

**Why 'Freeing Dead Capital' Won't Help West African Pastoral
Populations:
Citizenship, Hybridity, and Local Law in Land 'Law' Reform**

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Abstract: In this paper I contextualize the 2003 World Bank report *Land Policies for Growth and Poverty Reduction* within the broader literature on land reform. In doing so, I offer a comparative analysis of the implications that this and four other models frequently suggested in the literature (communal, land-to-the-tiller, evolutionary and incremental) hold for African property systems by contextualizing them in the experience of the Fulbe in the West African Sahel. I conclude that none of these models can adequately address the underlying issues of legal pluralism and weak institutional capacity in African property systems. Further, I question how each of these models is likely to impact the livelihoods of pastoralists in terms of their implications for land relations, security of tenure and poverty alleviation. Underlying all of these concerns however, I argue that the theoretical basis of how we define land relations and how we posit outcomes has serious implications for understandings of citizenship, social organization and democratization in the trajectory of African development.

Paper presented at the Spring 2008 Institutional Analysis and Development Mini-Conference,
Indiana University-Bloomington, 26-28 April 2008.

Introduction

Land reform in Africa has been on the development agenda since the pre-independence era, but despite numerous 'new' justifications, means and approaches to implementation, on the balance, these reforms have failed to meet their stated objectives. The attention to Africa's growing land issue is warranted and the fact that land reform is intimately connected with democratization, decentralization and poverty alleviation makes it a pressing, if not extremely complicated, problem for African governments, development experts and policy analysts. The most recent model for reform put on the table by major development organizations can be seen in the 2003 World Bank report *Land Policies for Growth and Poverty Reduction*, which ushers in a renewed focus on land titling and registration. By the report's logic, title to land will give the poor means to access credit markets via the capital in their land holdings and hence will foster economic development as the poor are able to invest in their land and engage in entrepreneurial activity. As a result, this paper seeks in part to evaluate whether the new push to 'free' dead capital on the part of the World Bank is likely to provide an effective means of land reform and achieve its broader rhetorical agenda of good governance, economic growth and poverty alleviation.

Additionally, this paper comparatively evaluates the World Bank's proposed means of land reform vis-à-vis four alternative models found in the literature on land reform while contextualizing these initiatives within the lives of Sahelian West African herders in an attempt to illustrate the practical implications each model holds for land users. The four alternative models include a land-to-the-tiller model, a communal rights model, an evolutionary model and an incremental/gradual model. I argue that although within all five models we see a clear dedication to improving various problems related to security in African land systems, none of these models address the three defining features of the land issue in Africa that render it so problematic in the first place. Firstly, none of the models seem likely to sufficiently resolve the confusions regarding legal pluralism. All land disputes come down to differing understandings of the rights and obligations associated with property; hence, land issues are at their base legal issues. African plural legal systems are unable to comprehensively provide clear definition of rights and mechanisms for adjudication in conflict resolution. Secondly, all of the above models, with the exception of the incremental model, assume a level of institutional capacity that rarely exists in African states and are especially rare in rural settings. None of the five models are able to offer African governments the incentives or means necessary to bolster the administration capacity needed to successfully enact land reform.

Thirdly, and more theoretically, I suggest that in looking at policies of land reform and their implications for altering institutional settings, we can see the underlying negotiations of power and authority taking place in many African states and communities. This has two implications for the models under evaluation here. To begin with, although the World Bank and other organizations have commissioned hundreds of case-studies and reports on various African peoples, environments and land conflicts, they have yet to acknowledge the many findings that indicate that land in Africa has social connotations that quickly become politicized in the process of land reform. As a result, most of the models under evaluation in this paper lack adequate perspective on the role that politics and power play in any process of changing land rights. This paper thus follows Martin Chanock's suggestion, when he writes, "thinking about proprietary rights might give access to fundamental sets of conceptions about social relations" (1991:65). Secondly, and as a central theoretical tenet of this research project, land reform – and the associated processes of development, most notably decentralization and democratization – embodies strong messages about state-society relations and citizenship. Each model listed above carries with it an associated view of how African society and property arrangements *should* look. Thus, implicit in all of the models are ways of understanding identity, power and citizenship that must be recognized and taken seriously by the development community and policy analysts when they discuss large-scale reforms of this nature.

Drawing from these theoretical perspectives, I conclude that the fundamental flaw in all five of these models is their focus on land reform as a means to an idealized end. It is important for all participants in this debate to recognize that no alteration to land use and access in Africa will be an entirely peaceful process; changes of this nature will inevitably produce social dislocation and undesirable outcomes for some groups and individuals. As such, assuming that a specific set of reforms will unproblematically produce a posited social outcome seems an uncertain endeavor. This research seeks to argue that any legal reform of land access will necessarily entail winners and losers, but in recognizing that within the land debate and its associated contention across the continent, communities are actively negotiating power and social relations, sees some way forward. Thus, this paper suggests that donor and policy attention should be redirected at streamlining plural legal systems, clarifying citizenship laws and enhancing institutional capacity and mechanisms of conflict resolution while taking a hands-off approach to the specific reform of property systems.

I begin this paper with an overview of the land question in African history and its specific manifestations in the three countries under study here. Within this discussion, I also address basic

characteristics of the Fulbe, and their specific experiences on land relations under colonial and independent governments. I conclude this section by outlining the fundamental land issues at stake among the Fulbe today. Following this, I offer a comparative analysis of the five models (the market-based, communal, land-to-the-tiller, evolutionary and incremental model), with specific reference to their implications for Fulbe pastoralists in West Africa. Following this, I identify what I see to be the key strengths of the latter model, the incremental approach, and suggest ways to strengthen its approach to legal and land reform as a way forward.

African Land, Plural Legal Systems and the Fulbe

As a brief note on case selection, I will use the running example of the Fulbe¹ in Burkina Faso, Mali and Niger. I choose to look at pastoralists² for two reasons. Firstly, many past land reform policies have been criticized as not adequately taking into account issues of indigenous land rights and common land holdings and the World Bank's report attempts to respond to these critiques. Secondly, pastoralists have a history of political, social and economic marginalization within the state and as such, I believe they deserve more serious attention by the development community and national elites as they pose a particular set of problems to issues of land reform and integration into the development agenda more generally. Furthermore, I choose to look at Sahelian West Africa as an alternative to the dominant focus on Eastern and Southern African pastoralists in order to discuss the particular legal and developmental problems posed by the Francophone African tradition of declaring the bulk of traditional pastoral land as 'public land.'

Land

It is widely accepted that African land usage patterns in the pre-colonial period relied upon an understanding of property as a common resource within a lineage or a community. During the mid to late 1800s and on, however, the widespread perception that Africa was empty profoundly influenced how European powers shaped their new colonial territories. Frequently, 'vacant' land

¹ 'Fulbe' is one of many names applied to this group. Other names include Fulani, Fulfunde, Peul, Pulaar and Halpulaar depending on the region. It is important to note the question of whether the 'Fulbe' constitute a united ethnic group or whether it is "a scholarly construction of reality." Azarya, in his discussion of the issue, suggests that there is enough linguistic and sociological evidence to suggest that we can take the Fulbe as a meaningful social label if we are careful not to assume that they are homogenous or uniform in their beliefs or practices (1999: 6-10).

² In referring to 'pastoralists,' I follow Smith's suggestion that we can define a pastoral society by two features: firstly, that mobility plays a large role in social organization and secondly, the self-identification of a community. If herds are more important to a social group than settled agriculture, they can often be called pastoralists, but when settled agriculture is an equally important economic activity, Smith prefers to label them as agro-pastoralists (2005: 16-17).

was taken into possession by the state though in colonies where there was no large settler populations to inhabit them, such as Sahelian West Africa, state land was in effect left to indigenous laws and customs. Land ownership in Francophone colonies share a general history as the French colonial apparatus nationalized all land in an attempt to centralize state power and abolish customary law (Deville 1999: 4). French colonial policies regarding land, and their creation of state property, was designed to control the African population and encourage peasant commodity production, rather than to give good land to settlers as was often seen in British East and Southern Africa. Berry outlines three other key processes of social change during the era: first, colonial regimes frequently displaced peoples and changed existing social distributions of land; secondly, they created boundaries that were by and large artificial; and lastly, they recreated and invented 'customary' rule of land access and ownership, most clearly seen in their attempts to codify customary law (2002: 642-643). As a result, customary arrangements for land use have remained in place as the *de facto* rule of law (Bassett 1993: 7).

Customary tenure was considered to be inherently insecure by colonial authorities and land reform gained considerable popularity following the Second World War. Successful reform in many Asian countries, which helped spur high growth rates in agricultural productivity, led to the active promotion of the idea by development specialists in Africa following independence (Migot-Adholla and Bruce 1994: 9). The period immediate following independence can therefore be characterized as 'developmentalist,' as the state was seen as the primary engine for development with poverty alleviation as the driving rhetorical justification for large-scale development policies (which took such forms as land reform, attempts at modernizing farming through infrastructure investment or marketing boards) (Bernstein 2002: 442-443; Moore 1998: 40). By and large, such reforms are now seen as failures, which Peters attributes to their having been founded on "faulty premises," not least of which was the idea that customary land tenure was inherently insecure (2004: 273-274). Although authors such as Migot-Adholla and Bruce (1994) have challenged this idea at length in arguing that the social embeddedness of land in African communities makes customary land as, if not more, secure than individualized holdings, the international development community's approach to land reform today prioritizes titling and registration in order to solidify individual rights to property in an attempt to encourage the development of land markets. "Farmers must be given incentives to change their ways. One important incentive is the right to permanently cultivate land and to bequeath or sell it," the World Bank writes in a representative example of this perspective (1989: 104).

Specific to the case studies under analysis here, both Burkina Faso and Niger have implemented land reforms in the past, while Mali has not. All three countries however, have implemented decentralization schemes in the past twenty years and it is important to note, as Thébaud writes, “land tenure and natural resource management issues have become indissociable from the decentralization processes which are ongoing in some Sahelian countries” (1995: 28). Toulmin et al. caution that decentralization programs maybe particularly ill at ease with the needs of pastoral populations, who are often not settled in any local community and whose annual migratory patterns put them under the jurisdiction of even more administrative units than prior to such reforms. This may result, they suggest, in a lack of attention to the broader needs of the pastoralists and their environmental management if decentralized governmental units are focused too exclusively on the local level (2002: 16). In Mali, newly appointed local official have often impeded on the authority of customary chiefs, meaning decentralization has had a particularly negative impact on herders who are less likely to interact with local government officials (Beeler 2006: 22). Moorehead argues that Malian herders have had almost no experience with land registration as the result of a weak judiciary concentrated in urban areas which rarely intervenes in land conflicts or rural areas of the country, most notably pastoral lands (1998: 57).

The Burkinabé government introduced the Agrarian Land Reform Program (RAF) in 1985, which reduced some ambiguity surrounding state ownership of land by solidifying the state’s exclusive rights to manage it. The original legislation, which has been revised repeatedly to adapt to the nation’s progressive democratization, did set some land aside for pastoral use, but kept it under state administration (Banzhaf et al. 2000: 14). In 1991, RAF was revised, making some government owned lands available for purchase. Burkina Faso’s land reform functionally codified land rights, as it sought to incorporate customary legal practice into the national legal framework, but it resulted in a system so complicated that most people reverted to extra-legal means of conflict resolution (Alinon 2004: 42-43). As Moore observes, “the possibility of private landholding remains a reality only on the books” in Burkina Faso (1998: 39). Faure notes that the first two versions of RAF were correct in challenging customary land tenure for a few reasons, mainly that traditional land ownership was often exclusive to women and young adults and inhibited long-term investment. However, the system was set up in such a way that land reform was seen as a solely administrative act and did not encourage consultation between customary land owners and purchasers (1995: 1-2, 8). The RAF was revised again in 1996 and 1997, but did little to clarify the legal standing of land in rural areas (Nelen et al.: 2004: 16).

In Niger, the government has been attempting to recognize customary land rights via the Rural Code, a system roughly approximate to the idea of Common Law since 1986. In practice, the Code seeks to merge customary rights, Islamic law and constitutional law to create a framework for future legal decision-making (Toulmin and Quan 2000: 214). The plan promotes subsidiarity of rights, whereby the government delegates power over land issues to local institutions and authorities (Alinon 2004: 44). Yet Lund concludes that it has only led to the creation of overlapping jurisdictions. The plan has created political competition that effectively increased the government's control of the process rather than democratizing it. "The need for order, which the Rural Code was supposed to remedy, has been accentuated by the process it triggered off," Lund concludes (1998: 4-5; 222). In respect to land issues, the Rural Code provides registration and title only upon request by a land holder, but early evidence suggested that farmers, in anticipation of the Code's requirements, cleared as much land as possible in order to title it upon the reforms implementation. More specific to pastoralists, the Rural Code grants 'proprietary rights' to land that is recognized as the customary home of a group of pastoralists, or where they spend the majority of the year, but these groups do not receive ownership in communal or individual form that would allow them to exclude others from the land (Toulmin and Quan 2000: 217-218, 225-226).

These three cases fit well in the broader African experience with land reform where large-scale changes are often diverted by a lack of institutional capacity or political will and corruption among many other reasons. Within the three cases, we can see another important trend as African land relations become increasingly conflict-prone. Toulmin et al. argue that the conflict associated with African land reform "is inherent in the process of social change" (2002: 11-12). Conflicts over material resources such as land in African states, Dorman et al. write, "are potent and meaningful for their contestants because they are framed and understood in terms of identity and belonging" (2007: 6). Two main views exist on what effects disputes over land rights have in African communities. Berry suggests that privatization and land registration has never produced its desired results by virtue of the fact that land in Africa is not merely an economic asset but a social one as well and "people's ability to exercise claims to land remains closely linked to membership in social networks and participation in both formal and informal political processes" (1993: 104). She goes further to suggest that the commercialization of land has actually exacerbated the number of demands made on property as rural farmers invest themselves more heavily in the social networks she suggests control access to land (1993: 132-133, 194). Peters (2004) argues to the contrary that we can see the emergence of class systems within negotiations over land, as traditional custom is

slowly broken down by the influence of market in African societies. This position may be more applicable to Eastern and Southern African countries, with their history of settler colonies, than West Africa, notes Lentz; rural inequality in Western Africa is more often the product of “the manipulation of ‘customary tenure by urban political elites, investing in commercial agriculture, and along the lines of increasingly exclusive boundaries between ‘natives’ and ‘strangers’” (2006: 30). To this extent, Berry agrees, noting that land claims in West Africa are frequently legitimized through appeals to custom and narratives about a communities past and future (2006:247). Regardless of how we conceptualize the origins of conflict or the variation it takes across communities, conflict over land is a growing problem and any attempt to reform property systems must recognize and address this pattern.

Law

One of the fundamental ideological justifications of the European civilizing mission was the desire to bestow the rule of law upon indigenous Africans (Mamdani 1996: 109). The work of scholars such as Chancock (1991, 1998), Berry (1993) and Mamdani (1996) has shown that control over land in the colonial period was employed by both customary rulers and colonial regimes as a means to control labor. As a result, the rapid changes that took place within African society during the period can be seen reflected in the customary courts where customary law was implemented and ultimately redefined (Williams 1996: 210-211). That colonial officials and customary authorities often reconstituted customary law during its codification, the former in an attempt to reduce its ‘backwardness’ and the latter in an attempt to both please and benefit from the colonial administration, is now generally recognized among scholars of Africa. Chancock argues that in any attempt to study customary law, our foundation must be in “the shifting and uncertain structure of the law of marriage, succession and family property” (1991: 67-68). The plurality that defines African legal systems today, must then be understood in full recognition of this nature of customary law and in speaking about law in Africa, we must be careful to recognize that it is rarely “a neat parallel system but often a contradictory blend” (Peters 2004: 272).

Williams, looking at how land reform has influenced state-society relations, concludes that customary law still remains an important avenue by which most Africans are able to access land and that land reform have often functioned to bolster the influence of local authorities (1996: 220). That traditional authority continues to play such an important role in African societies and local governance today, Berry suggests, may reflect less of an inherently problematic nature of African statehood than a pattern of “ambitious and enterprising individuals who adroitly deploy symbols of

tradition to legitimate and enhance their pursuit of property and power” (2006: 256). The relationship between customary law and formal, national law must be seen as a dynamic relationship therefore, as both national and customary law interact in reconstructing the normative basis of the other in a mutually constitutive manner. Hagberg writes, “local interpretations of state law are crucial for understanding the ways by which local normative orders are shaped. Similarly, comments on tradition and local institutions influence the means by which state law is implemented” But legal pluralism has many critics, many of whom advance the argument that the unequal power dynamics between multiple legal systems is often masked under an image of equality (Hagberg 1998: 65, 231). Lund supports this idea in his writing on politico-legal institutions, which all reflect power structures as they establish rights and entitlements at the same time that they neglect to establish others he argues (2002: 20). However, Lund continues in his analysis to assert that a politico-legal institutions jurisdiction depends on a dispute and that many disputes over land in Africa draw on multiple institutions at the same time. “The concrete involvement of a politico-legal institution in a dispute over property will often depend more on the broader configuration of the political scene than on the substance of the particular dispute,” he continues, despite attempts by involved authorities to assert their own dominion over a dispute by evoking ‘traditional’ values, etc. (2002: 21). The problem at the base of this is that the nationalized legal systems that were given to African governments by their former European colonizing powers are not well-suited to the “normative multiplicity and fluidity” that describes property systems and the claims that emanate from them in the developing world (Lund 2002: 18). Nonetheless, many authors suggest that customary means of adjudicating land claims are being slowly eroded by the influx of the market and Western influence. Mathieu et al. argue that although these global processes have started to alter and often reduce the salience of customary forms of land access, African societies and governments have yet to initiate an alternative regulatory framework that will efficiently and equitably assure land transactions (2003: 21).

In formal property rights theory, property rights are often seen as ‘bundled’ rights, defined by features such as exclusivity, inheritability, transferability and means of enforcement (Feder and Feeney 1991: 136). von Benda-Beckmann argue that conceptualizing property rights as ‘bundled rights’ is useful for two main reasons. To start with, it allows us to discuss the full range of rights and obligations that are associated with property rights. Secondly, it allows us to disaggregate to the numerous categories of property and its associated rights. Thus, they give the example of private ownership as a ‘master category,’ from which we can deduce the specific rights and obligations associated with the specific category (2006: 18). This is useful in our discussion, as we

can see within the sub-section of ‘master categories’ such as state law or local law the multitude of claims, including those that are secondary or temporary in nature. A system of property rights therefore “structure[s] the ways in which wealth can be acquired, used and transferred” and is seen as the associated rules, principles and procedures a community uses to determine the legitimacy of property ownership and use (von Benda Beckmann et al. 2006: 2; Dekker 2003: 32). Property relations exist on multiple levels, which von Benda-Beckmann conceptualize as being tripartite in nature with ideological, institutional and concrete levels that all exist within the context of social relations. The ideological understanding of a property system often differs from properties legal-institutional manifestations on the ground. von Benda-Beckmann caution that these two layers need to be conceptually divorced when analyzing property systems as although a legal code will embody some manifestation of a systems ideology, the process of translating between the levels will generate considerable contradictions. Similarly, they argue that we must separate categorical³ and concrete property relations as well. Property theory ‘fails’ they note, when “*categories* of property rights are assumed to inform people’s behavior and to affect resource allocation ... while actual property relationships remain largely unnoticed” (2006: 29-30, 22, 25). This is not to say that the former does not inform the latter, as the social relations of land and the means of employing resources are directly impacted by property law; it is at the intersection between the two that social property relations change and adapt on the ground (von Benda-Beckmann 2006: 25-26). McAuslan, speaking of land relations as opposed to land law specifically, offers a similar means to understand the intersection between property systems as they look in statute books and property systems as they look within communities. He constructs three circuits to best describe land relations in many developing countries: a circuit for customary land holdings which are administered by customary law, an informal economy where land is regulated by a combination of custom and local practices and an official land market that is administered by national law. These circuits allow us to see the overlap among all three as opposed to implying neatly categorized economic land markets as well as facilitating a more accurate understanding of land relations as they exist in reality (2003: 7).

Law reform, Bruce et al. write, will always create winners and losers and it is this characteristic that explains its political volatility. The objective of such reform however, must be met with an understanding of how to proceed from the legal status quo to the ideological point set

³ Rights that emerge out of categories of property relations are those that emerge from the “legal-institutional forms” that “provide a legitimizing and an organizational blueprint for property relationships, as well as a procedural and substantive repertoire to clarify problematic issues, notably disputes.” These categories, in essence, make explicit rules and procedures for property transfers (2006: 16).

forth (2006: 14). In this vein of thought, there has been a growth in studies of 'land *law* reform,' as focus has shifted from how to redistribute land to how to reform legal systems as they pertain to land (Manji 2006). The implications of this shift in focus can be seen in Bruce et al.'s argument that the means of articulating rights structures incentives for intended beneficiaries. Restructuring land rights without a sufficient legal framework can thus hold serious implications for the ability of an endeavor to meet stated objectives, such as poverty alleviation (2006: 27). More concretely, reforming land law involves important political decisions – both explicitly and implicitly – about how a society should be structured, the nature of legitimate political authority and how political sovereignty is to be conceived of and exercised (Boone 2007: 559). It is clear therefore, that any reform to property systems, or the legal systems that govern them, carries with it important implications for a state's political structure. von Benda-Beckmann clarify the risks of setting specific goals for reform, writing,

“many academics, for example, are outspoken advocates of an ‘appropriate’ restructuring of property in relation to certain goals, such as individual freedom, a just distribution of wealth, or an efficient use of productive resources. ... Given the misconceptions upon which they are constructed, and despite the fact that these ideas often gain a policy audience, it should not surprise us that idealized property models are not an accurate reflection of what we find in real life” (2006: 14).

The problem of basing reforms on an idealized notion of the outcome reformers hope to achieve is of particular relevance to the discussion of competing models below. Here, however, I would like to clarify two central problems that emerge in such endeavors. Firstly, the process of defining a social end in the context of most rural African society today, particularly when we attempt to include pastoral groups, migrants and women, is unlikely to be truly democratic in form. The alternative, of having a donor-based model applied to the state, is equally problematic in terms of a democratic deficient as well as raising concerns over the long-standing problem of donors not taking adequately into account the role of context. Secondly, to assume that a community can agree upon an outcome and then trace it back to a specific set of reforms fails to capture the conflictual nature inherent to such processes. Moore reminds us that “absent from most proposals for the future are allusions to the predictable illegalities and distortions of direction that are likely to occur” (1998: 37). Any process of land or legal reform will necessarily lead to good and bad outcomes and, as such, the concerns of von Benda-Beckman and Boone must be kept in mind: any change to property systems will renegotiate the boundary and structure of politics within communities and as such will produce some degree of social dislocation and conflict.

The challenge becomes then how to set up adequate systems of adjudication that can ensure principles of equity before the law. Pragmatically therefore, the “applied objective” of the legal

reform of property systems is ultimately to foster institutions that are able to arbitrate conflict over property and set forth clear rules to balance public and private law (von Benda-Beckmann et al. 2006:7). Bruce et al. suggest that land law reform must follow a sequential pattern and argues that it must occur concomitantly with other reforms to state institutions, the economy and the broader legal system (2006:13). Speaking to such developments, Mathieu et al. reaffirm the central role of the state in organizing an effective legal framework to address land matters, but recognize that in view of the remote nature of the state and the national legal sphere within the lives of most rural citizens, it is important to encourage and support “intermediate arrangements which ‘fill the gaps’ left by the law” (2003: 27). The idea that a hybrid or mixed solution is needed is becoming increasingly more predominant in the literature on land reform and land law reform in Africa. Such an approach however is a difficult one to undertake, most notably writes Peters (and in doing so, reflects the work of von Benda-Beckmann et al.) because the legal system is an idealized abstraction of reality, which often falls far from actual practices in communities. It is important, she continues, to ask “... whose security is gaining or losing rather than assuming that security inheres in a particular type of tenure (private, individual), or legal procedure, such as titling” (2007: 469).

The Fulbe in Francophone West Africa

The Fulbe are a group of loosely associated pastoral herders who occupy regions of the Sahel zone from Senegal to Ethiopia. Fulbe society is characterized by internal stratification with a caste system and is influenced both by indigenous religious beliefs and Islam; these factors led them to be favored by colonial authorities, who often perceived them as being more closely related to North African and Arab culture (Azarya 1999: 1-2, 18). Pastoral groups have long been characterized as ‘stateless’ and are traditionally ruled by decentralized collective decision-making arrangements by elders, and the Fulbe do not differ from this pattern. As the name applies to diverse groups of herders, there is no unifying Fulbe authority to represent the interests of the community as a whole (Ensminger and Rutten 1990: 690). Land has also traditionally been seen as a common resource, and access to land is usually granted through group membership. Many groups, Bonte writes, also practice the “superposing of land rights” where differences in access are given for grazing, religious and political purposes (1999: 216-217). Property, especially cattle, are often thought to be owned by multiple members of a family; for example, women will retain milking rights where sons may acquire cattle from their fathers throughout the course of their life (Smith 1992: 153). All pastoral populations, Smith suggests, are driven by the need for pasture and water for their herds and the search for these leads to their transhumant lifestyle as they migrate

seasonally, often in annual patterns (2005: 6-7). While Smith notes that all pastoral groups retain close ties with their animals, the Fulbe do not maintain as close an attachment to defined geographical regions as other pastoral groups in West Africa (1992: 10, 28).

Although pastoral transhumance has traditionally be one of the most efficient means to manage Sahelian grasslands, the expansion of private land ownership across the continent as well as environmental pressure on land, have exacerbated tense relationships between pastoralists and settled farmers. Rapid population growth in Niger for example, has created increasing pressure on agricultural land, which has greatly reduced pasture area as well as encroachment on livestock corridors. The former pattern of cohabitation of agricultural and pastoral systems, often defined by reciprocal relationships, is increasingly unsustainable as conflict increases (Diarra and Monimart 2006: 6). Bassett argues that population growth alone cannot explain increasing demands on land, but rather that demographic change exists in tandem with evolving systems of land use over time as individuals respond to political and economic change (1993: 13). The Fulbe themselves are increasingly migrating further south and Azarya identifies a number of reasons for this, such as recurrent droughts from the 1970s on, a desire to mitigate their increasing marginalization in national political life and a greater demand in southern areas and countries for meat as urban consumer demand grows (1999: 11). This migration has only functioned to expand the scope of conflict however and farmers, who generally have been more influential on the state, have tended to win when legal recourse is used (Smith 2005: 209).

The increased awareness of environmental degradation has further exacerbated tensions between pastoralists and their governments, with the latter often assuming that the pastoral herders are the root cause of desertification. Rather, Smith reminds us that pastoral systems had occupied these lands for thousands of years and there is no serious reason to think that the managed, ranch-based models proposed by many governments and development agencies would better protect these environments (2005: 211). Hagberg critiques the tendency for policy makers and government to see pastoral modes of production as producing a 'tragedy of the commons,' and notes that this perception often reinforced the idea that governments need to take a firmer hand in maintaining resources, often through privatization. Rather, he suggest that "local institutions have generally proved resilient and responsive to problems of communal use" and that when problems do arise, they are more frequently related to national or international processes than problems at the local level (1998: 61). Nonetheless, such interpretations of environmental degradation can be traced back to the late colonial period, when colonial governments tried to 'rationalize' customary farming methods via the direct involvement of the state (Berry 2002: 657). Yet governments

themselves are often complicit in land use changes, particularly in the Francophone Sahel where most communal land holdings still fall under state control. Surveying East and West African pastoral experiences, Lane suggests that the nationalization of public lands may in fact lead to a tragedy of the commons that had not happened under pastoral land management. Because the state is rarely able to provide an adequate system of land management and because, by definition of it being public land, all citizens are entitled to use it, pastoralists are encouraged to expand their herds as they are unable to exclude users from their territory (1998: 9-10).

Platteau characterizes this pattern of state ownership of common pool resources as 'disappointing' and notes that Mali's experience with state management of traditional Fulbe herding grounds in the Niger River delta all but expelled herders from the region (1995: 6, 4). Mali's post-Independent government, under the banner of rural socialism, nationalized grazing lands, prompting what Maiga and Dialla refer to as "anarchy." In Mali, Moorehead notes that conflict resolution happens on an ad hoc basis and herders are disadvantaged by the predominance of technical experts and civil servants on adjudication committees as well as the inability of most herders to speak French. Thus, although herders are ensured judicial due process by the constitution, the bulk of land conflict cases are administered by regional officials or local technical agencies and cases are rarely heard by the judicial bodies who only visit the region infrequently (1998: 65).

Burkina Faso's government created pastoral zones in the mid-1970s, in an attempt to give herders secure access to land, but in doing so encouraged their sedentarization by trying to give incentives for pastoralist to transition into ranching practices. The plan was supported by the World Bank and although it met with initial success, once external funding had been withdrawn, the project only created conflict among relevant parties. Moreover, the plan forced pastoralists to choose between security of tenure and the mobility that defines their social identity (Nelen et al. 2004: 10). Titling of communal pastoral lands is further complicated by the fact that flexible land access is a defining feature of pastoral communities, hence individual or even communal titling is fundamentally at odds with mechanisms of social reproduction (Berry 2006: 254). In his study of conflict between herders and farmers in northern Burkina Faso, Lund concludes that deference to the state's authority is generally done out of fear or ignorance, an unsustainable long-term solution for conflict management (1997: 11).

Under Niger's land reforms, the Rural Code is still unable to give clear demarcation of pastoral areas or accord any protection to pastoral land rights from the advancement of agriculturalists. Although Niger's decentralization scheme has increased representation at the local

level, Hammel concludes that pastoral groups still have little say and what few concessions have been made towards protection of pastoral lands is more motivated by a desire to maintain peace and stability than any particular respect for their claims to land (2001: 16, 19). Lane however, notes that despite the domination of local councils by non-pastoralists, the public hearings and debate within communities encourage the involvement of many community members (1998: 12). Although reforms such as these work well with decentralization, there must be sufficient political will to transfer not only administrative but financial power to the local level. Thus this method is potentially quite democratic but highly dependent on the participation of political elites (Alinon 2004: 44-45).

In summary, the key problems facing the Fulbe today are methods of adjudicating access to land as farmers expand into what were once traditional communal land holdings. Means of conflict resolution have often emerged within specific communities and a variety of practices have been recorded. In Mali, local pastoral groups have responded by organizing yearly meetings to avoid conflict during herd movement since 1969 (although with increased inclusion of government agencies and local cooperatives) (1998: 4). Many existing policies relating to land or resource management within Mali are loosely enforced or contradictory, writes Beeler, but many such informal mechanisms of management exist (2006: 11). She reports that in the Malian village where she had interviewed locals, she was told that the village posted rules every year (they changed based on changing circumstances), to prevent conflicts between pastoralists and herders. A study in the area revealed that most communities had similar practices and had been doing so for eighty to 100 years, although some people felt respect for the rules was declining with increased migration into the community (2006: 11). Looking at Karaboro farmers and Fulbe pastoralists in Burkina Faso, Hagberg cites at least ten parties involved in the local conflict resolution he observed. When disputes are not settled, outside actors from beyond the department may become involved as disputes engage broader social networks. The Fulbe in Burkina Faso have formed a trade union (*Syndicat des Eleveurs*) which has promoted pastoral rights in conflict situations. The group has been criticized however, for working not only within the context of specific conflicts, but for mobilizing interests at the national and regional level. This approach, which seeks to claim rights for Fulbe agro-pastoralists is, according to Hagberg, not always supported by Fulbe parties to specific conflicts, who express a preference for settling the affair by employing local social networks rather than advocating for rights claims (1998: 20-21, 223-225).

The second central concern regarding pastoralists and property rights, involves increased recognition by the state. Pastoralists have long been seen by governments as threatening to the

rationalized model of statehood, and its associated understandings of borders and land-use, that was imparted to African countries by their former colonizing powers (Dorman et al. 2007: 19). That many nomadic and pastoral groups continue to cross national borders on annual migratory paths reflects a trend observed by Dorman et al. whereby “marginal or minority groups, especially those of indigenous extraction, are excluded – intentionally or not – from the nation-building process” (Dorman et al. 2007: 9). In example, the Burkinabé government’s tendency to side with farmers is reflected both in local practice and in national discourse, and the government, largely composed of non-Fulbe, predominantly reinforces the rights of farmers whose fields are trampled by herds in a reflection of these patterns (Hagberg 1998: 211).

Four Models for Land Reform

Privatization/Market-Based Models

Today, the rhetorical justification for land reform in Africa is no longer predicated on poverty alleviation alone, but on the idea that the twin international agendas of market economics and good governance will provide the intermediate means to do so. These ideas are closely related to the policies of land titling and registration put forward in the World Bank’s 2003 report *Land Policies for Growth and Poverty Reduction*.⁴ The report is a departure from past emphasis on privatizing land ownership however, as is seen in the importance it places on the ability of the poor to access credit markets, therefore enabling them to turn their assets (in the form of land or homes) into capital to invest (2003: 275-276). Specifically, the Bank believes that a clear demarcation of property rights will enable the poor to access credit which will foster the emergence of functioning land, rental and credit markets and this, in turn, will increase efficiency, productivity and economic growth. This view is heavily influenced by the work of de Soto, whose 2000 book *The Mystery of Capital* argues that the failure of the Third World to develop is the result of the poor’s inability to access capital as they lack adequate documentation of property rights; de Soto refers to these untitled assets as ‘dead capital.’ “Interest has subsequently turned to what might be described as the potential scope for financializing land relations,” Manji writes of the Bank’s new approach (2006: 55).

⁴ The Bank published around one policy report of this nature per year and they are seen as being widely influential, both internally within the World Bank and on the thinking of other multilateral and bilateral donor agencies. The last Bank report to address the issue of land policy was published in 1975.

One of the Bank's notable departures in the report is the recognition it affords to indigenous systems of land management, including communal land holdings. The Bank addresses the needs of pastoralists (although in sweeping terms), admitting, "simply introducing private property rights will be neither feasible nor cost-effective" (2003: 68). Within the discussion, the Bank notes that as population density increases, the increasing value of lands will "eventually lead to increased individualization of land," continuing their idea of an evolutionary process leading to an end point (2003: 68). In the meantime however, they note that a number of West African Sahelian countries (including Mali, Niger and Burkina Faso) have successfully introduced reforms to foster more responsibility for ecosystem management within local, pastoral communities. Yet to the Bank, these seem at best short-term solutions in the long-term trajectory to private land holding (2004: 69). It is important to be clear that although the Bank has begun to address the relative benefits of indigenous systems of land management, the end goal of a liberalized market economy has not changed. Rather, as they still believed that the introduction of a market economy would eventually produce the desired system of codified land rights, the focus was shifted to the intermediate stages of development – such as credit markets – that would produce the desired effects (Manji 2006: 54-55).

Capitalistic models such as that exemplified by the Bank's 2003 report, are largely apolitical and do not discuss in any detail the means of reforms based on titling and registration. Nonetheless, individualized land rights as advocated here carries with it clear political implications for society. The privatization advocated by groups such as the World Bank would effectively sever ties between the state and pre-colonial communities. Political membership would thus be defined individually at the national level and access to land would be controlled by the market. Participation by individuals in activities pertaining to ethnic or community membership would fall solely within the realm of civil society (Boone 2007: 572-574, 580-582). Berry questions our ability to discuss privatization in relation to its impact on economic developments alone, rather she argues that we must look to its political consequences as such reforms are closely related to dynamic and changing social relationships and means of contesting political authority (2006: 243).

Practical critiques of this approach center around three main themes. Firstly, it is highly contested whether privatized land title increases security of tenure at all. Bruce et al. notes that holding title to land does not have a proven link to increasing agricultural productivity and that the immediate concerns of farmers often focus on needs other than registration. Moreover, he identifies the danger of elite abuse of land titling schemes as a particular concern regarding such practices which may in fact reduce security of tenure (1993: 260). Breusers, in his study of mobility

and land access in Burkina Faso, follows Bruce et al.'s train of thought, when they write that legal reforms that attempt to privatize land rights are prone to be "highly disruptive," to the extent that they interrupt long-practiced strategies of risk-aversion and social networks. The fact that land in Africa is largely seen as being social embedded "means that one tenure regime can seldom be legislated away in favour of another" (quoting Shipton & Goheen 1992: 316) (2000: 390). This is closely related to the second central concern regarding privatization of land titles. As land rights in Africa are frequently layered and overlapping, privatization in the sense it is promoted by the World Bank, carries with it an implied alienation of secondary rights users from land (Boone 2007: 582). Secondary rights users include women, youth and migrants, groups who rely on such rights in key informal economies, such as the production of food for household consumption. The specific reforms suggested by the Bank, along with most arguments for privatization, also remain silent on the unit of title, and it cannot be assumed that groups who currently rely on secondary use rights would receive any security of tenure – let alone title – during the registration schemes under proposal here.

The last main concern with the World Bank's proposed reforms reflect a common theme pertaining to all models of land reform as they question the ability of African states to provide the institutional capacity needed to enact reforms of this nature. Drawing on Polanyi, Boone notes that the rise in functioning-markets that the Bank assumes will be concomitant to the privatization of land rights necessitates a strong state with high administrative capacity in order to register, adjudicate and enforce land rights (2007: 581). Chauveau et al. writing on West Africa, describe a situation whereby,

"existing institutions are out of step, unable to deal with problems of scarcity and to co-ordinate or arbitrate between divergent interest ... In this time of changing norms, land actors are left to fill the institutional void. The only (implicit) rules are opportunism, force, simulation and play on the pluralism of norms, since neither traditional nor state institutions are currently capable of legitimizing, co-ordination or controlling these monetary transfers" (2006: 10).

It seems unlikely therefore, that the Bank will find the necessary administrative capacity to implement its reforms.

With specific reference to the needs of pastoral populations, Lane criticizes reforms that attempt to privatize land for failing herders in two principal ways: firstly, such reforms are unlikely to increase productivity on the part of pastoralists, and rather are more likely to increase insecurity and hence further degrade land. Secondly, such reforms are likely to harm communal tenure systems and are unlikely to provide an alternative that can foster equitably and efficient outcomes for pastoralists (1998: 14-15). Bruce et al. write that land titling, with particular reference to past

World Bank projects, are particularly problematic for indigenous peoples, such as pastoralists, in that the communal land rights of much of indigenous land holdings makes it difficult to recognize under national law; a fact which is compounded when we consider the fact that many indigenous peoples aren't even recognized themselves under national citizenship laws (2006: 41). The Fulbe, we can conclude, would not benefit under a market-based model of land reform and such questions remain to be answered as to whether the majority of rural farmers would benefit either.

Communal Rights

Boone describes the communal rights model as “a restoration of a *status quo ante*.” Associated with such an approach are calls to return land to its original inhabitants who will reengage traditional means of land management. Such a reform promotes the idea therefore, that land rights should be invested in the community as opposed to the individual and as such, actively seeks to promote the exclusive land rights of ‘indigenous’ community members (2007: 570). Under such a model, usufruct land rights would be allocated to individuals at the discretion of the community. Juul notes that the discourse on ‘stranger’ and ‘autochthon’ has become closely linked to the idea that the degradation of local resources is the result of the declining salience of local means of resource management, particularly in relation to common pool resources. The most evident conclusion of people who hold this view, she continues, is that establishing strong property rights for the community – or autochthons – will enable the community to reestablish the validity of this traditional means of resource management and in the process, exclude newcomers (2002: 189). As such, the state under a communal model is composed of communities who are seen as “natural (pre-state) constituent units of the modern nation;” thus citizenship to the state depends on citizenship to a local political community. Such a model directly challenges the goal of many post-colonial states of constructing a national sense of citizenship and it eliminates the possibility of having overarching laws regarding land access or rights and obligations of citizenships as all of these would be mediated through the community (Boone 2007: 578, 579).

Critiques of this model take four main forms. Firstly, the communal model raises difficult questions as to how we can define the boundaries of a ‘community’ and what criteria exist for membership. Secondly, the model does not offer any assurances regarding equitable access to land and resources. Within indigenous communal land holdings, gaining access to land is often a political process and “thus, membership in the social group is, by itself, not a sufficient condition for gaining and maintaining access to land. A person’s status (age, gender, ethnic group, elite group affiliations) can and often does determine his or her capacity to engage in tenure building,” writes

Bassett (1993: 20). Similarly, any attempt to register rights based on community membership, risks alienating community members who rely on secondary rights, such as migrants and herders (Toulmin and Quan 2000: 207). Thirdly, as claims to autochthony have been increasingly prominent within African society, basing access to land on definitions of 'community,' in view of the political nature of such terms, risks fueling tension and conflict between 'strangers' and 'locals' (Juul 2002: 205). Finally, the communal model does not resolve the question of how political authority and the management of resources and land will function within a community and what, if any, oversight mechanisms are to be put in place (Boone 2007: 570).

Two other concerns exist specifically for pastoral land rights. Firstly, although delineating land for pastoralists may strengthen their ability to restrict outsiders from using the land, it risks both restricting pastoral movement as well as provoking conflict among users (Thébaud 2002: 180). Secondly, when membership to a community and resource management rely on mobility, attempts to secure a groups access to land via communal titling may in fact "founder on, or even impede, the continual renegotiation of access to water, pasture and markets on which their livelihoods depend" (Berry 2006: 253-254). Although such a model would secure some land for pastoralists, as Juul notes, there have been few petitions to privatize communal land holding by pastoralists, who tend to prioritize their mobility over access to specific sets of property (2002: 189). Because such claims are likely to expel migrants from land however, it is impossible to guarantee that conflict can be diminished as the resulting dislocation could exacerbate existing lines of tension in a community.

Land-to-the-Tiller

A land-to-the-tiller model was widely popular in Asia in the period following the Second World War. Such a method has not been widely advocated in Africa, but is worth discussing briefly here. Similar to that proposed by the World Bank, this strategy of land reform relies on registering and titling land ownership in order to grant tenure security to farmers currently using the land, but rather than the market-based mode of farming advocated by the privatization model of the Bank, a land-to-the-tiller model promotes small-scale farm holdings. Such a model is considered to be one of the most pro-poor and flexible models of land reform in the literature as it promotes the rights of small-producers and reduces the risk of farmers being thrown off of their plots arbitrarily. Moreover, it escapes arguments over historical ownership of land by granting title to whomever is farming the land at the time titling takes place, regardless of common sources of conflict such as communal claims to land or informal rental procedures. To this extent, it is arguably the most

friendly model to migrants who can gain title to land under such a model in a way that they cannot under a communal model as discussed above (Boone 2007: 574-576). Under this model, citizenship is acquired by virtue of a farmer's productive use of land. In the process, this entails nullifying land claims based on ancestry or autochthony. In doing so, it undermines the idea that within a state, numerous 'communities' exist who have historic connections with the land. (Boone 2007: 583-584).

Critiques of this model focus on the lack of clarity on how user rights would be implemented politically at the local level, especially in view of the fact that such a model relies heavily on the redistribution of land by a centralized authority. This is closely related to the second main critique, that such reforms require a strong state with high levels of administrative capacity (Boone 2007: 585). Associated with this are concerns over ambiguity in how such a model would establish thresholds pertaining to 'productive use' of land or whether the unit of title would be a household, a head of household or heads of household. Both of these problems, moreover, are predicated on the state having a sufficient level of legitimacy in the eyes of the local population to successfully implement such reforms without invoking widespread discontent. This model is arguably the most harmful for pastoral interests as the mobile lifestyle that most herders engage in means they are rarely in a locality long enough to either meet ambiguous definitions of 'productive use' or establish clear claim to a specific piece of property. More fundamentally, such an approach implies sedentarization, which the traditional livelihood of most pastoralists is opposed to.

Evolutionary Model

Platteau describes the process by which individual land rights emerge in an evolutionary model as a "gradual extension of use rights." At the beginning of this trajectory, farmers are constrained in how they may use and transfer land by lineage systems and family whose permission is needed for sale. However, as land becomes increasingly scarce, farmers will gain some autonomy and will support their land sales with written documentation. As this process accelerates, there is a demand by the citizenry that the government offer a means to legally protect land tenure through titling and it is here that the government's role is most important and clear. It is thus, "the combined pressure of growing land scarcity and increasing commercialization of land-based activities" that lead to a system of individualized and formalized land holdings (2000: 52-53). The implications this model holds for citizenship are similar to that of the market-based model as the evolutionary view posits a Western-style, market-economy based on individualized land rights as the ultimate outcome.

Platteau characterizes a fundamental flaw in this approach in its implicit assumption that increased pressure on land will lead to a technological change that will modernize farming practices. He contends to the contrary, that such innovation will only result from the involvement of public extension agencies or donors, as opposed to “spontaneous market forces.” Perhaps more importantly, he argues that land sales take place even without formal title, and the assumption that the desire to sell will increase the demand for formal registration is not tenable as such (2000: 70, 71). Boone contributes another critique of this model when she argues that such a model assumes that the evolutionary process of property rights development takes place within a functioning constitutional framework – an assumption that does not hold throughout much of Africa (2007: 586).

This model poses some of the same key problems for pastoral populations as the market-based models outlined above as it takes as its central tenet that African land relations are progressing towards an individualized system of land holdings that are fundamentally contrary to the traditional understandings of property and land access seen in most pastoral populations. Similarly, if the implied agent of change is increased pressure on land and modernization of farming technology, the evolutionary model suggests that pastoralists may be driven from their traditional migratory routes long before the final stage of individualized land-holdings is even met.

Conclusions on the First Four Models

Before moving on to address the fifth model, important pragmatic and theoretical conclusions need to be drawn regarding the four models that made up the lions-share of the development literature until the early 1990s. Firstly, two main practical problems run through all of the models. Firmin-Sellers argues that neither a position of privatization nor one based on an evolutionary understanding of property rights can adequately solve for one of the most pressing problems facing African land reform: the lack of sufficient means of enforcement for those rights. More specifically, she argues that for any property rights regime (privatized or communal) to be successful requires that the relevant leaders in charge be able to provide both the necessary coercion for enforcement as well as demonstrate their own commitment to reform. If either of these principles is lacking or weak, the institutions for enforcement will be weak as well (1995: 878-879). Firmin-Sellers is not the first to recognize this, even the World Bank, in a 1989 report, admitted to the problem weak institutional capacity played in implementing privatization reforms (104). Secondly, reoccurring questions over implementation of reforms can be seen. von Benda-Beckmann et al. write that reforming legal access to property such as land and water by promoting

specific sets of rights over others “often run into great difficulties of implementation and trigger off undesired and unintended consequences.” The authors suggest furthermore, that this often is specifically caused by a lack of attention to the interconnections property holds with social relations (2006: 27).

In a more theoretical vein, all of these approaches suggest particular understandings of identity and citizenship that seem deeply problematic. Speaking directly to the issue of pastoralists, Breusers notes of Burkina Faso, that any approach to settling land disputes should take into account the diverse nature of relationships between Fulbe and settled agriculturalists (in his study, the Moose). It is important to recognize, he writes, that while some issues may polarize the two groups, inter-ethnic relationships are also integrated in other situations. He suggests that instead of approaching these issues territorially, by focusing on the multiple and nested claims to land, that we shift focus to levels of social organization and in doing so open our analysis to look at organizations and groups and the relationships among them. This would allow us, he contends, to gain more ‘realistic’ understandings of land relations without “ty[ing] actors to neatly territorialized spaces” (2000: 397). This argument can be extended to look at claims to autochthony that have proliferated throughout Africa during the last fifteen years. Geschiere and Jackson attribute this rise in many communities to the emergence of multi-party politics and decentralization; as the development community shifted from an understanding of development as being state-led to one that sought to bypass the state altogether, key questions were raised in local contexts as to “who can claim to ‘really’ belong to the ‘community’ that is supposed to profit from a new-style development project?” The result, they write, is a marked departure as ‘fuzzy’ identities rely on the emptiness of the terms ‘local’ and ‘stranger and, in a particular, a “nervousness” in claims to autochthony and belonging. The claims by many to be an ‘original inhabitant’ or autochthon, they continue, are particularly relative and susceptible to manipulation. To mistake this trend as another manifestation of the push to return Africa to ‘the local’ is to mistake what in all actuality is an attempt to negotiate access to global processes of social, political and economic change (2006: 5-6).

Implementing Better Strategies

The four models discussed above can be seen as characterizing the literature until approximately fifteen years ago when the strongest counterweight to the market-based model currently being promoted by major international agencies such as the World Bank emerged. This

model can be described as an incremental or gradualist approach to changing land relations and has been most clearly expounded in the work of Bruce (1993, 1994 (see Migot-Adholla 1994)) and Lund (1997, 2001) (Peters discusses the model as well, 2004, 2007).

Incremental/Gradualist Approach

Following roughly the same premise as the evolutionary model outlined above, the incremental or gradualist model suggests that land relations must be situated in a long-time horizon and be allowed to develop on their own. This model differs significantly however, in that it relies on community-based innovation and means of informal formalization as short-term means of managing tenure security (Platteau 2000: 71). Migot-Adholla et al. assume that African land tenure systems are moving towards one dominated by the market economy that will resemble the Western model, but one that is best left to occur in an evolutionary fashion as increasing pressure on land will create changes (1994: 262). Lund supports this idea, arguing that there is no reason to believe that outside privatization will increase tenure security. Rather, “processes of privatization occur and have a long history in many places without government initiative” (2001: 157, 159). The suggestion is that various systems of land tenure must be allowed to gradually ‘adapt’ until a formalized system of land rights is achieved (Ouédraogo 18; see also Delville 1999). The model is frequently suggested in view of findings that land titling is unlikely to actually increase economic growth due to a lack of functioning credit markets. In areas without working land and credit markets, therefore, land registration and titling may be an overly costly measure, especially as individuals can gain a great degree of tenure security through means of informal formalization (Feder and Feeney 1991: 147).

In this respect, the state is seen as facilitating the process by developing means of integrating cases of ‘local law’ into the greater legal framework, as it is the responsibility of the government to formalize and codify rights as they evolve (Platteau 2000: 52). ‘Local law’ or ‘informal formalization’ refer to means of ‘securing’ land rights in a way that have local value but are still ‘extralegal’ in the sense that they do not follow proper governmental procedure and are not necessarily recognized by the law within the context of a specific community.⁵ Mathieu et al. offer examples of such informal means of formalization from Western Burkina Faso, where citizens will support land sales by a local receipt (or *petit papier*) which is a document composed by the seller

⁵ Lund offers a more concise definition: “‘non-state law’ in the sense that it is not issued in written form by the state. It differs from other non-state laws such as customary law or religious laws in the sense that it is not inscribed in a specific normative structure. It is rather a pragmatic adaptation of norm and procedures, often in the wake of administrative or judicial reform” (1997: 11-12).

and purchaser of land but which has no certification by the government (2003: 8). Resorting to means of informal formalization is more common in Francophone Africa, Lentz suggests, than in Anglophone countries where citizens are more liable to adjudicate land claims in the courts, a pattern that is arguably a product of the formality of the French-inherited legal system in the former and the emphasis placed on judicial precedent in the latter (2006: 28). Details as to how this would work are not always clear and different authors take different positions, but it is consistently advocated that the state capitalize on local ingenuity. "We should be moving away from a 'replacement paradigm,' in which indigenous tenures are to be replaced by tenure provided by the state, toward an 'adaptation paradigm,'" write Bruce et al. Such a paradigm would require a legal and institutional environment capable of fairly representing and managing changes in indigenous law. Thus, land registration and titling must be reserved for situations where land is subject to intense dispute (the authors identify here urban and peri-urban lands as likely candidates) or where a resettlement scheme is being undertaken or where no customary tenure system exists. Likewise, should an individual wish to title their land, they must be able to do so, but on a user-pays basis. Donors, they argue, should focus efforts on increasing institutional capacity and the ability of governments to survey land (1993: 260-262). Thus, this model suggest that instead of actively trying to replace indigenous tenure arrangements with a Western, market-based model, land reform should attempt to play on the strengths of indigenous means of land management while retooling certain aspects of these systems when necessary (Bassett 1993: 25). As such, this model does not posit a clear image of citizenship, but rather suggests that understandings of political identity and affiliation are evolving at the same time that property relations themselves are changing. Most authors of this approach however, do see a Western-style market economy as the eventual outcome, it is only the means of getting there that is in all actuality being questioned.

Critiques of this approach tend to center around the failure of the model to adequately address issues of unequal access to land, to the extent that the model makes no normative commitment to improving the rights of women, minorities or youth in the short-term, but it remains a popular alternative to top-down approaches (peters 2004: 277). Drawing on her research in Malawi, Peters argues that to switch from state-led to locally driven or 'community' means of land reform ignores a large literature that speaks to the relationship between land and growing competition and inequality across Africa (2007: 468). A more detailed analysis of the model's shortcomings is discussed below.

Directions for Future Development of the Model

Many features of the incrementalist approach to land reform are attractive. Notable among these are its relatively hands-off approach, to the extent that it leaves a large part of the negotiation over land access and changing nature of rights to the communities within which the problems actually exist. Similarly, in relying on local understandings of property, this approach is right to capitalize on 'local law' and the ingenuity shown within communities across the continent. The room granted to local solutions calls to mind the recent stress placed on 'ownership' among the development community. The incremental approach is able to do this because at its base, it recognizes the multidimensionality of land in African societies and as a result, understands that the link between social relations and land necessitates a slow approach as such relations cannot be expected to change by sudden titling in an equitable or peaceful manner.

There are, however, clear shortcomings to this approach as well. Notable among these are its cautionary approach to intervention and how it conceptualizes the appropriate role for state. While the incrementalist approach generally sees the state's primary purpose as facilitating the evolution of 'local law' with the end goal of integrating certain aspects of this into formal legal code, I suggest a more active role for the state in a few key arenas. Although it is clear that the incrementalist approach sees the state as having an important role in moderating the legal sphere, the particular nature of the problems posed by Africa's plural legal system necessitates some degree of legal reform on the part of the government; land law seems to be one of the most important issues to be resolved when discussing how to increase security of tenure and its associated goals of poverty alleviation. To be clear, in suggesting this, I recognize the caution to be taken by Manji's comment, when she writes that "the promotion of the rule of law ... is an inherently political project" (2006: 53). However, while this must be kept in mind, my concern lies in the apparent inability of African legal systems to adjudicate between land claims that fall under different forms of law as opposed to any desire to abolish customary, religious or national law per se or to consolidate them into a unitary legal framework. Moreover, because an incremental approach to land relations understands that within conflict over land, understandings of power and identity are being renegotiated, any acceptance of such an approach must attempt to encourage clear means of conflict resolution.

To begin with, it is increasingly important that the role of customary law within local communities be recognized by international donors, development agencies and African governments alike. Although the Bank's 2003 report does acknowledge customary land holdings to some degree, much of the literature on land reform addresses the role of customary rights with not

much more than a symbolic gesture. McAuslan questions the ability of any reform that does not recognize both national and customary land law to succeed in societies where the market economy has yet to dominate and where traditional understandings of land still predominate (2003: 6). No policy that encourages the replacement of customary law, be it in the immediate future or as a projected evolutionary outcome, is liable to meet great welcome politically or within the communities who will ultimately have to negotiate changes in legal and property rights. International involvement in legal reform must then address the relevance of customary law. Similarly, it is increasingly apparent that law reform cannot be considered a technical issue alone. Rather, as McAuslan writes, “every step down the legal path involves policy” and even decisions related to legal technicalities must be seen as such (2003: 251). Legal assistance will certainly be needed for African governments as they attempt to negotiate between competing understandings of rights, adjudication and land access. However, as the market plays an increasingly prominent role in African states, administrative law in particular will need development as the prospective growth in private land transactions will demand “more specific, detailed and clear” legal statutes. To the extent that the majority of African land falls under ‘customary authority,’ which frequently falls within the legal domain of state owned land, customary landholdings often fall under public law, which McAuslan argues, is effectively administrative law as well. Thus, as communities attempt to strike a balance between public and private law, international donors and African governments must accept that *more* law is needed and that this requires a host of political and policy debates that must be taken seriously and cannot be reduced to discussion over technicalities in legal code (2003: 255, 256, 258).

McAuslan identified three key circuits of law: customary, informal and formal, and at each of these levels, he suggests specific policy reforms which, although falling short of a complete legal reform, may help streamline plural legal systems by increasing clarity and simplicity. McAuslan questions the flexibility of customary land systems in allocating land access and its ability to provide secure rights, particularly for women and minorities. As a result, central governments and donors should encourage the investigation and recording of customary law to ensure transparency and to aid in its application within the court system. Similarly, this will help with his second objective of developing established means of transferring land so as to prevent customary authorities from abusing their power. (2003: 16). At the informal level, or that of ‘local law,’ international agencies and governments should work to clarify the legal and administrative framework both in terms of its accessibility and in simplifying procedures for registering land or obtaining title in order to capitalize on the local ingenuity seen within informal formalization

(2003: 18-19). McAuslan is less concrete in regards to the national level of formal constitutional law. He suggests that governments need to make sure that the externalities to land use are considered before development projects – be they private investment or public projects such as large-scale infrastructure development – are undertaken. Specifically, he suggests that “the social and community costs and benefits are weighed as well as the private costs and benefits to the developer” (2003: 20-21). To this, I would suggest that at the national level, governments and judiciaries be encouraged to reaffirm the right to due process and equality before the law. Some of these ideas are liable to be contentious, but examples can be seen where they have been implemented. Tanzania’s land reform, largely considered to be one of the most well-thought out examples in Africa, laid down basic principles of fair procedure, including a right to “contest the matter at a hearing and a right of appeal ... the law also provides that *inter vivos* transfers and other transactions designed to prevent women from inheriting or acquiring land, or obtaining credit on the security of land, may be disallowed” (McAuslan 2003: 265). These changes were justified on the constitutional principle of equal treatment and as such set a positive example for other countries.

To argue for legal reform in a similar manner to how many of the models outlined above advocate for land reform would be to fall victim to many of the same underlying problems. But in clarifying certain basic precepts of all levels or circuits of the judicial system, this approach seeks to capitalize on the areas of overlap and the degree to which the normative underpinnings for all relevant legal spheres speak to one another. If these layers are as imbricated as much of the above literature suggests, it seems that clarifying the legal ideals and rights at all levels will facilitate the emergence of a more comprehensive legal system than outright reform. Thus, to a large extent, I suggest that beyond establishing and reinforcing clear principles of equality before the law and attempting to expand the presence of the courts in rural areas to adjudicate conflict, the legal domain is just as likely to benefit from an adaptation paradigm as is that of land. Although there must be room within the legal system to provide short-term solutions to urgent problems, the institutions needed to protect property rights will only be fostered by adopting a process-oriented approach to reforms (Dekker 2003: 28). To be certain, norms of equality are not something easily established from the national level down, but the established legal commitment of a government to equal rights before the law sends a message for the nation as a whole whether or not immediate change is produced. McAuslan argues that success can only be measured in actual change and not in mere reforms to statute, but while this may apply when we discuss the social system as a whole, the commitment on the part of a government to principles of due process and procedural equity is at the least a noteworthy accomplishment along the way (2003: 17, 264).

The second arena where I suggest the state take a more active role is in regards to citizenship laws. In view of the contested nature of identities within the political realm, it seems crucial that states reevaluate citizenship laws, which up until this point largely exist in their colonial-era forms. That citizenship has immediate impacts for land may seem a dubious claim at first, but I suggest that there are two primary impacts of how membership to a political community at the national level impacts access to tenure security. Of primary importance, being a citizen carries with it certain rights and obligations on the part of the state. As such, having clearly defined rights as a citizen can guarantee a citizen the right to due process before the law when making claims over property. For every citizen to have access to and the adequate knowledge to navigate the court system is unlikely in the short-term, but reformulating citizenship laws and naturalization requirements is a much simpler first step. Hickey argues that shifting the basis of citizenship from being defined by origin to residence is one of two necessary moves to protect the rights of minority groups (the second is to formally recognize minorities in the law) (2007: 100). Hickey further argues that it is necessary to push conceptualizations of citizenship in Africa away from its binary representation in the work of Mamdani (1996) ('urban citizens' versus 'rural subjects') or Ekeh (1975) ('ethnic' versus 'national,' 'traditional' versus 'modern'). Citizenship should be seen with more nuance as these categories are rarely mutually exclusive and are more fruitfully conceptualized as 'subject-positions' (2007: 101). Herbst writes that despite early pan-African sentiments, citizenship laws in the newly independent states quickly began to reinforce the state boundaries that had been left to them by their former colonizing powers. He goes on to code the citizenship laws of forty African countries, and notes that of these fourteen define citizenship by the place of birth (*jus soli*) while twenty-six by ancestry (*jus sanguinis*); most Anglophone states followed the former model while Francophone states the latter. Mali, Niger and Burkina Faso all have *jus sanguinis* stipulations for citizenship (2000: 236-239). As a result, he argues that African states have yet to address what could be a potentially useful tool for state-building by making substantial changes to citizenship laws, as citizenship itself remains a polemic issue in most African states (2000: 239). Young, citing the same study by Herbst, notes that ancestry's predominance in conferring citizenship implies a close link between membership to a community – often ethnic in nature – and national citizenship. Moreover, he notes that naturalization is also restrictive in most African states (2007: 256). The work of Herbst and Young alludes to the second main benefit from reformulating citizenship laws. To the extent that claims of autochthony are gaining ground in many African states, clearly establishing the criteria for citizen-status at the very least preempts national grounds for such claims, although it arguably would have less impact on the local context

of many of these claims. Alarming, among the many tactics undertaken by elites to control who can run for political office and who cannot following the introduction of multi-party politics in Africa, a trend is emerging in which elites attempt to disqualify potential rivals by questioning their standing as citizens. Incumbents have gone so far as to bring these issues to court and provide evidence as to why their challengers do not meet the strict rules for citizenship, frequently by questioning the nationality of the candidates parents. Such a process, Whitaker argues, has far reaching implications as these tactics “fuel broader xenophobic sentiments and legitimize calls for the exclusion of whole groups” (2005: 116, 111). Reforming citizenship laws alone will not undermine the power that narratives of ‘autochthons’ and ‘strangers’ have proven to have when deployed within communities, but it will establish a national-level clarification of the term. In this sense, implementing reforms regarding who is a citizen and who can be naturalized takes the first step towards clarifying the rights of citizens and the obligations of the state to them. In the process, reforms of this nature at the very least send symbolic messages regarding what constitutes the ‘nation.’

Finally, the issue of institutional capacity needs to be resolved regardless of what land reform models are promoted within Africa. Strengthening the ability of African governments and bureaucracies to administer and effectively enforce land rights is of critical importance regardless of what or whose rights are being protected. As many authors note, the weak capacity of the African state has been further eroded in the past fifteen to twenty years. Although discussions of state capacity have often focused on corruption and absenteeism in state bureaucracies, the region has suffered from notable brain drain and the civil service often works with out-dated technology, which has considerable impact in how efficiently titles can be filed and land surveyed. The push towards market liberalization under Structural Adjustment Programs has only exacerbated this problem and the assumption by many donors that they will be able to produce the necessary incentives has largely proved unsuccessful. They often suggest policies that “count on extraordinary individual behavior” by assuming that the state (and in particular the executive branch) will have more political volition than is actually observed (van de Walle 2001: 131, 275; van de Walle 2004: 84). None of the models discussed above, with the possible exception of the incremental model, are able to resolve the issue of institutional capacity on which much of their proposals depend. That being said, it can be said of all models, including the suggestions I myself have made, that a fundamental problem exists in structuring incentives and resources for governments to increase the strength of their institutions without feeding into the corrupt bureaucracies that have so come to define images of African statehood.

It is important to recognize that underneath these divergent approaches to Africa's land question lay different modes of understanding the nature of land relations in Africa. The incremental model critiques the post-Independence view that customary land relations in Africa are inherently insecure and hence unable to structure the necessary incentives for investment and the development of functioning markets. Alternatively, the influence of the work of Berry (1993) on shaping a new understanding of African land relations as flexible, adaptive and negotiable that can be seen within the incremental or communal approaches is equally problematic. Peters attempts to push beyond this dichotomous formulation to question what exact form these flexible relations take, especially in regards to inequality. In privileging the negotiability of land, she suggests that we "overestimate the ability of people to influence the debate about what constitutes tradition and to lay down the norms for contemporary access to resources." Either approach, Peters continues "fetishizes" either a mythical market or a mythical 'local.' We must turn, therefore, to a historically grounded analysis of the how real communities and individuals negotiate access to land in the context of globalizing forces such as democratization and market integration (2006: 91, 100). The reforms proposed above to the incremental model attempt to capitalize on the reality of local law while striving to provide a national framework for hybrid legal systems that are better able to balance plural legal systems while still assuring some degree of due process and procedural equality in conflict arbitration.

Conclusion

In summary, a three key implications for policy implementation and land law run throughout this research. Most importantly, African governments, the development community and policy analysts must think about land reform as being intimately connected with power relations and politics at all levels of governance. It is impossible to divorce the technical aspects of law and land reform from the profound influence it has in restructuring a community's means of political contestation. It is in view of this concern that I suggest we should be hesitant to accept too readily the idea that land-holdings in Africa are fluid and flexible, as the work of Berry suggests. Although major international organizations such as the World Bank have started to adopt this rhetoric, we should bear in mind the mounting evidence that across Africa land relations are increasingly reflections of growing class division or are increasingly susceptible to manipulation of 'custom' by elites (Peters, 2004, 2007; Lentz 2006). As definitions of citizenship and belonging narrow, the differentiation of property rights drives social conflict over access and usufruct rights

while demanding increasingly exclusive definitions of group membership that risk undermining the process of democratization entirely. Thus, I return to the question posed by Peters, that in any evaluation of land reform, we must question who stands to win and who stands to lose in any particular arrangement (2006). None of the models outlined above adequately problematize this question and as such, cannot answer important questions about exactly what the path to reform will look like or how land reform will shape African societies in the future.

Secondly, the practice of conceptualizing land reform as leading to a posited end in a linear and uncomplicated fashion is a problematic way to address policy formation, especially in view of the stakes. Any changes to the means of production and access to resources of local populations will inevitably create conflict and social dislocation. This must be recognized before any reform is implemented and the provision of mechanisms for conflict resolution must be a priority for any organization or state attempting to alter property systems. Intimately related to this problem is the inability of any of the models to guarantee that they will meet the single objective of poverty alleviation that unifies them all. To the extent that every means of land reform proposed above brings with it an understanding of how the social organization of property rights should look, they also imply who stands to gain the most from development policy and who does not. In this sense, all five models reinforce the idea that land reform as a panacea to Africa's development impasse is at its base unrealistic and that, like all large-scale reforms, it must coincide with a multitude of factors to bring about sustainable solutions to African poverty.

Finally, despite the backlash against the central state seen in calls to return to the 'local,' the findings of this paper suggest a renewed evaluation of the central state and its relation to local communities. The many apparent failings of decentralization in Africa reflects an overly eager trend to embrace a mythical 'local' while a healthier balance between the two may produce more sustainable solutions. Specifically when speaking about land law reform, the state is the only actor who can establish the precedence of due process and procedural fairness. The question then becomes how to balance encouraging states to play a larger role while not encouraging the corrupt practices that provoked the backlash in the first place. It seems then, that in many respects the admittedly imprecise suggestions by numerous authors that a 'hybrid' or 'mixed' system – be it of state power structures, legal pluralism or property systems - points the way to the most viable, albeit challenging, direction for future research to explore.

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