt western models of private property and/or state acquisition of land for public purposes and can be treated as a separate issue, various models have been followed to promote security of land rights for the rural population. The World Bank, which has funded millions of dollars of land reform research and policy in Africa, focused for many years on creating 'modern' systems of land tenure through registering title to land. The belief was that titled ownership would offer more tenure security, and thus more efficient land use. This helps the rural poor, it argued, because the title may be used as collateral for loans to encourage investment, and this assists the development of land markets through which more dynamic farmers could acquire additional land. The Bank's well-known 1989 report on sub-Saharan Africa suggested registration – effectively privatization - would fuel economic growth (World Bank, 1989). Remarkably, there has subsequently been a change of opinion among some of the Bank's senior figures. A change in policy became viable in the Bank over the last five years, as a response to years of lobbying by research organizations. Important Bank figures like Klaus Deininger now believe the almost exclusive focus on land titling and private ownership has been a mistake, since it ignores the complex ways in which most Africans have always maintained land access through other means, outside the formal legal system (Deininger, 2003). This shift in thinking, visible at successive conferences on land reform and in several key policy documents, has been important - and it has occurred at a time when East Timor is making similar decisions to those faced by African countries.

This policy shift is not to suggest that people *themselves* will not seek exclusive ownership and title. Rural people *are* seeking security by trying to 'formalize' informal arrangements of land rights, where the latter are threatened or become insecure. But full privatization is just one option for developing countries. In fascinating studies in West Africa, it was found that households subvert emergent or existing national land laws by creating written documents asserting title, getting these witnessed by Imams and local leaders to give them an air of (false) legitimacy (Lund, 1993; Lavigne Delville et al, 2002; Berry, 2004). These 'fictional' transcripts have no legal standing, but are a form of "social tenure" that can sometimes help to ward off hostile counter-claims. There are many existing institutional arrangements of this sort that can potentially offer increased local tenure security – but only if levels of transparency, accountability and dispute resolution are improved.

In addition, Africa has seen a big push to 'decentralize' government. This has often gone on, as in East Timor, *at the same time* that land reform is being debated - particularly for the last 15 years. There can be confusions between land and governance reform, and they don't always work well together. But as Alden Wily (2003) shows, in many cases new 'decentralized' local government bodies, or new local institutions, are also being given powers to manage land administration or to decide about land claims. There are positive lessons to be learned here, but weaknesses have shown themselves.

From a political perspective, the push to decentralize may seem sensible and in the interests of the rural poor, after sixty or more years of colonialism and more than thirty years of (often poor) centralized governance. But, in practice, decentralization is often not satisfactory at all - *real* decision-making powers are not transferred locally (so there is *deconcentration* of state power, not *devolution*). Either there is no revenue for the new local bodies that are expected to raise much of their own costs, or local government simply becomes dominated by political parties or powerful local leaders. Some of those leaders may be benevolent; others nepotistic and corrupt. Many will not have the necessary experience. Decentralization may change little – powerful people still make decisions (Batterbury, 2006). For Berry (2004:82), "local empowerment' is at best a work in progress".

Issues and challenges

Despite enormous geographical and historical differences, the recent phase of land reform in Africa raises similar issues to those being debated in East Timor. We raise these in outline only.

1) What choice of land reform, leading to what type of management system, is best? Informal, customary systems predated the colonial period. But under colonial rule, there were direct and indirect methods of controlling land, differing between 'settler' colonies (like Kenya, where all the best land was taken from indigenous inhabitants) and 'extractive' regimes where fewer whites actually lived, and money was made through extracting and exporting primary resources for the benefit of Europeans (like the Congo, Nigeria). The latter have certainly had fewer problems in restoring land to local control, but raise new problems about who to restore *to*: who, after all, is local? (Berry 2004).

2) Centralized or localized? Should a new land management system be formalized (which means working out who owns what at the national level, issuing land titles, taking any disputes to the courts and resolving them, and paying compensation to some parties) - or should it be kept informal and under local management, as it is presently in rural East Timor and in much of Africa? If informal, then how will the written, oral, or witnessing processes that create local agreements be managed? Just as they are today? Or differently?

3) What process and structures should there be for dispute resolution? Will teams from a Government ministry or consultants come out from the city to hold inquiries about disputed plots (as had begun to occur)? Or will this be done locally by customary leaders, elected local government, legal tribunals, or other bodies, as before? Should the decisions be taken by independent people, maybe from other regions or those not aligned to political parties?

4) The more central the land management system, the more cumbersome and costly it will be to administer and maintain. Centralized systems today involve creating a computerized national land register of land titles. This is not usually very accessible to the poor and vulnerable, and it is easier to access and use by those who are educated, wealthy, or have other forms of information and contacts. It can be efficient but it requires considerable resources to maintain. For this reason, formalized tenure systems currently only account for about 10% of land in Africa (Deininger, 2003). We know they are being discussed for East Timor.

5) If land management and dispute resolution is done locally, as in most customary systems before colonialism, then there are important criteria to make them work well. These are a) representativeness of decision-making bodies; b) availability of funding for the meetings and information-gathering that local leaders will be forced to undertake to resolve disputes; c) having good dispute resolution processes, and, d) good accessibility – documents and decisions pertaining to land need to be open for inspection, in the local language and in a convenient location. But there is a question. If ‘informal’ methods of validation are maintained in East Timor for several more years, can they be strong enough to secure rights against powerful outsiders, such as plantation owners and agribusiness? Will those actors be able to “buy” or “coerce” themselves land from local people more easily under an informal system?

Land management in postcolonial Africa

Africa provides a few of the answers to these questions, but land tenure reform is far from complete and it is still hotly contested. Because the African colonies were supposed to be financially viable, most western administrators set up a private property model for valuable land - plantations, mines, cities, and settler areas - since this could easily protect and support foreign investment. But elsewhere (i.e. most of rural Africa), such legislation was rarely implemented because it was too expensive, and local users kept their existing access to land through local systems of tenure. Rural people did, however, have to pay taxes of various sorts, in return for very minimal state services.

In the postcolonial period (since about 1960 in most cases), confusion has increased. Land systems have taken three main forms¹.

1) All land was nationalized by the new independent state. There are various ways to do this, and a host of different rules. Nationalisation was a common outcome

¹ A fourth category, conversion to private ownership, is mainly present in cities and commercial areas.

where independence was obtained by socialist parties or activists (for example in Zimbabwe, Tanzania, Burkina Faso, Guinea, Mozambique etc.).

2) Rural land is placed - or remains - in traditional (customary) ownership - as in Ghana. In Ghana the state has reaffirmed chiefs as customary authorities with ultimate rights over land (Berry, 2004). Land is allocated by them on the basis of kin and community claims. Although this system is localized and therefore more accessible to local people, accountability can be weak, with many examples of chiefs being accused of abusing their power and selling community land for personal gains, or for reasons not agreed with by their populations. The mechanisms for challenging chiefs' actions are poor. Kojo Amanor, a highly respected writer on rural development in Ghana, argues against the chiefs as the best people to manage land access – he says they have repeatedly broken the trust of their subjects (Amanor, 1999). A few customary land secretariats do exist in Ghana, and these are being monitored by a donor-supported Land Administration Project to see whether this customary institution should be encouraged more widely.

3) Land redistribution and resettlement occurs, to redress colonial imbalance or white ownership of the most productive areas (as in Zimbabwe). Land redistribution can also occur for insidious political purposes (as in Ethiopia under Mengistu, who, using the 1980s famines as a pretext, shifted troublesome ethnic groups away from their customary territory). In some cases white-owned estates were converted into state farms and agrarian collectivized co-ops (in Mozambique and Angola). Most of these have not lasted, being uncompetitive or poorly managed.

In East Timor there were two successive colonial regimes operating different land tenure systems. In Africa, there were a few cases where colonial power also changed more than once. For example when Germany lost WW1, it also lost its colonies. Cameroon, Togo, Benin and some other countries were ruled by Germany until 1917, then by the UK or France, causing complications. Some 'old' regulations were not fully replaced by 'new' ones in these countries.

Although not so relevant to East Timor, in most of Africa there remains the additional issue of pastoralists who move their herds frequently across large areas of land. Western-style land registration (and nature conservation projects that forbid cattle grazing in parks or protected areas) often disadvantage livestock herders, denying them access to traditional grazing areas, or even forcing them to settle and to abandon their nomadic/semi-nomadic lifestyle.

Relevance to East Timor

Many lessons from Africa could apply in the "new nation". We have picked out a few key issues.

1) Formalizing property rights through issuing of individual title may have some pitfalls. This is essentially land privatization leading to a land market. Kenya chose to

register all land in this way. Financial and political manipulation by powerful actors can occur in an inefficient legal climate or a financially driven 'free market'. Also, there have been major delays in the court system, and international development donors, plus the general public, are not happy when titling becomes slow. "Secondary rights" to land, like share-cropping arrangements and livestock grazing, can suffer.

2) Restoring customary rights. Mozambique has gone far down the route of restoring customary rights, after a long period of Portuguese rule and civil war, through a process of land registration (Box 1). Communities can register their *community* lands and hold collective land titles to these. This is thought to be a good law, but there are problems in its application – a lack of good community representation in the titling process. Also some titling systems - particularly near the city - can be costly to survey and administer. There are interesting cases outside Maputo where squatters with no land rights paid a surveyor to map their settlement, so that they could later have some power in the new system (Malauene et al, 2005). In Uganda, the 1995 Constitution removed overall title from the State and vested it in landholders. The Land Act was passed in 1998, recognizing all existing tenure regimes as having equal legal weight, with non-compulsory registration possible at the local (district) level.

Box 1 Mozambique

In this former Portuguese colony, land was nationalized at independence in 1975 and the power to give land concessions was taken from traditional authorities and given to the government provincial services (in rural areas) & town councils (in urban areas). The first land law was in 1979, with the state renting land to users for 15 years, as a renewable arrangement. Individuals were permitted half a hectare in irrigated areas and one hectare in rain fed areas. Registration was required and agricultural cooperatives, state farms and some private farms had to acquire formal land titles. Yet, perhaps as expected, few people registered land during next 17 years. The law was amended in 1986 to increase the duration of concessions by private entities from 15 to 50 years, again renewable. After 16 years of war, the mass return of refugees and an influx of other foreigners (some from Zimbabwe and South Africa) led to increased land conflicts. A new land policy in 1995 set up wide public consultation processes and subsequently a new land law in 1997 was passed to respond to increased demand. It gave 'nationals' the use-rights to land which they had been occupying for more than 10 years, without having to formally register it. The law also aimed to promote national and foreign investment without harming local people who had no formal registration. The law reaffirms state ownership of land, but safeguards rights acquired traditionally through *occupation and inheritance*. It still allows for concessions to be granted to private entities for 50 years. The law allows for community land registration and gives local communities the right to negotiate with outside interests. The main weaknesses of the system is that it remains centralized, with little support for local administration and the development of effective customary systems, and that, in practice, it is failing to protect local land users against commercial interests (Chilundo et al., 2005).

3) Informal documentation to manage land tenure. In the absence of legal codes and clearly defined land rights, people often sort out their own documents attesting “ownership”, as we have described above. These could be witnessed by respected figures - Church leaders would be one possibility in East Timor. The argument is that this paperwork is better than nothing and may also be important if a national land registration system is ever introduced (Lund, 1993). Timorese may seek these sorts of solutions if there is little government action to formalize land rights, and people continue to feel insecure.

4) Territorial units are devolved to local management committees given *communal* usufruct rights, similar to 2). One approach termed *Gestion des Terroirs* (village land use management) in francophone Africa - was popular in the 1990s (Batterbury, 1998). For this to be successful, the communities need to be territorially bounded without many overlapping rights. Burkina Faso, a very poor country, pioneered this approach. Land is ‘owned’ by the state in Burkina, but village communities have been empowered to delimit their territories and practice conservation and land rehabilitation often working with local government or donors. There was little paperwork involved with this process and in the initial years, it was a startling success. In the last five years, however, there was talk of these local territorial entities being the basis for new decentralized government structures as well (as federations of village *terroirs* totaling populations of 20,000 people). This complicated matters too much, and after wasting millions of dollars on studies of how to combine local land management with local political decentralization, the country is rethinking this relationship.

5) Conventions. Formal or informal codes are created for areas with overlapping claims to them. E.g. forests or other areas that provide common pool resources for gathering produce or fuelwood or grazing. All the parties with a stake in the area develop a Convention concerning access and use, which sets out use rights, timings, and penalties for misuse. The Convention itself needs to be monitored and may be lodged with local government (Hilhorst & Coulibaly, 1998). The Tara bandu system in East Timor may have some parallels with African cases (Palmer & do Amaral de Carvalho, 2007).

Conclusion

In a situation without full civic peace, and a very complex system of extant land titles, claims, and counter-challenges, it is difficult to see how the present lack of certainty over land rights in East Timor can continue. There are many experiences of land registration and land management in Africa that may be relevant to the efforts of the new government to initiate reform and to provide decentralized systems for land management and administration (Cotula et al, 2004; Toulmin & Quan, 2000; Kanji et al 2005). Despite problems, there is now a strong trend towards striving for locally operated and locally controlled systems, not least to reduce costs, to reduce the backlog of disputes within the judicial system, and also to be relevant and accessible to the majority of land users (Batterbury’ 2006). Enormous donor pressure has been exerted on African governments to ‘solve’ disputes over land, and to assure land for the rural poor, but these have only been partially successful.

It has taken a long time in Africa to recognize that western style formal land registration is not always culturally, financially, or politically appropriate, and that it may have an adverse effect on poorer households who either do not qualify for land ownership, are excluded because of their limited means, or rely on complex access arrangements that would disappear under privatization. Other solutions than those tried in East Timor may be appropriate, probably with some balance being struck between tradition and modernity. But the essential task today is to provide security in many other areas of life – security of livelihoods and personal security, as well as secure access to land. Land reform, aimed at smoothing out the historic injustices of land access arrangements and providing opportunities for investment, is just one part of a larger struggle in which Timorese people are currently engaged.

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