Demystifying Contemporary Customary Land Tenure in Legally Plural Southern Africa

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Abstract

In this article, we seek to redebate the question: what actually do we mean when we talk of customary land tenure system in the post-independence southern African region? We frame the debate within the concept of legal pluralism and apply a critical hermeneutic approach to analyse terms and vocabulary that are often used to construct the meaning and discourse of customary tenure in Africa. Hermeneutics emphasises the role of meaning in enabling us to gain knowledge or constrain us from gaining knowledge of phenomena, objects and concepts. We ask very serious, but sometimes unconventional, questions about the way the concept of customary tenure gets to be framed in contemporary writings. The questions include whether terms such as "right", "property", "communal" and "traditional" are appropriate descriptors to use in the domain of customary land tenure. Yet a more controversial, albeit very important, question we raise is whether customary land tenure system is, a priori, discriminatory to women. In the article, we make two major conclusions: first, contemporary customary tenure is a fundamentally bastardised version resulting from several initiatives of state intervention, and second, uncritical deployment of foreign concepts by researchers has significantly constrained our opportunities to understand what customary tenure is. In the light of this, we recommend that future research critically scrutinise the meaning of terms and the impact of state policies on customary tenure.

Keywords: customary land; tenure security; communal lands; women; farm investment; property

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Introduction

Customary land tenure is Africa's most prevalent property system (Barry and Danso 2014; Ubink 2018) with 90 per cent of the continent's land held under this system. In most nations, the living customary law at community level usually governs customary land tenure practices particularly in rural areas where customary courts are more accessible than other legal systems (United Nations 2013). The Commission for Gender Equality (2009) defines land tenure as the terms and conditions on which land is held, used, transacted and transferred. It is common to find a mixture of multiple justice systems, such as the living customary law, formal customary law, religious law and statutory law, coexisting in diverse and complex societies (Ananda, Moseti, and Mugehera 2020; Mnisi 2011; United Nations 2013). Customary land tenure in Africa is complex and manifests itself through multiple versions as it is usually enforced verbally and at times written as noted by the United Nations (2013). It can be said to be observed practices invested in binding authority, relational, normative, negotiable making it flexible, and emerging from what people believe they ought to do in the light of the ever-changing socio-economic and political environment (Budlender et al. 2011; Diala 2017; Ubink, 2018; Zenker and Hoenhe 2018).

Mnisi (2011) identified "customary courts" in the South African context while Ubink (2018) referred to "customary justice systems" for the Namibian and Ghanaian context as accessible and affordable legal vehicles accessible to the rural resource-poor communities. Participation by community members in these courts is voluntary, taking the form of discussion forums where group consensus carries the day (Mnisi 2011). It appears that these community-based courts are stratified in accordance with the way communities are structured. It is therefore common that land tenure arrangements can be negotiated and concluded at household or family level, by a clan, through a village headman or at the level of the chief (Mnisi 2011; Ncube 2018). In practice, most land tenure agreements and deals are resolved at much lower customary courts, that is household, family, clan, and headman, and do not even reach the chief or traditional leader level courts (Mnisi 2011; Ncube 2018). However, where customary courts have been found to be unjust owing to entrenched colonial and apartheid patriarchal legal clauses, women have opted to use higher statutory courts in the case of South Africa (Mnisi 2011). The Commission for Gender Equality (2018) recently interrogated the House of Traditional Leaders which was recognised through negotiations by the Convention for a Democratic South Africa (CODESA) and later embodied in Chapter 12 (s211 and s212) of the Constitution (RSA 1996). The findings by the Commission for Gender Equality indicate that the House of Traditional Leaders has not yet fully embraced or is not enforcing the gender equitable customary interests of communities.

Studies by Budlender et al. (2011), Mnisi (2011) and Ubink (2018) have unearthed a legal disconnect and frustration emanating from African states' attempts to improve tenure security through various mechanisms such as land reform, and formalised, as well as professionalised customary courts at the traditional leader or chief's level. This process tends to adopt foreign and colonial norms which clash with community norms. Community norms are diverse, ever-changing, non-professional living customary practice as the abovementioned authors noted. The indigenous property system predates colonial times; one would assume by now that the customary tenure system should be the most understood concept by academics and policymakers. In contrast, recent studies found that our knowledge of customary land tenure is poor and sometimes misleading (Djurfeldt 2020; Mnisi 2011; Ngcukaitobi 2018).

In this article, we present an effort to redebate the question: What do we mean when we talk of landed property relations that fall outside the scope of the freehold tenure in African communities (Bennett 2008; Cousins 2008; Ngcukaitobi 2018; Pottier 2005)? The theme of customary land tenure has been researched and written on extensively, but "no single topic concerning Africa has produced so large a poor literature" (Bohannan as quoted in Bennett 2008, 138). This poverty of literature has nothing to do with want of empirical data, but it is because often researchers misinterpret the data.

One of the leading causes is that we tend to root our understanding of these tenure regimes in a past of which we know little. Peters (2013, 544) laments that "colonial overrule fundamentally reshaped social relations around land, conceptions of property, links between land and authority and between place and identity, with effects that continue to reverberate today". Early anthropological works (Hunter 1936; Schapera 1955) have attempted to recreate the nature of African property systems in land before the conquest. However, Delius (2008) counters that it is impossible to know precisely in what way African societies dealt with land before contact with the West because they did not make and leave written records. All that we can know of the past is from research work mainly by historians and anthropologists, which, for all its worth, has fundamental limitations.

Pottier (2005, 55) preambles his extensive review of customary land tenure in sub-Saharan Africa by posing the question: "Today, what exactly do we (and others) mean by the term 'customary land tenure'?" Peters (2013) outlines the historical heritage of the colonial construction and post-colonial reproduction of customary tenure and its denial of full property to landholders. "When today we refer to customary land tenure, we may be referring in part to a feat of social engineering that allowed western legal concepts to slip in through the back door of so-called native courts" (Pottier 2005, 59).

In this argument, Pottier underscores the thesis that the customary tenure we experience and comment about today is a result of a deformed version of customary law. This

argument is corroborated by Mnisi (2011). Diala (2017) argues that poorly defined customary law stems from lack of understanding that the law is by nature flexible and emergent. For this reason, studies that seek to understand costmary tenure should be interdisciplinary in approach and possess tools that enable them to identify and capture multiple complexities of legally plural systems. This critique is in agreement with Van Averbeke's (2002) conclusion that study of indigenous knowledge and technology requires the use of research methods that do not form part of the conventional toolbox of agrarian scientists.

Zenker and Hoenhe (2018) reiterate that customary law today, which governs land tenure and associated agrarian practices, should not be thought to be what it was in the past as it is constantly evolving and therefore not static. This argument is very central to this article. This can lighten the burden to concern ourselves with the lost past but yet deprives us of the opportunity to conduct meta-analysis of the distant past, present and future state of customary tenure. In this article, we aim to re-engage the debate about what customary land tenure is as it is practised in different southern African communities and then suggest better ways of looking at the subject matter.

The central argument of this article is that efforts to study and reach valuable conclusions about the customary land tenure system in the contemporary era have been constrained by a lack of rigorous interpretational scrutiny of the key theoretical concepts commonly deployed in the land tenure discourse. Such concepts include the legal orders used to regulate tenure, the vocabularies used to characterise tenure systems, and the propriety of deploying exotic standards such as rights and property.

This theoretical error has fed into the ongoing assertion that customary land tenure systems do not offer security of tenure and that they discriminate against women. In the article, we use a critical literature analysis driven by hermetical techniques to interrogate these issues. First, we highlight the complexity of customary land tenure by exposing its paradigmatic inclinations. Second, we debate customary land tenure within contextual themes such as general legal considerations, the definitional and conceptual contestations, the use of rights language, and gendered approaches incorporating women's rights. Finally, we conclude by summarising the main ideas raised in the debate and hint at areas for further research.

Methods and Theoretical Inclination

The character of customary land tenure system is more complex than what descriptive studies present to the readership primarily because they tend to pay insufficient attention to conceptual issues. Journal papers and books that refer to customary land tenure in the sub-Saharan African region were reviewed. The literature review was concerned mainly with picking some of the major issues that drive the contemporary customary land

tenure debates. To identify these drivers, the relevant journal papers and book chapters were read in full. The critical literature analytical technique was not to tabulate the number of times a particular conclusion is reached in bodies of research, but rather to ask more transfactual questions about why such conclusions are drawn and the extent to which they pose as true reflections of the phenomena and objects they set out to describe.

The literature analysis process is underpinned by a hermeneutic argument that an empirical conclusion is as good as its ability to stay true to the semantic and contextual meanings of the phenomena it seeks to describe. The analysis, therefore, takes seriously conceptual factors that include colonial incorporation and its accompanying offshoots such as engineering and bastardisation of local social and legal institutions that significantly reshaped the practices of land allocation and administration under customary systems across the region.

In dealing with these factors, the analysis is guided by recognition of the plural social and legal orders within which contemporary customary tenure exists and is practised. Second, the analysis raises hermeneutic questions about the propriety of various vocabularies that commentators deploy to represent multiple aspects of customary tenure. These factors have left an enduring hermeneutic impact on the way in which we, in the post-colonial era, interpret tenure-related terms such as communal, customary, property, and rights in land. This has also compromised our ability to critically question what customary tenure can offer to women's access to land and the level of tenure security it offers to its beneficiaries. Using a hermeneutic oriented and context informed literature analysis, we deal with some of these challenges and add useful insights to the ongoing debates about customary land tenure.

Findings and Analytical Arguments

Legal Pluralism and Land Administration

All countries in southern Africa use multiple legal systems of determining use of and access to land (Bennet and Peart 1991; Chigbu 2019; Mutangadura 2004; Zenker and Hoenhe 2018) owing to the histories of colonial incorporation that used tactics such as the engineering of legal and social orders (Ngcukaitobi 2018). The existence of the multiple legal systems may be explained through legal pluralism, a concept that has long been rejected in legal studies but gained currency at the turn of the century (Diala 2017; Peters 2006). Legal pluralism implies that there is a choice to opt for one legal system over another (Mnisi 2011; Peters 2006, 262). In southern Africa, the existence of Roman–Dutch law, English law, statute law and customary, as well as indigenous laws is a stark illustration of the pluralist legal reality. These laws are usually subordinate to

national constitutions, which embody the supreme law for each country (see, for example, section 2 of the Constitution of the Republic of South Africa 1996).

South Africa, Botswana, Lesotho, Swaziland and Zimbabwe use customary and Roman–Dutch laws. Mozambique and Angola use customary and Portuguese laws, whereas English law and customary law are used in Uganda, Zambia, Kenya, Tanzania and Malawi (Hebinck and Mango 2008; Walker 2002). In these countries, these legal bodies co-exist in a hierarchical order of supremacy with statutory law leading the pack. Although customary law is officially recognised in South Africa, the South African Constitution approaches it with notorious ambivalence. This has led some scholars such as Bennet (2008) to question whether the corpus of customary law as a legal system is constitutional and whether it is truly "official" law. Tautologically, the Constitution instructs that courts must apply provisions of customary law when that law is applicable (see section 211(3) of the Constitution (RSA 1996); White 2015, 3). This may imply that customary law is practically adjunctive, applicable only when and where it does not contravene principles of statutory law and the Constitution.

In South Africa, statutory law covers all land including private, estate or commercial lands of which ownership vests in individuals or corporate entities as either freehold or leasehold and customary tenures in which land rights are vested in communities (Cousins 2008). It covers the latter in tandem with customary law in an ill-defined and contested power-sharing arrangement, which the Land Rights Bill of 1999 and the Communal Land Rights Act of 2004 have tried but failed to resolve in South Africa (RSA 1999, 2004).

Communal, African, Traditional, Local, Customary Land Tenure?

Our understanding of the customary tenure has been significantly obstructed by tendencies to deploy exotic terminologies, some of which are ill-conceived. In Zimbabwe, for instance, customary tenure is called communal or trust tenure (Cheater 1990), in Botswana it is called tribal tenure, whereas in South Africa it is called traditional or communal tenure (Cousins 2008). These differences are a function of the reality that the post-colonial political economy has failed to critically confront the past and redefine the present in ways that adequately articulate with de facto realities. This has led to confusion and uncertainty about what customary tenure actually is. The confusion is not so much because multiple terms are used to denote a single phenomenon, but rather because these terms do not mean the same thing.

The ensuing confusion has been compounded by the reality that several post-independence states have subjected customary land to various programmes of tenure reform. In Kenya, individual titling was implemented in the 1960s (Mackenzie 1990; Platteau 2000). In Zambia, Uganda and Mozambique, formal demarcation and

registration of land parcels have been conducted, while South Africa is feverishly considering to follow suit under its Tenure Reform Programme (Walker 2002).

Use of the term communal has been critiqued by several commentators including Cousins (2008) who argues that it implies collective rights and ownership of resources while in actual fact customary tenure is a mixture of rights including individual ones in residential lands and arable plots and group rights in pasture and forestry lands. Land rights in residential and arable lands are held by heads of household on behalf of the household (Hebinck and Mango 2008). The pasture and forest lands in which all members of the local community are allowed to have access of use are not governed by a principle of the commons; but rather such access is an incidence of customary institutions and consideration of community livelihood priorities and practices. To the extent that it is used to explain customary tenure, the term communal is misleading (Cousins 2008).

There is another tendency to refer to customary tenure as "African land tenure system" (Asabere 1994; Gyasi 1994; Lund 2000). Such thinking is partly motivated by the fact that the first group of people to conduct systematic studies of land tenure in Africa were not African themselves. Simply designating the land deals that they found in Africa as "African tenure" therefore provided the simplest means of describing "the other" in relation to what they knew from home. It was also partly owing to failure of foreign researchers to apprehend variations across the continent, and even between different ethnic groupings.

In as much as there are significant commonalities in ways communities deal in customary lands across the subregion, customs around which it organises largely differ from one ethnic group to the other. For instance, in Malawi, access by married couples to customary lands significantly depends on whether the marriage is matrilineal or patrilineal. In the former, rights vest in the wife and the opposite applies in the latter (Namubiru-Mwaura 2014). In Nigeria, Kenya and Uganda, the customs allow childless widows to marry a woman, and use her deceased husband's land to pay bride wealth. In this case the widow becomes the female husband and assumes social and legal fatherhood of all the children her wife produces in the marriage. This custom enables childless widows to retain access to their husbands' lands (Gray and Kevane 1999). Another example is Eritrea in which two types of customary tenure are found. The first type is family tenure locally called *risti*. Under *risti* land is owned in perpetuity by a family group which traces its origins to a common father. The second type is *diessa* under which individuals or households are allocated arable plots for use but such plots are subject to reallocation after every seven years (Huggins and Ochieng 2005).

In the light of these multiple variations, therefore, researchers may need to ask the question: which part of Africa are we referring to when we say African landed property

systems? Even in the same country, customs are significantly differentiated and are plural. Tendencies to ignore this plurality and differentiation are largely to blame for the ongoing poverty of customary tenure knowledge.

Another pocket of the land and agrarian scholarship refers to customary tenure as "traditional tenure" (Benneh 1971). This choice of name derives mainly from the realisation that African village leaders and administrators of land such as chiefs and headmen often refer to the past and histories of their forbearers when defending the rights of their communities on the lands they occupy. Many land rights claimed by tribes and other customary groupings are traced back to histories of intertribal conquest and complex processes of succession and bequeathing. Such historical genealogies and renditions are often resorted to when settling land disputes and explaining why they (the village leaders) propose certain judgments. However, calling customary tenure "traditional" presupposes continuity of an unchanging primordial practice. Customary tenure has changed through long histories of state interventions and its own internally driven initiatives to adapt to forces of social change such as population growth, literacy and changing livelihood systems and related land use practices.

Furthermore, protagonists of the traditionalist nomenclature miss a very significant hermeneutic point. According to the Oxford Advanced Learner's Dictionary (2015), tradition means "a way of doing something that has existed for a long time among a particular group of people". Its derivatives such as traditionalist and traditionalism should be understood in this light. By so arguing, it is clear that even the freehold individual title systems are traditions given that they have been practised in Europe since the time of enclosures in the eighteenth century. Perhaps it is high time we invited explanations for why the way of allocating and holding land in Africa is said to be a tradition whereas the more than four-century old Eurocentric freehold practice is considered otherwise.

Yet the quandary does not get resolved by resorting to the concept of locality. Of late, all land dealings that are not directly governed by statutory law have sometimes been referred to as "local law" or "local rules". Designating these practices as local law may not be appropriate because they are not legalistic, but processes whose legitimacy and wisdom are derived from revered codes of socially acceptable practice that survive across generations and get to be transmitted down through oral tradition. Where need be, such codes are reinterpreted and modified by older people in whom, by virtue of their advanced ages, vests the licence of gerontocratic wisdom.

Furthermore, it is not without problems either to say that villagers use local rules when apportioning land. This implies that there is a set of rules drawn by majority participation in a particular village or any other level of social organisation. It needs to be noted that rules are not similar to customs. Whereas rules are more contemporaneous

because they can be formed now to deal with current issues of social practice, customs are historical and embedded in the ages-lived sociocultural genealogies of a set of people. Grade five pupils for instance can come together and set rules of classroom conduct today to guide against a possible unacceptable behaviour, but they may not do just the same with classroom customs. Besides, it is not clear what is meant by local. Is it a village, a ward, a district, a province or what? Of late the concept of local mainly in the social science epistemology has been conflated with the concept of indigeneity (for example, Fabricius, Scholes, and Cundill 2006). This has happened because of tendencies to uncritically assume that those who reside in a given locale necessarily originate from there.

Tendencies to perceive and seek to explain processes of social phenomena in localistic categories climaxed in the sustainable development decade of the 1990s. Largely, the sustainable development discourse and policy ethic emphasised and still does appreciation of initiatives and practices of local people, especially rural residents of developing nations. Arguably, this is seen as a way of immersing research mindsets and practices in local realities. This is happening at the time when the World Bank's Land Policy Department is shifting from top-down land tenure interventionist paradigm which had been characterised by state and externally led tenure reform projects to one that builds on local village administrative structures using local customs and practices.

Residential and arable lands in which plot holders enjoy individual access are allocated and administered using customs observed within a particular jurisdictional polity that is led by a tribal leadership. Tendencies to think that land is allocated on the basis of social acceptance by or according to membership of a community (Berry 1993; Cousins 2008, 2009; Walker 2002) are questionable. First, one needs to define what the scope of community is. Besides, such thinking assumes that members of a community need to reach a consensus each time there is a person looking for land. Of course discussions regarding who is looking for the land, where available or unused land is and how to allocate it are often held at different levels of village organisation, but such discussions are framed and guided by the customs observed by the polity. Moreover the language of discussion and factors that get to be considered in such discussions are predefined by the prevailing ethic of the customary socio-justice system.

There is a need to draw a line between community decisions and the customs of a community. Whereas community refers to people or social groupings that live in a particular area, community decision means the choices or judgements that such people make about issues that concern them, in this case the allocation of land. Customs are about long-time lived and accepted ways of doing things in a community, and although they change and modify, these ways date back to a stretched past and they form a special alloy around which the collective identity of people in a community galvanises.

Rights in Land: A Measure of Standards Misapplied

Another problem is that we use foreign concepts such as "right" to analyse customary tenure. Pottier (2005, 60) charges that talking of rights in customary land tenure systems is "corruption" that results from "excessive standardisation and misreading of basic African approaches to land and people". Agreements of land allocation and transfer between persons are made on the basis of custom, availability and intended use of land. Such considerations are far different from the legalistic and binding notions of the rights and entitlement repertoire as they are defined in Western-informed property disciplines.

In rural villages of sub-Saharan Africa, which relative to other regions have low population densities, land is allocated almost to all people who apply for it. Researchers have taken this to mean that people get allocated land because it is their right to get land. But Moore implores that we need to ask if this is because of right in its legalistic rule-bounded notion "or are we talking about frequent practice of generosity in the presence of land plenty?" (as quoted in Pottier 2005, 65).

Conditions of accessing land in customary tenure should be analysed and talked of in terms of socially sanctioned powers bestowed to individuals, households or groups by the community in accordance with customs thereof. Such powers may be permanent, exclusive or otherwise. Unlike rights that are encapsulated in impersonal and non-political bodies of legal repertoires, power is a function of social, political and economic relations between and among persons in relation to access to and use of resources. Conditions of accessing land are an incident of social relations, belonging with others in the context of a shared customary order. Continued access to land is therefore more assured by efforts to maintain one's relationship with others and observance of prevailing customs, not by right (Chanock 1985; Pottier 2005).

Women under Customary Orders

Another less understood issue is the way in which women's interests are treated in customary tenure. It is widely argued that customary systems of social organisation are patriarchal hence inherently inimical to the interests of women (Claassens and Ngubane 2008; Mann 2000; Nhlapo 1995). This is mainly because they order succession using the model of male primogeniture. Property governed by customary law is controlled by the male head of household and may be passed on to his nearest male relative when he dies who will act as his widow's guardian if she chooses to remain with her matrimonial family. And the widow's opportunities of gaining control or access to the land depend on the will of the male successor (Mann 2000).

This thinking further posits that there are two things that characterise the incidence of women's access to land. First, women can enjoy rights to use land, but not to own land and to make decisions such as allocating or alienating land. Second, women's access to

land is mediated by their relationships to their male counterparts as mothers, daughters, wives and sisters (Walker 2002). Dissolution of these relationships often negatively affects women's rights in land. Mutangadura (2004) argues that because women access land through their husbands and fathers their rights are just usufructuary. In her survey across six countries, Mutangadura found that in Zambia land is allocated according to marriage, in Lesotho women cannot own property because they are regarded as minors, and in South Africa, despite the country's progressive constitution, on the ground women face patriarchal resistance from their husbands and traditional leaders.

Particularly in South Africa's former homelands, the debate about the way customary property systems articulate with the interest and opportunities of women is made more complex by the country's long history of state laws that were not only racially discriminatory, but also heavily patriarchal. Although they vehemently argue that customary systems are oppressive to women today, Claassens and Ngubane (2008) admit that it is the past colonial and apartheid laws that entrenched gender discrimination in property. Before colonial incorporation, women enjoyed secure tenure in family land, even single women got land allocated to them in their own names and arable plots were known as family resources controlled by women and not by male household heads (Claassens and Ngubane 2008). This is in line with early anthropological accounts produced by Hunter (1936) about the Mpondo communities of the former Transkei, Schapera (1955) about the Tswana of the former Bophuthatswana and Sansom (1974) about the Zulu and Venda people.

However, the major problem we often confront in our ongoing search for what exactly customary tenure is (what do participants do? who does what? and why do they do what they do?) is that the storyline is often ordered in a normative configuration. This ordering ignores evolving adaptations to forces of social change or sometimes brash them aside as deviant behaviours. The normative order emphasises "precision and fixity, whereas the norms of custom are volatile and open-ended" (Bennett 2008, 139). Delius (2008) recognises this as a methodological problem committed by researchers in the field. Researchers often enquire about what ought to happen and not what actually happened and happens. Such questions are hypothetical; they do not talk to real processes as they unfold in real social settings. This is a methodological blunder that can be traced back to early colonial conquests when anthropological studies were specially commissioned by the empire for the documentation of cultures of the colonised. This normative tradition is continuing to blight contemporary research efforts perhaps because of our dearly held conception that custom is static and primordial.

In the context of customary property regimes in which land is accessible largely through allocation and succession, matters of who gets to hold and use the land must not be dislocated from the complex matrix of family and village organisation. A gendered analysis of land access needs to be complemented by a critical appreciation of the

political economy of the African rural household set-up. The majority of these households are composite, comprising parents and married sons that live with their wives there and single mother-daughters that live with their children. In such a set-up, what happens when a married son passes on and is survived by his young widow? Given the phasing off of levirate practices, can the young widow marry another man from another family and continue living at her matrimonial homestead? If she continues living there and use the land, which family name will be used for her family and her new-found husband?

It is unfortunate that very few researchers have asked these questions when documenting cases of women who lose access to their lands at widowhood. Researchers have documented cases of women leaving their matrimonial homes at the death of their husbands (Claassens and Ngubane 2008; Mann 2000), but in their processes of inquiry they seem to have overlooked two important considerations. First, the type of homesteads from which these widows are coming; is it a composite or nuclear homestead? Second, find out if the act of eviction is motivated by interest to prevent the widow from controlling and accessing land in which case the evictor is acting in selfish economic interest, or perhaps the motives have nothing to do with land access at all. Just like any other household members, including wives, sons, daughters and husbands, widows can be evicted from a homestead by their fellow members for several reasons such as serious transgression of household customs, behaviour that cannot be rehabilitated and witchcraft. Paying attention to these issues during data collection processes holds potential to unravel new insights and significantly enrich our knowledge regarding the way in which customary institutions, including customary land tenure, deal with women's interest in land, and their welfare as both household and community members broadly.

Conclusions

The debate on what it means to talk of customary land tenure system in the legally plural sub-Saharan region will remain a critically important subject in both academia and policy for far into the future, and it is expected to become more acute as land becomes scarcer and conflicts over land correspondingly intensify. The Kenyan land titling case, South Africa's tenure reform programme and a horde of other land reform programmes across the region have proven that the customary land administration system is here to stay in spite of the growing domination of statutory law in property. This reality is expected to increasingly challenge the efficacy of the subregion's property systems that are legally plural.

Uncertainties and confusions in this property system have already started to be accentuated by the growing land rush as demand for land is intensifying. This is owing to, among other things, population increases and development and expansion of agri-

based economic activities that are being promoted to absorb the unemployed labour force in rural areas. As land resources progressively become scarce, more land-dispute cases are expected in both local village and magisterial courts. In order to adjudicate on and resolve such cases, certainty and clarity about what customary land tenure system is and entails will be critically vital. The process of developing such clarity and certainty calls for an informed and deliberate reformation of law, policy and epistemic paradigms of the relevant social science academic disciplines. The cross-referential relationship between policy and academia is a crucial space that needs to be closely watched in this reformation project. These domains need to readjust their thinking and begin to adopt terminologies, policies and laws that recognise the de facto complex configurations of customary tenure in the contemporary post-colonial era.

The readjustment project requires that academics and policymakers engage in honest and robust debates. These debates must not only take stock of the ways in which past colonial and apartheid policies have distorted customary law, but also need to be underpinned by a critical hermeneutical analysis. This analysis must pay attention to the role that meaning plays in shaping our understanding of and actions on things, including concepts, phenomena and objects. To a large extent, the meanings that we give to customary tenure build the kind of knowledge we hold of it. And this knowledge influences the ways in which we act on it, especially the kind of policies we deploy to regulate access to and use of customary tenure land parcels.

Notes

The pronoun “we” is widely used in this article and is used to refer to members of the research community. The concept is borrowed from Pottier (2005) whose work has significantly inspired this article.

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