INTRODUCTION

Grand larceny - the stealing of other people’s moveable property – but what term in common law for the stealing of people’s land? Given the extraordinary extent of such theft within civil and common law jurisdictions it is odd there is no ready term for this crime. Perhaps that is the point; much of this land theft has been engineered by parliaments and aligned elites as perfectly legal. Therefore we must be content with the odd conjunction of ‘lawful theft’ or more pallid ‘dispossession’.

I would like to speak about land theft at scale on the African continent, and Patrick McAuslan’s immense contribution to countering this in his law development work. His contribution is largely unsung by beneficiaries, and who rightly see such land law changes as the least they are due. Still, they need identifying: 50 million or so landholders in Tanzania and Uganda and tens of millions others who have gained through Patrick’s less direct interventions in the many other African states where he has worked, or where paradigms he has part in developing have slipped across borders on their own (the case in South Sudan). Additionally, Patrick’s influence has been felt through the many social change agents and agencies that have made use of his analyses to help justify the case for reform to sceptical policy makers.

Of course Patrick has not moved land law in Africa into more just territory on his own. Readiness for change has existed where he has come to work and even been expressed in new formal policies. Africa

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does not lack a plethora of scholars and activists or even the odd visionary civil servant who were already on the case of tenure injustice, so to speak. It has usually been they or facilitating donors who have sought his assistance in the first place. Yet, it has often been the combination of Patrick’s experience, his facility with words, non-combative manner, and the authority he carries in a continent where several Anglophone chief justices, attorney generals, ministers and scholars have been his students or colleagues, that so often serves as tipping point in shifting the ground upon which majority urban and rural land interests are legally premised.

The fundamental issue which has been so repeatedly at stake is straightforward and not new: are the indigenous land interests of half a billion rural Africans today (one billion by 2050) worthy of respect as real property rights or not? Up until the 1990s virtually all national land statutes in Africa said not. It is preferable, such positions told us, to maintain rural populations as permissive occupants and users on lands declared the property of the state. Justifications were consistent country to country and embracing the Anglophone, Francophone and Lusophone arenas. First, as colonial laws had explained and delivered into self-fulfilling prophecy, African tenure was about using the land, not owning it. Second (and contradictorily) ownership of the soil was communal, in the hands of communities, clans, or tribes. Given the transformation of such aggregated polities into modern states, it was logical that the state take on this mantle, representing an up-scaling of communalism which served as founding notion of new African socialism in Guinea, Senegal and Tanzania in the 1960s, later in revolutionary Ethiopia and Mozambique, and more generally adopted elsewhere as simply the due right of the independent state as inheritor of colonial powers (Alden Wily, 2011a).²

However, the African state was neither then, nor since, a genuine aggregate of the people. In practice the African state, with exceptions among which the rule-of-law prone South Africa, Botswana and Mauritius are routinely noted, is shorthand for the government of the day, and the government of the day shorthand for an entity wherein separation of powers among the judiciary, executive and legislature is often smudged into oblivion and the whole interwoven by the commercial interests of senior actors and aligned social elites. That is, policy making in practice routinely places perceivable private interest above the public interest of the majority these institutions are charged to serve.

² There was also an obverse argument which dismissed communal tenure as capable of being property precisely because it was communal, not resonant with the individual-centric post-feudal tenure regimes of Europe, which by then had rooted property as a temporal and fungible commodity and dependent upon a state regime of documented recognition to exist.
True, gathering multi-party politics and electoral reforms since the 1990s have mitigated this along with an explosion of press freedom, civil society mobilization and voice, and some reduction in civil conflicts and war. Yet, as a host of political economists have attempted to explain, the point at which it becomes in the interest of the inter-connected socio-political and economic elite to suborn itself to regulation and place public interest above its own is still remote in Africa. Whether derived through Marxist analysis of class formation and political change or neoliberal analysis, a conclusion is shared that the machinery and instruments of the African state cannot yet be relied upon to place the rights and interests of the majority poor first (Bayart, 1993, Chabal and Daloz, 1999, Reno, 2000, North et al., 2009, Bernstein, 2004, 2010, Patnaik and Moyo, 2011). This reaches deeply into a fundamental concern of land-based economies: who owns and controls the land and its natural resources (forests, oil, minerals and water) matters. This is not to say that state actors are not benign. As North et al. observe, they want to secure their own land rights but not to see these so uniformly secure that their manoeuvrability in structuring socio-economic relations to their own advantage is constrained (pp 77-78).

At this point, promise of change without struggle is receding. After what now looks like a honeymoon era of democracy-led land policy and change between 1991-2007, the global land rush so prominently affecting sub Saharan Africa shows signs of revitalizing aligned state/business-led dispossessory strategies (Alden Wily, 2011b). This comes in a slow-down of reforms intended to rebalance a century of land and resource capture from citizens, and who remain predominantly poor.  

A great deal has been written on the global land rush, along with calculations of its dimensions. For our purposes here these points are most relevant; first, while buyers and lessees of vast tracts of African land are mainly foreign agribusiness, African governments actively encourage and facilitate this with extraordinarily cheap land deals (around 0.50 cents to one US dollar a hectare) with virtually total import and export duty waivers; second, that local entrepreneurs including politicians are partaking in the bonanza as mediators, speculative land buyers, and as local partners of new enterprise, helping to identify and secure expansive lands; third, that most of the lands being leased (on usually renewable terms) are lands which are under the ownership and/or administration of the state and therefore legally theirs to dispose of but also the customarily-held lands of hundreds of rural communities. Finally, although it is still early days in the current boom, so far the persuasive promises of roads, wells, schools

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3 61% of Africans in the region were living in poverty in 2008, 39% in extreme poverty. That had been a decline in the country proportion of poor since 1988 only in East Africa. Three quarters of poor people in Africa are rural and dependent upon land-based production. See http://www.ifad.org/prr2011/media/kit/factsheet_e.pdf

and especially jobs for affected communities have proven largely hollow, and made outside binding contracts. In brief, it is fair to perceive the new globalised land rush as the maturation of the dream of neoliberalism peddled in Africa since the late colonial era and which received such a strong boost in the structural adjustment requirements of World Bank led lending to African states from the late 1980 and gaining additional local traction from the shared transnational capital interests of local entrepreneurs; that is, that those with entrepreneurial spirit must be facilitated to take over the lands of the peasantry (and the increasingly valuable tiny parcels of millions of urban ‘squatters’ in Africa’s multiplying cities) for the sake of growth, despite the proven uncertainty of its promised trickle-down benefits to majorities. As Shivji has remarked, ‘This new phase of capitalist accumulation, based on the old form of accumulation – you could call it primitive accumulation or accumulation by dispossession – is rooted in the destruction of people and their livelihoods and the pillaging of resources: land, forests, minerals, water and bio-resources’ (2011:4).

The lands at stake, it may be necessary to point out, are not minor. Indeed, when one subtracts the limited land areas in sub Saharan Africa which are under statutorily defined private title (and which, outside of cities and towns are predominantly focused on the former white farming areas of Southern Africa) this leaves more than a billion hectares of lands variously defined as state property or so-called unowned public lands over which the state has legal dispositive authority (Alden Wily 2011b). As noted above, most of this is at one and the same time the indigenous tenure sector, upon which half a billion rural Africans are dependent, but within which their customary rights lack protection as real property rights. It is this legal conflict that has lain at the heart of rights-based land law reformism on the continent since 1990 and in which Patrick has played such a salient role.

Looking Back to Understand the Present

As preface, it is useful to remind ourselves how this legal injustice has come about. Patrick has written brilliantly on two old cases, alerting us to the critical linkages of European feudal law with modern African law (McAuslan, 2007). The first case pitted the customary inheritance law of the Irish against the practice of primogeniture under English common law. This was the case of Tanistry engineered for hearing in the Court of King’s Bench for this purpose (Dorsett, 2002). Of course the case was not really about inheritance so much as how to get hold of Irish lands at scale cheaply and legally, and in the process, bring into line the overly-independent Anglo-Irish nobles settled for some centuries in parts of

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5 e.g. http://mg.co.za/article/2011-03-10-tanzanias-biofuel-projects-promise-proves-barren
Ireland (Morrissey, 2004). This was the time of the revitalized conquest of Ireland (1603 under James I) and his Court’s determination to go beyond the Pale; that is, the 50 square miles around Dublin by then feebly controlled by English kings. The objective now was to suppress the Catholic Irish sufficiently to limit challenge to Protestantism, to bring the fickle frontier lordships back under fee-paying and military loyalty to the King of England, and to expand lucrative plantations (Morrissey, op cit.).

To do this legally was important for this was also the era in which the legal profession was coming into its own as the human glue keeping the fragile marriage of the Kingdoms of England and Scotland together, and giving a fillip to reforms designed to bring the rulings and jurisdiction of diverse local courts into a centralized, consistent, post-medieval ‘common English law’. The power of this superior law to dictate what was lawful and not lawful was an attribute anxiously sought by its advocates.

The problem facing the King of England and his advisers was the awkward fact that the Irish not only considered themselves the owners of their lands but also had a sophisticated legal system regulating society and tenure, a rich customary law known as *Brehon*, first written down in the 8th century (Ginnell, 1984). Most clans had their own *Brithem* (lawyer) to guide practices and resolve disputes among the different levels of family, service-based (community officials had special land privileges), and collective ownership of peat bogs, communal farms to feed the poor, and high grounds used for hunting. The task of the English was therefore both complex and simple: to establish that customary Irish landholding did not amount to real property, so that the King could lawfully take over these ‘unowned lands’.

The first step was easy. Sir John Davies for the defence argued that as a conquered people, the laws of the Irish could not survive (superior) English law; that as a Christian kingdom, Ireland must also follow the more Christian (i.e. Protestant) law of England; and that ‘the backward Irish’ could only benefit by coming under the ‘just and honourable English common law’ (Dorsett, op cit: 9-13).

This still left the tricky business of establishing that Irish land tenure could not be upheld by English common law itself. For this the court seized upon the Irish practice of Tanistry, by which heirs were elected to avoid clan and family lands falling into the hands of possibly incompetent eldest sons. Davies laid out the case for the superiority of primogeniture under English common law: as law must serve public good, and public good requires ‘certain ownership of land’, election demoralizes the expectations of the eldest son (‘even debauchery could result’). Indeed, such customs were the ‘true cause of the barbarism and desolation of the Irish’. Nor did election meet the test of reasonableness required by the new English common law; it was obvious, Davies insisted, that the oldest son was naturally the most
worthy man of blood and surname. Getting to the nub of the matter, such customs were also ‘prejudicial to the profit and prerogative of the King of England’, who, if allowing clan-based tenure to continue would deprive himself of the (lucrative) benefits and powers of being the ultimate owner (ibid).

Thus it was established that the Irish did not own their lands, and had a backward tenure system which had to be suppressed for their own good. In the absence of owners, the King of England was free to help himself to their lands. The Anglo-Irish lordships scurried to prove their allegiance to the English king with the help of a revitalized surrender and regrant programme (1606) to deal with their ‘defective titles’, many of which had been acquired by then under Brehon law. A massive land grab ensued, some 100,000 new Scottish and English settlers being given Irish lands by 1641 (Morrissey, op cit.). This colonisation made tenants and serfs of the Irish on their own customary lands, triggering centuries of rebellion and bloodshed still not entirely resolved.

The second case that Patrick refers to is the better-known as of Johnson and Graham’s Lessee v. William M’Intosh heard by the American Supreme Court in 1823 (McAuslan, 2007). This was a similarly engineered case to establish in law that indigenous populations did not own the lands they occupied and used, to again to facilitate state-supported land takings at scale. The case was Johnson and Graham’s Lessee v. William M’Intosh heard by the American Supreme Court in 1823 (US, 1823). To invalidate Indian sale of some 43,000 square miles of land to private investors (and in which results he had indirect personal interests), Chief Justice Marshall set about proving that Indians had illegally sold that tract. For this he brought the assumed rights of discovery to new levels; this purported to grant discoverers not only political sovereignty over territories taken, but also original ownership of all lands within those territories. With echoes of Davies’ argument, Marshall established in his court that property only devolves on the instructions of English law; English law says the King owns original title, and as descendant of the British Crown, only the new American States may therefore lawfully sell or grant those lands. Indians held ‘a mere right of usufruct and habitation, without power of alienation’ (ibid: 569).

In any event, Marshall argued, in a new twist, Indians could not have been real owners as they were not cultivators, neither settling nor developing the land in visible ways; they therefore could not have acquired ‘proprietary interest in the vast tracts of territory which they wandered over... they had no individual rights to land’ (ibid: 570). This had philosophical support; although John Stuart Mills was yet to
develop his defining thesis on property (1859), John Locke (1689) and Adam Smith (1776) had already established that property only comes into being by man’s labour.

Additionally, Marshall said, Indian lands were vacant, Indians having fled from bloody wars ahead of colonial agriculturalists, leaving the soil ‘no longer occupied’ (ibid: 591). Finally, he observed, Indians are heathens and savages and the force used to acquire title by conquest therefore ‘finds some excuse in the character and habits of the people’ (ibid: 589).

As we know, relatively few English escaped disposessory land law themselves. Around the same time as Marshall’s ruling, millions of rural poor were finally being ejected from their lands to make way for the roads, railways, factories, housing estates, and agricultural mechanization feeding the Industrial Revolution. They had in fact lost their original tenure some centuries through their customary lands being allocated over their heads to Norman nobility from the 12th century and had been separated more and more from controlling rights in the centuries since. 6 By 1660 this had allowed some better off tenants of the manors to secure freehold and copyhold terms but left the majority (around 90 per cent) 7 without title to their farms, and heavily dependent for livelihood upon the still expansive meadows, moors, fens and pastures maintained in each community domain (Linebaugh, 2010). Given the financial killings which titled lords of the lands could make from developing these lands, parliament, made up of wealthy (land) lords was only too willing to endorse some two hundred enactments enforcing enclosure and eviction or this or that commonage and tenant holdings between 1760 and 1830, eventually brought together into a single disposessory law as in the public interest through the General Inclosure Act (sic), 1845. This public interest, observed Hobsbawn, was ‘no more than … enlightened self-interest and profit seeking to transform the great mass of the rural population into freely mobile wage-workers’ (2011 (1962): 184). It was, the social historian, Thompson, adds ‘… a plain enough case of class robbery … played according to the … rules of property and law laid down by a parliament of property-owners and lawyers’ (1991 (1963): 237).

The Great Dispossession of Africans

European states had been no more dilatory than England in devising legal means of disposessing populations in latterly lucrative tropical climes through the late 18th and 19th centuries, aided ironically

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6 North et al., op cit: 77-109 provide a useful chronology of the legal steps taken in England over centuries towards turning rights in land into commodities. Hobsbawn, 2011 (1962), Chapter 8 and Thompson, 1991 (1963), Chapters 6 and 7 provide the social transformation context.

7 North et al. op cit: 93.
by otherwise liberal bills of rights entrenching elite-centred notions of property. By the time fourteen plenipotentiaries of European states (including America, Russia and the Ottoman Empire) met in Berlin in 1884-85 to divvy up Africa into preferential trade zones, they were therefore well equipped to ignore the fact that Africa was already owned. Accordingly, the early international law arising out of Berlin, the *General Act of the Berlin Conference on West Africa, 26 February 1885*, only required the signatories to inform each other when they expanded their coastal enclaves (Article 34) and to establish sufficient authority ‘to protect existing rights’, meaning their own rights, not those of natives (Article 35). ‘Natives’ were not entirely forgotten; the Powers (as they called themselves) were to hold a watching brief over the moral well-being of natives and to promote religious, scientific or charitable institutions ‘to bring home to them the blessings of civilization’ (Article 6).

In light of the latest scramble for lands and resources in Africa, it is worth noting that the original scramble from the 1880s was a scramble for markets and resources, with no initial intention to establish political colonies, already a financial burden on other continents. Millions of manufactures were lying unsold in Europe following the Great Depression which had begun in the 1970s (Hobsbawn, 1997 (1987): 62-67). Despite the financial crises (Hobsbawn reminds us the first Baring Banking House crisis was in 1890), there were, as we have to expect from such crises still plenty of entrepreneurs with money burning holes in their pockets looking for new investment opportunities. However, given the intensive competition among European enterprises already operating in Africa, it is not surprising that the free trade commitments of Berlin crumbled almost immediately. Economic protectionism segued quickly into political protectionism as the Powers found it necessary to create colonies or at least protectorates to secure their trading and resource-reaping advantages.

Proof that Africa was unowned became a crucial task in this project. Without this the greater expanse of the African hinterland could not be taken at will, or for free. Solutions were delivered in tens of sovereignty-cum-land laws enacted around the continent between 1896 and 1914 (Alden Wily, 2011c). Broadly, these established European heads of state as the ultimate owners of all lands and resources within vastly expanded colonies and only from whose hands acknowledged real property could derive. This could arise through registration of documents of approved past purchases from natives, applicable within existing coastal enclave or mission areas, or through new land grants to European entrepreneurs by Governors. While British and German administrations favoured issue of entitlement in absolute or

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8 For example, while doing away with feudal overlordship the Declaration of the Rights of Man (1789) and the subsequent Napoleonic Civil Code (1804) consolidated the notion of property as existing only by state if not kingly dictate meant that property owners in France remained few.
long lease titles, the French and Belgians found it easier to simply allocate millions of hectares of their new hinterland territories to home companies, encouraging formation of consortiums to increase their capacity, and requiring these investors to perform administrative tasks on the side, including tax collection. For example, by 1900 more than seventy percent of modern Gabon and Congo had been divided up into some forty-two different French company concessions (Gray, 2002: 142). In the odd instance, such as in German Cameroon, Ghana, and Sudan (in the case of Arabs only), chiefs or leading families who could prove ownership could also secure title, but only a handful had the means to do so (Alden Wily, 2011d). To double-lock vast valuable resource areas against local claims other laws were introduced to declare all unfarmed or unsettled native lands as wastelands, *herrenlos* or *terres sans maîtres*, and by default the direct property of governments (ibid).

The road to land robbery was not smooth. As land takings, protests, boycotts (of European goods being introduced by the ton in the cotton and kettle line), refusal to sell food to European traders (or to settlers in Anglophone and Lusophone possessions), and rebellion occurred up and down the continent, even where military force was applied (Alden Wily and Faure, forthcoming, Werner, 1993). This does not seem to have had much effect. Sometimes worldly-wise chiefs did better, such as when they played the colonizers at their own game, tackled colonial authorities in their own courts, and even in the late colonial years, brought complaints before the Trusteeship Council of the UN (Amanor, 2009, Larsson, 2001).

Still, the legal norms barely changed over the decades. If anything they became more draconian. What had begun in the 1880s as a device to capture the continent at no cost became more genuine conviction that African land rights did not have attributes of property, and that it was not in the natives own interests of progress to consider this to be so. Any form of traditional collective possession and land use had in particular to be extinguished as fast as possible. The exceptions were few, amongst which Liberia (at least until the 1950s), Ghana, Lesotho and Botswana stand out. Elsewhere, legal land theft was uniformly endured throughout the sub-continent. This built upon norms denying that lands other than those granted or acquired by approval of the state deserved protection as and limitation upon the right of Africans to acquire such lands or secure documentation beyond lands immediately used for housing or permanent cultivation. Indigenous, community-based tenure regimes were deemed incapable of delivering property and retained only as a useful tool for local regulation of occupation and use rights. Meanwhile across the continent all beach fronts, waters, oils, minerals, marshlands, and often also forests, woodlands and rangelands – i.e. cumulatively over 90 per cent of the land area of the sub-
continent – were stolen wholesale from local community owners, deemed to be the property of the state, and in Francophone and Lusophone states in particular, forests in particular made the private property of the state (Alden Wily and Faure, op cit.).

As 20th century demands that colonial administrations not just pay for themselves but make a profit for the home country, exploitation of resources and land takings grew. This was reinforced by the resource and manpower demands of two world wars and economic depression in-between. Turn of the century commitment to ‘peaceful native occupation’ dwindled. Local authorities found no difficulty in evicting thousands of African households in renewed bouts of land takings after both World Wars, to make way for home country enterprise in especially Francophone West Africa, for renewed European settlement in Anglophone Africa, or to hand over thousands of hectares to public-private lands schemes, such as launched by the Niger Basin Authority to green the desert, or by the British Ministry of Food to grow groundnuts in Tanganyika. Early international agribusiness was a main beneficiary, such as the oil palm companies in Ghana, Firestone in Liberia, or tea and fruit conglomerates in Kenya (Brooke Bond, Del Monte). As claims for independence loomed after 1945, colonial conviction hardened that native tendencies towards family and communal tenure were impeding the class formation needed to accelerate capitalist formation and make African economies viable. By then colonial administrators believed their own rhetoric that Africa had and remained unowned, and that they as benefactors, if anything, were owed.

This was not in itself rejected by local elites so much as raised their ire when they were excluded (Alden Wily and Faure, forthcoming). These elites variously had origins in wealthy slave and then trading families or chiefdoms, had gained immensely from the encouragement given to mission schools through the century, which had involved significant transfer of norms, not just literacy and religion, and were routinely co-opted in regional guards or as local administrators in the Indigenat or indirect rule Anglophone regimes from the 1930s. They had bought into and benefitted to an extend from the European tenure regimes introduced by colonizers and sought the same privileges as European settlers and companies enjoyed (Gray, op cit., Reno, op cit., Chabal and Daloz, op cit., Kanyinga et al., op cit., Amanor, 2008). As much for these groups as anyone, the many donor-funded programmes of individualization, titling and registration would be launched in the post-independence 1960s, intended to assist ‘energetic and rich Africans to acquire more land and bad ones less land thus creating landed and landless classes’ (Swynnerton, 1954).
The reality of engaged African class formation through the 20th century are important for this helps explain why so few new African nations (at least 40 states were created between 1956 and 1975) did not take independence as opportunity to liberate their people’s land rights from introduced European norms (Alden Wily, 2011a). Instead, with few exceptions, they entrenched those norms further, turning their own new administrations into landlords over all those lands not already alienated in absolute or leasehold title. During the late 1970s and 1980s, a wave of allocations rode through Africa, governments allocating these lands to their burgeoning numbers of parastatals, often run by associates of politicians and civil servants, and with increasing frequency to individuals, including from among policy making ranks, Land hoarding, unused lands in the hands of limited numbers of families, and speculation rose apace, even as peasant farm holding began to diminish sharply in average farm size, and arable land shortage and outright landlessness set in (Jayne et al., 2005).

Where affected communities protested loss of their lands at scale, ending in the case of Sudan in civil war, new legislation was introduced to remove any doubts as to the legality of land takings, such as by the Unregistered Land Act, 1970 in Sudan, the Land Reform Decree, 1975 in Uganda, the State Domain Law, 1963 in Gabon, the Land Tenure Law, 1974 of Cameroon, and the Rural Lands (Planning and Utilization) Law, 1973 in Tanzania, under which occupancy and use rights were extinguished on a more targeted basis, reminiscent of the early English enclosures. The upshot was that by 1990 millions of rural Africans had even less tenure security than they had possessed in 1890, and the risk of losing land in practice had grown exponentially.

Reforms and Patrick’s Role

Reform to national land laws began to occur in the 1990s, as part of wider democratization which saw half of all African states adopt multi-party governance by 2007, freedom of the press to soar, and control of corruption and rule of law to move to the forefront of aid agendas (NIC, 2008). Law reform was part of this, signalled by new constitutions (more than 25 on the continent between 1990 and 2010) along with law reform in virtually all sectors.

Today, at least 20 of Africa’s 57 mainland and island states have adopted entirely new land laws, have these in draft, or have established commissions of inquiry to develop new land policy (Alden Wily, 2011b). Just as many have enacted new forest laws, which should contribute significantly to reform in how this massive resource on the continent is tenured. It would be pleasing to declare that this wave of reform over two decades has liberated customary land rights from a century of subordination and
turned half a billion permissive occupants into acknowledged property owners across the continent. In only some cases has this been so. Seven states have made sufficient legal changes to warrant this claim. They may be named in order of achievement as Mozambique, Uganda, Tanzania, Benin, Burkina Faso, South Sudan and Kenya, with South Africa ambivalently included as an eighth case, given failure to sustain a constitutionally sound implementation law in respect of the land rights of some 90 per cent of the rural population (i.e. those living in the former homelands) (ibid). Another seven states have made more partial changes. Some improve opportunities for rural dwellers to secure at least their house and farm plots in customary titles but not their major shared land assets like rangelands and forests (e.g. Botswana, Namibia, Madagascar, Cote d’Ivoire). Others do provide for community land areas to be demarcated inclusive of both farms and commons but award lesser security to communities than for commercial or individual concessions (e.g. Angola). The country which virtually alone sustained customary rights as an absolute property right throughout the colonial and post-colonial 20th century has nevertheless failed to limit personalized capture of these rights by chiefs since (Amanor, 2009).

This still leaves 43 states which have either passed new land laws but with little change or even more negative effect upon customary rights (e.g. Ethiopia, Rwanda, Eritrea, Lesotho, Zambia and Niger), promised reforms but not delivered (e.g. Malawi, Swaziland, Senegal), or whose investigatory commissions are taking suspiciously many years to arrive at conclusions (e.g. Nigeria, Liberia, Sierra Leone, The Gambia, Chad). There are also countries like Gabon, DRC, Sudan, Cameroon, Mauritania, Mali, Central African Republic and Burundi which have avoided commitment to tenure reform altogether. Should they make changes it is most likely that these will be limited to provisions to administer existing norms more efficiently.

A main reason for limitations is the fact that many countries have only pledged to reforms in response to structural adjustment demands of international lending agencies since the late 1980s or early 1990s. New loans require accelerated commoditization of land and privatization of rights through revitalized programmes of individualization, titling and registration, to both encourage poor families to legally sell their farms and to more certainly define state land assets and free them from accepted customary occupancy and use constraints. Demands are also made that foreigners may have stronger legal rights to access land on secure and renewable terms, and that development conditions, ceilings on holding size, and other measures deemed impediments to advancement of commercial farming be removed. The World Bank’s ‘Doing Business’ programme has been on hand since the early 1990s to advise on the
drafting of investment promotion laws and which enactment across the continent perhaps better symbolizes the tenor of so-called land reforms since 1990 than new land laws themselves.

And yet, the transformations sought have not been entirely one way. For in the process of determining how to modernize tenure and its administration in accordance with the new neoliberalism, the fact that so many millions are still tenants of state has routinely come to be reviewed. Sometimes rights-based political change such as manifest especially in South Africa have been forceful in limiting market-led reformism, and given the powerful role of land grievances from the customary sector, most post-conflict economies at least begin by pledging greater equality in land relations and redress of the technically landless or insecure tenure of their rural populations and legal remedy to the uncertainty of occupancy for their rising city populations (e.g. Liberia, Sierra Leone, Angola, Namibia, Sudan).

The result is that even where this is only partially delivered in new legal paradigms, the status of customary land tenure - by far and away the major regime on the sub-continent – has everywhere become a prominent socio-political issue. This is even so in even the most recalcitrant of Congo Basin states, which has such lucrative logging, mining and agribusiness deals so well instituted that they see no reason to liberate these expansive lands (e.g. 85 per cent of Gabon is forested) from rent-seeking state ownership. The current land buying spree by mainly foreign agribusiness but also by post-crisis speculators with freed-up cash burning holes in their pockets predictably strengthens resistance to demands for change and pays for this with promises of trickle-down effects to land loss in the form of jobs. Difficulty in reconciling rising popular demand across the continent for protection of customary land interests and the demands of elites aligned with global investment interests may explain the slowness with which new land policies and/or laws have been coming to fruition over the last five years.

In these circumstances, the exceptions take on special weight. It is not incidental that Patrick McAuslan has been closely involved with some of the more successful rights-based land law reforms. Patrick’s role in Tanzania was most direct, as lead drafter of new land law in the mid 1990s with a national team of experts. The resulting laws now stand more painfully than ever as landmark legislation on the continent in triggering reforms which may, at least for the coming decade, have come to halt.

In the interim those laws impacted enormously upon the direction of new policies and/or legislation in Uganda (and where Patrick was also on hand to significantly improve the final shape of the land bill in 1997-98, and then later to nurture its application as well as draft crucial amendments on the critical matter of women’s land rights, which failed to appear at the last minute in the assented Land Act, 1998.
The Tanzanian and Ugandan land acts have since greatly influenced the tenor of land law in Africa’s newest state, South Sudan. Additionally, a more circuitous intervention by Patrick had an effect. This arose through a brave attempt by a US-funded project to develop and legally embed procedures for returning millions of hectares lost to people in the states of Southern Kordofan and (Southern) Blue Nile to state-engineered land grabbing between 1967 and 1983, and which had finally led African populations in those states to join the South’s war against the North (1984-2002). Under the North-South Peace Agreement (2005) those two states were retained by the North, now Sudan. Pursuing rather weakly-phrased commitments to restitution in the Comprehensive Peace Agreement (2005) the US-funded land project nevertheless sought out to help state authorities deliver on this and in the process to bring land relations in the two highly contested areas under modern customary (community-based) governance (Alden Wily, 2010). Patrick was invited to contribute to the last drafts of a radical new land chapter for the State Constitutions and to draft new land laws to apply the principles (McAuslan, 2006a). Khartoum rejected these outright, and which refusal helped pushed aggrieved populations in those two States back into civil war with Khartoum, raging until the present. In the meantime, the drafters of new land law in the south (now South Sudan) drew courage from that (failed) initiative north of the border, resulting in the remarkably straightforwardly just South Sudan Land Act, 2009.

Most recently, Kenyan drafters rather more directly cut and pasted provisions from Tanzania’s Land Act into their own new Land Act, 2012; provisions which may well prove to be the best protection of majority land interests in both urban and rural settings.

Elsewhere, key paradigms and procedures of the Tanzanian and Ugandan laws have been routinely held up as models to emulate by others (including myself) in new policy and law making processes in a host of African states from Namibia and Malawi to Liberia, Zambia, Gabon, Ghana and Cameroon, and which importantly include Francophone civil law jurisdictions. Patrick has himself been bearer of these models and the routes to majority land justice they entail through his in-country legal assistance work up and down the continent from Somaliland to Lesotho, through his writing, and through the many workshops and conferences in which he participates and writes for (McAuslan, 2006b).

The background to Patrick’s involvement in the lead Tanzanian land laws is important for a massive amount of spadework had already been undertaken, and rather well expressing the continent-wide tug of war between market-led and rights-based imperatives and which had to be rationalized in fair and binding law. The pre- eminent contribution on the latter was by Professor Issa Shivji, appointed to chair a
Presidential Commission of Inquiry into Land Matters, which sat during 1991 and 1992. The Commission travelled the country holding 277 public meetings, setting the tone thereafter for land commissions across the continent to be consultative. Its report (URT, 1994) covered multiple topics but with a firm focus on the status of the indigenous tenure of more than 20 million rural Tanzanians at the time (now around 32 million).

The Commissioners concluded their report with a list of eighteen recommended principles of national land policy. Inter alia, these aimed to fully devolve land rights governance to village level, taking advantage of Tanzania’s already existing regime of elected councils 8,367 villages (now 11,000+) and whose customary lands, exclusive of forest and wildlife reserves, covered around 70 per cent of the country. The Commission recommended that primary title be directly vested in village assemblies, the adult constituencies of each of these villages. Customary rights to these lands were to have equivalent force with rights obtained through the introduced British statutory forms of tenure (URT, op cit; 143-150). Non-village lands were to be known as national lands, owned by the national community, and administered by an autonomous National Land Commission. At one stroke these provisions together would have cut the President (and his government of the day) out of his radical entitlement to all lands in Tanzania and closed off millions of hectares for land takings without compensation.

Not surprisingly, this did not meet with favour by the post-socialist administration of President Mwinyi. From the 1980s the government had got used to passing ministerial orders (under the Rural Lands (Planning and Utilization) Act, 1973) extinguishing customary rights in specified areas to free these up for formal allocation to the growing ranks of private investors, parastatals and public-private partnerships for large-scale wheat, seed bean and other cultivation. These schemes focused upon the expansive pastoral lands of northern Tanzania (and under other policies, pastoralists were instructed to settled down as ranchers) (Wily, 1988). Evictions resulting from the nine or so Orders prompted challenges in the courts as unconstitutional (Maina, 2007). Alarmed, and frustrated at its hands being tied, the central state enacted the Regulation of Land Tenure (Established Villages) Act, 1992. This was presented as the means to resolve increasing disputes and uncertainty around lands which families had abandoned, voluntarily or otherwise, to settle in aggregated villages under the Villagization programme of the 1970s. Did the lands they left behind, and which were often within the boundaries of the general village land area, still belong to them, or were their rights now limited to the house plots and new farms which their elected village governments had allocated since? (ibid). The law claimed to solve the problem by extinguishing all customary land rights. Coincidentally or otherwise, the law was passed just
as Shivji’s Commission presented very different recommendations to the President, rooted in sustaining customary rights as a matter of founding principle. A view came to dominate that government was less seeking to resolve uncertainty by the law than rob the population of their lands to hand out to themselves and investors (Maina, op cit.).

A year later this law was struck down by the High Court as unconstitutional in failing to protect customary rights (October, 1993). This was upheld a year later following appeal by the Attorney-General. The core issue was whether customary rights had incidents of real property, which most colonial and post-colonial laws and courts had decided was not the case. Now Judge Nyalali of the Court of Appeal decided otherwise, ironically by reinterpreting the intentions of the British in the 1920s (Land Ordinance, 1923, still in force in 1994). He ruled in a manner which has since caught the imagination of many a land rights activist up in Africa in the oft-cited

‘We have considered this momentous issue with the judicial care it deserves. We realize that if the Deputy Attorney-General is correct, the most of the inhabitants of Tanzania mainland are no better than squatters in their own country. It is a serious proposition’ (Judgement, 1994, Attorney-General versus Lohay Akonaay and Another, Reported in [1995] 2 LRC 399).

The Judge’s timing was right. The Shivji’s Commission report was being circulated widely in civil society circles and international interest and pressure for rights-based reform was being roused. The Government of Tanzania could not avoid calling together civil society and state representatives to debate a new national land policy, finalized in June 1995. Cabinet had already decided it would not surrender ultimate title in the President (December 1994) and made this its bottom-line. Nevertheless, neighbouring Uganda would be inspired to take up that baton, doing away altogether with the feudal and colonial notion of vesting ultimate title in the state in its ground-breaking National Constitution of 1995, setting a precedent which no other African state has since emulated.

In other respects the Tanzanian Land Policy settled the issue of customary land rights in quite radical ways (MLHUD, 1995). Still, there was plenty of room for manoeuvre when it came to entrenching its 100 or so policy sub-statements into hard law. Pressure to conform with the positions of the state were considerable. This included resolve to not handicap its priority objective to fully commoditize land and pursue mass titling towards this, and which objectives had originally driven its willingness to change land law in the first instance (Alden Wily and Mbaya, 2001). Related, the state was also determined to free up lands for able foreign enterprise, threatening the mass capture of citizen’s land which the Shivji

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9 Lohay Akonaay and Another v. The Hon. Attorney-General, High Court of Tanzania at Arusha, Miscellaneous Civil Cause No. 1 of 1993 (Unreported) and Court of Appeal of Tanzania, Civil Appeal No. 31 of 1994, reported in [1995] 2 LRC 399.
The Commission had warned of. The ever centrifugal forces of power-holding were also in play, the post-Nyererian administration chafing to rid the country of the devolved village governance system established in the 1970s, and which had vested significant powers in community elected councils in 1982 legislation. By the mid 1990s some of the new generation ruling party politicians derided village government as a mistake of socialism along with the failed collective farming initiatives as impeding individualism (Wily, op cit.).

Additionally, as a means to retain as much land as possible in the hands of central government, perimeter boundaries of each village’s area were also being demarcated to exclude all but existing settlements and farms, with a little extra to spare for expansion. This would deprive the rural population of the traditional communal woodlands and pastures they so heavily depended upon to supplement farming. The new Policy could be interpreted as supporting this truncation of rights.

Further, following the new agricultural policy of 1987, the plan was that each village council would be granted a 99-year leasehold over the whole farming area and sub-lease parcels to village members (NLUPC, 2011). While the new Policy reneged on this and settled for an arrangement which limited the council to a management role, it made statutory titling compulsory to accelerate what investors thought of as a legal market in land. Nor was pressure relieved upon pastoralists to sedentize; in fact the Policy outlawed nomadism. This, again it could be interpreted, as a means of releasing much of the pastoral rangelands in the north for other purposes.

Meanwhile, prompted by the 1992 Rio Declaration, the natural resource sector was launching numerous initiatives to multiply the number of national forest and wildlife reserves; again, communities in mainly the north of the country were finding their communal assets subject to demarcation for this (Alden Wily, 1997).

Cumulatively, these pressures could remove most of the 61 million hectares making up the customary land sector if the new Land Policy was delivered into law weakening the protection of untitled customary rights beyond the farm. At worst, village lands could be confined to the variously calculated six to eleven per cent of the country area under active cultivation.¹⁰ The choice before the drafters of the new land laws was whether to entrench these dispossessions or to see through real reforms in the status of indigenous tenure, as recommended by the Shivji Commission. In McAuslan’s hands, closing

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¹⁰ In fact smallholder cultivators were believed to routinely cultivate only four million hectares in 2009 (Kironde, 2009). Also see Angel et al., 2010, and http://data.worldbank.org/indicator/AG.LND.ARBL.HA.PC/countries
the gaps against land theft, making the law comprehensive and watertight in procedure to limit manipulation, and logical and workable, and yet not entirely disabling clear state determination to retain governing privileges and thus risking the rejection of the reforms altogether appear to have been imperatives.

The resulting draft (1996) was eventually enacted as two laws, the Land Act, 1999 and Village Land Act, 1999. While surprising little in substance was altered in the interim, inconsistencies arose in the last minute transposition into two bills. One of the more important for the focus here upon customary lands was the status of those 55 million or so hectares of lands within the village land sector as mentioned above are neither occupied nor permanently farmed but deliberately retained for water catchment and limitation of soil erosion without which much of the lowland farming practised cannot function, and for maintenance of wood, pasture and fishing resources, and as zones for sustainable shifting cultivation in the present or more permanent farming in the future for expanding populations. According to the Land Act but not the Village Land Act such presently unoccupied lands may be classified as national or state lands (i.e. General Lands in the terminology of the law) and made available by government to the growing queue of local elites and foreign investors.\textsuperscript{11}

Helpfully, other sections in the laws aid the curtailment of such theft, reducing central government to recurrently beg rural communities since to voluntarily surrender ‘unutilized lands’ for the Tanzania Investment Centre to dispose of. Not surprisingly, response has been limited given the real utility of these uncultivated lands to rural livelihood. This, along with other strictures upon land takings from the village land sector in the law have been sufficiently frustrating to private enterprise that the Tanzanian National Business Council under the chair of the President Kikwete finally issued the \textit{Kilimo Kwanza Resolution} (‘Farming First’) in 2009. This makes amendment of the Village Land Act ‘to facilitate access to village lands’ a pillar of its programme. Popular resistance to passage of such a bill has grown in an increasingly wary peasant sector which sees its land assets sought on all sides. Local alarm has most recently escalated as some villages who were persuaded to release their communal properties have found the promised benefits of jobs, wells and facilities not materializing, and worse, in some cases, see their former lands sold off by bankrupted European investors to other investors with whom they have no benefit-sharing deals (Redfern, 2011, Kitabu, 2011).

\textsuperscript{11} As per contradictory definitions of village land in the Land Act and Village Land Act.
This is not to say that laws cannot be changed. Largely pro-investors amendments have already been made to the Land Act, 1999 (McAuslan, forthcoming). Nor, as the 2010 Tanzania Human Rights Report elaborated, has vastly improved land law for the majority entirely prevented unlawful evictions by state agencies, or halted the designation of village lands as Game Controlled Areas (Legal and Human Rights Centre, 2010). Nevertheless, the new laws do impose brakes on unjust actions, provide grounds for court cases, and offer fairly accessible protection on less complicated matters than mortgages as affecting the poor urban and rural majority.

What are these legal protections devised by McAuslan’s team? Focusing again on the pre-1999 vulnerability of all customarily-held lands, these may be listed as follows. Most fundamentally, the laws gave customary interests force as property, of equal status and effect as awarded a formally registered, state-granted right in land. This assures customary landowners equivalent compensation when their lands are required for public purposes. This has special pertinence in Tanzania in that it has been precisely on this point that much litigation in the past has been raised, including cases mentioned earlier.\(^\text{12}\) The procedures for acquisition of village lands for public interest were elaborated in such a way in especially Regulations under the acts (2001) and at such cost to the state (including compensation for removal costs, loss of livelihood, etc, not just the open market value of the land itself) that this has since has arguably significantly limited compulsory acquisition since to more genuinely essential public purposes. For example, cost constraints forced the central forestry department after 1999 to abandon plans to establish new state forest reserves and to find more community-based approaches to expanding protected areas, a task in which it has been unusually successful (Alden Wily, 2012a).

Additionally, both by terminology and provisions, the laws have taken much of the sting out of the power of the President and his Commissioner of Lands to help themselves to untitled lands. In the first instance, while transfers of land from village to general or reserved land are permitted, the procedures entrenched are sufficiently laborious and demanding of local consultation and consent, that, again, random transfers are reduced to the more necessary. The powers of the President (in fact, his Land Commissioner) were truncated with precise clarification as to these as powers of trusteeship only. With all land declared public land (as was already the case before these new land laws) but with untitled customary rights now given the same protection as titled rights, the classical distinction of private and public land has been thoroughly undercut, as also the implication of public land as unowned land. That

\(^{12}\) E.g. the Meru Land Case, which went through various courts from 1948-52, and did lead to a concessionary amendment in 1950 to the Land Ordinance, 1923; to a series of cases reported upon by Maina, op cit., and the Lohay Akonaay and Another v. the Hon. Attorney-General case of 1993-1994.
is, since 2001 when the new land laws came into force, all land in Tanzania has an owner, customary or otherwise, titled or untitled.

The key equivalency of granted and customary rights was delivered in subtle but powerful ways. For the first time, it actually became advantageous in Tanzania to hold a customary rather than statutory state-granted right; the term of customary rights are unlimited, the identity of owners more flexible, conditions of tenure locally determinable, and revenue deriving from issue of formal deeds in their regard able to be retained by the community. The protection of untitled customary rights is particularly powerful, combined with the drafting team’s ignoring of the policy directive to make formalization of rights compulsory. (Other directives were ignored or worked around, such as failing to outlaw nomadism). Any hint that titling meant extinction of customary rights and replacement of these with non-customary rights such as deriving from introduced European tenure norms was cast out with clarity in the law that registration of customary entitlements was simply a matter of formalization of what existed, that is, certification, not conversionary titling as had become the convention across the continent. Just as critical, the new laws made it crystal clear that customary rights in land could be owned by not just individuals, but couples, families, groups or whole communities as determined appropriate by the community. The meant that collectively owned local forests, pastures and marshlands were at once acknowledged as owned. This tenure may be double-locked in registers and issued title deeds of collective ownership if desired.

Perhaps most powerfully, the Village Land Act facilitated the inclusion of these collective assets by requiring that these communal lands be identified and described in the village land register prior to adjudication and issue of title deeds by the village council over house and farm plots owned by individual families in the community. This was complemented by the flexibility offered in the law as to how perimeter boundaries of each village area may be defined and formalized in issue of Certificates of Village Land, confirming the right of the elected village council to regulate all land matters within those boundaries. Contrary to the above-mentioned preference of officialdom that communal lands be excluded from these village land areas, the Village Land Act made it lawful for boundaries to be defined through inter-village agreement. As expected, such consultation sees villages include all their lands, leaving no unowned areas between their respective areas. Such agreement has since been made compulsory in the Land Use Planning Act, 2007.

The land laws also took seriously the National Land Policy’s instruction that the elected village councils have administrative authority over land matters. The designation of these bodies as the legal land
manager secured the existence of community-based governance, almost uniquely developed on the continent (Ethiopia developed a similar regime), and laying a basis for further empowerment rather than demise through a local government reform programme which is still ongoing. This is not to say that battles of power between district councils and village councils do not continue to rage, not least given the financial vulnerability of district councils to central state dictate (Alden Wily, 2011c).

Additionally, the land laws clarified once and for all the conundrums existing between customary and more recent community-derived allocations under the Villagization programme, by explicating customary rights in their true colours, as rights deriving from and sustained by community consensus, and not necessarily ancient in their origins. This took much of the steam out of conflicting customary and village-based land claims. That is, the law threw back decisions as to what land rights existed upon the living community to decide, provided these decisions do not contradict basic human rights and principles of equity and justice.

Other provisions of the new land laws extended protection of customary rights as they exist in the peri-urban and even urban domain. So too are customary rights protected in reserved areas, unless explicitly extinguished, at long last removing the presumption that the setting aside of a land area for protection purposes necessarily involves a transfer of rights from community to state. Both developments in the law have positive implications for land rights and resource governance which space does not allow to be elaborated here.

It would be inaccurate to describe the Tanzanian land laws as perfect. Indeed, I among others have laid down criticisms (Alden Wily, 2003). Some criticisms, such as made by Manji (2005) and others as to the highly procedural and thus administrative nature of the laws as defeating flexibility have proven unfounded. As Patrick himself has argued (McAuslan, 1998) the devil is in the detail and it is the careful and comprehensive entrenchment of procedure in the laws which have helped to curtail wilful misinterpretation of principles or abuse of process by self-interested parties, from land developers to the state itself. The jury is still out on a number of other issues, such as whether the supply of no fewer than 50 forms for village land managers to use helps or hinders their uptake of land administration, or whether communities should have been permitted to sell their lands directly to non-villagers and local and foreign entrepreneurs. Patrick on his own admission did not support the sanction against the latter in the National Land Policy (personal communication). However, this paternalist protection has in fact proven a bulwark against what almost certainly would have been a plethora of land sales or leases by less than transparent or well-informed village authorities, which many communities may have come to
regret. As illustrated earlier, villages have enough difficulties at this point with the land seeking demands of state authorities. In sum, there are a multiple of other positives as well as shortcomings in the laws not covered here. But it may be safely asserted that as a whole the new land laws assure 32 million or so Tanzanians a level of tenure protection they did not previously enjoy.

The laws have also come to be seen as a gold standard on the continent, and in matters beyond the central issue of collective land interests discussed above, such as in treatment of women’s land rights, the handling of secondary rights and the quite complicated arrangements which pastoralists need to make to secure land access, and not least of all, the new security of occupancy endowed by the land laws upon growing millions of untitled urban and peri-urban occupants noted in passing above, together with a practical plan for regularization of such interests. Within Tanzania itself, McAuslan was brought back to lead the drafting of new forest law (Forest Act, 2002). This also set a new gold standard in sub Saharan Africa for devolved natural resource conservation and governance, including enabling communities to declare their own forest reserves out of village lands and to apply to manage, and even eventually become owners of national reserves created out of their original customary property (Alden Wily, 2012a).

In this presentation I have focused on only one aspect of Patrick’s legal drafting assistance in the agrarian world, and largely upon his contribution in Tanzania. As those who have read or worked with the professor/development expert know, there are a host of other aspects which he has helped enormously to reform and in a host of countries beyond sub Saharan Africa including states as far afield as Afghanistan (and more comfortably!) the Maldives. And yet even on this one point on the status of indigenous land rights described herein, Patrick’s contribution to the liberation of the rights of millions is among the handful of peerless. Thanks to him, there is a good deal less ‘grand larceny’ in land matters in agrarian economies than might otherwise exist today, particularly in Africa. He, with others, has contributed enormously to the long overdue but still incomplete demise of ideas of that continent as terra nullius.

Cited References


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