

LAND TENURE REFORM AND THE BALANCE OF POWER IN EASTERN AND SOUTHERN AFRICA

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This paper examines the current wave of land tenure reform in eastern and southern Africa. It discusses how far tenure reform reflects a shift in powers over property from centre to periphery. A central question is whether tenure reform is designed to deliver to rural smallholders greater security of tenure and greater control over the regulation and transfer of these rights.¹

Policy conclusions

- Whilst diverse in initial objective, and uneven in delivery, tenure reforms address a remarkably common set of concerns. Most embody significant shifts in the balance of power in state–people property relations.
- Overall, tenure reform incorporates new recognition of local level land rights and significant transfer of powers over their disposition nearer to the ordinary landholder.
- At the same time, some authority over land is being concentrated more at the centre, amply illustrating the essentially political nature of property relations and the time-old reluctance of central governments to release powers.
- Nonetheless, intentionally or otherwise, governments are delivering to landholders new powers and rights in land which may enhance democratisation in this and related spheres.
- The manner in which customary, unregistered rights in land are being regarded in new tenure law represents the most crucial area of change and should yield an African character to property relations in the 21st century which has been determinedly denied throughout the 20th.

Introduction

Widespread tenure reform

Reform in the legal and administrative manner in which land rights are recognised and regulated is occurring widely in sub-Saharan Africa. Earlier papers in this series (Adams, 1995; Adams et al., 1999) treat aspects of this. This paper aims to widen the geographical scope of discussion and to set tenure reform in the context of democratisation.

In eastern and southern Africa in 2000 it is only those states currently at war with themselves or others that have *not* embarked upon directive tenure reform. In Uganda, Tanzania, Zanzibar, Mozambique, Zambia, Eritrea, Namibia and South Africa, important new land tenure laws have been promulgated in the last decade, all of which are in only the earliest stages of implementation. Rwanda, Malawi, Lesotho, Zimbabwe and Swaziland have new national land policies and in some cases laws, in draft. Kenya is the most recent country to establish a commission of inquiry into land matters (1999).

Driving forces

Reasons for launching land reform tend to accumulate over time and build into a commitment to overhaul the whole rather than to amend in piecemeal ways. Immediate motivations vary widely, from frustration with shortfalls in the colonial-derived property laws, a desire to free up the market in land, accelerate entitlement programmes, or to redress land losses caused by racially discriminatory laws. In few states have the redistributive intentions of classical land reforms of earlier decades been the driving force. Nonetheless, a degree of redistribution is likely to accrue indirectly through the stabilisation of the land rights of the majority, rural small holders and the untenured urban poor ('squatters') which is widely being suggested through the reforms. Change in the way in which private property is acknowledged in law in the first place, is everywhere becoming an important, if often unintended, area of transformation.

Land reform as socio-political transformation

Without exception, political change underwrites and directs land reform. This has been signalled in a wave of new independence or political regimes in the last decade (Eritrea, Ethiopia, Rwanda, Mozambique, Namibia, South Africa, Zambia, Malawi and Uganda). Or it may arise through shifting socio-political relations within society itself, being realised through 'multiparty-ism', strengthening of devolutionary strategies, and heightening popular voice and demand. The thoroughly political nature of land distribution and security means that 'reform' readily becomes a focus in times of political uncertainty. As the current crisis in Zimbabwe illustrates, it may be all too readily used as a tool to prompt or control rising political opposition.

Nor does tenure reform exist in strategic or legal isolation. This is seen in the concomitant flurry of reform in the natural resource sector and in the laws of governance. Almost all countries in the region have new forestry, wildlife and environmental management laws now in place, a trend prompted by the international protocol culture of the late 20th century. New local government laws are being promulgated in half of the countries in the region, generally strengthening devolution. New national constitutions have been promulgated since 1990 in Mozambique, Namibia, Zambia, Malawi, Ethiopia, Lesotho, Uganda, Eritrea and South Africa. The Constitutions of Tanzania, Kenya, Rwanda and Swaziland are under review. Cumulatively, these developments signal important socio-political transitions at the turn of the century of which shifts in property relations are but one part, albeit one expected to be central to further 'democratisation' of society in coming decades.

Democratisation of process

Tenure change rarely proceeds as intended: no matter how modest the initial objectives, its scope quickly widens beyond the immediate realm of property. Each nation state finds itself having to tackle issues of governance and state–people

relations in general. The very notion of 'public trust' over land often comes under attack, as for example in the understanding of 'public property', 'public purpose' and the right of governments solely to determine how land is designated in the first place (Kenya, Tanzania, Uganda, Zambia and Zimbabwe). These wider issues imply serious redistribution of powers, and 'political will' for reform often wavers, as has been the case so far in Uganda, Tanzania, Zimbabwe, South Africa, Malawi, Lesotho and Namibia.

One result is that new tenure law is more partial than desired, increasingly containing provision for review (Tanzania), indications that it will be 'refined' through regulation (Mozambique), or promulgated in such a way that further laws will definitely be required (South Africa and Eritrea). Incremental approaches are increasingly being adopted (Namibia and South Africa).

From beneficiary to actor

Where is the populace in all this? With few exceptions (notably Mozambique) it has been cast as a potential beneficiary of centrally-driven, defined and delivered processes. Consultation has been minimal, and at times, deliberately limited (Rwanda, Ethiopia, and Tanzania). As a result, the approach often lacks the social legitimacy and locally-derived stratagems through which simple, cost-effective and workable new regimes often emerge. Sometimes even the most central elements of reform are having to return to the drawing-board (Mozambique, Uganda, Zambia, South Africa and Zimbabwe). Where traditional leadership, local governance and identification of 'community' are weak, in demise, disarray or conflict, a vision as to how to develop community-based approaches is in the first place problematic (South Africa and Mozambique).

Shifts in process

Shifts in approaches to land reforms are now becoming discernible: the 'command' approach loses credibility; popular consultation is expected and clarity and accessibility of new law demanded. Not just law-making but the nature of property law itself begins to alter, as the conventional boundaries among land, administration and family law are breached in the search for totality, transparency of powers and process, and accessibility. Attention to technical aspects of tenure reform (survey and physical planning in particular) tend to fall away in favour of exploration and re-exploration of land rights. In the substance of the law, uniformity tends to give way to plurality, with concomitant increase in subsidiarity, and the provision of voluntary opportunity. As the cost implications of genuine reform come to light, implementation plans hover uncertainly between the market-assisted and the government-funded.

Most state governments in the region are hesitating on the brink in one critical respect or another, wary of the long, 'untidy' and contentious road ahead. Policy-making processes are being slowed (Malawi, Zambia, Rwanda, Lesotho and Ethiopia); enactment of important new laws or amendments is being withheld (Uganda), or the commencement of promulgated laws delayed (Tanzania). Problematically for 'command' approaches, this is like bolting the stable door after the horse has fled. Once embarked upon and once the populace is awakened to opportunity, tenure reform is seen as simply too important to allow their governments to leave it incomplete.

Democratisation of rights

Common concerns and variable response

What exactly of substance is changing through this 'reform'? Each of the following issues is having to be addressed by most countries in the region:

- How far should land itself, and powers over land, be vested in the state?
- How far should a market in land be permitted and prompted – and how freely should land be available to non-citizens?
- At what level of society and with what degree of autonomy from the executive should property relations be regulated and administered?
- How may the plethora of land disputes be more swiftly and fairly disposed with?
- How should unregistered, customary landholding and common rights be dealt with in the law?
- How should the rights of women in land be handled, especially given their major role in agriculture?
- How far should the rights of long-term farm-workers and tenants be made rights of ownership or otherwise secured?
- How far should the tenure regimes of hunter-gatherers and pastoralists be recognised?
- How should the occupancy of the still-growing millions of urban poor, thus far designated as squatters, be dealt with?
- How may all rights in land be brought into a simple, efficient and accessible system of documentation and evidence?
- How may the budgetary implications of tenure change be minimised without putting the implementation of reform at risk? How much can the user afford to pay?

Response has been patchy. The rights of women, pastoralists and hunter-gatherers are developing most slowly. In contrast, the security of long-standing farm workers and tenants has been much attended to (Uganda, South Africa and Zimbabwe). Programmes to transform the unstable occupancy of urban 'squatters' into secure land rights are being given a foundation in new land laws (South Africa, Tanzania, Namibia and Uganda). In such quarters, security of tenure over land is indeed improving.

However the most dramatic transformation is being made in how unregistered, customary rights as a whole are being handled in state law, a transformation which in turn facilitates security in each of the above sectors.

Transformation in customary land rights

The facts are these: despite a century of purposeful penetration by non-customary tenure ideology and legal provision, unregistered, customary tenure not only persists but is still by far the majority form of tenure in the region. None of the strategies adopted to ignore or diminish it have been successful. Examples of such strategies are given in Box 1.

Capitulation

It is not surprising that the persistence of untitled occupancy has come to represent the single most important 'problem' facing current tenure reform in the region.

Perhaps the most radical shift in tenure reform occurring in sub-Saharan Africa today is that for the first time in one hundred years, states are being forced to recognise African tenure regimes as legal in their own right and equivalent in the eyes of national law to the freehold/leasehold culture.

In Eritrea, majority customary rights have been reconstructed into lifetime usufructs, with guaranteed state protection (1994). In Zambia, earlier (1995) efforts to convert customary rights into leaseholds is now under reconsideration in draft national land policy (1999). In South Africa, how to clarify the millions of unrecorded rights in homelands and embed them in statute appears to be posing a much greater challenge than the 'simpler' mechanics of restitution and redistribution. However, the clearest lead of all is being given in the new tenure laws of Uganda, Tanzania and Mozambique. In different ways, these simply recognise customarily-obtained

land as fully legally tenured 'as is', in whichever form and with whatever characteristics they currently possess. In addition they may be made registerable entitlements if so desired. Zimbabwe and Malawi policy recommendations suggest these states could follow suit (1999).

Changing notions of tenure

These developments undermine the very principles upon which property relations have been legally constructed over the last century. Previously, recording, registration, and entitlement were all geared towards individual ownership; now, the link has been broken. Whilst certification remains indispensable as a founding route to land security, it is no longer necessarily tied to individualisation. Accordingly, new tenure laws in South Africa, Mozambique, Uganda and Tanzania make provision for not just individuals but for two or more persons, groups, associations, and communities, to hold land in legal and registerable ways. The certification process itself has to change: it may be verbal, and verbally endorsed (Mozambique). The community itself may conduct the adjudication, recording and titling processes (Tanzania). As a matter of course, the local regimes through which these rights are created and sustained – customary land tenure systems – are being empowered in these ways.

New life for common property

New political and legal perspective upon 'commonage' follow logically from this. For instance, over the last 75 years or so forests and woodlands amounting to more than 100 million hectares had been largely appropriated by the state from local customary ownership through the creation of forest reserves. The purpose has been both economic (timber) and conservationary, resting upon a long-held assumption that rural citizens do not have the tenurial incentive to demarcate or protect forests. Further, forests have been steadfastly perceived as spheres of traditional access, not of traditional tenurial interest.

Now, with recognition of the capacity of groups and communities to hold property, the understanding of communal property itself is undergoing change: what was yesterday commonage, and with all the ills of open-access implied, is today legally registerable private (group) property. Commonhold itself is emerging as a new form of tenure (Alden Wily, 2000).

Box 1 Strategies for transforming customary land rights

These have included efforts to prompt reconstruction of rights into freeholds or leaseholds (especially in Kenya, Malawi and Lesotho) and the subordination of customary rights in constructs of 'virtual' government land, as in the homelands of South Africa, the communal lands of Zimbabwe, Namibia and Malawi, the trust lands of Kenya, and until recently, the 'public lands' of Uganda. These are customarily-held lands vested in presidents and states, turning their inhabitants into landless 'occupants' on their ancestral lands.

Most pervasive of all has been a related set of permissive stratagems premised upon expectation that customary rights would give way automatically to titled holding as the market in land expanded or through more coerced conversion programmes (Kenya).

Even where early efforts to consider customary rights in national law were made, these tended to re-fashion them into forms acceptable to dominant European norms. Thus in Botswana during the late 1960s, the Tribal Land Act 'forgot' to incorporate commonage – the most critical element of agro-pastoral tenure – a lacuna which has plagued land relations in that country ever since. The error is about to be repeated in Namibia through the Communal Lands Reform Bill's intention to make commonage freely available for individual leaseholding.

These shifts in thinking are finding reflection in the processes for forest reserve creation now being offered in new forest policies and laws (Tanzania, Kenya, Uganda, Mozambique, South Africa, Malawi, Zambia, Namibia, and Lesotho). Whilst the 'setting aside' of important forests remains intact as the central strategy of forest conservation in Africa, these countries are beginning to look to local communities as both the 'rightful' and more effective owner-managers of these lands. Village and community-owned forest reserves increasingly lead the way as the framework for forest protection (Alden Wily with Mbaya, forthcoming).

Democratisation of authority over tenure

Devolving tenure administration

The point at which acquisition and disposal of land rights are officially endorsed and regulated is also moving closer to the landholder. Whilst the driving force is structural, i.e. to simplify and increase the accountability of tenure procedures, it gains its 'downward' thrust from the recognition of customary tenure and the need to provide appropriate formal machinery for its implementation (Box 2).

Popularising dispute resolution

Comparable steps towards devolution are occurring in the

Box 2 Moves towards democratising authority over tenure

The most dramatic democratisation has occurred in Uganda where tenure administration is designed to operate entirely independently of the executive and of local government, through new district land boards, supported by a network of some 4500 local level land committees, a plan which, for its sheer scale, cost and hesitant official will, is however still far from being in place, two years after its passage into law.

New tenure laws in Tanzania (1999) bypass the district level and directly designate the elected government of each village as Land Manager. Adjudication, registration, entitlement and land dispute resolution will all take place within, and by each village community. In short, there will be some 9225 discrete tenure administrations, following the detailed guidance of the new Village Land Act, 1999. Whilst tempered with interventionist powers of the state and the exclusion of property held directly by government (Land Act, 1999), this tenure regime represents one of the more radical departures in tenure administration in the region. The new laws are yet to see commencement but given that they will operate through existing institutions, may have a chance to succeed.

After twenty years of confining customary rights to presidential dictate, Zimbabwe considered in 1998–9 a proposal to finally rid itself of the demeaning 'communal lands' framework, to recognise customary tenure as a statutorily-defined regime and to adopt a largely community-based regime for its administration. Implementation is unlikely to proceed whilst the more powerful issue of restitution of white-owned lands claims national attention. The Malawi Land Commission has more recently recommended a similar democratisation of tenure and its regulation to the local level (1999), but this has not yet been acted upon.

In those two states, as elsewhere in the region, slower progress towards devolving powers over tenure is variously attributable to the absence of well-developed institutions at the grassroots level (Namibia and Zambia); emerging conflicts among traditional leadership and new institutions (Lesotho and South Africa); and widespread breakdown of the 'community' itself through decades of top-down, divisive strategies and dislocation of populations (Mozambique and South Africa). As the first of several states to try implementing its land reform of 1997, Mozambique has been forced to use land law to develop new mechanisms through which community and community-based institutions may develop. This need is mirrored everywhere in the region. Should it be heeded, land reform could eventuate as the major prompt towards early 21st century development in local level governance.

locus and means through which land disputes may in future be resolved. Again, new paradigms arise mainly from the overload and non-accountability of current regimes but also in the pressures towards the improved local level access to machinery, participation and client-accountability.

The trend has been towards establishing formal tribunals independent of the judiciary but with the recourse to ordinary courts, operating at the local level, and in some cases operated by community members (Mozambique, Tanzania, Uganda and Eritrea). Provision of mediation services is the strategy adopted in new South Africa tenure law but as yet not one that reaches significantly into the community level.

Contrary trends

From the above, it may be seen that a real shift in the balance of interests and powers in property matters – from centre to periphery, and from state to people – is under way, albeit a shift which is hesitant, uneven and still incomplete. Moreover, a number of opposing forces threaten to concentrate certain key powers at the centre.

Root powers of the state

Nowhere is this clearer than in the reaffirmation, rather than release, of root powers of the state over property. Thus, all but one nation (Uganda) has firmly entrenched primary ownership of land ('radical title') in the hands of the state (or the president), leaving to citizens only the right to own 'interests' in that land. From this proceeds power to designate, regulate, intervene and appropriate land at will – a facility used with unusual frequency, dubious purpose, and lack of accountability by many governments in the region in recent decades and one that, arguably, has promoted rent-seeking landlordism.

Power to appropriate land

Such new constraint as there is on presidential powers may be seen in the improvement of rates of compensation, and in more transparent procedures for appropriation. Not a single new tenure law has significantly narrowed the grounds upon which property may be taken. An exaggerated version of the problems associated with state powers is being observed currently in Zimbabwe, where presidential determination to coopt private property at will has thrown the country into chaos, and caused ominous conflict between the executive and judiciary. Whilst the process of appropriation has seen improvement in several states, it is only in the new tenure laws of Tanzania (1999) that this has been designed specifically to limit unjustified appropriation of the more weakly tenured sectors, those holding land in customary ways. Similarly, the construction of 'government land' or 'state land' – lands held directly by the state as landlord – does not appear to be losing ground (again Uganda excepting). Also, there are ominous signs that the long overdue promise to liberate homelands and communal lands from central ownership and control may not after all be quickly realised (Alden Wily with Mbaya, forthcoming).

Conditions and limitations

There are other ways through which the state routinely exerts control over the status and transfer of property. In the more developed economies of the region, planning and zoning laws, levy of rates and land taxes, and new rules governing transfer of properties, may appear (South Africa). Compulsion to occupy and use agricultural land to maintain tenure – a long-standing feature of African tenure regulation – is just as evident elsewhere in new tenure laws as it is in old, despite a good deal of evidence that adherence is erratic at best. The placement of ceilings upon the size of landholding is also

increasing, rather than decreasing as a strategy of control (Tanzania, Eritrea, Ethiopia, Lesotho and Namibia).

These conditions constrain the market in land, particularly as affecting the unregistered, customary sector. This is despite the early intentions of most of these same states to promote an entirely free market in property, now regarded as a naive intention.

These limitations embody the complicated face of state authority, at one and the same time, 'controlling' and 'benign', in this case seeking to protect new rights being awarded from uncontrolled erosion – but just as often, dictating the terms to its own proprietorial (and rent-seeking) advantage.

Conclusion

The very nature of nation states is such that people will never be free of the regimes they create or tolerate but neither will the state ever be free of the demands of the people for whom they act. Getting the balance right is what current democratisation in the subcontinent is all about. As each step is taken towards enhancing the proprietorial interest of the ordinary citizen in current land reform, the nature of state power itself is altered, each time settling a little nearer to the landholder, who in turn is forced and empowered to be a little less passive in his or her relation to the state. It is arguably from these kinds of development that tangible improvements can be made, both in the formal processes of democracy, and in social relations more generally. There can be no illusion that the path will be smooth.

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Endnotes

1 This paper is based upon study of more than 70 laws, in particular the new land laws of Uganda, Tanzania, South Africa, Mozambique, Namibia, Zambia and Eritrea, and the policy proposals of Swaziland, Zimbabwe and Malawi.

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