

Compulsory Acquisition as a Constitutional Matter: The Case in Africa

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Abstract

Compulsory acquisition of land by the state for public purposes is an entrenched feature of national constitutions. Yet the scope of private property is rarely defined. This is problematic in agrarian economies where millions own land under non-statutory arrangements that were historically excluded from recognition as property. This study examines the case in Africa where more than 650 million people are untitled customary landowners. Despite vibrant constitutional change, protection of these rights remains disappointing, while the grounds for taking land have expanded. However, this article concludes that reining in the scope of public purpose is not the most useful way forward. It would be more productive to persist in bringing constitutional force to bear on the standing of customary rights, along with democratizing procedures towards full community participation in deciding how public purpose acquisitions should proceed. The result would be greater tenure security, good governance and more peaceful relations between the state and people regarding land.

Keywords

Compulsory acquisition, eminent domain, constitutions, customary lands, Africa

INTRODUCTION

A fascinating feature of national constitutions is the minimal extent to which they define private property, while devoting much attention to stipulating the conditions in which state authority may deprive people of their property. From Rome's Tables circa 450 BC to the watershed American Constitution and onwards, the nature of property has been presumed to be a natural right needing no explanation.¹ Such constitutional alteration as has accrued

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1 In tracking the evolution of expropriation in the Roman state, Roselaar shows that owners sometimes refused to have their lands taken, necessitating negotiation: S Roselaar "Confiscation and expropriation: The legal consequences of Roman imperialism" in B

has mainly been to widen the justification, procedures and scope of remedy resulting from the state's sacred right to interfere, while the composition of private property itself has remained static, and as sacred. This is clearest in western and industrial economies where state-citizen property relations are well settled. The US Supreme Court's much cited ruling in *Kelo v City of New London* aptly illustrates focal concern around what the state may and may not do in respect of private property, as well as the limits of public purpose, not upon the substance of property itself.² Nevertheless, from time to time there are changes in what is accepted as "property", such as the altered eligibility for compensation in Ireland³ or, more obviously, in post-communist economies such as Poland and Hungary.⁴

Adjustment to the conceptual boundaries of private property is much more evident in the agrarian world. This is to be expected, given the massive social and political transformation in this domain over the last century, a crude indicator of which is proliferation of new constitutions in these states as compared with advanced economies.⁵

Specifically, the extent to which customary occupancy and use is rated a protected property interest has come to the fore in many of today's 150 or so agrarian economies. These countries are home to five billion people, a large proportion of them dependent upon land for their livelihood, despite accelerating urbanization.⁶ Deleterious legal treatment of customary rights has historically helped trigger conflict and civil war.⁷ Constitutions eventually

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Hoops, EJ Marais, H Mostert, JAMA Sluysmans and LCA Verstappen (eds) *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* (2015, Eleven International Publishing) 25 at 36.

- 2 *Kelo v City of New London* 545 US 469. See J Lovett "Somewhat at sea' public use and third-party transfer limits in two US states" in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans and LCA Verstappen (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015, Eleven International Publishing) 93.
- 3 R Walsh "Reviewing expropriations: Looking beyond constitutional property clauses" in Hoops et al (eds), id, 125.
- 4 M Habdas "Fundamental premises of land expropriation in Poland" in Hoops et al (eds), id, 299 and I Andorko "The history of Hungarian expropriation law" in Hoops et al (eds) *Rethinking Expropriation Law II*, above at note 1, 43.
- 5 Constitution-making has been most prolific in Latin America, where half of all states have promulgated ten or more constitutions. See G Negretto "Replacing and amending constitutions: The logic of constitutional change in Latin America" (2012) 46/4 *Law & Society Review* 749 at 752.
- 6 Oxfam International, International Land Coalition, and Rights and Resources Initiative *Common Ground: Securing Land Rights and Safeguarding the Earth: A Global Call to Action on Indigenous and Community Land Rights* (2016, Oxfam) at 15.
- 7 L Alden Wily "Tackling land tenure in the emergency to development transition in post-conflict states: From restitution to reform" in S Pantuliano (ed) *Uncharted Territory Land, Conflict and Humanitarian Action* (2009, Practical Action Publishing) 27 at 29. Rights and Resources Initiative *From Risk and Conflict to Peace and Prosperity: The Urgency of Securing Community Land Rights in a Turbulent World* (2017, Rights and Resources Initiative) at 7.

address the triggers. In earlier decades this prominently involved redistributive farmland reforms as a plank of new governance in Asian and Latin American post-feudal states.⁸ Since the 1990s, the focus has been on reforming the relationship of indigenous and received law property norms.⁹ This article examines how far these reforms are becoming constitutionalized through the means of compulsory acquisition.¹⁰

Mass shortfall in eligibility as property owners

Globally, two groups are most affected by compulsory acquisition: the untitled urban poor and customary landholders. The former mainly comprise 860 million slum dwellers, projected to double in number in sub-Saharan Africa every 15 years, the continent where urbanization is fastest and where slum dwellers already represent 62 per cent of the urban population.¹¹ Attempts to regularize their occupancy are shifting from classical titling to recognition of the legitimacy of neighbourhood-endorsed transfers, turning slum dwellers into lawful owners or tenants.¹² The community-based nature of informal city tenure in the developing world deserves note, for it breaches a classical notion that property only comes into existence by the definition and hand of the state, which alone may be its protector. This has a still clearer impact in the challenge that rural customary tenure presents to the definition of property.

A FOCUS ON RURAL PROPERTY

This article focuses on the rural domain. The reasons are straightforward. If agrarian states comprise 150 of 196 polities today, so too do they embrace by far the largest land area of the world, support most of the world's land dependents, most poor people, and comprise the regions with the most armed conflict and conflicted state-making.¹³ These are also the regions where 2.5 to 3 billion rural dwellers hold lands through customary (ie community-based) property regimes, and whose lands constitute at least 50 per cent of the planet's land area, more than six billion hectares.¹⁴ National

8 L Alden Wily, D Chapagain and S Sharma *Land Reform in Nepal: Where is it Coming From and Where is it Going?* (2009, Alden Wily, Chapagain and Sharma) at 4 and 187–209.

9 *Id* at 5.

10 Also known as eminent domain, compulsory purchase, resumption or takings.

11 UN Habitat *State of the World's Cities 2012/2013: Prosperity of Cities* (2013, Routledge and UN Habitat) at 148–51.

12 A Durand-Lasserve, M Durand-Lasserve and H Selod *Land Delivery Systems in West African Cities: The Example of Bamako, Mali* (2015 World Bank and Agence Française de Développement).

13 L Alden Wily "Communities and the state rethinking the relationship for a more progressive agrarian century" (Third Al Moumin Distinguished Lecture on Environmental Peacebuilding, presented at American University, 6 October 2015 on behalf of Environmental Law Institute, UN Environmental Programme and American University).

14 Oxfam International et al *Common Ground*, above at note 6 at 39.

laws recognize only one fifth of this area as owned.¹⁵ Yet, farming within this largely presumed un-owned sector provides most of the world's food.¹⁶ Taking into account forest and rangeland resources that fall customarily within their domains, these communities may also hold most of the world's carbon stocks.¹⁷ Further, despite rapid urbanization, rural dwellers remain in the majority in Africa and Asia and are projected to constitute more than three billion people by 2050.¹⁸

The case in Africa is particularly interesting, where customary landholders are likely to number more than one billion by 2050. Although differences by country are extreme (varying from 0.1 to 86 per cent of country area) only 10 per cent of the continent's area is defined as private property by virtue of registered deeds of transfer or cadastral entitlement.¹⁹ Much of the remaining 2.6 billion hectares is legally defined as national, state, government or public land with various meanings but sharing government jurisdiction. As shown below, few African states categorize customary lands as distinct from public or national lands. Thus, in practice, lands owned through customary regimes frequently overlap with lands the law defines as public, un-owned or state property.

An estimate of customary lands may be obtained by excluding registered private lands, urban areas and the major class of national or public lands where habitation and / or use is statutorily forbidden (protected areas). In Africa, this means that 2.3 billion hectares of state domain could be customary land.²⁰

Many jurisdictions accept that much of the public or state domain is occupied by its citizens on the basis of customary law, but do not equate that occupation with an interest in private property. Even lawful occupancy is often

15 Rights and Resources Initiative *Who Owns the World's Land? A Global Baseline of Formally Recognized Indigenous and Community Land Rights* (2015, Rights and Resources Initiative) at 9.

16 GRAIN "Hungry for land: The world's poor feed the world with less than a quarter of all farmland" (May 2014), available at: <<https://www.grain.org/article/entries/4929-hungry-for-land-small-farmers-feed-the-world-with-less-than-a-quarter-of-all-farmland>> (last accessed 13 January 2018).

17 Rights and Resources, Woods Hole Research Center and LandMark *Towards a Global Baseline of Carbon Storage in Collective Lands: An Updated Analysis of Indigenous Peoples' and Local Communities' Contribution to Climate Change Mitigation* (2016, Rights and Resources, Woods Hole Research Center and LandMark) at 1.

18 See World Bank Data Bank "Urban population per cent of total", available at: <<http://databank.worldbank.org/data/reports.aspx?source=2&series=SP.URB.TOTL.IN.ZS&country>> (last accessed 13 January 2018).

19 L Alden Wily "Res communis: Unfinished business in Africa" in P Kameri Obote and C Odote (eds) *The Gallant Academic: Essays in Honour of Professor Okoth-Ogendo* (2017, University of Nairobi Press) 103 at 105.

20 L Alden Wily "Estimating national percentages of indigenous and community lands: Methods and findings for Africa" (November 2015), available at: <http://communityland.s3.amazonaws.com/LandMark_public/LandMark-MethodsPercentage_Africa20170623.pdf> (last accessed 16 January 2018).

restricted to house plots and permanent farms. Assisted relocation, payment for productive trees and the right to harvest standing crops may be the only compensation that customary occupants receive when their lands are taken for greater public purposes than peaceable occupancy. Recompense for loss of lands that families own in common beyond homesteads has historically been rare. Valuable and intentionally communally-owned forests, rangelands and waterlands have been typically designated as un-owned and un-ownable wastelands (*terres sans maîtres, herrenlos* or *tierras sin dueño*).

Reasons for denying that the customary regime produces property are well known and not limited to Africa. These include the fact that the regime derives not from the state, but from communities, as historically evidenced in the absence of statutorily registered entitlements.²¹ A more political factor has been the determination of new and old agrarian state-makers alike to secure as much land and resources as possible for their own purse and to embed legal reasons for doing so. While long nurtured in the feudal state, the more expansive flowering of these legal norms was through colonization, routinely conjoining political authority over a region (*imperium*) with the co-option of ownership of all land and resources within it (*dominium*).²² This conveniently exempted 100 or so colonial polities from equitably (if at all) compensating land losses by millions of customary owners when their lands were interfered with for public or state-endorsed private purposes. Procedures other than eviction barely applied, as governments could lawfully assume that these lands were not property.

These conditions have not been entirely remedied. On the contrary, some have been exacerbated. This may be the case where ultimate title to all land remains in, or is newly vested in the state, the situation in at least 17 African states.²³ Water and traditionally mined surface minerals are also often vested in the state, forests somewhat less often, despite anciently practised local possession and use of all these resources.²⁴ This compounds a view among officialdom that no compensation for loss of these assets is due, as there is a common sentiment that the state owns all land and resources anyway.

21 L Alden Wily "Customary tenure: Remaking property for the 21st century" in M Graziadei and L Smith (eds) *Comparative Property Law: Global Perspectives* (2017, Edgar Elgar) 458 at 461.

22 P McAuslan "Property and empire: From colonialism to globalization and back" (2015) 24/3 *Social & Legal Studies* 339 at 341.

23 Angola, Burkina Faso, Chad, Eritrea, Ethiopia, Guinea, Guinea Bissau, Libya, Malawi, Mauritania, Mozambique, Niger, Rwanda, Sudan, Tanzania, Tunisia and Zambia are states where either the constitution or land laws explicitly vest ultimate title in the soil in the state or president on behalf of the national community. Citizens therefore own rights to the land, but not the land itself.

24 For water, see L Alden Wily, F Dubertret, P Veit, K Reytar and NK Tagliarino "Water rights on community lands: LandMark's findings from 100 countries in land" (2017) 6/4 *Land* 77, available at: <<http://www.mdpi.com/2073-445X/6/4/77/xml>> (last accessed 16 January 2018).

Grievance among customary landowners has grown exponentially over the last half century, contributing, inter alia, to a new era of tenure reform. As globalized commercial investment in untitled lands expands, denied eligibility for compensation takes an increasingly bitter turn.²⁵ Each year at least 15 million people are displaced by development projects, with evidence that the majority have reduced wellbeing after the process.²⁶ Creation of “new poverty” after land acquisitions has been reported for some time.²⁷ Around 2000, in response to sustained failure to provide compensation to meet even 20 per cent of the value of tangible losses experienced by those affected by the government projects it funds, the World Bank was to build compulsory resettlement and rehabilitation into its procedures.²⁸ Guidelines on this from a range of agencies now abound,²⁹ some targeting the private sector.³⁰ The African Union issued its own guidelines on the subject in 2014.³¹ A global project is now tracking large-scale land acquisitions.³² A Dutch government initiative is also reviewing multiple guidelines with a view to presenting an international protocol on compensation for adoption by all parties.³³ Principles in international law are regularly revisited for support.³⁴

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- 25 I German, G Schoneveld and E Mwangi “Contemporary processes of large-scale land acquisition in sub-Saharan Africa: Legal deficiency or elite capture of the rule of law?” 48 *World Development* 1 at 6. Rights and Resources Initiative *From Risk and Conflict*, above at note 7.
- 26 A Oliver-Smith (ed) “Development and dispossession” in TE Downing, C de Wet, GV Button, MM Cernea and D Clark *Development and Dispossession: The Crisis of Forced Displacement and Resettlement* (2009, Springer) 3 at 4.
- 27 T Downing *Avoiding New Poverty: Mining-Induced Displacement and Resettlement* (2002, International Institute for Environment and Development and World Business Council for Sustainable Development) at 8.
- 28 M Cernea “Risks, safeguards, and reconstruction: A model for population displacement and resettlement” in M Cernea and C McDowell (eds) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (2000, The World Bank) 11.
- 29 For example, see *Voluntary Guidelines on the Responsible Governance of Tenure* (2012, Food and Agricultural Organization of the UN (FAO)) at 27–28, *Operational Manual on Involuntary Resettlement* (2013, The World Bank), *Standard on Involuntary Resettlement and Access Restrictions* (2012, IUCN) and *Guide to Free, Prior and Informed Consent* (2010, Oxfam).
- 30 For example, see The Interlaken Group and Rights and Resources Initiative *Respecting Land and Forest Rights, A Guide for Companies* (2015, Rights and Resources Initiative).
- 31 *Guiding Principles on Large Scale Land Based Investments in Africa* (2014, African Union, African Development Bank and Economic Commission for Africa).
- 32 Land Matrix “The online public database on land deals”, available at <<http://www.landmatrix.org/en/>> (last accessed 13 January 2018), showing 44 million hectares under concluded deals, mainly in Africa and Asia.
- 33 *Towards a Protocol on Fair Compensation in Cases of Legitimate Land Tenure Changes: Input Document for a Participatory Process* (2016, True Price and University of Groningen).
- 34 For example, the Universal Declaration of Human Rights 1948 (art 17), the International Covenant on Economic, Social and Cultural Rights 1976 (arts 1 and 11) and the International Covenant on Civil and Political Rights 1976 (art 17), with a focus on indigenous and tribal peoples in the Indigenous and Tribal Peoples Convention 1989 (ILO 169, art 14) and

Nevertheless, losses remain significant, especially in countries with weak and unaccountable governance, often also those where most untitled customary property exists.³⁵ As Xu concludes “[t]he traditional conception of expropriation is not broad enough to capture new forms of interference with property rights”.³⁶

THE ARGUMENT: REMAKING THE STATE MEANS REMAKING EMINENT DOMAIN

Meanwhile, the nature of present-day land law reform gives cause for thought. This is no more simply a material matter of who owns what lands today than it was when the King of England’s Court decided in 1607 that the lands of Ireland were un-owned because the customary laws by which they were governed did not match the precepts of English common law. This, the court claimed, made it lawful to assume that Irish lands were un-owned, enabling ready reallocation to Scottish and English settlers.³⁷ The meaning of “the state” is also at stake in how property is defined and protected. This is as much for several billion unregistered landholders today as it was for Hobbes and John Locke, arguing in the 17th century that property was, or was not, the manufacture of the state, and did not exist without its say-so.

How property comes into existence remains a current topic for debate regarding the handling of indigenous, community-based property regimes. The sub-text has come to the surface. If, for example, a nation of mainly undocumented owners were acknowledged as property owners, where would this leave the present-day government as *de facto* majority landowner, stripped of its assets, and bound to rely upon functions not as owner but as regulator of the property relations of its populace? Surely through such reforms, state and society are themselves transformed.

Furthermore, if the modern state is constitutionally declaimed as the people, as a number of constitutions do, then surely decisions as to how public purpose is executed require a similarly more inclusive approach? Where the state has co-opted root ownership of all land in the country on behalf of its

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UN Declaration on the Rights of Indigenous Peoples 2007 (arts 26 and 32). The African Charter on Human and Peoples’ Rights 1981 (arts 14–22) is also pertinent.

35 J Lindsay, K Deininger and T Hilhorst “Compulsory land acquisition in developing countries: Shifting paradigm or entrenched legacy?” in H Lee, I Kim and I Somin (eds) *Eminent Domain: A Comparative Perspective* (2017, Cambridge University Press) 118 at 119–20.

36 T Xu “Hidden expropriation in globalization and soft law protection of communal property rights” in Hoops et al (eds) *Rethinking Expropriation Law II*, above at note 1, 89 at 90.

37 *Case of Tanistry* (1608) Dav 28: 80 ER 516 at 520, as reviewed by S Dorsett in “‘Since time immemorial’: A story of common law jurisdiction, native title and the *Case of Tanistry*” (2002) 26/1 *Melbourne University Law Review* 32, available at: <<http://www.austlii.edu.au/au/journals/MelbULawRw/2002/3.html>> (last accessed 16 January 2018).

citizenry, recalibrating a property right as a right to occupy or use a defined tract of that shared national property, this also suggests a necessary shift towards inclusive decision-making in even the most elaborated powers of eminent domain.

Why focus on constitutions?

Land laws detail how property is defined and these or specific expropriation laws lay out how private property may be compulsorily acquired. Studies, such as that by Tagliarino or as monitored in respect of rural communities by LandMark, scrutinize land laws for the exercise of compulsory acquisition.³⁸ While some assert that this does not need constitutional authority,³⁹ the fact remains that virtually every constitution finds the need to specify this power and its limitations. For as long as inclusive governance and land rights are on the agenda, as has been the case over the last century in agrarian economies, constitutional positions on this remain important. “Land is for social use and must go to the tiller”, declares article 18 of Guyana’s 1980 Constitution, with the aim of redistributing farmlands to tenants and workers, as did 50 or so jurisdictions from 1917 up until the 1980s.⁴⁰ “Democratization of ownership” (as in Colombia’s Constitution of 1991), “agrarian reform” (Constitution of The Philippines 1987) and sometimes restitution (such as in South Africa’s 1997 Constitution) have become stated purposes of expropriation. It is fair to say that constitutional treatment of property rights is a barometer of the intended nature of the agrarian state, so rooted as it is in land and resource dependence.

There are also practical reasons why constitutional provisions are usefully explored. They are often the only laws accessed and read by citizens, or which citizens have had some small role in devising. The more fragile and transitory the state, the more important it becomes for citizens to read what the proclaimed agenda of the constitution means for them. It is not surprising that constitutions in the agrarian world have multiplied exponentially in length and scope over the last half century.⁴¹ Constitutions are also viewed as less easy to change and ignore than other laws.

38 NK Tagliarino “Encroaching on land and livelihoods: How national expropriation laws measure up against international standards” (World Resources Institute and University of Groningen working paper, June 2016), available at: <https://www.wri.org/sites/default/files/Encroaching_On_Land_And_Livelihoods_How_National_Expropriation_Laws_Measure_Up_Against_International_Standards.pdf> (last accessed 16 January 2018).

39 For example, Justice Catchell of the Court of Appeals of Maryland in *Baltimore v Valsamaki* 916 A 2d, 324 (2007), as cited by L Verstappen “Rethinking public interest in expropriation law: Introductory observations” in Hoops et al (eds) *Rethinking Expropriation Law I*, above at note 2, 15.

40 Alden Wily et al *Land Reform in Nepal*, above at note 8 at 9.

41 J Cordeiro “Constitutions around the world: A view from Latin America” (2008, Institute of Developing Economies discussion paper 164) at 28.

CONSTITUTIONS IN AFRICA

The vibrancy of constitutionalism in Africa is cause enough to examine what these legal manifestos say regarding compulsory acquisition.⁴² Africa comprises 54 independent states and one non-self governing territory, Western Sahara, included here on grounds that its independent Polisario government is a member of the African Union. All 55 polities have national constitutions. Only five are older than 1990 (Botswana, Liberia, Mauritius, Tanzania, and São Tomé and Príncipe), although they have been much amended since. Eight constitutions are under review as at January 2018 (Democratic Republic of Congo (DRC), Eritrea, The Gambia, Ghana, Liberia, Mozambique, Sierra Leone and Tanzania,). Four others are termed provisional (Libya, Somalia, South Sudan and Sudan). The newest constitutions are those of Algeria (2016), Ivory Coast (2016), Central African Republic (2015), Tunisia (2014) and Zimbabwe (2013). The constitutions of Zambia and Rwanda have been most recently overhauled if not repealed. As expected, the ending of civil war, the advent of multi-party governance and others changes have been key triggers for constitutional reform since 1990. So what do these constitutions say on the subject of compulsory acquisition?

COMPULSORY ACQUISITION IN AFRICAN CONSTITUTIONS

Definition of private property

First, no African constitution fails to recognize the *existence* of private landed property and only Guinea Bissau's Constitution offers no protection.⁴³ To be precise, most African constitutions do not acknowledge private property itself but the right to property. This is most expected where ultimate title is vested in the state and property is defined as a right to occupy and use part of that estate. Only Kenya, Morocco, Mozambique and South Africa oblige the state to ensure that adequate housing is available within its means.⁴⁴ There is no

42 Dates of constitutions as at January 2018 are: Algeria 2016, Angola 2010, Benin 1990, Botswana 1966, Burkina Faso 1991, Burundi 2005, Cameroon 1996, Cape Verde 1992, Central African Republic 2015, Chad 1996, Comoros 2001, Democratic Republic of Congo 2006, Djibouti 1992, Egypt 2014, Equatorial Guinea 1991, Eritrea 1997, Ethiopia 1995, Gabon 1991, The Gambia 1997, Ghana 1992, Guinea 2010, Guinea Bissau 1993, Ivory Coast 2016, Kenya 2010, Lesotho 1993, Liberia 1986, Libya 2011, Madagascar 2010, Malawi 1994, Mali 1992, Mauritania 1991, Mauritius 1968, Morocco 2011, Mozambique 2004, Namibia 1990, Niger 2010, Nigeria 1999, Republic of Congo 2005, Rwanda 2003, São Tomé and Príncipe 1975, Senegal 2001, Seychelles 1993, Sierra Leone 1991, Somalia 2012, South Africa 1996, South Sudan 2011, Sudan 2005, Swaziland 2005, Tanzania 1977, Togo 1992, Tunisia 2014, Uganda 1995, Sahrawi Arab Democratic Republic (Western Sahara) 1999, Zambia 1991 and Zimbabwe 2013.

43 Guinea Bissau's Constitution, art 12.

44 Constitutions of Kenya (art 43), Morocco (art 31), Mozambique (art 91) and South Africa (art 26).

prescription against landlessness, although some do make equitable *access* to land a principle.⁴⁵

Acknowledgement of private property is characteristically curt and uninformative. “Private property is sacred and inviolable” say the constitutions of Chad and the DRC.⁴⁶

At times private land is only defined in the negative, as in article 12 of Guinea Bissau’s Constitution: “[p]rivate property includes all assets that do not qualify as the property of the State”. Alternatively private property only appears in the context of the right of state authorities to take it away, which is the case in Botswana, Djibouti, Gabon and Guinea.⁴⁷ More gently, in Morocco and Mauritania the state may limit the right to property “if the exigencies of economic and social development of the country necessitate it”.⁴⁸ Ethiopia is an exception in (briefly) describing the nature and scope of private property: “[p]rivate property’ ... shall mean any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common”.⁴⁹

More illumination is obtained where constitutions distinguish between public and private property, as do those of Equatorial Guinea and Guinea Bissau,⁵⁰ or in constitutional acknowledgement of collective property as in São Tomé and Príncipe and Egypt where this is termed cooperative property.⁵¹ Where all land is vested in the state, from which private rights descend, constitutions frequently refer to protection of the right to hold, bequeath and inherit land, not to the right to sell or otherwise transfer it, which is the case in Mozambique.⁵² Ghana’s Constitution is alone in stating that land ownership shall carry a social obligation to serve the larger community (article 36). In Burkina Faso, “[t]he right to property is guaranteed. It may not be exercised contrary to social utility or in a manner that prejudices the security, liberty, or existence of the property of others”.⁵³ These are principles more often seen in Latin American constitutions.⁵⁴

Still, the nature of private property remains elusive in African constitutions. Millions of customary landholders cannot easily decipher from these texts

45 For example, constitutions of Kenya (art 60), Somalia (art 43), Zambia (art 253(1)), Zimbabwe 2013 (art 297(1)(c)(ii)) and South Africa (art 25).

46 Constitutions of Chad (art 41) and DRC (art 34).

47 Constitutions of Botswana (art 8), Djibouti (art 12), Gabon (art 10) and Guinea (art 13).

48 Constitutions of Morocco (art 35) and Mauritania (art 15).

49 Ethiopian Constitution, art 40(2).

50 For example, see the constitutions of Equatorial Guinea (art 28) and Guinea Bissau (arts 10 and 12).

51 For example, see the constitutions of São Tomé and Príncipe (art 44) and Egypt (art 37).

52 Constitution of Mozambique, art 109.

53 Constitution of Burkina Faso, art 15.

54 For example, Colombia’s Constitution, art 58.

how far their interests are accorded status as property or its equivalent in the face of compulsory acquisitions. Phraseology in some anglophone constitutions enabling compensation to “any person having an interest or right over the property”⁵⁵ holds promise. However, once delivered into land acquisition laws this usually limits eligibility to tenants, lessees or others with contractual arrangements with registered owners.

Similarly, as discussed below, sustained classical provision in many African constitutions that property may be owned “in association with others”, while important for community-based tenure, may be limited to registered entities such as cooperatives and local governments.

Compulsory acquisition

While constitutional descriptions of what is meant by property are limited, the conditions through which the state may compulsorily acquire lands can be extensive, covering 30 or more provisions. This makes compulsory acquisition one of the most elaborated constitutional subjects. This is mainly seen in some countries with a common law heritage (The Gambia, Ghana, Lesotho, Nigeria, Sierra Leone, Zambia and Zimbabwe), with the notable exclusions of Uganda, Tanzania and Kenya where these matters are covered in land laws. Anglo-francophone Mauritius and Seychelles compete for detail as to the grounds for acquisitions, possibly due to high levels of foreign land ownership and demands from these owners for clarity.

As expected, most stipulations fall within the ambit of the two well-established conditions: for state acquisition of private property to be lawful, it must be for a public purpose and for fair indemnification. A third condition is less explicit: that deprivation may only be by the authority of law. However, a number of francophone states, such as Chad, Mali and Madagascar, as well as Ethiopia do not make the establishment of legal procedure a constitutional condition to acquisitions.

Definition of public purpose

Elaborations of public purpose are diverse. There are 20 African constitutions that do not mention public purpose, beyond stating that it must apply for an acquisition to be legal.⁵⁶ The constitutions of Mauritania and Cameroon only mention public purpose in their preambles. Eight mainly anglophone constitutions are more specific.⁵⁷ The Gambia’s Constitution lists public purposes as those “necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning, or the development or

55 For example, Kenya’s Constitution, art 42.

56 The constitutions of Algeria, Burundi, Cape Verde, Chad, Eritrea, Ethiopia, Ivory Coast, Kenya, Madagascar, Mali, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, South Sudan and Sudan.

57 The constitutions of The Gambia, Ghana, Lesotho, Mauritius, Seychelles, Sierra Leone, Uganda and Zimbabwe.

utilization of any property in such manner as to promote public benefit” (article 22(1)(a)). Lesotho’s Constitution elaborates that acquisitions may occur “in satisfaction of any tax, duty, rate or other impost”, “by way of penalty for breach of the law”, “as an incident of a valid contract, or the terms and conditions of service of a public officer”, “in the execution of judgments or orders of a court”, in circumstances where it is reasonable to do so because “the property is in a dangerous state or injurious to the health of human beings, animals or plants”, “for the carrying out of soil conservation or conservation of other resources”, because it is “enemy property, property of a deceased person, a person of unsound mind, a person who has not attained the age of 21 years”, for the purpose of its administration “for the benefit of other persons entitled to the beneficial interest therein” or in respect of “property of a person adjudged insolvent or a body corporate in liquidation”.⁵⁸

About a third of constitutions include exceptional purposes. Examples are in: South Africa, where the nation’s commitment to land reform and to reforms to bring about equitable access to all South Africa’s natural resources is a stated purpose; Liberia where expropriation may be authorized for the security of the nation in the event of armed conflict; and Gabon where land may be taken if there is an insufficiency or absence of productive use, a grave condition in a heavily forested country where invisible forest dependency by rural communities competes with commercial logging.⁵⁹ After listing 35 public purposes for which land may be taken, the Constitution of Mauritius uniquely forbids a court to call into question acquisitions that have been supported in a final vote in the legislative assembly by not less than three quarters of all members.⁶⁰

Unusually, Zambia’s Constitution does not mention public purpose but lists 34 reasons that may trigger acquisitions. While many are similar to those cited from Lesotho’s Constitution, others threaten purposive conservation, as may occur in community forests or rangelands by enabling the state to take land that is “unoccupied, unutilized or undeveloped” (article 16). At times, public purposes are so multiple and open-ended that the header under which they are listed (Protection of Deprivation of Private Property)⁶¹ seems a misnomer.

A further point of exposure to land acquisitions is signalled by the accumulation of constitutional pledges to permit the exigencies of economic development to necessitate expropriation. This is stated in at least 11 newer constitutions adopted since 1990.⁶² Thus Ethiopia and the Republic of

58 Constitution of Lesotho, art 17(4).

59 L Alden Wily *Whose Land is It? The Status of Customary Land Tenure in Cameroon* (2011, Centre for Environment and Development, FERN and Rainforest Foundation UK) at 50.

60 Constitution of Mauritius, art 8(4).

61 For example, Constitution of Zambia, art 16 (comprising 38 sub-clauses).

62 Constitutions of Cape Verde (art 89), DRC (art 34), Equatorial Guinea (art 27(3)), Ghana (art 36(4)), Mozambique (art 108), Namibia (art 99), Republic of Congo (art 34), São Tomé and Príncipe (art 34), Swaziland (art 59(4)), Western Sahara (art 44) and Zambia (art 10(3)).

Congo assure foreign investors the right to use lands.⁶³ Zambia's Constitution disallows the government from compulsorily acquiring an investment except under customary international law.⁶⁴ The constitutions of Mauritius and Botswana specify that beneficiaries of compensation at compulsory acquisition may transfer the payments to any country of their choice.⁶⁵ Swaziland stipulates that compulsory acquisition "may not be used to undermine or frustrate an existing or new legitimate business undertaking of which land is a significant factor or base".⁶⁶ This implies an uneven playing field for land held for commercial and non-commercial purposes.

Limiting public purpose

Limitations exist, but again they do vary. The most important for untitled landholders is that the hardship that acquisitions will cause to those affected must not unreasonably outweigh the benefits of the public purpose intended, but this is declared in only six constitutions.⁶⁷ In seven constitutions, the acquisition of private property may be accomplished only through a court order.⁶⁸ Access to a court by those affected is provided in 20 of 55 constitutions,⁶⁹ with variation as to what complaints may be heard. Constitutions in 11 countries leave this open (such as those of Uganda and Kenya),⁷⁰ while nine others are expansive in listing matters that may be heard.⁷¹ Among constitutions not providing court access, the right of appeal to administrators is generally possible (such as in Eritrea).⁷²

Only five constitutions specify that owners have the first option to reacquire their property in the event of the land not being used for the intended public purpose.⁷³ Even fewer constitutions make the state responsible for resettling

63 Constitutions of Ethiopia (art 40(6)) and the Republic of Congo (arts 34–35).

64 Zambian Constitution, art 10(3).

65 Art 8(2) in both cases.

66 Swaziland Constitution, art 211(5).

67 Constitutions of Gambia (art 22(1)), Ghana (art 20(1)(b)), Lesotho (art 17(1)(b)), Mauritius (art 8(1)(b)), Seychelles (art 26(3)(c)) and Sierra Leone (art 21(1)(b)).

68 Constitutions of DRC (art 34), Egypt (arts 35 and 40), Republic of Congo (art 35), Somalia (art 26(2)), South Sudan (art 28(2)), Swaziland (art 19(2)(c)) and Togo (art 27).

69 Constitutions of DRC, Egypt, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Nigeria, Republic of Congo, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Swaziland, Togo, Uganda and Zimbabwe.

70 Constitutions of Uganda (art 26(2)(b)(ii)) and Kenya (art 40(3)(b)(ii)).

71 Constitutions of Botswana (art 8(1)(b)(ii)), The Gambia (art 22(1)(c)(ii)), Ghana (art 20(2)(b)), Lesotho (art 17(2) and (3)), Liberia (art 24(a)(iii)), Mauritius (art 8(1)(c)(ii)), Seychelles (art 26(3)(e)), Sierra Leone (art 21(c)(ii)) and Zimbabwe (art 71(3)(c)(ii) and (iii)).

72 Eritrean Constitution, art 23(4).

73 Constitutions of The Gambia (art 22(4)), Ghana (art 20(3)), Liberia (art 24), Seychelles (art 26(4)) and Sierra Leone (art 21(5)).

displaced inhabitants on suitable alternative land; this is implied in Zimbabwe,⁷⁴ and explicit in Ghana⁷⁵ and The Gambia: “[w]here a compulsory acquisition of land by or on behalf of the Government involves the displacement of any inhabitant who occupies the land under customary law, the Government shall resettle the displaced inhabitants on suitable alternative land with due regard to their economic well being and social and cultural values”.⁷⁶

Less common limitations are occasionally proclaimed, such as the declaration in Tanzania’s Constitution that it is unlawful for any person to be deprived of his property for the purposes of nationalization.⁷⁷ Liberia’s Constitution forbids a person being punished for treason from having his land taken or his spouse or next of kin deprived of its enjoyment.⁷⁸

Compensation

Only the constitutions of Guinea Bissau, Libya and Western Sahara do not provide for compensation.⁷⁹ Ten other constitutions do not stipulate that indemnification must be fair, just and / or appropriate. However, six of these do provide for such matters to be determined by law.⁸⁰

Constitutions often do not list the bases upon which compensation is calculated. However, the Constitution of Ethiopia does require compensation to be “commensurate with the value of the property”.⁸¹ South Africa’s Constitution provides the most detail:

“The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.”⁸²

Limiting compensation to developments on the land

It was noted above that at least one third of all African states vest all land in the state. Many others vest untitled land in the state, discriminating against customary landholders who do not typically hold registered entitlements.

74 Constitution of Zimbabwe, art 72(2)(c).

75 Constitution of Ghana, art 20(3).

76 Constitution of The Gambia, art 22(4).

77 Constitution of Tanzania, art 24(2).

78 Constitution of Liberia, art 24(c).

79 See the constitutions of Guinea Bissau (arts 12–13), Libya (art 16) and Western Sahara (art 34).

80 Constitutions of Cameroon (preamble), Morocco (art 35), Nigeria (art 44), Rwanda (art 34), São Tomé and Príncipe (art 46), and Tunisia (art 41).

81 Ethiopian Constitution, art 40(8).

82 South African Constitution, art 25(3).

Constitutional mention of either of these circumstances is strangely absent from African constitutions, but indirectly evident in provisions such as those in Swaziland's Constitution that owners shall only be entitled to prompt and adequate compensation for any improvement on the land (article 211(3)). Again, this penalizes community members who purposely do not improve shared natural forests and rangelands, presuming that the law acknowledges these as owned in the first instance. Zimbabwe's Constitution gives a different reason for limiting compensation, as justified in cases where the land is being taken for redistribution:

“[T]he people of Zimbabwe must be enabled to re-assert their rights and regain ownership of their land; and accordingly (i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and (ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement”.⁸³

Compensation before eviction

Constitutions are equally deficient in providing principles as to when and how reparation will be made. The one principle that is stated is whether or not compensation is to be paid before the acquisition. Francophone Africa is more generous on this score than anglophone Africa. There are 16 francophone constitutions that require payment to be made before acquisition,⁸⁴ as do those of Djibouti, Egypt, Ethiopia and Uganda. 33 constitutions mainly from anglophone and lusophone Africa only stipulate that payment must be prompt, or are silent on the matter (such as those of Tanzania and Mozambique). While it may be argued that important projects will be delayed to enable payments to be made, the reality routinely reported is that compensation payments can be delayed for decades, causing hardship, exacerbated where there is no legal requirement for interest to be paid on the amount due, reducing the value of the compensation to a pittance after a decade or more of inflation.⁸⁵ The Constitution of Mauritius is one of the few that states that interest on unpaid compensation will be paid “at the legal rate in equal

83 Constitution of Zimbabwe, art 72(7)(c).

84 Constitutions of Algeria, Benin, Burkina Faso, Burundi, Central African Republic, Chad, DRC, Gabon, Guinea, Ivory Coast, Madagascar, Mauritania, Niger, Republic of Congo, Senegal and Togo.

85 For Ghana, see W Larbi “Compulsory land acquisition and compensation in Ghana: Search for alternative policies and strategies” (paper presented at the International Federation of Surveyors / FAO / Consiglio Nazionale Geometri [National Council of Surveyors] International Seminar on State and Public Sector Land Management, Verona, 9–10 September 2008) at 16. For Malawi, see P Jere *Improving Land Sector Governance in Malawi: Implementation of the Land Governance Assessment Framework* (2012 World Bank) at 67.

yearly instalments with a period not exceeding ten years”.⁸⁶ In Zambia, “in default of an agreement, the amount of compensation shall be determined by a court of competent jurisdiction”.⁸⁷

Process

Constitutions are even briefer on procedure. This is left to enactments. Liberia’s Constitution does require that the government inform affected persons of the reasons for expropriation, while those of Malawi and Zimbabwe order that adequate notification be given.⁸⁸ The right to negotiate the level of compensation impliedly exists where access to a court is assured but, as shown above, only a third of constitutions explicitly afford such access. In any event, Africa’s majority poor have limited means to go to court, reinforcing the importance of an inclusive process in the first instance.

Inclusive process suggests that merely informing affected persons that their land is to be taken is insufficient. Ideally, the proposal should be discussed with them, in a manner that reaches all those affected and allows enough time for them to consider the proposal before giving their views. The state should be obliged to demonstrate that it has considered other options including leasing from the holders rather than acquiring the land. A cost-free mechanism through which complaints may be easily presented by individuals or communities should be provided, along with a legally embedded checklist of all matters to be discussed, with the stated objective of reaching agreement as far as reasonably possible through consensus between the state and affected persons or communities.

As is often the case, soft law has taken the procedural lead through the construct of free, prior, informed consent (FPIC), at least for those who define themselves as indigenous or tribal peoples in accordance with ILO 169 or the UN Declaration on Indigenous Peoples (UNDRIP). The UN Food and Agricultural Organization (FAO) 2012 Voluntary Guidelines on Secure Tenure do not demand FPIC for compulsory acquisition. FAO was possibly mindful of the limited adoption of ILO 169 and UNDRIP into national laws,⁸⁹ and constrained by its reliance upon majority UN member state

86 Constitution of Mauritius, art 8(4)(c)(i).

87 Constitution of Zambia, art 16(3).

88 Constitutions of Liberia (art 24(a)), Malawi (art 44) and Zimbabwe (art 71.3).

89 As of late 2017, only 22 countries had ratified ILO 169/1989. See International Labour Organization “Ratifications of C169: Indigenous and Tribal Peoples Convention, 1989 (No 169)”, available at: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0:NO:11300:P11300_INSTRUMENT_ID:312314> (last accessed 16 January 2018). Although 144 states adopted UNDRIP in 2007, only Australia, Colombia, Panama, Peru, Philippines, South Africa and Venezuela had introduced FPIC for indigenous peoples into domestic law by 2016. For additional review see K Reytar, P Veit and F Dubertret “Indigenous land rights: How far have we come and how far do we have to go?” (9 August 2016) *World Resources Institute*, available at: <<http://www.wri.org/blog/2016/08/indigenous-land-rights-how-far-have-we-come-and-how-far-do-we-have-go>> (last accessed 13 January 2018).

endorsement of the guidelines. FAO may also have been mindful that eminent domain and consent are a contradiction in terms. An argument of this article is that, while this is so, maximizing public participation in determining the costs and benefits of compulsory acquisition towards consensus is long overdue in democracies proclaimed to be inclusive.

No African constitution has ventured into this territory. The right of those affected to participate in decision-making is not constitutionally provided in a single case. This does not mean that participatory approaches are not applied from time to time, nor that other rights are not occasionally drawn into service to ensure that affected landholders are granted more than a right to be informed. One reviewer of this article helpfully reminded the author of the implications of “fair administrative action” as provided by constitutions in both Kenya and South Africa. The relevant article 47 has been tested in Kenya with regard to compulsory acquisition; while the petition failed, the judge determined that fair administrative action requires that, “[t]he public need not only be invited but must also be given adequate opportunity to participate ... it is not intended to be a mere cosmetic exercise as the spirit behind the constitutional requirement that the public be involved in governance and decision making as well as [sic] legislative exercise is that the end product be deemed owned by the same public”.⁹⁰ This opinion echoes precisely what this article suggests is long overdue: that public purposes for which the lands of citizens can be wilfully taken demand public approval and that the practical route for this is through an entrenched participatory process for acquisitions. Further comment on this is given below.

Appeal to administrative bodies

Meanwhile it may be noted that opportunities are slowly opening for aggrieved communities who cannot afford to go to court or who have no right to do so on matters of compulsory acquisition. In theory, they could bring complaints to the socio-economic councils now provided within 26 francophone constitutions, although in only one case does the council’s mandate explicitly include mediation between the state and citizens.⁹¹ This is a more likely task for an ombudsman or mediator, provided for in 21 constitutions of francophone, lusophone and anglophone Africa.⁹² This office typically receives complaints and may conduct “inquiries concerning the administrative faults and the violations of the rights of citizens committed by agents of the executive and judiciary”.⁹³ Six of the nine land commissions (or Land Management Board in Swaziland) in anglophone Africa can receive appeals,

90 *Patrick Musimba v The National Land Commission and Four Others* [2016] eKLR, para 147.

91 Constitution of Senegal, art 87(1).

92 Constitutions of Benin, Burkina Faso, Burundi, Djibouti, Equatorial Guinea, The Gambia, Ghana, Guinea, Ivory Coast, Lesotho, Malawi, Mauritius, Morocco, Mozambique, Namibia, Rwanda, Seychelles, Sierra Leone, Somalia, South Sudan and Togo.

93 Burundi’s Constitution, art 237. Only in Namibia’s Constitution may the ombudsman himself bring proceedings against state parties (art 91).

although their primary shared purpose is to lead national land policy development.⁹⁴ Only in Sudan is the purpose of the commission to arbitrate between willing contending parties on claims over land, entertain claims against the relevant government or other parties and assess appropriate land compensation.⁹⁵ Among other functions, the National Land Commission in Kenya is empowered “to initiate investigations on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress”.⁹⁶

Eligibility of untitled landowners

Of course, provisions for compensation for compulsory acquisition are meaningless for those who are not deemed to be lawful owners in the first instance. As described above, in Africa this mostly affects untitled customary landholders and slum dwellers with longstanding occupancy. Together they may number 1.8 billion people by 2050.

As concluded above, constitutions are opaque when it comes to defining private property. Reference that no property “of any description” and especially to “no right over or interest in any such property” shall be acquired compulsorily without stipulated conditions being met, should be helpful, but appears in only seven constitutions,⁹⁷ six of which, in any event, protect customary landholders more directly under other articles, as examined below. Several are more specific when it comes to compulsory acquisition. Art 40(4) of Kenya’s Constitution says that “[p]rovision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land”. Article 171(10) of South Sudan’s Constitution stipulates that “[c]ommunities and persons enjoying rights in land shall be entitled to prompt and equitable compensation on just terms arising from acquisition or development of land in their areas in the public interest”. Article 37(2) of Angola’s Constitution says “[t]he state shall respect and protect the property and any other rights in rem of private individuals, corporate bodies and local communities, and temporary civil requisition and expropriation for public use shall only be permitted upon prompt payment of just compensation under the terms of the Constitution and the law”. Article 40(4) of Ethiopia’s Constitution provides that “Ethiopian peasants have rights to obtain land without payment and the protection from eviction from their possession”, while article 40(5) provides “Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands”. Article 25(6) of South Africa’s Constitution

94 Constitutions of Ghana (art 258), Kenya (art 67), Swaziland (art 212), Uganda (art 238), Zambia (arts 233(2) and 254(2)) and Zimbabwe (art 297).

95 Constitution of Sudan, art 187.

96 Constitution of Kenya, art 67(2)(e).

97 Constitutions of Botswana (art 8.1), The Gambia (art 22(1)), Ghana (art 20(1)), Lesotho (art 17.1), Mauritius (art 8.1), Swaziland (art 19(2)) and Uganda (art 26(2)).

states that a “person or community whose tenure is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress”.

Recognition of collective tenure

By tradition, customary tenure has a communal character and customary lands are increasingly referred to today as community lands or community property. Beyond the homestead, other assets such as forests, rangelands, ponds, lakes, and streams and wetlands are normally the most directly shared property of the community. Often, lands that families have the right to farm in perpetuity or otherwise belong to the community in common.⁹⁸ Reference to communities as landholders in their own right, as in the citations above, is therefore important.

The right to hold land individually or in association with others is stated in 24 of Africa’s constitutions.⁹⁹ However, this may only apply to registered bodies. Thus, when article 33 of Egypt’s Constitution declaims that “[t]he State protects ownership which is three types: public, private and cooperative ownership”, the last refers to registered cooperatives with boards “which cannot be dissolved except by court order” (article 37). The case is similar in Algeria, Equatorial Guinea, Guinea Bissau, Madagascar, Morocco, and São Tomé and Príncipe in respect of local governments.¹⁰⁰ Few distinguish, as Angola does, between corporate bodies and communities as protected holders of rights that must be accounted for.

Public land overlapping customary lands

As noted above, the overlap of public / state and customary lands is severe in Africa. Some 36 constitutions refer to public / state land (often called government land). Where land itself is not nationalized, waters, minerals and hydrocarbons are commonly listed. Beaches, infrastructure, and sometimes airspace (in the case of Cape Verde)¹⁰¹ and exclusive economic zones¹⁰² are often specified today. Radio and television broadcasting is added in Equatorial Guinea.¹⁰³

98 L Alden Wily *Customary Land Tenure in the Modern World: Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa* (2012, Rights and Resources) at 8.

99 Constitutions of Angola, DRC, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Ghana, Guinea Bissau, Kenya, Liberia, Madagascar, Malawi, Morocco, Mozambique, Namibia, Republic of Congo, Rwanda, São Tomé and Príncipe, Seychelles, Swaziland, South Sudan, Uganda and Zimbabwe.

100 Constitutions of Algeria (arts 43 and 333), Equatorial Guinea (art 131), Guinea Bissau (arts 12 and 13), Madagascar (art 34), Morocco (art 35 read with art 71), and São Tomé and Príncipe (art 9).

101 Constitution of Cape Verde, art 91.

102 Such as the constitutions of Ghana (art 257(6)) and Nigeria (art 44(3)).

103 Constitution of Equatorial Guinea, art 29(1).

Vacant land in Madagascar¹⁰⁴ and archaeological sites in Mozambique and Angola are also defined as public property.¹⁰⁵ In Malawi, Namibia, Ghana and Rwanda lands already vested in the government are referred to as public lands.¹⁰⁶ In Malawi and Namibia this is specified as including communal and customary lands respectively.

Under other articles, communities may find that they are not owners of certain land types within their customary domains. Article 9 of the Constitution of the Republic of Congo gives the government “permanent sovereignty” over forests. “Natural resources” are public land under the constitutions of Ethiopia, Niger, Tunisia, and South Sudan.¹⁰⁷ “Protected areas” are widely deemed to be state property. This may be by virtue of these lands already being vested in the government (the case in Ghana, Malawi and Rwanda),¹⁰⁸ or stated directly, as in Morocco where “[t]he public domain in Morocco shall include nature conservation zones”.¹⁰⁹ Article 237(2)(b) of Uganda’s Constitution stipulates that “[t]he Government or a local government as determined by Parliament by law, shall hold in trust for the people and protect, natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens”.

Only four constitutions itemize public / state property with precision: those of Cape Verde, Mozambique, Angola and Kenya list eight, nine, 11 and 14 sub-categories respectively.¹¹⁰ All include waters, minerals and protected areas for the preservation of wild flora and fauna as public property.

Contradictions that abound in practice around public and customary lands are occasionally apparent. Thus, while South Sudan’s Constitution is specific that communities own all customary property including lands held collectively, such as forests and rangelands, it also declares that all natural resources belong to the National Government.¹¹¹ One article of the Kenyan Constitution establishes national forests as public land while another establishes these same areas as community property by identifying ancestral lands traditionally occupied by hunter-gatherers (in this instance, forest peoples) as community land.¹¹² It is therefore helpful that the Kenyan Constitution also provides for transfers among classes of public, private and community land.¹¹³ Divestiture of public lands including to communities is anticipated in

104 Constitution of Madagascar, art 139.

105 Constitutions of Mozambique (art 98(2)) and Angola (art 95(1)(j)).

106 Constitutions of Malawi (art 208), Namibia (sched 5), Ghana (art 257(2)) and Rwanda (art 44).

107 Constitutions of Ethiopia (art 40(3)), Niger (art 148), Tunisia (art 13) and South Sudan (art 171(4)).

108 Constitutions of Ghana (art 257), Malawi (art 207) and Rwanda (art 44).

109 Constitution of Morocco (art 98(2)(d)).

110 Constitutions of Cape Verde (art 91), Mozambique (art 98), Angola (art 95) and Kenya (art 62).

111 Constitution of South Sudan, art 171(4).

112 Constitution of Kenya, arts 62(1)(g) and 63(2)(d)(ii).

113 *Id.*, art 68(c)(ii).

Angola's Constitution.¹¹⁴ Article 98(3) of Mozambique's Constitution clarifies the distinction between public and customary lands as follows: "[t]he law shall regulate the legal regime of property in the public domain as well as its management and conservation, and shall distinguish between the public domain of the state, the public domain of local authorities, and the public domain of communities, with due respect for the principles of imprescriptibility and immunity from seizure".

Direct recognition of customary property

Constitutional protection of untitled customary owners at compulsory acquisition is obviously maximized where their lands are granted status as property. Some constitutions (such as those in Benin, Botswana, Comoros and Ivory Coast) do not indicate tenure categories at all. Others (those of Liberia, Libya, Malawi and Rwanda) only distinguish between public and private lands. The constitutions of Algeria, Egypt, Equatorial Guinea, São Tomé and Príncipe, Madagascar and Morocco specify lands belonging to registered cooperatives as a category of landholding for rural communities who wish to adopt settled farming.¹¹⁵ Namibia has one of the few constitutions to specify family land as registrable, although this is also provided in the land laws of a few other countries.¹¹⁶ Overall, constitutional recognition of rights deriving from African customary tenure as property interests is still partial or non-existent. Therefore the constitutions of the following 11 countries are notable for singling out customary or community lands as a special category of landholding, with stated or implied equality with statutorily secured private property.

Kenya

"All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Land in Kenya is classified as public, community or private" (article 61). "Community land shall vest in and be held by communities identified on the basis of ethnicity, cultural or similar community of interest" (article 63(1)).

Mozambique

"The national economy shall guarantee the coexistence of three sectors or ownership of the means of production ... The cooperative and social sector comprises, specifically (a) community means of production, held and

114 Constitution of Angola, art 95(3).

115 Constitutions of Algeria (arts 43 and 333), Egypt (art 33), Equatorial Guinea (art 131), São Tomé and Príncipe (art 9), Madagascar (art 34) and Morocco (arts 35 and 71). This is also provided in land legislation in Tunisia but not in the constitution.

116 Namibian Constitution, art 98(2). Examples of countries with national land laws that mention families as legal persons for the purposes of registering title include Tanzania, Uganda, Kenya and Burkina Faso.

managed by local communities and (b) means of production exploited by workers” (article 99).

Uganda

“Land in Uganda shall be owned in accordance with the following land tenure systems (a) customary; (b) freehold; (c) mailo;¹¹⁷ and (d) leasehold” (article 237 (3)). “On the coming into force of this Constitution (a) all Uganda citizens owning land under customary tenure may acquire Certificates of Ownership in a manner prescribed by Parliament; and (b) land under customary tenure may be converted to freehold land ownership by registration” (article 237(4)).

South Sudan

“The land tenure system in South Sudan shall consist of public land, community land, and private land” (article 171(2)). “Community land shall include all lands traditionally and historically held or used by local communities and their members. They shall be defined, held, managed and protected by law” (article 171(5)).

Ghana

“The State shall recognize that ownership and possession of land carry a social obligation to serve the larger community and in particular the State shall recognize that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin or family concerned and are accountable as fiduciaries in this regard” (article 36(8)).¹¹⁸

Angola

“All land originally belongs to the state and forms part of its private domain with the aim of conceding and protecting the land rights of individuals or corporate bodies and rural communities” (article 98(1)).

Ethiopia

Private property includes “lands held ... in appropriate circumstances ... by communities specifically empowered by law to own property in common” (article 40(2)).

Zambia

“Land shall be delimited and classified as State land, customary land, and such other classification as prescribed” (article 254(1)).

117 Mailo is a legal form of landlordism developed in the 1900s to reward certain kingdoms to the British government and under which root title over lands was allocated in square miles.

118 Stool and skin lands refer to lands held collectively under customary tenure in chiefly societies in Ghana.

Swaziland

Swazi National Land¹¹⁹ “shall continue to be regulated by Swazi custom” (articles 115(6) and 115(7)).

DRC

Less robustly,¹²⁰ the DRC guarantees the right to individual or collective property “according to the law or to custom” (article 34).

Equatorial Guinea

“The State guarantees the traditional land ownership of land by farmers” (article 30(1)).

Other protection

In addition, South Africa’s Constitution indirectly provides for community lands by assuring restitution or equitable redress for communities dispossessed of property as the result of past racially discriminatory laws (article 25(7)).

The lack of constitutional provision does not necessarily preclude protection of unregistered customary or community lands under land laws. Burkina Faso, Botswana, Sierra Leone and Tanzania are cases in point. For example, Tanzania’s 1977 Constitution obviously does not embrace the terms of land laws introduced in 1999; the latter leave no room for doubt that unregistered customary rights are equivalent to state-granted rights. Conversely, dedicating specified lands for customary occupancy, as in Zimbabwe and Zambia, does not necessarily imply that rights to these lands have equal force to rights obtained through statutory entitlement.¹²¹

Treatment of customary law

The 11 countries mentioned above are among those that recognize customary law, but they rarely make direct reference to customary land law as South Sudan’s Constitution does: “[r]ights in land and resources owned, held or otherwise acquired by the Government shall be exercised through the appropriate or designated level of government which shall recognize customary land rights under customary land law”.¹²² Many other constitutions state that customary law may be applied by courts deciding civil cases, without specifically mentioning customary land law.¹²³ This absence is not necessarily a matter of concern, as land laws may be specific that customary land law is permitted to operate and be introduced into court cases. For example, Somalia’s Provisional Constitution states that it “does not deny the existence of any other rights that are recognized or conferred by Shari’ah or by customary law to the

119 Swazi National Land comprises both public-like lands controlled by the King and village lands controlled by appointed headmen.

120 Admittedly with knowledge of land laws taken into account.

121 Alden Wily “Res communis”, above at note 19 at 111.

122 Constitution of South Sudan, art 171(7).

123 For example, constitutions of Botswana, Chad, Lesotho and Nigeria.

extent that they are consistent with the Shari'ah and the Constitution".¹²⁴ Nevertheless, there are cases where absence of reference to customary land law is meaningful, reflecting a wider failure of national law to accord customary land rights the same force as is granted to statutory entitlements, currently the case, for example, in Niger, Rwanda and Sudan. Overall, admission of customary law (and / or Shari'ah in some countries such as Somalia, Mauritania and Morocco) offers practical protection for customary landholders in just over half of all African states, as their landholding is governed by both custom and Shari'ah, the norms of which regarding land rights are often difficult to distinguish.

CONCLUSION

This article has purposely not addressed land laws, nor the large number of special laws addressing compulsory acquisition. This has disadvantages, as the most complete picture of the legal status of untitled rural lands requires these to be addressed. This is aside from examining what occurs in practice when community or customary lands are involuntarily taken by the state.¹²⁵

Instead, this article has had a more modest objective: to determine how far the land interests of majority rural landholders in Africa are *constitutionally* protected when their lands are needed for public purposes. Its implicit premise is that eminent domain has been a stable element of constitutional law and changes will surely be reflected in present-day constitutions. In addition, constitutions have assumed popular currency for millions of ordinary Africans; for as long as they face marked socio-political uncertainty and endure unaccountable governance, they increasingly look to constitutions for assurance that, one way or another, their interests will prevail. As observed earlier, this partly results from the surge in popular consultation that has marked the post-1990 era of constitution-making, also extending to land and other laws. A corollary incentive to examine constitutions is the fundamental role that the balance in state and citizen land relations plays in shaping the nature of the modern agrarian state.¹²⁶

That said, this study also confirms that a review of constitutions alone will never be sufficient for grasping all the legal norms around eminent domain; recourse to land acquisition legislation remains essential. Ideally, this also includes case law, barely touched upon in this article, which has sought to overview an aspect of constitutions throughout the continent. This produces other constraints, most obviously around the diversity among 55 states. Yet it will also have been observed that a contrary force exists in sustained legal traditions received from Europe, along with Shari'ah law in the Sahel and the

124 Constitution of Somalia, art 40(4).

125 See Alden Wily "Res communis", above at note 19; Alden Wily "Customary tenure", above at note 21; and Tagliarino "Encroaching on land and livelihoods", above at note 38.

126 Alden Wily "Communities and the state", above at note 13 at 70.

Horn. Retention and borrowing within these traditions is highly evident, such as observed above in distinct civil and common law traditions about when compensation is paid.

The dominance of constitutional change on matters of customary rights at compulsory acquisition in anglophone eastern and southern Africa is also noticeable. While nodes of change logically spread through language and regional lines, the enormous commonality in the plight of untitled customary landholders from the Cape to Cairo suggests that intra-continental dialogue across legal traditions would be helpful. Later, if not sooner, socio-political change requires legal reconstruction of what constitutes immovable property in a continent of near-universal historic and persistent discrimination against indigenous tenure systems, which share structural commonality as inherently community-based and sustained. As implied above, there can be no expectation on grounds of population growth alone that these will simply disappear, as was the dominant policy orthodoxy of the 20th century. On the contrary, in combination with more rights-based awareness and demand, clear if struggling trends towards popularly inclusive governance and the practicality of devolved land rights governance, community-based tenure regimes have more, not less, importance in agrarian stability.

Some transformations of tenure have been noted towards this, given the right of rural communities under 20 per cent of African constitutions to own land in common and govern their own land relations. Nevertheless, it is difficult to conclude that these transformations have reached deeply if at all into the matter of compulsory acquisition. While (almost) all African constitutions acknowledge and protect private property, its scope remains elusive or beyond the reach of millions of untitled customary landholders. Equally as ill-served are even faster rising numbers whose rural lands have been absorbed against their will into expanding cities and towns, as well as those who have long lived within city boundaries without tenure protection. Although not explored here, it is fair to say that the tenure security of Africa's rapidly expanding slum populations sees minimal to no attention in African constitutions. Without the direction of the supreme law that both the rural customary and vulnerable urban sectors deserve, limitations around compulsory acquisition exaggerate the injustices.

Reining in the number and type of public purposes for which land may be lawfully taken is a natural first candidate for change. Constitutional provisions around this currently range from silence and two-liners to listings of 30 or more grounds in one fifth of laws: a precision that is illusory, some causes offering unbounded possibilities for acquisitions. The recent addition of public-private and private enterprise as lawful causes opens the boundaries further. In the midst of the vibrant expansion of land and resource-based developments along with supporting infrastructure, containing public purposes to protect untitled properties seems likely to fail.

A more productive focus would be to widen the scope of all aspects of compensation: who is eligible, for what they may expect reparation, when, and how much. The need to embrace unregistered customary landholders at

scale, provided thus far in only a handful of constitutions, should rank as a basic human right in the land-dependent societies that characterize Africa. It is equally critical to ensure the security of shared undeveloped lands, such as rangelands that belong to communities and routinely comprise their major land asset in drier zones, as well as forests in wetter zones.

Returning to process to advance equity in property norms

The question of consent must be raised again. As observed, this may be rated a step too far given the compulsory nature of eminent domain. Yet it may equally be that consensual decision-making is the most important indicator to impose; in other words that, where inclusive democracy is the proclaimed mode of governance, those affected by state policies must have a chance to have their voice heard, even to the extent of being able to refuse proposals that will induce unreasonable degrees of hardship. Among other things, a consultative approach may open the way towards partnerships with local populations becoming the norm rather than the exception. Shareholding, leasing rather than acquisition, equitable employment rights and other advances can be better pursued within an obligatory process of engagement towards consensual decision-making. Even the most traditional of public interest developments, acquiring lands for mining, hydrocarbon, water, solar, wind, tourism and infrastructure developments, can be better balanced with citizens' rights through such reforms. Otherwise, the immense potential for conflict and even violence in the face of enforced land and resource acquisitions will be realised; instances have already been observed to be rising sharply in respect of large-scale land acquisitions affecting rural communities.¹²⁷

Conceivably, eminent domain itself will be slowly democratized to fit better with the continental reality of majority rural land dependence. This is doubly pertinent in the many African states that constitutionally establish that either the state is the people, and / or that the state holds land only on behalf of its citizens, as is the case in Benin, Burkina Faso, Ethiopia, Tanzania and Togo, among many others.

In practice, this may be workable only on the back of an interim obligation for compulsory consultation. Critically, free, prior and informed popular participation should apply to all cases, and to all persons affected, not only to the 25 million or so persons who identify themselves as indigenous peoples. Alternatively, this could apply, again, not to certain peoples but to certain types of acquisition and to landholding conditions. As compulsory consultation becomes a practised norm, challenge by affected persons and communities as to why their involvement is not required would incrementally multiply the occasions where local participation in determining if and how an acquisition for changed land use should go forward is applied.

127 Rights and Resources Institute *From Risk and Conflict*, above at note 7.

In short, a focus on procedural change may have greater chance of success than trying to rein back the ever-expanding boundaries of public purpose and interest, or disputing compensation values, and may divert attention to two more fundamental lacunae still subordinating majority customary property rights in a rapidly changing 21st century. These are, first, that for as long as their indigenous property norms continue to be deemed lesser than those defined and secured through received law regimes, rural Africans will receive minimal consideration at compulsory acquisition. Secondly, even where customary landholders have obtained constitutional recognition that their ownership is due equitable redress at compulsory acquisition, denying them a fair role in decision-making will still, time and again, override or minimize their interests. The procedure of compulsory acquisition in constitutional law seems a worthy focus for advocacy.