



SECURING LAND AND RESOURCE RIGHTS IN AFRICA: PAN-AFRICAN PERSPECTIVES

EDITED BY MUNYARADZI SARUCHERA

SECURING LAND AND RESOURCE RIGHTS IN AFRICA: PAN-AFRICAN PERSPECTIVES

A SELECTION OF PAPERS GENERATED DURING THE FIRST TWO YEARS OF OPERATION OF THE PAN-AFRICAN PROGRAMME FOR LAND AND RESOURCE RIGHTS (PAPLRR), A PARTNERSHIP PROGRAMME BETWEEN THE AFRICAN CENTRE FOR TECHNOLOGY STUDIES (ACTS), KENYA; COMMUNITY CONSERVATION AND DEVELOPMENT INITIATIVES (CCDI), NIGERIA; THE PROGRAMME FOR LAND AND AGRARIAN STUDIES (PLAAS), SCHOOL OF GOVERNMENT, UNIVERSITY OF WESTERN CAPE, SOUTH AFRICA; AND THE SOCIAL RESEARCH CENTRE (SRC), AMERICAN UNIVERSITY IN CAIRO, EGYPT.

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Programme for Land and Agrarian Studies (PLAAS)
School of Government, University of the Western Cape
Private Bag X17, Bellville 7535
Cape Town, South Africa
Tel: +27 21 959 3733, Fax: +27 21 959 3732
E-mail: plaas@uwc.ac.za, Website: www.uwc.ac.za/plaas

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CONTRIBUTORS

Koffi Alinon, Co-ordinator: LandNet-Togo; Collaborative research fellow: Faculty of Law, University of Lomé and Laboratoire d'Études Rurales, Institut de recherche pour le développement (IRD), Paris

Habib Ayebe, Geography lecturer: University of Paris-8, St-Denis, France; Researcher: Institut de recherche pour le développement (IRD), Paris

Aninka Claassens, Independent consultant on land issues, South Africa

Ben Cousins, Professor of land and agrarian studies; Director: Programme for Land and Agrarian Studies (PLAAS), School of Government, University of the Western Cape, Cape Town, South Africa

Stephen Greenberg, Independent researcher, South Africa

Abdel Mawla Ismail, Researcher: Land Centre for Human Rights in Egypt

Patricia Kamari-Mbote, Advocate of the High Court of Kenya; Chair: Department of Private Law, University of Nairobi

Nelson Marongwe, Freelance researcher and consultant on land, environment and sustainable livelihoods, Zimbabwe

John Mope Simo, Directeur de Recherche: Cameroon Ministry of Scientific and Technical Research; Sociology teacher: Faculty of Medicine and Bio-medical Sciences, University of Yaoundé

Clement Ng'ong'ola, Associate Professor, Department of Law, University of Botswana

Michael Odhiambo, Executive Director: Resource Conflict Institute (RECONCILE), Nakuru, Kenya and Co-ordinator for LandNet, East Africa

Daniel Omweh, Senior Research Fellow, Nigerian Institute of International Affairs (NIIA); Member: Presidential National Working Group on the African Peer Review Mechanism in Nigeria; Fellow: Korea Foundation, Lagos, Nigeria

Hubert Ouédraogo, Co-ordinator: LandNet West Africa; Independent consultant on land and resource rights issues, Burkina Faso

Munyaradzi Saruchera, Researcher: Programme for Land and Agrarian Studies (PLAAS), School of Government, University of the Western Cape, Cape Town, South Africa; Network Co-ordinator: Pan-African Programme on Land and Resource Rights (PAPLRR) (first phase), Promoting Common Property Networks in Africa (Co-Govern) programme, and Stimulating Community Innovations in Sustainable Land Management programme

Rawia Tanfic, Research Fellow: Economics and Political Science Faculty, American University of Cairo, Egypt

Smokin Wanjala, Land law lecturer: University of Nairobi, Kenya

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Mumyaradzi Saruchera



INTRODUCTORY OVERVIEW

MUNYARADZI SARUCHERA

BACKGROUND TO PAPLRR

Across the African continent the land and resource rights of the rural poor are threatened by inappropriate policies and institutions (including global treaties); unequal social, political and economic relations; the actions of powerful vested interests (wealthy national or local elites, international aid organisations, multinational corporations); and the weakness of grassroots organisations. It is against this background that the Pan-African Programme on Land and Resource Rights (PAPLRR) Network's initiative to analyse, understand and engage with these issues was conceptualised by four African centres of excellence that subsequently developed the programme in 2001.

The unique contributions Africa can make are seldom taken seriously in international natural resource policy-making debates. One reason could be that the African voice on land and resource rights is perhaps not as strong in international forums as it should be. By coming together in forums such as PAPLRR, Africans are able to share their concerns and develop capacity to articulate their opinions and influence outcomes in the international arena.

Defining an agenda for advocacy and strategic engagement with governments, and building links across divides between scholars, practitioners and advocacy groups, is an emphasis of PAPLRR into the future. A key focus of the programme is the role of land and resource rights in the struggle against poverty, exploitation and oppression as well as their contribution in solving real world problems of African people, not as academic objects to be studied, but as key components of the struggle.

PAPLRR is hosted and co-managed by four African partner organisations, each of which co-ordinated and hosted one international meeting in its respective region during the initial phase of the programme. The partners are the African Centre for Technology Studies (ACTS), Kenya; Community Conservation and Development Initiatives (CCDI), Nigeria; the Programme for Land and Agrarian Studies (PLAAS), School of Government,

University of Western Cape, South Africa; and the Social Research Centre (SRC), American University in Cairo, Egypt.

The **objective** of PAPLRR is to develop and articulate a pan-African voice on land and resource rights, policies and advocacy, and engage with other stakeholders at regional and international research and policy-making events. Among other things, PAPLRR is an attempt to undertake networking and experience-sharing amongst Africans on their own continent, amongst themselves, rather than at the behest of outsiders. PAPLRR attempts to shift the balance and re-locate the centre of debate, learning and knowledge on land, resource tenure and rights in Africa, back to the continent where it belongs.

The **rationale** for PAPLRR is that, across the African continent, policies have been formulated and re-formulated with little regard to their implications for land and resource use. Scholars, researchers and practitioners should have an opportunity to contribute to these developments and enhance the policy-making process. Since the developments are happening on a wide scale, coming together to discuss and share knowledge and understanding on what is taking place in different countries may help bring about new opportunities to effectively influence policy.

PAPLRR'S ACTIVITIES

Three central themes were identified by the partner organisations as sufficiently common to guide PAPLRR's work programme. The themes are: land and resource tenure, in both local and national contexts but also within; wider economic contexts and en-gagements (for example, international trade and global environmental treaties); and roles and relationships in research, advocacy, policy and capacity building around land and resource rights, and their implications of analysis for strategies and actions. A key analytical thrust is the political economy of land and resources.

Based on these themes, PAPLRR's activities were implemented over an initial period of two years (2002–03) through:



- a series of workshops at which a small but core group of African researchers, practitioners and advocacy activists met to develop common understandings of land and resource rights, together with strategies and actions to secure rights for the rural poor;
- networking visits between institutions across the four participating African sub-regions; and
- engagement with policy makers and other researchers and practitioners, at international and regional events such as the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa in August/September 2002.

In line with its original conceptualisation, PAPLRR established a small but fairly consistent pool of core participants (about 10 for each sub-region) who participated at each of the four international meetings that produced materials, some of which have been included in this book. It was not an easy task to select the papers for this publication. (See the full list of papers in Appendix 2.)

The initial group of core participants was central to the implementation and growth of the programme. Although no strict and common selection criterion was applied, each partner identified participants to represent their respective regions based on a fairly flexible understanding of the programme. As at the end of 2003, PAPLRR's active membership was 42 (13 female and 29 male), representing 19 African countries altogether.

A series of workshops was hosted in the first phase of PAPLRR, with SRC hosting the **inaugural workshop** in March 2002 in Cairo, Egypt. The three central themes of the programme: land and resource tenure; wider economic contexts and engagements and roles and relationships in research, advocacy, policy and capacity building formed the content of the workshop discussions.

The **second workshop** was held in Lagos, Nigeria in July 2002, and hosted by CCDI. The focus was on civil society advocacy for land rights, deliberately so, given PAPLRR's preparations to engage the World Summit on Sustainable Development (WSSD) in Johannesburg, South Africa a few months later. A milestone output of the Lagos meeting, and indeed PAPLRR is the **Lagos Declaration on Land and Resource Rights in Africa**, which was drafted and adopted at the same meeting. The statement was distributed, in both hard and electronic copy forms, with other networks and at the WSSD conference. (See Appendix 1 for the full text of the Lagos Declaration Statement.)

ACTS hosted the **third workshop** in Nairobi, Kenya in November 2002 where the following themes were

discussed; struggles for real land and resource rights; implications of the New Partnership for Africa's Development (Nepad) and associated foreign investments on land and resource rights; implications of the World Trade Organization and associated trends on resource rights; and democratisation and governance of land and resource rights.

The **fourth and final workshop** was held in May 2003 in Cape Town, and hosted by PLAAS. The objective of this meeting was to explore the Nepad policy and its implications for land and agriculture, tenure security, property rights and natural resource management, as well as explore the opportunities and constraints for civil society engagement within that policy framework.

BACKGROUND TO THIS BOOK

PAPLRR builds and strengthens links between African researchers, development practitioners and advocacy groups in a bid to enhance their capacity to critically analyse national and international economic and political forces at various levels. Research findings and practitioners' perspectives have been, and will continue to be, communicated at strategic policy events such as the WSSD (referred to above), the African Ministerial Conference on Environment (AMCEN) and the Global Biodiversity Forum (GBF) to enhance and demonstrate the capacity of Africans to engage in, and influence, policy outcomes.

This takes place within international frameworks and treaties, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Convention on Biological Diversity (CBD), the United Nations Convention to Combat Desertification (UNCCD); and in arenas such as the World Trade Organization (WTO). The challenge for Africa is to link the decisions taken at these macro levels to the micro context in which ordinary people live. Patricia Kameri-Mbote (page 48) discusses the land and resource rights implications in Africa of selected international frameworks and conventions.

There are important commonalities that bring Africans together, including common concerns around land and resource rights. Firstly, across Africa poor people's land and resource rights are still insecure and inadequately recognised in law. The rights of women and minority groups are also weak and insecure. Africa's shared history of colonial rule and its consequences could be the reason for such a situation. In some countries, NGOs and other civil society formations are severely hampered in their attempts to improve matters – see, for example, the situation in Egypt as outlined by Abdel Ismail (page 135). The sharp divide between customary and statutory law in property regimes compounds this issue. The commonalities and differences between African people



as well as the challenges they face were extensively discussed at the PAPLRR inaugural meeting in Cairo.

Smokin Wanjala (page 9) picks up this discussion by exposing the vagaries of colonialism, which led to class differentiation, and social formations that profoundly define land rights and tenure in east Africa today. The same pattern, characterised by alienation, exploitation and subjugation of local populations, was also witnessed in southern Africa where some of the present land reform challenges (in Zimbabwe, Namibia and South Africa) can be traced to colonial history as ably captured by Nelson Marongwe (page 18), Stephen Greenberg (page 113), as well as Ben Cousins and Aninka Claassens (page 139). The undemocratic and exploitative nature of the colonial state informed the policies, laws, and institutions that were to characterise the independent states. In most cases, the colonial legal system was adopted wholesale, although in some instances reforms to dismantle the system are vigorously being pursued.

Secondly, the way in which colonial states took control and ownership of land in order to establish their territory means that vast areas of land across the continent legally belong to the state while the people who actually use the land have secondary rights on such land. This trend is particularly evident and problematic in Africa where large areas of land were (and sometimes still are) in private hands, often minorities of European settlers. The fact that the state has the ultimate rights to land creates many problems, including vague or insecure land tenure arrangements in some parts of the continent. Clement Ng'ong'ola discusses the effect of constitutional property rights on land reform in four southern African countries (page 60). Koffi Alinon discusses the legal pluralism which bedevils secure tenure in Francophone West Africa (page 41) and Hubert Ouédraogo outlines the need for those countries to encourage a research-based approach to solving their problems (page 105). Cousins and Claassens build a comprehensive picture of the struggle to secure communal tenure in South Africa while John Mope Simo discusses how the proclamation of a new national park in Cameroon has affected the rights of the people living there (page 85).

As a result of colonialism, Africa shares a history of exploitation, a history of struggle against exploitation in all forms and shades and a struggle for freedom, independence or liberation. This is part of a shared history which gave rise to PAPLRR that brings Africans together to share a continuing struggle for certain basic rights and freedoms. It is because of these commonalities and shared history that Africa continues to seek unity and solidarity through efforts such as the African Union and Nepad. Such commonalities provide a common basis for engaging the rest of the world on what Africa needs to do for its own development.

The issue of Nepad is a current and critical development that PAPLRR engages with in so far as its implications for agriculture, food security and land and resource rights for the poor are concerned. Although the discussions are not exhaustive, Daniel Omoweh (page 95) and Rawia Tawfic (page 30) examine the opportunities and constraints of the Nepad policy framework. As Omoweh says, land and natural resources are so central to the African development process that they cannot be relegated to the kind of cursory treatment they are given in Nepad, given that Africa's huge resource endowments partly account for its colonisation in the first place. The struggles to retain or regain access to these resources by domestic and external forces continue to this day.

Despite the good intentions of Nepad, PAPLRR criticises its neo-liberal premise and opening up African economies to external investment by securing property rights for foreign capital. Nepad is silent on the practical steps, modalities, an enabling policy framework, and the relevant institutions for safeguarding and enhancing the land and resource rights of the rural and urban poor. The poor people's productive capacities should rather be enhanced to regenerate local economies – the very basis for meaningful and sustainable African development. To this end, a mass-driven Land Initiative is an absolute necessity, given the agrarian nature of the African economy, building on experience such as that of the east African countries discussed by Michael Odhiambo (page 126). Such an initiative should be premised on full engagement of relevant civil society structures, the state and the poor people. Omoweh's paper and the Lagos Declaration (page 159) discuss Nepad in greater detail.

PAPLRR observes that African economies, particularly since independence, have not posted strong records of economic performance and development. As a result, chronic poverty and declining production continue to haunt the continent. This is yet another commonality shared by Africans, as is the need to locate the role of land and resource rights to deal with these challenges. The notion of land and resource rights should be set against the backdrop of good governance where civil and political rights ought to be equated with socio-economic rights, and perhaps incorporated in the structure of African societies and constitutions.

In this regard, demands for land reforms are an integral part of the continuing development struggles of the poor. Wanjala, Marongwe and Greenberg highlight the somewhat mixed results of redistributive land reform policies in east and southern Africa. One of the points that emerges is that racialised inequality in land ownership and resource use features prominently as a major issue in southern Africa.

Africa is faced with the threat of an increased pace and scope of globalisation, characterised by new kinds of



mechanisms to integrate economies into the global system of production and distribution. One of PAPLRR's central themes is the huge implication of globalisation for land and resource rights of the poor. In his paper, Habib Ayeb speaks out against how the Egyptian state has turned the common good of water into a commodity for sale in an attempt to draw foreign investment (page 75). Collusion of national and local elites with powerful international actors is one major threat for resources, especially common property resources on which the poorest rely for their livelihoods. Threats of such collusions are real and common in many African contexts, providing yet another basis for PAPLRR's sharing of experiences and analytical understanding.

Another global phenomenon is the proliferation of international treaties, especially over the last two decades, which impact on Africa's resource base, use and governance. African governments routinely sign-up for these treaties and yet the effects of such treaties on local people are not fully understood. Kameri-Mbote succinctly illustrates the linkages between international treaties and local livelihoods in her discussion on how the pursuit of national, regional and even international goals of poverty reduction and food security are linked to access and enjoyment of secure land and resource rights. In Africa and more particularly Nepad, poverty reduction is largely premised on land productivity in addition to access to basic services, markets and health care. Thus, secure rights to land and other resources underpin secure livelihoods and shelter by reducing vulnerability to shocks and guaranteeing a level of self-provisioning and supplementary incomes from basic foodstuffs. Insecure land and resource rights have been linked with social unrest in the Great Lakes region (Rwanda, Burundi and Democratic Republic of Congo), with adverse impacts on both long-term and short-term development.

So, despite many differences, Africans also have a lot in common. This provides impetus for dialogue in search of mutual understanding on various issues. However, there is need to recognise differences and appreciate that each society is unique and internally heterogeneous across the nation state in respect of language, culture, institutions and laws. Besides, Africa has slightly different responses to the common history of colonial rule and different post-colonial development paths with different outcomes found across the continent. It is equally important to recognise that concerns for redistribution of certain resources, for example land in southern Africa or water in north Africa, are not necessarily as pertinent in other parts of the continent.

Underlying these socio-economic and institutional differences are ecological variations across Africa, from very dry areas to very wet areas, and from forests to

savannas and grasslands. These variations make a huge difference to PAPLRR's analysis of the importance of rights in resource management regimes and it is important to understand and recognise these differences. For example, the English-speaking world's concept of 'common property' is not found in the French language. For this reason, it is difficult to even begin to theorise issues of common property among Africans from different legal traditions. Nevertheless, despite all these challenges we, as Africans, have to reach out to one another across these differences and find ways of working together for our common good.

PAPLRR is thus engaging in a challenging and difficult enterprise of seeking common ground, recognising and appreciating differences and reaching out across linguistic barriers to undertake the analysis of land and resource rights in Africa. It is a difficult undertaking, especially when it comes to highly contested and politicised issues of land and resource rights. In Africa, as elsewhere, talking about land and resource rights invariably leads to discussions about power and politics.

EMERGING ISSUES

There are important issues emerging from the land and resource rights analysis being undertaken by PAPLRR. Firstly, current institutional arrangements for claiming and maintaining strong land and resource rights for the poor are questionable. A critical question that arises is: what institutional arrangements promote down-ward accountability and representation of the rural poor, in negotiations for international agreements, to protect their land and resource rights?

Secondly, in order to secure the land and resource rights of the rural poor, there is need for comprehensive and inclusive tenure reforms. Linked with tenure security is the need for a clear distinction between customary and statutory tenure in land reform processes. Most importantly, the optimal role for customary tenure in land and resource tenure reform should be investigated. Customary tenure was subjected to many colonial distortions and yet remains a potential solution to landlessness and guarantor of land rights in Africa. At the same time customary tenure protects poor people from market forces, for example, the Ugandan Land Act of 1998 recognises customary tenure as a measure to keep landlessness in check. Addressing tenure issues is integral to preventing and managing Africa's conflicts arising from unfair or inequitable rights of access, right to use and own land and other natural resources. Wanjala and Cousins & Claassens raise these and other pertinent issues in their discussions.

Thirdly, the role of land and resource rights in Africa's conflicts is a crucial issue that requires attention in PAPLRR discussions. Uneven land and resource rights are strong causes of conflicts on the continent, including in Zimbabwe, Nigeria and the Great Lakes region. An



issue deserving more attention is the role of land and resource rights in building and sustaining peace. Maybe PAPLRR could consider ways to incorporate land and resource rights issues into the ongoing efforts to develop peace and security policies within the African Union and sub-regional bodies across the continent.

Fourthly, the issue of who decides which rights for what individuals and groups is a key theme whose implications should be fully understood. More specifically, the role of the state in formulating rules and mediating tenure arrangements needs to be scrutinised and creative alternatives developed. Today, states represent important property rights holders who have their rights protected by international law. States are also granted permanent sovereignty over their natural resources. Thus, states can own, directly control and utilise land and natural resources through any of their administrative structures or grant user rights to preferred beneficiaries. States are in a peculiar position as grantors and guarantors of property rights, both at the local and international level, as well as holders in their own right.

In postcolonial societies the destabilisation caused by colonial rule contributed to the breakdown of social, political and economic communal structures which saw states moving in to replace the centres of power in all areas, including property holding. In the process, states took over most of the properties previously held by communities and thus have come to monopolise common property resources. This development has far-reaching implications for land reform in many African countries and puts states in an unfair position with respect to mediating over property relations.

Fifthly, PAPLRR observes that Nepal is a key emerging policy arena in which the fundamental role of secure land and resource rights should be widely understood. Civil society must find effective ways of engaging with Nepal. Other key policy issues for engagement are the various global fora, including the WTO, where critical debates around the place of Africa within the global political economy are both possible and necessary.

Sixthly, privatisation is a major force in the world today. Dominant neo-liberal economic frameworks foster privatisation with highly negative consequences for the rural poor. The issue of privatisation, in its many contexts, needs continuous engagement while counter-strategies to protect vulnerable groups and subdue the forces of capital are developed.

The seventh point is with regards to social movements and civil society's roles for land and resource rights advocacy and lobbying. PAPLRR identifies a number of challenges both at regional and sub-regional levels. According to Odhiambo, funding remains a major impediment to land and resource rights and policy

networks. A lack of funding is an undeniable problem, but even where funding is available, the Tanzanian experience shows that donors may have other agendas which are not necessarily consistent with local interests.

Greenberg observes that the most important requirement for meaningful grassroots movements is their ability not only to capture, but also to hold onto, space in which the movements and their occupation of the land is recognised, however the latter may have come about. While issues and developments underpinning resource policies may shift radically and rapidly in response to events on the ground, such changes require movements that are prepared to act ahead of policy as well as within it. Social movements should lead the state rather than tail it. In most cases of successful resource capture around the world, the state has been compelled to recognise and even support occupations through *post-hoc* legalisation.

The current character of the African state demands that sustained civic organisation be built to demand progressive change. Key issues include what sort of support is required to build and maintain independent grassroots organisations, and how best this support can be provided. In particular, how can the radical middle class engage fully with emerging grassroots movements without imposing its own prejudices and assumptions on the movements?

There needs to be an identification of interests between the radical intelligentsia and the landless, based on the imperative that the majority of the population should have secure access to land. A related political and organisational matter is the willingness of the radical middle class to work directly and consistently with the landless and their organisations.

While NGOs may provide valuable assistance in nurturing and maintaining grassroots independent organisations, there are limits, especially in the context of growing NGO professionalism. A voluntary, politically and morally-based approach is preferable, for it allows individuals to remain outside circuits of institutional power. While debates on methods and forms of support should be encouraged, the limits of support from developmental institutions should be understood and transcended.

Lastly, according to Greenberg, the movement of landless people in South Africa provides an important example of the potential for tactical and practical co-operation between rural and urban grassroots movements. Inside the struggles of the landless, tendencies that seek to promote working class leadership of the movement should be supported and encouraged. It is only then that the theoretical rights won in the struggle against apartheid will become real for the dispossessed and marginalised.



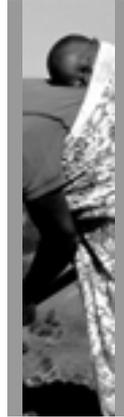
THE WAY FORWARD

Despite its recent entrance onto the land and resource rights research and advocacy scene, PAPLRR is making an impact and can be viewed as a successful initiative. Given the objectives and work programme set before it, PAPLRR is doing well despite operational challenges. The Lagos Declaration Statement is a good entry point to consolidate the struggle and translate current gains into a practical and meaningful advocacy work programme on the continent.

PAPLRR locates a niche in relation to other initiatives on resource rights. However, PAPLRR's focus and objectives may require narrowing for it to become more influential and effective. It is therefore necessary for PAPLRR to take a strategic decision on its future activities, and among these consider advocacy, research, information sharing, capacity building, or a combination of some or all of these. Effective and successful collaboration takes place around a single issue, rather than a variety of interests, in knowledge networks.

Within such a strategic decision could also be a consideration to institutionalise PAPLRR for sustainability into the future. PAPLRR will need to engage policy and build effective relationships with other networks and the experiences of the WSSD should serve as a learning curve for future policy engagement strategies.

It is not easy to claim PAPLRR's success in creating an African voice on land and resource rights. However, one thing is certain – PAPLRR is making an impact. The groundwork for such an objective has been successfully laid and reasonable progress in developing individual and institutional expertise in this respect achieved. A network of researchers, activists and development practitioners has been established and is well networked for action. Necessary considerations for the growth of PAPLRR should include securing funding and positioning the network as a credible source of information for civil society, the rural poor and policy makers, as well as achieving more geographical spread across Africa.



SECTION 1:
LAND AND RESOURCE RIGHTS IN AFRICA:
REGIONAL OVERVIEWS



LAND AND RESOURCE TENURE, POLICIES AND LAWS IN EAST AFRICA

SMOKIN WANJALA

INTRODUCTION

For most of sub-Saharan Africa, land defines the social, economic, and political relations in society. Land provides the basis upon which planners predicate their strategies of development and, in this regard, it is the most crucial factor of production. Land is both a resource and a focal point of social identity and solidarity. Being the most extensive form of property, it determines the nature of power relations in society. The manner in which land rights are defined and allocated attract substantial normative, institutional, and administrative arrangements in a legal system.

In agrarian societies such as those of east Africa, land policies and tenure systems have retained an unchanging centrality in the countries' political economies. As the political systems in the region undergo the hiccups of transition, the land question remains the single most contentious issue in the search for a more just society. Three eras in the history of these countries have impacted upon the policy, institutional, normative and political dimensions of land relations. These are the colonial period, characterised by alienation and exploitation of land resources by the colonial regime; the post-colonial period, characterised by the developmentalist ideology of cash crop production for the export market; and the multiparty era, characterised by the ideology of globalisation and the free market economy.

LAND TENURE DURING THE COLONIAL PERIOD

The colonial period witnessed the alienation of land and displacement of the local people from their lands into what were infamously called 'reserves'. The colonial regimes then set in motion discriminatory policies, which would maximise their exploitation of land resources and the institutionalisation of colonial agriculture. Law played an instrumental role in this strategy.¹ Africans were considered incapable of owning land in the sense in

which the concept of ownership is understood in English jurisprudence. (See, for example, Okoth-Ogendo 1996 and Wanjala 2000). Customary law was not only regarded as inferior to English law, but also as lacking the juridical attributes to put land ownership into operation.

A dual system of land law was therefore introduced in the colony to legitimise this unequal development. English land law would apply to the areas which had been set apart for white settlers. These areas, which in the case of Kenya came to be known as the 'white highlands', were the more arable and inhabitable. Native law and custom were to apply in the African reserves. While the settlers held large chunks of fertile land, the Africans were squeezed into areas that were not immediately required for European settlement. These policies had the net effect of creating social economic maladjustment within the African communities. Poverty, disease, famine and ethnic tensions came to characterise the daily lives of the African people. These developments in turn led to political agitation and organisation. With colonial land policies increasingly becoming untenable, the need for reform became urgent.

At first, the colonial authorities adopted legislative measures that were purely administrative in effect. For example, the Native Lands Trust Ordinances, promulgated in the 1930s, created native lands trust boards to manage African affairs in the reserves. These boards consisted almost exclusively of Europeans, with only one slot being reserved for an African – if a suitable one could be found. The boards that were established to manage settler affairs, on the other hand, were mainly comprised of settlers, with minimal representation by colonial officials.

Thus the concept of trusteeship, with its inherent paternalism, became firmly anchored in colonial land law and policy. In Kenya, further reforms saw the removal of African reserves from the purview of the Crown Lands Ordinance of 1915, through the promulgation of the



Native Lands Trust Ordinance of 1938. On the part of the authorities, such action was intended to give a false sense of security to the Africans about their lands, which had been gazetted as native lands. In reality however, the move was calculated to consolidate the control of African affairs through the system of indirect rule. But sooner or later, the real issue would have to be addressed by the colonial regime if the discontent among the people was to be contained, even if for a while.

The problems then being experienced in the reserves were a direct result of the policies of land alienation, displacement and exploitation of African labour. The official argument embraced by the colonial regime was that the problems in the reserves were not a result of the lack of land caused by unfair policies. The problem, it was officially argued, was one of defective tenure arrangements. In this regard, customary land tenure was considered as being inimical to sound land-use and agricultural development.

This was the position advanced by the East African Royal Commission and the plan for the reform of African land tenure prepared by RJM Swynnerton (1955). The Swynnerton plan became the blueprint for land tenure reform programmes in Kenya during the period just before independence in 1963. Henceforth, through the process of land adjudication, consolidation and registration, individualisation of tenure was to be vigorously pursued as a panacea for under-development.

The reforms had a profound impact on the social formations of the emergent post-independent state. While the ultimate objective was to transform indigenous tenure, the real effect of these land reforms was to create socially antagonistic classes based on the amount of land accumulated. It was to be expected that at independence, the nationalist government would embark upon a radical land redistribution programme to resettle the hundreds of thousands of displaced peasants. After all, the armed peasant struggle (the Mau-Mau) was ignited by the need to recapture stolen lands from colonial invaders. But a combination of factors ensured that the much-anticipated reforms never actually materialised.

The inherent contradictions and injustices in the colonial state had created a privileged class of white settlers and a few African loyalists on the one hand, and a disinherited African peasantry on the other. The former had accumulated large amounts of land far exceeding their immediate or medium term needs. The latter had been reduced to mere providers of cheap labour. This state of affairs could either be destroyed through revolutionary policies as was the case in Tanzania; or be maintained through the politics of accommodation as was the case in Kenya. Indeed the constitutional negotiations that preceded independence revolved around the land question.

At the end of it all, the nationalists not only recognised the sanctity of private property in land but also legitimised the colonial expropriations. (For a detailed analysis, see Kanyinga 2000.) The independence Constitution of Kenya recognised and protected private property in an elaborate Bill of Rights. The Constitution was a product of a negotiated settlement, which ensured that the interests of the white land-owning minority were safeguarded. The nationalist government also sought to placate institutions which were crucial for the supply of finance capital by not embracing radical land reforms. In the ensuing political struggles within the political aristocracy that followed, the radical wing was vanquished. The liberals adopted the developmentalist paradigm. Policies of economic growth and modernisation were promoted at the expense of economic redistribution and social empowerment.

Tragically for Kenya, the undemocratic and exploitative nature of the colonial state informed the policies, laws, and institutions that were to characterise the independent state. The colonial legal system was adopted wholesale, and land tenure reforms initiated by the colonial regime were vigorously pursued. Individual tenure was to be the stimulant of agricultural production.² This decision firmly anchored English property law as the jurisprudential embodiment of individual ownership of land in Kenya. Customary law was to regulate land relations under customary tenure. Where a conflict arose between customary law and English law, the courts were to decide on the basis of the merits of the case. Where the land in question was registered, under the imposed law, courts always ruled that the fact of registration had extinguished any claims to such land based on African customary law.³

Public land, on the other hand, was vested in the President. This was in conformity with the English notions of land ownership where technically, no one owns land but the Crown. Monarchical powers were therefore equated with presidential powers. Through the enabling provisions of the Government Lands Act, the President could now make grants of such public land to individuals and collectivities either in leasehold or freehold. In other words, the President now enjoyed the same powers the Governor had had over land in the colony. Land that had been administered under the Native Lands Trust Ordinance was now vested in the respective county councils to be held by the latter for the benefit of the local inhabitants, in accordance with the applicable customary law.

Three types of tenure emerged out of these legal arrangements, namely individual or private tenure, African customary tenure, and public tenure. To this day, land relations operate within these frameworks of tenure. These in turn have generated different social classes. Some of these classes are inherently antagonistic while others are symbiotic. Indeed the land reform discourse in



Kenya today is informed by the conflicts, tensions and contradictions that characterise human relations in society. Basically, the land problem revolves around questions of control and access to land resources, land use imperatives, historical claims to land, gender relations and rights to land, urban shelter and informal economic activity, foreign investment, and cultural expression. The prevailing land tenure and the political dispensation largely determine how these issues are dealt with. The political dispensation is critical because it brings into focus the role of the state. The state, as the ultimate repository of political power, plays an important role in arbitrating between conflicts and setting the policy framework. In this regard, the state can play the role of an impartial arbiter or be an integral part of the conflict.

In Tanzania, the nationalist government rejected the land market reforms that had been advocated by the colonial regime. Instead, the policy of villagisation was adopted. Freehold tenure was replaced by leasehold tenure. The first five national development plans called for the settlement of peasants in new villages supervised by a government agency. Land tenure in these villages was based on statutory rather than customary law. The latter was considered primitive and inimical to the needs of a modern society. After the 1967 Arusha Declaration, all land in Tanzania was nationalised then followed by forced resettlement of thousands of peasants and pastoralists in new villages. Agricultural production was to take the route of 'transformation' and 'improvement'. Transformation meant the translocation of people into new environments where they would be required to farm using new technologies.

The other strategy of transformation was the establishment of larger parastatals to which large tracts of land were alienated for purposes of commercial agriculture. The 'improvement' approach simply entailed the provision of capital and other farm subsidies that, if deployed, would lead to improved productivity and lifestyles.

In Uganda, the post-colonial government centralised all former Crown lands and placed them under the superintendence of a land commission. This led to the accumulation of large amounts of land by the politically powerful at the expense of the peasantry. In an attempt to forestall this development, the government enacted the 1969 Public Lands Act, which sought to protect the rights of peasants who had been declared tenants of the Crown. This law also placed a ceiling on the amount of land that an individual could acquire. In terms of development strategy, the government adopted policies of transformation and improvement along the lines followed by Tanzania. Group farms were established through the translocation of peasants from their traditional settings onto uninhabited land. The government then provided subsidised farm inputs to the farmers. The peasants who were not uprooted from their

farms were encouraged to improve their farming and production techniques through credit and farm subsidies.

The land tenure laws and policies initiated by the government were interrupted by the military coup of 1971. Following the coup, the military regime enacted the 1975 Land Reform Decree. This decree nationalised all land in Uganda and declared all citizens to be tenants at the mercy of the state. The military regime created yet another landed class, drawn largely from the military, at the expense, yet again, of the peasantry. Critically, Uganda was thrown into a confusion of tenure as all institutions of governance were taken over and distorted by *ad hoc* policies. It was not until the 1990s that the situation regarding land tenure was clarified following the enactment of the Land Act.

CONTROL AND ACCESS RIGHTS TO LAND IN EASTERN AFRICA

The historical developments discussed in the forgoing section have had far-reaching and varying effects on control and access rights to land of the majority of the people in the east African region.

KENYA

Land-ownership patterns in Kenya have followed the predominantly class differentiation strategies of the colonial era. Within the regime of private or individual tenure, there are three distinct classes: large-scale, average-scale and small-scale landowners. The first category constitutes the landed nobility. This is the group that either took over the plantation farms left by departing settlers, or acquired large chunks of land through purchase or outright privatisation. It comprises a small percentage of white settlers, former colonial home guards and their offspring, the ruling political elite and latter-day primitive accumulators and capitalists. At the far end of the spectrum, there is a group of opportunists and sycophants who periodically pander to the whims of the ruling clique in return for grants of land. Between them they own disproportionately large tracts of land. They are also the dominant political class. By controlling the main factor of production in the country's economy, this class exerts a pervasive influence on the social, economic and political affairs of the nation.

The average scale landowners are usually middle class wage earners and entrepreneurs. Some in this category are also political apparatchiks. The majority, however, are small-scale landholders. These are the peasants who were hooked onto the phenomenon of individual ownership of land through tenure reform. This process was supposed to enhance land productivity. Yet the element of exclusivity, inherent in individual ownership, has over the years created social economic disequilibria among communities. Private registration led to the disinheritance of many from what they had come to



regard as their ancestral land. This led to irreparable social disharmony, condemning whole communities to a permanent state of hostility.

The peasants are expected to derive a decent livelihood from within the confines of their boundaries. While this was possible in the early days of independence, radically changing demographic, climatic and economic conditions have reduced the viability of these units as life-sustaining centres. Poverty is widespread in most of the peasant holdings. Research shows that, contrary to assumptions about the benefits of individual ownership, there is no direct link between individual title and agricultural productivity.

Then there are the landless, whose ranks continue to swell. In the eyes of the law, these people do not have any recognisable or protectable rights over land. They are referred to as 'squatters', 'trespassers', or 'adverse possessors'. Many of these are victims of historical processes of disinheritance, while others have been born into the resultant injustice that perpetuates property inequalities. Landlessness for these people has meant a life of squalor and serfdom. No systematic effort has been made to comprehensively address the plight of the landless. Past resettlement efforts have been undertaken haphazardly to suit the political expediency of the time. The phenomenon of 'squatterism' poses a real danger to social stability.

The trust land areas, where privatisation has yet to take place, are characterised by uncertainty of tenure. The constitutional position is that such land is supposed to be held by the relevant county council on behalf of the area residents, in accordance with the applicable customary law. Yet, in contravention of constitutional provisions, tracts of land have been allocated to individuals in total disregard of the interests of the local inhabitants. In areas where agriculture is a viable economic activity, and where the theories of the value of individual ownership would justify the process, the government adopted a cynical approach to land adjudication and registration. The rationale for this kind of strategy by the then government was to be found in the political economy of land. Governmental control of land resources is a critical factor for political self-perpetuation. In a largely agrarian society, political loyalty is ensured by the possibility of accessing land resources through the largesse of government.

In areas that are not capable of supporting rain-fed agricultural activity, especially crop production – such as semi-arid and arid areas – economic activity largely depends on the availability of scarce water and pasture. Livestock production and marketing is the main economic activity in these areas. But the scarcity of water and pasture has resulted in armed conflict between

residents. These conflicts are further exacerbated when they take on an ethnic and political connotation, as so often happens in Kenya.⁴ So, the economics of access to and control of land resources remains critical to any land reform programme.

TANZANIA AND UGANDA

Unlike Kenya, the governments of Tanzania and Uganda undertook land reforms that culminated in new land legislation. Following the structural adjustment programmes of the 1980s, both countries came under increasing pressure to reform their land tenure systems with a view to establishing a land market. The socialist policies in Tanzania and the chaos in Uganda after the military coup combined to stifle the emergence of private property in land. Without secure property rights, it would not be possible to develop a land market. The Tanzanian government appointed a land commission and, based on its report, enacted a comprehensive Land Act defining and describing various land rights ranging from customary to individual private rights of occupancy.⁵

Following a World Bank and United States Agency for International Development (USAID)-sponsored study (Makerere Institute of Social Science and Land Tenure Center of the University of Wisconsin 1989) it was recommended that a land market should be developed in Uganda to stimulate agricultural production. Such a market would provide a mechanism for transferring land from inefficient to efficient farmers. The result was the enactment of the 1998 Land Act. (See also Bank of Uganda 1990, 1993.) These reforms resulted in the creation of a powerful social class of landed individuals who acquired superior political leverage over other classes. This development in turn led to social antagonisms and tensions such as those in neighbouring Kenya. The social economic fallout of the uncritical individualisation of tenure in Kenya led to the appointment of a commission by the President to examine and review the country's land tenure systems and laws. The developments in the three neighbouring countries indicate that the challenge of land reform is far from over. Some of the challenges will certainly confront policy makers and governments not only in the region, but also in parts of Africa where land remains the focal point of social and economic realisation.

ENDURING CHALLENGES

URBAN TENURE FOR THE POOR

As the east African countries and other parts of Africa grapple to re-energise their economies through macro and micro reforms, one of the daunting tasks they face is to secure the land rights of the urban poor. Economic activity in many Third World countries has been restricted to urban satellites. This phenomenon has been occasioned by the failure to transform rural economies



into dynamic self-generating enclaves capable of sustaining ever-growing populations.

With the increasing number of people continuing to gravitate towards the cities has come increasing pressure for shelter and land on which to build shelters. Many housing structures in urban areas are fragile and inadequate for decent human life. The semi-modern housing estates cropping up in suburban environs are not aimed at addressing the need for shelter. They are capital investments, which are way out of the reach of the urban poor.⁶

It is in the urban areas where much of the informal economic activity takes place – especially between the middle and lower classes. These economic activities take the form of petty trade and merchandising, warehousing, service delivery, and low-scale industrial production. All these activities depend on some form of access to and control of title to land. But the existing legal arrangements do not facilitate the urban poor's access to land. In fact, it can be argued that in the Kenyan context, the law does not recognise land tenure outside the framework of the traditional forms of property holding.

Thus, unless an individual can claim title to land on the basis of a freehold or a leasehold title, or has a claim under customary law, occupation of land by other means is bound to be tenuous in legal terms. Indeed this is the tragedy that has befallen many people who do not have such traditional titles to land.

For economic activity to prosper and to accommodate the poor in urban areas, innovative forms of tenure are needed to coexist with traditional ones – for example, legislation that confers powers on executive authorities to make grants of un-alienated government land either in leasehold or freehold. Apart from the fact that these powers are too wide to be exercised in the public interest, it is also clear that presidential grants were not intended to take care of the needs of the urban poor. Instead, public land in urban areas has been privatised, completely without regard for the public interest. Beneficiaries of such grants have been individuals with good political connections.

Increasingly, economic activity is being viewed in terms of the classical market economy ideology which emphasises private property. Activity that entails access to land resources or space by the urban poor for self-economic realisation is not considered 'economic'. There is no legal protection of such access to land. The interests of the individual have tended to take precedence over the interests of the majority. In recent times Kenya has witnessed the unbridled destruction of many temporary structures in the three major towns of Nairobi, Mombasa, and Kisumu. These structures, so-called *kiosks* are a haven of informal economic activity.

The officially sanctioned destruction of these structures has been based on the fact that the owners do not have title to the land or the space they occupy. The temporary licences, which the local authorities sometimes grant to the owners, are considered inferior in the face of either a leasehold or freehold title that an individual may acquire over the same piece of land. Official destructive action has intensified levels of poverty and rendered many people even more vulnerable.⁷ There is a need to rethink the issue of tenure in urban areas. The time has come for the concept of tenure to be freed from the notion of a fixed connection to the soil. As far as urban economic activity is concerned, what is needed are forms of tenure that can accommodate the fluid and multifarious requirements of human survival. Governments should devise, legislate and implement forms of land tenure that confer rights of access to the urban poor for purposes of facilitating their economic activities. Even if such rights are transitory and temporary, they may be qualitatively as good as any other form of tenure.

GENDER AND RIGHTS TO LAND

Property rights, by their very nature, are an expression of power relations. The manner in which the rights are allocated and regulated in society often determines the ensuing relations. In the countries under discussion, women constitute the majority. They provide both domestic and on-farm labour, and play a critical part in the economic and social life of the nations. Yet, it is a paradox that the land rights regimes do not adequately secure the rights of women over this vital resource. Although the countries' constitutions outlaw discrimination on the basis of sex, some of them allow such discrimination to take place in questions of personal law such as marriage, divorce and burial.⁸

In matters relating to land rights, the applicable laws do not specifically discriminate against women. But the application of customary laws in marriage has, to the extent that customary law may provide for discriminatory practices, diminished the capacity of women over land rights. Although the Law of Succession Act is largely gender-blind with regard to inheritance of property upon the death of a spouse, actual practices among many communities in Kenya discriminate against women. Under many customary laws, women have no identifiable rights over land. In some communities, the husband solely inherits all of the wife's property, whether it was acquired before or after the marriage took place.

It is important that this situation be clarified so as to secure the rights of women to land.⁹ This would entail the explicit prohibition of customary laws and practices that discriminate against women in questions of property ownership and inheritance (see Benschop 2001). Such action would go a long way towards enhancing the ongoing struggle for democratisation and ensuring redistribution and social justice.



LAND USE IMPERATIVES

One of the concerns regarding land resources in eastern Africa, and indeed most of sub-Saharan Africa, is the tension between access to and control of land and its efficient use. All these countries have a rigid framework for the protection of property rights embodied in their constitutions. Private property, from the point of view of those in whom rights of property are vested, is sacrosanct. Such property is not to be compulsorily acquired unless it is in the public interest. Moreover, such acquisition must be followed by full and prompt compensation. Apart from the freedom against arbitrary acquisition by the state, landowners are also protected from unjustified interference in how they may use their land. Such interference by the state is only possible through the instrumentality of sectoral planning legislation.¹⁰

The government of the day may control land use practices that are considered inimical to the integrity of land and long-term sustainable use. Thus, practices that may result in soil degradation and erosion, for example, can be prevented through specific legislation. The assumption underlying this legislative regulation is that it is necessary for the greater good of society. Experience shows, however, that there has been an over-emphasis on control and access to land as opposed to the efficient use of same. Questions of tenure more often than not take precedence over questions of land use. This has led to a situation where there are no national policies to harmonise the relationship between property rights and use responsibilities.

This anomalous situation can be explained by the fact that the politics of liberation was informed by the need to reclaim lost or conquered lands. The type of policies and legal arrangements that would determine the nature of land ownership largely informed the political discourse that followed. Thus, questions of tenure took precedence over questions of land use practices. Having become a central factor in the post-independent state, and in the political struggles that followed, the issue of who would control access to land became too important. Official policy largely disregarded the need for land-use planning and conservation. More emphasis was placed on land acquisition than land conservation. In countries that retained the colonial tenure system, the ruling clique had to continue expanding the domain of private tenure at the expense of public tenure.

The unmitigated shrinkage of public tenure has led to the destruction of important land resources such as rare indigenous forests and other genetic resources. The situation was exacerbated by the fact that any legal challenges to state-sponsored destruction of national biodiversity were met with rigid common law rules.¹¹ Although the international legal regime has challenged the sovereignty of states with regard to matters of the

environment, governments have often signed and ratified the relevant instruments without any commitment to abide by the principles embodied in these instruments. Even with the domestication of some of the principles in the international treaties, official action to implement the law has not been freely forthcoming.¹² The net effect has been the postponement of questions of intergenerational equity in the acquisition and use of natural resources.

GLOBALISATION AND LAND RIGHTS FOR THE POOR

In tandem with the increasing sensitivity of the international community to matters of environmental conservation, there is a globalisation movement. This parallel development in the internationalisation of human affairs should ordinarily bode well for the rights of the poor. Since certain aspects of land-related rights are recognised by the international law of human rights, it would not be idle to argue that this dual movement should secure the land rights of the vulnerable and voiceless.

Yet, the processes of globalisation and the human rights movement do not share similar ideologies. Globalisation is largely the internalisation of world social economic trends according to the dictates of the dominant cultures of Western capitalist economies.

Given the asymmetry of economic power between the developed world and the under-developed countries of the Third World, globalisation is an inherently unequal process.¹³ The human rights movement, on the other hand, is founded upon the dictates of human dignity and social justice. Right from the moment the idea of human rights took root at the United Nations, it became encapsulated in the ideological tensions that characterised the Cold War superpower relations.

On the one hand of the ideological divide, the emphasis was placed on civil and political rights, while on the other, the emphasis was on social and economic rights. The stultification of the human rights movement over the last 40 years was due to this ideological tension. What this meant for land rights of the poor is that they did not attract the attention of policy planners in countries that had chosen neo-liberal economic models of development. This suggests that property rights of the poor might have flourished under a more socialist economic arrangement.

But even within the context of such an economic dispensation, the land rights of the poor would have been recognised only within the hegemonic development plans of a centrally planned economy. This is what happened in Tanzania. In countries like Kenya, the state was identified as the main engine of development. The macroeconomic goal was growth and modernisation.



The provision of basic social services such as food, shelter, clean water and health facilities was relegated to the bottom of the list of development priorities. The emphasis on macroeconomic growth meant a demphasis on socio-economic empowerment and poverty eradication. With increasing poverty and low economic growth recorded in most African countries, in came the structural adjustment programmes of the 1980s.

The programmes advocated the free market, as an alternative to the state, as the agent for economic development. The failure of the developmentalist model was characterised by a decline in per capita incomes, deterioration of social services, poor and non-existent infrastructure, intensifying levels of poverty and environmental degradation, and rampant corruption. But the architects of the structural adjustment programmes did not attribute the failure of the state to the inherent contradictions of primitive capitalism. They either chose to ignore or did not take into account the phenomenon of what has been described as the 'instrumentalisation of political disorder'¹⁴ in most African countries. Thus they assumed that economic restructuring could successfully take place outside the framework of political restructuring. The imposition of economic responsibilities on an already disempowered people was the regrettable consequence of these programmes. The market, which was to replace the corrupt state, was underdeveloped and riddled with distortions.

Thus the international re-awakening to the desirability of democratic and accountable governance after the fall of the Soviet Union was not accompanied by a commitment to fundamental restructuring of imperialist institutions. Globalisation is taking place within this context. Policies of control and access to land can only continue to strengthen the position of those that are already powerful. The demand for Third World economies to open up their markets for foreign investment also means that land must be allocated for such investment.

In Kenya, for example, large expanses of land have been set aside for export processing zones to facilitate the investment needs of foreign multinational corporations. Such policies are seriously threatening the rights of the urban poor to decent shelter. The government, desperate to secure foreign financing for its recurrent and development budget, usually has little to say on behalf of the marginalised. The situation is further complicated by demands for the government to pull out of the economy through divestiture from the public enterprises, commonly known as parastatals. This entails selling the public stake in these institutions to private investors. The foreign corporations that are buying these state enterprises often ensure that they get long-term guarantees of security, including land tenure security. Such guaranteed security has the effect of tying up land resources at the expense of the local poor.

While there is nothing intrinsically wrong with the state's withdrawal from participating in the economy, it is important that divestiture be informed by long-term policies and principles that protect the public good, in this case the rights of the poor to land resources. Yet, Kenya does not have a framework law to guide the process of divestiture. To date, the sale of state enterprises has been taking place in a haphazard manner and the process has not been transparent. The real effect of divestiture on the security of tenure for the poor may not be known until it is too late.

RETHINKING CUSTOMARY TENURE

Comprehensive land reform cannot be undertaken without a deliberate effort to recontextualise African customary tenure. This is because customary tenure has been the subject of much intellectual confusion and distortion, resulting from scholars' simplistic reliance on English concepts of property in trying to understand the nature and institutions of African land relations. Three fundamental misconceptions have arisen from this over-reliance upon foreign notions of land ownership. One, that Africans did not own land; two, that land belonged to the community as a whole; and three, that as a result, land could not be transferred. These misconceptions led to the relegation of customary land law to an inferior status in the colonial legal systems – a status from which it has never recovered. Fortunately, a large body of literature written by more recent scholars has helped to rescue African land tenure from the conceptual confusion into which it had been thrown.¹⁵

It is instructive to emphasise that interest holders under customary tenure are determined by their status in a rural community. One of the main criteria for differentiating status is, in fact, the right of access to land and the power to control that access. The content of the interest is the most complex area of inquiry. A distinction must always be made between access and control. Benefit would include any entitlement to exploit the land whereas control entails only the power to decide who may benefit from the land and in what circumstances (Bennet 1995:3). Land, in an African setting is always the subject of many interests and derivative rights. Such rights are vested in individuals and groups. The rights and interests frequently coexist with each other. For example, the rights of the members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of law. Besides, their enjoyment is dependent on certain conditions unique to the group. Several rights of the members could be inferior to, or coterminous with, or indeed superior to the sum total of rights of a group. Customary law does not vest ownership in the English sense in the family, but ascribes to the family the aggregate of the rights that could be described as 'ownership' (Coker 1966:30–3).



Sometimes the rights of access to land are described as ownership rights, but only in the manner peculiar to this system of land law – while the powers of control are described as sovereign rights. (See, for example, Lloyd 1962:66.) The rights of the members of a family are more often confused with the rights of the family as a corporate entity; and worse still, with those of the political sovereign – such as a chief or head of the family – as a caretaker in this very comprehensive and complex structure. In this scheme of things, the concept of security of tenure becomes difficult to fathom. Attempts to ensure security of tenure through legislation have not always been successful. Security of tenure is in practice achieved through open-ended and continuous processes of negotiation and political manoeuvring. Some writers have creatively argued that secure rights in land range along a continuum from the most temporary to the most permanent, and can swing backwards and forwards along the continuum (Okoth Ogendo 1993). As to the issue of land alienability, it is no longer tenable to argue that there never was a transfer of land to a stranger, for example. Customary law does not prohibit land alienation. Instead, it imposes a condition precedent to the effect that what is transferred is not the physical entity, but specific user rights necessary for the needs of a stranger.

Such is the complex system of customary tenure that it continues to maintain resilience in the face of legislative assault in the guise of land tenure reform. It is high time that this type of tenure was accorded its rightful place in the legal order. Creativity and innovation are needed to harmonise the inherent rigidities and fluidities in this system of tenure with the needs of a modern society.

This issue assumes added urgency given the fact that most countries in sub-Saharan Africa are undergoing a political transition towards democratic governance. In most African countries, a discourse about democracy is underway.

CONCLUSION

After many years of one-party authoritarianism, there are ongoing processes of state-sponsored constitutional reform in parts of Africa. What is taking place is not just a rewriting of a document of governance. Rather, it is a fundamental rethinking of the social contract. Earlier presumptions of the state and citizen relations are being questioned. Traditional models of governance are increasingly coming under scrutiny. The need for public participation in the decision-making processes is no longer a privilege granted by the state, but the very essence of legitimate government. New institutions for the implementation of democratic principles are being considered.

The discourse on land reform cannot therefore take place in isolation. It should be anchored within the wider debate on democracy. The land issue must therefore be

viewed within the context of the nation's natural resources. How these are utilised for present and future generations is an important aspect of that debate. Likewise, the property rights attached to these resources on a short and long-term basis and the people in whom such rights are vested are crucial issues. It becomes clear that long-held assumptions about tenure and title to land may no longer be tenable.

In addressing the land question, there is need to discard many misconceptions and myths about tenure, access, control and use of this vital resource. Policy makers must boldly confront the often neglected but persistent concerns for social equity, historical justice, democratic decision making, and the rational balancing of competing uses of land. At the end of the day, it must be acknowledged that land, by its very nature, belongs not to a class or a few, but to present and future generations. Rights and responsibilities must therefore be allocated on this basis.

¹In Kenya, for example, this was achieved through the promulgation of the Crown Lands Ordinances of 1902 and 1905 respectively. Through these ordinances, first the Commissioner and later, the Governor, was empowered to make grants of leasehold or freehold to the settlers on very flexible terms. Similar strategies were adopted in Tanganyika first, by the German colonialists and later by the British. In Uganda the situation was exacerbated by the creation of sub-tenancies through the Mailoland system.

²Swynnerton argued as follows:

Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer unit of land and a system of farming whose production will support his family. He must be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security such financial credits as he may wish to secure.

³See, for example Obiero v. Opiyo (1972) EA 227; and Esiroyo v. Esiroyo, (1973) EA 338. The policy of relegating customary tenure to an inferior status was not however restricted to the Kenyan colony. Similar laws and policies were extended to Tanganyika and Uganda. See for example Shivji 1998:2–7.

⁴Cattle rustling between mainly pastoralist communities in Kenya like the Samburu, Borana, Somali, Turkana, Marakwet and Pokot is related to this.

⁵However, it is clear from the legislation that government did not accept all the commission's key recommendations.



⁶Most of these housing units are purchased on mortgage financing schemes which can only be afforded by the upper middle class.

⁷The *Mama Lishe* structures that are being set up in Tanzania to replace the informal structures are a good example of innovative ways of accommodating the urban poor.

⁸The Kenyan Constitution allows such discrimination.

⁹The Ugandan constitution rightly outlaws the application of customary laws to land relations where such laws discriminate against women.

¹⁰For example, Kenya's Agriculture Act and Land Control Act.

¹¹An individual could not challenge state action unless he or she could prove that they had *locus standi*. This position has now been changed in Kenya with the enactment of the Environmental Management and Coordination Act. The Act confers the right to bring court action against the government.

¹²For an extensive analysis of the interface between property rights, the environment and the Constitution, see Juma & Ojwang 1996.

¹³For the various theories on globalisation, see Held et al. 1999.

¹⁴See the discussion of the dilemma of the African state by Chabal & Daloz 1999:1–16.

¹⁵See for example, Bentsi-Enchill 1964; Okoth Ogendo 1995, 1996.

BIBLIOGRAPHY

Bank of Uganda Agricultural Secretariat. 1990. *Report of the Technical Committee on the Recommendations Relating to Land Tenure Reform Policy*. October 1990. Kampala: Bank of Uganda.

Bank of Uganda Agricultural Secretariat. 1993. *Report of the Technical Committee on Land Tenure Law Reform*. April 1993. Kampala: Bank of Uganda.

Bennet, TW. 1995. Terminology and land, in *African law and legal theory*, edited by Gordon Woodman and AO Obilade. New York: New York University Press.

Benshop, M. 2001. *Draft report on women's land and housing rights in east Africa*. Nairobi: United Nations Human Settlements Programme (UN-Habitat) Gender Policy Unit.

Bentsi-Enchill, K. 1964. *Ghana land law*. London: Sweet and Maxwell.

Chabal, P & Daloz, JP. 1999. *Africa works: Disorder as political instrument*. Oxford: Indiana University Press.

Coker, GBA. 1966. *Family property among the Yorubas*. London: Sweet and Maxwell.

Held, D, McGrew, A, Goldblatt, D & Perraton, J. 1999. *Global transformations: Politics, economics, and culture*. Cambridge: Polity Press.

Juma, C & Ojwang, JB (eds). 1996. *In land we trust: Environment, private property and constitutional change*. Nairobi: Initiatives Publishers.

Kanyinga, K. 2000. Beyond the colonial legacy: The land question: Politics, and constitutionalism in Kenya, in *Essays on land law: The reform debate in Kenya*, edited by S Wanjala. Nairobi: Claripress:45–60.

Lloyd, PC. 1962. *Yoruba land law*. London: Oxford University Press.

Makerere Institute of Social Science Research and Land Tenure Centre. 1989. *Land tenure and agricultural development in Uganda*. Kampala.

Okoth Ogendo, HWO. 1993. Agrarian reform sub-Saharan Africa: An assessment of state responses to the African agrarian crisis and their implications for agricultural development, in *Land in African agrarian systems*, edited by T Basset & D Crummey. Madison: University of Wisconsin Press.

Okoth Ogendo, HWO. 1995. Terminology and land tenure in customary law: An exercise in linguistic theory, in *African law and legal theory*, edited by Gordon Woodman and AO Obilade. New York: New York University Press.

Okoth-Ogendo, HWO. 1996. *Tenants of the Crown: Evolution of agrarian law and institutions in Kenya*. Nairobi: ACTS Press.

Shivji, I. 1998. *Not yet democracy: Reforming land tenure in Tanzania*. London: International Institute for Environment and Development.

Swynnerton, R. 1955. *A plan to intensify the development of African agriculture in Kenya*. Nairobi: Government Printer.

Wanjala, S (ed). 2000. *Essays on land law: The reform debate in Kenya*. Nairobi: Claripress.



LAND AND RESOURCE RIGHTS IN SOUTHERN AFRICA

NELSON MARONGWE

INTRODUCTION

The discourse on land and resource rights in southern Africa is essentially a debate on community livelihoods. The colonial dispossession of native Africans' land compromised their ability to sustain themselves. For most countries in southern Africa, land reform is a central rural development strategy that is expected to provide the base for rural livelihoods. The nature of the land question depends on the colonial history of a particular country.

In discussing land and resource rights, I argue that land reform is much broader than just the settlement of people alone. Land reform and the accompanying rights are viewed as the foundation for the development of local economies. Access to other key resources such as water, forests and wildlife become relevant issues when discussing land and resource rights in southern Africa.

Demographic factors have also shaped the debate. This paper looks at the land issue in the region and how land has influenced resource rights issues in different countries. The paper also delves into issues of land tenure and resource rights, local governance and resource rights, land tenure and resource conflicts, and other regional dimensions of the land and resource rights discourse.

THE LAND PROBLEM IN THE SOUTHERN AFRICAN CONTEXT

The land debate in southern Africa is shaped by the colonial land expropriation experiences, the nature of the decolonisation process and the varied land reform experiences of individual countries in the post-independence period (Moyo 1995, 2000a; Van den Brink 2002). Moyo (2000a) argues that the land question in southern Africa is characterised by imbalances in the patterns of land ownership in the former settler colonial countries that include South Africa, Zimbabwe and Namibia, while in Botswana, Zambia and Malawi, the

debate is centred around tenure rights and utilisation of land.

The new social and political context in Mozambique since the 1990s has brought with it several challenges. For example, the Investment Programme for the Agrarian Sector (PROAGRI) (1997b as quoted in Chilundo 1999) states that the country's land conflicts centre around tourist developments along the Mozambican coastline and the non-planned nature of some foreign investments; lack of transparency in the procedures concerning foreign investment; lack of clear-cut and transparent procedures for allocation of land concessions and recording of land holders; poor institutional capacity to monitor requests submitted for concession explorations; and under-utilisation of wildlife and forest land by foreigners.

The history and nature of the colonial power shaped the land question in the respective countries. Like elsewhere in Africa, the legacy of colonial land policy varies between, for example, the former British and Portuguese colonies. The period of independence is also important in analysing the progress and approach to land and tenure reforms.

Botswana and Zambia have been independent for the past 38 years, Angola and Mozambique 29 years, Malawi 39 years, Zimbabwe 24 years, Namibia 14 years and South Africa 10 years. The land reform experiments and their completeness (or lack of it) are a function of the length of time over which they have been implemented.

The global environment as determined by the Cold War era had implications on the type of land and tenure reforms that were pursued by individual countries. For example, countries like Angola, Tanzania and Mozambique opted for the socialist model and to date the land problems faced by these countries are quite different from those of Namibia, Zimbabwe and South Africa. Botswana, one of the countries least affected by



colonialism, stands out for the way in which it has addressed its land problems – including land tenure, resource rights and governance issues.

In Malawi, the expansion of estate agriculture – producing tobacco, tea and sugar for the international market – occurred at the expense of communal land (Government of Malawi 2000; Mhone 1987). High population densities, particularly in the southern and central regions, have contributed to more intensive localised pressures on land. For example, the 1992/93 National Sample Survey of Agriculture reported that 78% of households in the small-holder sector owned less than one hectare of land, a figure that is too small to meet household livelihoods (Government of Malawi 2000).

Yet at the same time, land under leasehold estate was prone to ‘abandonment and under-utilisation, especially since many holders obtained grants that were far in excess of what they were capable of developing’ (Government of Malawi 2000:22). In response to high land pressure in certain localities, there has been a steady encroachment by the smallholder producer onto private land, gazetted forests, national parks and other protected areas. This was quite noticeable in the tea growing areas of Mulanje and Thylo and the tobacco estates in Kasungu. The perception that such estates are under-utilised was the prime driver for local communities to be tempted to encroach onto such land (Government of Malawi 2000).

Table 1: The land question in Angola and Mozambique

COUNTRY	COLONIAL POWER	INDEPENDENCE	LAND REFORM MILESTONE/KEY OBSERVATIONS
Angola	Portugal	1975	<ul style="list-style-type: none"> ■ At independence, the new government abolished private property and formed state farms and agricultural co-operatives on land abandoned by settlers ■ In 1985, government abolished state farms and started to allocate land to individual peasant producers ■ There is evidence of growing individualisation of land rights while the state has not made any policy position on community based tenure systems ■ The protracted civil war stalled democratisation of tenure
Mozambique	Portugal	1975	<ul style="list-style-type: none"> ■ All land was nationalised at independence. A few private farms whose land rights are guaranteed by the state survived ■ The government established large smallholder co-operatives, villagisation schemes and large state farms ■ By 1983, large state-owned companies and production co-operatives were divided into smaller units, giving rise to small state-owned companies, while others were given to rural families and the private sector – though the impact of this was minimal because of the war ■ After agreeing to the IMF and World Bank approved macro-economic structural adjustment programme, the Frelimo government acknowledged the need to reform the agricultural sectors and privatise, lease or close parastatal farms ■ The 1997 land law still states that land is state property and cannot be sold, alienated or mortgaged ■ The new law recognises the right to land through occupation by rural communities, based on oral testimony ■ There is intense competition for land in localised areas that include land close to developed infrastructure (transport, markets, agricultural extension services and irrigation systems) and coastal areas earmarked for tourist development ■ Companies and communities are granted a ‘title for use and improvement of the land,’ which is effectively a lease. A foreign investor is granted a lease for 50 years, which can only be renewed for another 50 years. Communities can formally seek to register their land rights

Source: Decoded from Bruce et al. 1996

Soon after gaining political independence, co-operative¹ resettlement was adopted by some southern African countries as part of the socialist transformation processes, typical examples being Mozambique and

Zimbabwe. Soon after attaining independence, Namibia also opted for a resettlement policy that catered for both individual and co-operative land holdings (Ministry of Agriculture, Water and Rural Development 2000).

Table 2: The land question in Namibia, South Africa and Zimbabwe

COUNTRY	COLONIAL POWER	INDEPENDENCE	LAND REFORM MILESTONE/KEY OBSERVATIONS
Namibia	Germany and apartheid South Africa	1990	<ul style="list-style-type: none"> ■ At independence, 45% of total land area (82.4 million ha) and 74% of potentially arable land was owned by white commercial farmers who were less than 2% of total population ■ About 44% of the country is freehold land which is sparsely populated while another 43% is communal land, and is allocated and administered by traditional authorities, although there is growing evidence of individualisation of tenure ■ Land claims by minority groups in the centre and north of the country, who are predominantly pastoralists and need grazing land, have largely been ignored by the South West Africa People's Organization (Swapo) government
South Africa	The Netherlands and Britain	1994	<ul style="list-style-type: none"> ■ Extreme inequities in the distribution of land between whites and blacks has seen 17.63 million Africans being crammed on 13% of the land while whites solidified control on 87% of the land that housed 5.2 million whites (on farms and small towns), 1 million Indians (mostly in urban areas), 3.4 million coloureds (in townships, on white farms and rural reserves) and 12.77 million Africans in townships ■ The government embarked upon market-driven land reforms and adopted a demand-driven and rights-based approach to tenure reforms ■ Through the Communal Land Rights Act, the South African government sought to transfer title from the state to communities and establish administration structures to issue and create registers of land tenure rights to individuals within communal areas
Zimbabwe	Britain	1980	<ul style="list-style-type: none"> ■ At independence, white farmers owned some 15.5 million ha (39.1%) of the land, most of which was in the most productive areas, while the natives were packed in the communal areas on 16.4 million ha and supported 57% of the total population, most of which was in the agriculturally marginal areas ■ The government, in conformity with the Lancaster House Agreement which provided for the handover of political power, implemented a market-driven land reform where farms were acquired on a willing seller-willing buyer basis ■ Generally, new farmers were given resettlement permits that defined their tenure rights to land, a system that has been criticised as a highly insecure land tenure arrangement ■ In 2000, the government initiated and supported land occupations that resulted in the 'acquisition of land' without payment. A series of constitutional amendments, an amendment to the Land Acquisition Act and the introduction of the Rural Land Occupation Act were 'rushed through' Parliament in an effort to legitimise the land occupations

Source: Decoded from Bruce et al. 1996



Table 3: The land question in Botswana, Malawi and Zambia

COUNTRY	COLONIAL POWER	INDEPENDENCE	LAND REFORM MILESTONE/KEY OBSERVATIONS
Botswana	Britain	1966	<ul style="list-style-type: none"> ■ At independence, tribal land, state land and freehold land occupied 48.8%, 47.4% and 3.7% of total land area respectively. In 1998, the ratios had changed to 70.9%, 24.9% and 4.2% respectively ■ The Tribal Land Act of 1968 transferred the authority over land from the chief to the Land Board and introduced certificates for customary grants of individual rights for wells, borehole drilling, arable lands and individual residential plots ■ The Tribal Grazing Land Policy of 1975 provided exclusive rights to large cattle owners while protecting the communal interests of small-scale herders ■ The land rights of minority groups that include the Basarwa (San) are yet to be recognised by Botswana's Land Tenure Policy
Malawi	Britain	1965	<ul style="list-style-type: none"> ■ The development of large estates has been at the expense of the smallholder agriculturist under customary tenure systems. For example, estate holding grew in size from 79 000ha in 1970 to 843 000ha in 1990 and 1 million ha in 1994. In the small-holder sector, plot size averages 1.1ha ■ The Registered Land Act of 1965 provided for the registration of customary land under private title in designated areas, but was only partially implemented ■ The Special Crops Act allowed only licensed estate farmers to grow certain primary export crops (tea, sugar, barley and flue-cured tobacco). However, new legislation is gradually allowing smallholders to produce and market barley tobacco ■ Encroachment of the estate sector and restriction on land-use are the major threats to the customary land tenure systems
Zambia	Britain	1966	<ul style="list-style-type: none"> ■ At independence, all land was vested in the hands of the President and most freehold title was converted to leasehold ■ State land constitutes 3.5% of the country, while traditional land (formerly trust land and reserve land) occupies the remaining 96.5% ■ The President has the right to make grants or dispositions of land to Zambian nationals or foreigners for lease-periods of up to 99 years ■ The 1995 Land Act allows local communities in customary land to obtain title to land, after consultation and consent of the traditional chiefs

Source: Decoded from Bruce et al. 1996

However, co-operatives have largely been a failure for reasons that are associated with, *inter alia*, biased or inappropriate beneficiary selection processes, lack of group cohesion and lack of tenure security. The failure of this model in countries where it has been tried is an indication that co-operative 'ownership of resources', especially land, is largely inappropriate for southern Africa.

The shift from government-led redistributive land reform to a market assisted one (El-Ghomery 1999) and

the adoption of structural adjustment programmes as prescribed by the International Monetary Fund (IMF) and the World Bank, have to a large extent shaped the dynamics of land reform and sustainable livelihoods. For example, the implementation of structural adjustment programmes in Zambia and Zimbabwe resulted in the removal of exchange rate controls, lifting of subsidies and price controls and a general relaxation of most regulatory policies (Moyo 2000a; Reed 2001). A major beneficiary of the programme has been the wildlife tourism sector form of land-use. Through various



means, the livelihoods of some communities showed greater bias towards the tourism sector while scholars like Moyo (2000a) even conceptualised wildlife-based land reform models. At the same time the ability of market-led land reform to target the poor is also limited. In this sense, the discussion on land reform and sustainable livelihoods in the region should make reference to poverty alleviation as one of the pre-eminent goals.

THE ZIMBABWEAN EXPERIENCE

After attaining independence in 1980, the Zimbabwean government embarked on a land resettlement programme aimed at redressing the land distribution imbalances created by over 100 years of colonial rule. Land acquisition for resettlement purposes has basically been through the market. Moyo (2000a:10) comments, 'the most dominant land acquisition approach used, between 1980 and 1997, even after the government of Zimbabwe passed laws allowing it to compulsorily acquire land, can be referred to as "state centred market-based approach"'. The greatest strides in land acquisition were achieved in the first five years of independence, from 1980–84 when over 2 147 855ha of land were acquired (representing about 60% of the total land acquired over 19 years). Acquisition of land through the market affected the cost, quality and quantity of land acquired for redistribution.

For various reasons, the government of Zimbabwe started implementing a 'fast-track' resettlement programme in July 2000. The ultimate objective of the programme was to accelerate both land acquisition and redistribution. The programme is officially viewed as a component of the overall national Land Reform Programme. The failure of the Inception Phase Framework Plan to come to fruition resulted in the land reform programme recording its slowest progress ever in the period between October 1998 and June 2000, and in the eyes of the government, this became the justification for the adoption of 'fast-track'. As at July 2003, over 4 million ha had been redistributed to 127 192 peasant/smallholder farmers, while over 2 million ha were given to 7 260 commercial farmers. As at 14 March 2002, about 14 286 households were informally settled on some 156 farms with a total area of 416 807ha. The rapid progress under 'fast-track' raised more questions than answers in relation to the discourse on land rights. Farm occupations characterised fast-track resettlement and created an environment of uncertainty with regard to the land rights of the affected large-scale farmers, while the rights of the incoming settlers largely remain unprocessed. The legitimisation of land occupations under the Rural Land Occupiers Act (2000) made freehold title for rural land one of the most insecure forms of land tenure.

At the beginning of fast-track resettlement in 2000, land occupations were illegal, according to the legal

framework that prevailed at the time. The Constitution of Zimbabwe, the Land Acquisition Act (1992) and the official government policy recognised the supremacy of private property rights. For reasons of political expediency, the government embarked upon a total revamp of the legal and judiciary framework in an effort meant to 'normalise' the situation created by farm occupations and fast-track resettlement which had thrown the concept of security into disarray, particularly as it relates to freehold land. First was the 2002 amendment of the Constitution of Zimbabwe, which placed the responsibility for compensating large-scale commercial farmers whose land was acquired for resettlement, onto the former colonial power, Britain. New procedures for paying compensation were also outlined.

Thus, the legal and policy changes that were effected by the fast-track resettlement programme raised questions relating to the legitimacy of the process and how governance issues would be addressed. This is based on the premise that land tenure is intricately linked to the theory of democracy and good governance. For example, the rushed enactment of the Rural Land Occupiers' Act cannot be viewed as good governance. The controversial nature of the legislation and its impact on tenure security, as well as its repercussions on the national, regional and international levels, remain issues of concern to the general citizenry. Consequently, the concept of security of tenure, particularly as it relates to agricultural land, was severely eroded under the current environment. As a result of the Rural Land Occupiers' Act, management of natural resources on the occupied lands is unclear. The question, for land that is under occupation, is: who has the authority to manage the natural resources on the defined properties? Practically, large-scale commercial farm owners have no jurisdiction over the state of natural resources on the occupied portions of their farms. If the new settlers are expected to take care of natural resources on the occupied land, what rights do they have over the land? This scenario leads to another possible situation where fast-track resettlement mimics an open access land tenure system.

Fast-track resettlement brings several challenges. Perhaps the most important one relates to the capacity of government to assist the newly settled farmers with all the infrastructural and social services required in the face of increasing international isolation by major donor countries. Addressing the tenure rights of new settlers is equally important if the financial sector is expected to provide support with much-needed credit services to finance input supply. Historically, the resettlement programme has done badly with respect to developing appropriate institutional structures for improved natural resource management. It is a bigger challenge for the fast-track programme to put in place measures and systems required for the sustainable utilisation of natural resources in the newly-settled areas. Also important is



the need to improve the dented international image of the country to attract foreign investment so as to stimulate the ailing economy. The fast-track resettlement programme has created a highly explosive situation that is contributing to the escalation of land-based conflicts. Management of the emerging conflicts is largely no one's domain, yet it is an essential requirement to sustain the fast-track resettlement outcome.

LAND TENURE AND RESOURCE RIGHTS

The predominant tenure systems in southern Africa are private/freehold property, state property, communal property and open access systems. The notion of private property rights has been and continues to be viewed as the ideal tenure system. As a result, land tenure arrangements have remained fixed and have not been adapting to the increasing and changing socio-economic demands. It can be argued that private property has remained too exclusive and insensitive to the changing social environment of southern Africa. The same can be said of state property. This has negatively affected the livelihood opportunities available to rural communities.

Munzer (1990, in Fourie 1998) argues that the concept of ownership is not finite and should therefore change with history. Experiences from other countries, particularly Kenya, have indicated how land title registration can increase insecurity and risk of vulnerable groups. Katerere and Guvheya (1998) observed that emerging issues in environmental management – namely water management, biological diversity and ecological diversity – transcend individual property boundaries, a situation they describe as challenging the supremacy of individual rights for land and natural resource decision making.

As a result of the rigidity of both private and state tenure systems, resource-sharing arrangements, particularly among the state, private property and communal farmers, have not been exploited. This compromises the livelihood opportunities available to the communal land dwellers. The point is that private and state land tenure systems cannot continue to operate as closed systems that are completely independent of one another if they are to survive. Some of the options to be considered include: the lease of unused agricultural land for crop production or grazing purposes by freehold large-scale farms; dead wood collection from both private and state land for use as firewood; wild fruit collection from state and private land; direct exploitation of other forestry products (for example, honey collection, harvesting of *mopani* worm, cutting and collection of thatch grass and mushrooms, and sustainable exploitation of wildlife and fish); and collection of traditional medicines from state and private forests (Marongwe 1999). Such initiatives have the potential to enhance livelihood opportunities of rural communities. In working out such arrangements, parameters for consideration should include develop-

ment of constitutions and written agreements between the concerned parties; stipulating and agreeing on rules and regulations that guide the exploitation of natural resources; and developing incentives and disincentives that promote the sustainable utilisation of resources.

In most cases, access to land determines access to other key natural resources such as water, forests, wildlife and other biological resources. In several countries, this is not the case with mineral resources. For example, in Zimbabwe, mineral resources belong to the state and any revenue (mining royalties) that accrues from mineral exploitation belongs to the state. An important question that derives from this scenario is the extent of land rights by individuals and communities. Should they extend to include mineral rights over the land? However, South Africa defines land rights as inclusive of rights over minerals (see Box 1).

Different countries in the region have tried land registration in communal areas, with various levels of success. For example, Quadros (2000) refers to the registration of land by villages as a pilot project in northern parts of Mozambique that are under customary management. Further, legal provision has been made for identification and registering of community rights over access to water and the passage of cattle through traditional grazing areas. (See Box 2 on Malawi.)

What seems to be emerging is that freehold or private land rights are the dominant land tenure system being adopted for the region. In some countries, notably Mozambique, Malawi and Botswana, measures designed

BOX 1: COMMUNITIES AND MINING RIGHTS: AN EXAMPLE FROM SOUTH AFRICA

South Africa's Minerals and Petroleum Development Bill was amended by Parliament following appeals by three influential 'tribes' of the North West province that the law would strip them of their existing rights. The Bafokeng, the Bakwena Ba Magopo and the Bakgatla Ba Kgafela, who own vast tracts of land in platinum-mining areas, had made submissions to Parliament opposing the Bill, their main argument being that it expropriates their mineral rights without making proper provision for compensation. Over the years, the tribes have been receiving royalty income from Anglo Platinum Corporation Ltd. According to the amended Bill, the tribes will continue to receive royalties but are required to account to the government every five years about how they have used the royalties for community development.

Source: *Mail & Guardian* website, 28 June 2002

BOX 2: POLICY ON TRADITIONAL LAND RIGHTS IN MALAWI

Land rights derived from the traditional system of land tenure are reducible to the ownership of specific rights by individuals, families and communities...previous policies deliberately failed to recognise the pattern of individual usage and rights in customary [arrangements] to be free ownership. Therefore, provision will be made to rationalise and accord full statutory recognition to customary land rights.

Source: Malawi National Land Policy 2000

BOX 3: LAND TENURE AND FORESTRY RESOURCES IN ZAMBIA

Unlike its predecessor (the Forest Act of 1973), the Forest Act of 1999 provides an integrated approach to the conservation, management and utilisation of forests and woodland resources and the participation of local communities, traditional institutions and the private sector in Zambia. However, the 1999 Act still places forests under government control, through the Forestry Department. This sets the basis for the contradiction between land tenure and tree ownership. Simuunza 1999 says that 69% of the forests fall on what was previously trust land and 18% on reserve land (now customary land), while 13% is on state land. According to the National Environmental Action Plan of 1994, this means 87% of protected forests are enmeshed within land rights of customary law, a situation that could lead to conflict between the traditional authority, local communities, and the Forestry Department. In terms of the Land Act, although planted trees belong to the one who planted them, cutting for sale of any trees is allowed only under licence from the Forestry Department. In reality, the government has no capacity to monitor the process, and cutting down of trees without licences has continued.

Source: Simuunza 1999

to secure customary land rights are being implemented – a move that is likely to improve the resource rights of communities. However, ideas vary on how far land rights should go. The bottom line seems to be that communities rely on access to natural resources for their livelihoods and hence resource rights that include the ‘total package’ of natural resources (land, water and fisheries, wildlife, forests and minerals) is most welcome. At the same time, there is scope for more positive interaction between customary land tenure and other tenure systems that include freehold, state-owned and

leasehold. An interesting scenario that derives from the Zimbabwean situation is that freehold property rights, in an environment characterised by political and social instability, are also highly insecure.

LOCAL GOVERNANCE AND RESOURCE RIGHTS

Local-level institutions and organisations are at the centre of the land governance and resource rights discourse. Whiteside (1998) says that local organisations often define a household’s use rights to resources; influence norms of behaviour that can be a crucial factor in sustainability; and that they are also responsible for managing common pool resources. Decentralisation and democratisation of resource rights becomes meaningful when local-level institutions take centre stage in community participation. Having effective local-level institutions in charge of land and resource rights issues is a major challenge that confronts most, if not all, of the southern African countries. The typology and taxonomy of these varies from country to country.

In several cases, governments have not decentralised resource rights to local communities and other local organisations that represent such communities. For example, Chilundo (1999:11) reports that in Mozambique, the state ‘is the entity in charge of supervision of the process of wood cutting (by timber concessionaires), including the verification of occurrence of damages to forestry and wildlife resources’. Owing to problems associated with insufficient capacity (human, financial and material), the state has failed to perform the function, and illegal and unsustainable forestry utilisation has continued unchecked. Kloeck-Jenson (1996) also observes the lack of consultation between the local chief (*nhakwava* or *fumo*) and communities in Mozambique. In these instances, woodcutters spoke only to the local chief after which they would begin cutting trees on community members’ plots without consulting or involving them in the process.

There is functional linkage between good governance at the local level and the desire for tenure reforms that seek to improve the management of common property resources. Thus the practice of good governance is located within the framework of sustainable natural resource management debates. Efforts geared at facilitating good governance must of necessity focus on, *inter alia*, the dissemination of information on rights, facilitation of local processes, improving access to law, capacity building and the development of appropriate conflict resolution mechanisms (Cousins 2000).

Traditional authorities in southern Africa have been challenged for failing to meet the demands of the new socio-economic order where the call for improved governance has taken centre stage. Generally, chiefs are not democratically elected and are often accused of



fomenting conflicts over land through favouring clan members in the allocation of land or getting involved in the illegal sale of land (Moyo 2000a). The ability of the traditional authority to embrace democratic principles that lead to good governance, transparency, accountability and equal gender representation in their structures is a subject that is increasingly being questioned. Based on the South African experience, Ntsebeza (1999) questions the ability of chiefs to embrace principles of democratic local government and gender equality. He even argues that, in South Africa, the institution of chiefs is at variance with that country's Constitution which stipulates that 'elected local government structures be established for the whole of the territory of the Republic, including rural areas' (Ntsebeza 1999:2). Given such a situation, one is obliged to ask whether traditional institutions are prepared to change, among other things, the way they are constituted and or make decisions. More importantly, are they prepared to incorporate women in their decision-making structures? Another important area of concern is the capacity of traditional institutions to perform modern day land administration functions and understand and implement natural resource management policies.

In Zambia, customary land occupies about 96.5% of the country and traditional chiefs and their village headmen administer it. Once an individual has been allocated a parcel of land, ownership is perpetual through cultivation (including fallow periods) and can be inherited upon the death of the owner. Thus, the institution of the chiefs is central to local-level land administration in Zambia. In an effort to improve security of tenure in customary land, the 1995 land law has permitted the issuing of freehold title in customary land. This is supposedly leading to a fusion of (or is it superseding?) modern tenure and customary land tenure systems – although indications are that traditional authorities interpret this arrangement as an erosion of their power base (Marongwe 2002a).

Land disputes in Zambia are ultimately subject to the authority of a magistrate, but rarely get this far in traditional areas. A headman's area of control is generally understood in the local community. Chiefs adjudicate disputes between headmen, although the exact formula varies between tribes. Circumventing tradition by appeal to the magistrate is legal but not very effective since in most traditional areas local authority is stronger and preferred. Magistrates, however, are handling an increasing number of cases involving boundary disputes between chieftainships (Simuunza 1999). The role of chiefs in conflict resolution is not only important in Zambia but in Mozambique and other countries as well.

In South Africa, land reform is demand-driven and is therefore being implemented through a more decentralised approach, compared with Zimbabwe. Through relevant pieces of legislation, a new set of

national institutions on land have been established since 1994. They serve as implementation structures for that country's land reform programme. For example, the Restitution of Land Rights Act of 1994 provided for the Commission on Restitution of Land Rights and the Land Claims Court, which are primarily responsible for implementing the restitution programme.

At the local level, legislation has provided a framework for the formation of trusts and communal property associations (CPAs) to take care of the community's land affairs. The KwaZulu-Natal Ingonyama Trust Act of 1994 gave birth to the Ingonyama Trust, which is supposed to be administered for the benefit, material welfare and social well-being of the members of the Zulu tribes and communities. The KwaZulu-Natal Ingonyama Trust has wide ranging powers that include making decisions and implementing them; pledging, leasing, alienation or other disposal of any trust land or of any interest or real right to such land. On the face of it, local land institutions in South Africa have comprehensive control over what happens to their land.

South Africa has established a legislative framework for the development of communal property associations, whose main functions are to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution. CPAs are legal entities capable of acquiring rights and incurring obligations in their name. They also have a perpetual succession, regardless of changes in leadership. These are all interesting institutional development scenarios still to be understood in their broader perspective. Women's representation in the emerging structures is of particular interest to various sections of society. Although most of these institutions are still in their infancy in terms of their growth cycle, Gutto (2001:8) observes that:

the formal constitution and election-based approach to the creation of, and leadership in, the communal property associations is shamefully deficient for reasons that lie in gender and age differentiation within communities, the lack of proper involvement of existing leadership institutions at the grassroots [level] and lack of developmental capital.

The extent to which such institutions are contributing to the development of good governance is yet to be evaluated.

Botswana's land boards have been hailed the best approach to local-level land allocation and administration (Quan 2000). The main strengths of the land boards are that they provide space for the fusion of customary and formal tenure systems while at the same time representing a strategy for decentralising land policy implementation. Other countries, such as Namibia, have replicated the land boards model.



Among other things, the land boards approach has been criticised for not being sufficiently democratic and being dominated by local elites at the expense of the wider local community (White 1999). Their ability to solve problems relating to overlapping land rights, claims and the multiple needs of different ethnic groups has also been questioned. Quan (2000:205) concludes by calling the government to 'clarify the place of Land Boards within a wider system of devolved local government, the development planning process, and mechanisms for dispute resolution'. The idea of land boards as piloted by Botswana seems to be one of the approaches that could be replicated in other parts of southern Africa.

The socialist dispensation of the Mozambican government gave rise to a new set of institutions known as the secretaries, a term used to refer to heads of zones and a construct of the ruling Frente de Libertação de Moçambique (Frelimo) party. The secretaries are pivotal in implementing the land law and have vast knowledge about occupied and unallocated land holdings in the country. Furthermore, the 1997 Land Law stresses the importance of defining representatives of communities. The 1998 regulations that supported the land law left it to the communities to self-select representatives, using their own methodology in the selection process.

As part of the strategy for improving community livelihoods and enhancing their resource rights, several countries have implemented various forms of community-based natural resource management (CBNRM) programmes. Perhaps the most publicised CBNRM approaches include Zambia's Administrative Design for Game Management Areas (Admade), Zimbabwe's Communal Area Management Programme for Indigenous Resources (Campfire), Mozambique's Tchuma Tchato and Botswana's controlled hunting areas. A key feature for these is that they are centered on the wildlife resource.

Other countries like Namibia, Malawi and South Africa have developed their own CBNRM programmes. In Namibia, conservancies that are controlled and managed by a group of villagers have been established. In Botswana a community can organise itself and form a representative quota management committee to be granted the right to wildlife. Given that the intended main beneficiaries of CBNRM programmes are the rural poor who are the least educated, the process through which communities gain rights to their resources is complicated and requires the intervention of external agencies. For example in Botswana, a community needs to form a legally recognised trust that develops a land-use plan, while in Namibia a community is required to demonstrate commitment and capacity to run a conservancy. In South Africa, the market-driven land reforms require communities to enter into various forms of partnerships and contractual agreements with the

private sector where collaborative arrangements are desired. It is this relationship between communities and external agencies that purport to be assisting communities (including NGOs and community-based organisations) that is a subject of controversy and contradictions.

In some situations, CBNRM programmes do not allow communities to own and control the land, as is the case in Zimbabwe and Namibia. In Namibia, for example, the establishment of conservancies does not transfer land ownership to the communities. Instead the state still has privilege to expropriate any piece of communal land including that under conservancies.

In Angola, neither the colonial Portuguese nor the post-independence government made an attempt to protect customary tenure systems. The community-based tenure systems that prevailed in the Central Highlands of Angola have since collapsed and Williams (1996) argues that the land tenure systems have become individualised while other household members either sold or leased the land. The Dimba and Khumbi, who are both agriculturalists and pastoralists, and have relatively recently adopted a permanent settlement system, settled in the southern parts of the country. Generally, the Angolan government has not made policy concerning community-based tenure systems.

LAND AND RESOURCE CONFLICTS

Conflicts over land and other natural resources are a major threat to rural livelihoods. The history of liberation struggles in southern Africa is rooted in the unsettled land question. Historically-based land/restitution claims are prevalent in Malawi, South Africa, and Zimbabwe. For example, Marongwe (2002b) observes that the occupation of Gonarezhou National Park in 2000 was largely a result of historically-based land claims by villagers and war veterans from Chitsa communal lands displaced in the 1960s to make way for the park. For the same reasons, Malawi's Nyika, Kasungu, Lengwe and Liwonde national parks are under constant threat from encroachment by surrounding communities.

War-induced movement of people within countries and across borders has negatively affected the livelihoods of communities. The landmine problem, which has its roots in the wars of liberation in various countries and in post-independence civil wars, has destroyed the livelihoods of some rural communities. It is estimated that between eight and 20 million landmines are buried in Angolan soil, while there are more than one million in Mozambique. Zimbabwe is still clearing some of the land mines planted during the liberation war which ended in 1980. As Louse (1997:18) notes:

Civil wars and protracted social conflicts throughout southern Africa, including Namibia, Angola, Mozambique



and Zimbabwe, have left a legacy of landmine contamination. The denial of land and an agrarian livelihood, vital to the normalisation of social relations, perpetuates socio-economic tensions...

The absence of resources and political will to de-mine thousands of square kilometres of agricultural land may mean permanent loss of productive land. Areas affected by landmines are basically unavailable for use by communal people (as arable or grazing land). The landmine problem is, therefore, contributing to 'starvation in an area of plenty'. The return of refugees and internally displaced people to their original homes has implications for access to land and other resources by this section of the population. Conflicts have arisen as returning populations seek to reclaim their lands (Quadros 2000).

Box 4 suggests that the struggle for sustaining community livelihoods is basically an issue about resource rights. Such an example also shows the need for tenure arrangements that will allow the flow of natural resources, in a regulated manner, from freehold property rights to communities located in customary land tenure systems.

OTHER DIMENSIONS

Various studies on trans-border areas have confirmed historical, socio-economic and local governance-related linkages among trans-boundary communities. Such movements across the borders are explained in cultural, historical and livelihood based expositions. For example, Marongwe (2002b) observed that some Zambian nationals access land in Mozambique for agricultural production. On the eastern border of Zimbabwe, citizens in Chipinge and Chimanimani cross into neighbouring Mozambique to access grazing and cropping land and other natural resources. This is, however, in direct contravention of various policies and legislative provisions, typical examples being veterinary regulations and immigration laws. However, the informal arrangements that govern access to farming and grazing land across international borders are yet to be properly understood.

The Malawian Land Policy of 2000 notes that nationals from Tanzania, Zambia and Mozambique have encroached into various districts in Malawi, including Ruphtii, Mzimba, Kasungu, Mchinji and Ntcheu. It has also been observed that Malawians from the border district of Mulanje have crossed to the Mozambican side and established gardens there. Of particular interest are the type of land rights given to immigrants, how the process of negotiating access to land is initiated, levels of investment made on the land, types of disputes that arise as a result of such arrangements, and how such conflicts are resolved. The major bottleneck encountered in the

BOX 4: A CASE OF RESOURCE CONFLICT IN ZIMBABWE

On 30 January 1983, Mr JJ Henderson, a large-scale commercial farmer, was patrolling his farm on a motorcycle. His intention was to inspect his cattle camps and visit a dam on the farm where he half expected to find poaching fishers. After inspecting the cattle, the farmer left his motorcycle a distance away and walked the rest of the way to the dam. The motive was not to alert any potential poacher of his approach.

On arriving at the dam, he found nine men fishing in his dam. The men were scattered around the dam and Henderson strategically waited for more than two hours until the men came together, thereby minimising their ability to escape. When he approached the poachers, they fled. He fired a shot to indicate that he was armed and all the men stopped. The farmer ordered them to stand in a line and confiscated their fishing rods and the fish. Henderson ordered them to take off their clothes, firing another shot to force them to do so.

The shot hit one of the poachers who screamed, and all the others undressed in fear. The farmer noticed that the injured man was bleeding. The shots had also attracted one of the farm workers. Henderson ordered his employee to carry the clothing and belongings of the poachers to the farmer's homestead. All the poachers were made to walk naked to the homestead, a distance of about 6km, where their clothes were returned.

Henderson rode home and reported that there had been an accident. He was charged with attempted murder and was sentenced to three years' imprisonment with labour. The Supreme Court of Zimbabwe refused an appeal against both conviction and sentence.

Source: Supreme Court Records, Judge No. SC17/84

search for solutions to this problem is that governments pretend nothing is happening and researchers have not done enough to highlight the nature of these activities and the types of conflicts associated with them.

The history of labour migration in southern Africa is basically a land and resource rights issue. In the first instance, it is the lack of resources, particularly minerals, that resulted in the colonialists having low interest in the development of a country like Malawi and turning it into a major exporter of labour to countries such as South Africa and Zimbabwe (Mhone 1987). A large portion of Zimbabwean commercial farm workers are of Malawian and Zambian origin. Many of South Africa's farm labourers are of foreign origin, mostly Zimbabwean or



Mozambican. Thus, the question of displacement of farm workers under the current land resettlement programme has regional ramifications. The discourse on land rights in relation to farm workers therefore spans national boundaries.

CONCLUDING REMARKS

This paper illustrates an increasing trend of communities trying to encroach on various forms of freehold and state lands. This is partly explained by the failure of market-driven land reforms to deliver land to those who need it most, and partly due to increasing pressures brought about by increasing population. In the Zimbabwean situation, land has been used for political expediency and the 'sanctity' of private property rights has been destroyed.

The debate on land and resource rights has historical, political, economic, as well as environmental dimensions. The approaches that have been used to correct the legacy of colonial land policies have to date not demonstrated progressive and best practice examples that can be used to solve the region's land and resource rights challenges. Lack of serious co-operation in discussing resource rights issues that affect the region has huge implications for development. The absence of effective mechanisms for co-operation and sharing of information on land and resource rights across the region hampers efforts to resolve this legacy. The social linkages between trans-border communities and the land and resource rights implications of these communities have not been given due consideration.

An interesting and emerging trend highlighted in this paper is that selected countries have implemented or are in the process of implementing measures to strengthen customary land rights. Such measures are, however, constrained by a lack of capacity and financial resources.

¹UNIN 1986 defines co-operatives as 'higher forms of political and economic organisation in which the means of production are owned collectively and are used for the benefit of the community as a whole'.

BIBLIOGRAPHY

Adams, M, Sibanda, S & Turner S. 1999. *Land tenure reform and rural livelihoods in southern Africa*. London: Overseas Development Institute. (Natural Resource Perspectives; no. 39.) www.odi.org.uk/nrp/39.html

Bruce, JW et al. 1996. *Country profiles of land tenure, southern Africa*. Madison: Land Tenure Center, University of Wisconsin. (Research paper; no. 130.)

Chilundo, A. 1999. *An analysis of policy and legislation governing natural resources in Mozambique*. Unpublished

paper prepared for Zimbabwe Environmental Research Organization (ZERO)-Regional Environment Organization, under the IUCN-Regional Office for Southern Africa (IUCN-ROSA) Networking and Capacity Building (Netcab) Project, Harare.

Cousins, B. 2000. Tenure and common property resources in southern Africa, in *Evolving land rights, policy and tenure in Africa*, edited by C Toulmin & J Quan. London: International Institute for Environment and Development:151–79.

El-Ghomery, MR. 1999. *Affluence and poverty in the Middle East*. Geneva: United Nations Research Institute for Social Development.

Fourie, C. 1998. Property in post-apartheid South Africa, in *Proceedings of the International Conference on Land Tenure in the Developing World with a focus on Southern Africa, University of Cape Town, 27–29 January 1998*, edited by M Barry. Cape Town: Department of Geomatics, University of Cape Town:160–74.

Government of Malawi. 2000. *Land policy of the Republic of Malawi*. Blantyre: Ministry of Lands, Housing, Physical Planning and Surveys.

Gutto, SBO. 2001. *Democracy, human rights and the land question in the new South Africa*. Paper presented at the National Land Tenure Conference, 26–30 November 2001, International Conference Centre, Durban.

Jensen, E. 1996. South Africa country profile, in *Country profiles of land tenure, southern Africa* edited by JW Bruce. Madison: Land Tenure Center, University of Wisconsin:253–60. (Research paper; no. 130.)

Katerere, Y & Guvheya, E. 1998. Seeking new perspective in land and natural resource management, in *Setting the foundations for building capacities, networking and research on land reforms in southern Africa, proceedings of a regional workshop held in Maseru Lesotho, 1–13 July 1998*, edited by N Marongwe & N Matowanyika. Harare: Zimbabwe Environmental Research Organisation (ZERO).

Kloock-Jenson, S. 1996. Mozambique country profile, in *Country profiles of land tenure, southern Africa*, edited by JW Bruce. Madison: Land Tenure Center, University of Wisconsin:238–46. (Research paper; no. 130.)

Klooster, D. 2000. Institutional choice, community and struggle: A case study of forest co-management in Mexico. *World Development*, 28(1):1–20.

Knox, A. 1996. Botswana country profile, in *Country profiles of land tenure, southern Africa*, edited by JW Bruce. Madison: Land Tenure Center, University of Wisconsin:213–7. (Research paper; no. 130.)

Knox, A. 1996. Malawi country profile, in *Country profiles of land tenure, southern Africa* edited by JW Bruce. Madison: Land Tenure Center, University of Wisconsin:230–7. (Research paper; no. 130.)

Lam, WF. 1996. Institutional design of public agencies and co-production: A study of irrigation associations in Taiwan. *World Development*, 24(6):1039–54.



- Louse, C. 1997. Killing the land: Paying the price: Eulogy to the death of the anti-personnel landmine. *Cantilevers Magazine*, 4:18–19.
- Marongwe, N. 1999. Land tenure and sustainable livelihoods in southern Africa. *Policy Matters, Newsletter of the IUCN Commission on Environment, Economic and Social Policy*, 5:10–2.
- Marongwe, N (ed). 2002a. *A review of existing policy/framework for management of land, forests, waters and fisheries in Mozambique, Zambia and Zimbabwe*. Report prepared for the IUCN-Regional Office for Southern Africa (IUCN-ROSA) Networking and Capacity Building (Netcab) Project, Harare.
- Marongwe, N. 2002b. *Conflicts over land and other natural resources in Zimbabwe*. Harare: Zimbabwe Environmental Research Organization. (ZERO).
- Mhone, GCZ. 1987. Agriculture and food policy in Malawi: A review, in *The state and agriculture in Zimbabwe*, edited by T Mkandawire & N Bourenane. Dakar: Council for the Development of Social Science Research in Africa:59–86.
- Ministry of Agriculture, Water and Rural Development (Namibia). 2000. *Resettlement co-operatives in Namibia: Past and future*. Report of a consultancy for the Division of Cooperative Development, Windhoek.
- Moyo, S. 1995. *The land question in Zimbabwe*. Harare: Southern Africa Political Economy Series Trust.
- Moyo, S. 1998. *The land acquisition process in Zimbabwe (1997/8)*. Harare: United Nations Development Programme Resource Centre.
- Moyo S. 2000a. *Land reform under structural adjustment in Zimbabwe: Land-use change in the Mashonaland Province*. Uppsala, Sweden: Nordiska Afrikainstitutet.
- Moyo, S. 2000b. *The interaction of market and compulsory land acquisition processes with social action in Zimbabwe's land reforms*. Paper presented at the Southern African Regional Institute for Policy Studies of the Southern Africa/ Political Economy Series Trust (SARIPS/ SAPES) Annual Colloquium on Regional Integration: Past, Present and Future, Harare Sheraton Hotel 24–27 September.
- Ntsebeza, L. 1999. *Land tenure reform in South Africa: An example from the Eastern Cape province*. London: International Institute for Environment and Development. (IIED issue paper; no. 82.)
- Quadros, MC. 2000. *Country case study: Mozambique*. Paper presented at a World Bank workshop held in Kampala, Uganda.
- Quan, J. 2000. Land boards as a mechanism for the management of land rights in southern Africa, in *Evolving land rights, policy and tenure in Africa*, edited by C Toulmin & J Quan. London: International Institute for Environment and Development:197–205.
- Reed, D. 2001. *Economic change, governance and natural resource wealth: The political economy of change in southern Africa*. London: Earthscan.
- Simuunza, I. 1999. *An analysis of policy and legislation governing selected natural resources in Zambia*. Report prepared for Zimbabwe Environmental Research Organization (ZERO), under the IUCN-Regional Office for Southern Africa (IUCN-ROSA) Networking and Capacity Building (Netcab) Project, Harare.
- Submanian, J. 1996a. Zambia country profile, in *Country profiles of land tenure, southern Africa*, edited by JW Bruce. Madison: Land Tenure Center, University of Wisconsin:270–5. (Research paper; no. 130.)
- Submanian, J. 1996b. Zimbabwe country profile, in *Country profiles of land tenure, southern Africa*, edited by JW Bruce. Madison: Land Tenure Center, University of Wisconsin:276–82. (Research paper; no. 130.)
- Subramanian, J. 1996c. Namibia country profile, in *Country profiles of land tenure, southern Africa*, edited by JW Bruce. Madison: Land Tenure Center, University of Wisconsin:247–52. (Research paper; no. 130.)
- Tang, SI. 1992. *Institutions and collective action: Self-governance in irrigation in Taiwan, Republic of China*. Taipei: Institute for Contemporary Studies Press.
- Toulmin, C & Quan, J. 2000. *Evolving land rights, policy and tenure in Africa*. London: International Institute for Environment and Development.
- UNIN (United Nations Institute for Namibia). 1986. *Namibia: Perspectives for national reconstruction and development*. Lusaka: UNIN.
- Van den Brink, R. 2002. *Land policy and land reform in sub-Saharan Africa: Consensus, confusion and controversy*. Paper presented at the Symposium on Land Redistribution in Southern Africa, Pretoria, 6–7 November 2002.
- Varugese, G & Ostrum, E. 2001. The contested role of heterogeneity in collective action: Some evidence from community forestry in Nepal. *World Development*, 29(5):747–65.
- White, R. 1999. *Study in NGOs' involvement in land issues*. www.iucnbot.bw
- Whiteside, M. 1998. *Living farms: Encouraging sustainable smallholders in southern Africa*. London: Earthscan.
- Williams, M. 1996. Angola country profile, in *Country profiles of land tenure, southern Africa*, edited by JW Bruce. Madison: Land Tenure Center, University of Wisconsin:209–11. (Research paper; no. 130.)
- World Bank. 1997. *World development indicators*. Washington DC: World Bank.



LAND AND AGRICULTURE IN NEPAD: IMPLICATIONS FOR NORTH AFRICA

RAWIA TAWFIC

INTRODUCTION

At the advent of the 21st century, Africa is still lagging behind in economic development. Economic indicators show that foreign debts exceed US\$350 billion while the continent's share of the world's gross domestic product and foreign investments represent only 1.6% and 2% respectively. To reverse these figures and place the continent on the path of sustainable growth and development, the New Partnership for Africa's Development (Nepad) was initiated. After the failure of 18 recovery plans, Nepad seems to give a glimpse of hope for resolving Africa's development challenges.

After the drafting of the Nepad document, discussions among non-governmental organisation (NGO) activists, research centres and intellectuals evolved around the initiative's theoretical underpinning and prospects. A number of civil society organisations, especially in southern Africa, attempted a comprehensive assessment of the initiative. Nepad is was a product of the merger between the Millennium Partnership for African Recovery Plan (MAP) elaborated by South Africa with the support of Algeria and Nigeria; the Omega plan elaborated by Senegal, with French backing; and the New Global Compact with Africa, designed by the Economic Commission for Africa (ECA) (Nabudere 2002:5–9).

At least two important points deserve emphasis in the historical inception of Nepad. First, although all African countries were briefed about the initiative – which was finally adopted by the Organisation of African Unity (now the African Union – the AU) summit in Lusaka, Zambia on 11 July 2001 – one can argue that the design of Nepad was mainly a South African-Senegalese affair. The involvement of other countries like Algeria and Egypt came at a later stage in an attempt to involve other strategic African leaders to support the initiative.

Second, there was no popular participation of African civil society in the process of developing the initiative. Leading critics of Nepad remain NGOs from sub-Saharan Africa in general, and the southern region of the

continent in particular.¹ North African NGOs and civil society do not currently feature in the main protestations of the initiative. This can be partly explained by the limited awareness and knowledge about the initiative among the north African countries, in comparison to other regions.²

This is not to say, however, that the north African region did not criticise the provisions, theoretical assumptions and basis of Nepad. Nepad requires popular marketing in the region and critical assessment of its implications is necessary.

The main focus of this paper is to investigate to what extent Nepad addresses the African agricultural crisis in general and the north African land and agricultural predicament in particular. This implies the need for a review of the provisions of Nepad, the planned projects, and the extent to which these provisions and projects will meet the needs of the north African countries.

The first part of the paper reviews Nepad provisions in the area of land and agriculture as declared in its main document issued in Abuja, Nigeria in October 2001, as well as its Comprehensive African Agriculture Development Programme (CAADP). The second part presents an overview of the status of land and agriculture in north Africa and the main problems hindering north African agricultural development. The third part discusses how CAADP deals with these problems and addresses the main causes of agricultural crisis in Africa in general and north Africa in particular.

LAND AND AGRICULTURE IN NEPAD

According to the Nepad document (2001), Africa's natural resources are the leading means to alleviate poverty. The emphasis on Africa's indispensable resource base (water, land, forests and protected areas), heritage sites and agriculture, all prove that Africa's resources are crucial in the eradication of poverty and reversal of the marginalisation of the continent



(paragraph 10). Within the context of sectoral priorities in the Nepad programme of action, agriculture is identified as a key area of intervention. The initiative refers to Africa's major challenges in the agricultural sector. Most Africans are rural-based and rely on natural resources and subsistence agriculture (paragraphs 129–31).

For Nepad, reversing the current poverty situation in Africa requires tremendous development strategies and programmes; improvement of rural infrastructure; support of research on agriculture and empowerment of local communities; and increased donor support for community natural resource management and agriculture (paragraphs 132–4).

Nepad's agriculture, trade and market access initiative aims to achieve six main objectives (paragraph 154):

- to improve the productivity of agriculture, with particular attention to small-scale and women farmers
- to ensure food security for all people and increase the access of the poor to adequate food and nutrition
- to promote measures against natural resource degradation and encourage production methods that are environmentally sustainable
- to integrate the rural poor into the market economy and provide them with better access to export markets
- to develop Africa into a net exporter of agricultural products
- to become a strategic player in the development of agricultural science and technology.

For achieving these objectives a number of actions have been specified at the continental, as well as international levels (paragraph 155).

At the African level:

- Increasing the security of water supply for agriculture by establishing small-scale irrigation facilities, improving local water management, and increasing the exchange of information and technical know-how with the international community.
- Improving land tenure security under traditional and modern forms of tenure, and promoting the necessary land reform.
- Fostering regional, sub-regional, national and household food security through the development and management of increased production, transport, storage and marketing of food crops, livestock and fisheries. Particular attention to be given to the needs of the poor, as well as the establishment of early warning systems to monitor droughts and crop production.

- Enhancing agricultural credit and financing schemes, and improving access to credit for small-scale and women farmers.
- Reducing the heavy urban bias of public spending in Africa by transferring resources from urban to rural activities.

At the international level:

- Creating new partnership schemes to address donor fatigue for individual, high-profile agricultural projects.
- Developing countries to assist Africa in carrying out and building up its research and development capabilities in agriculture.
- Promoting access to international markets by improving the quality of African produce and agricultural products, particularly processed products, to meet the standards required by those markets.
- Supporting African networking with external partners in agricultural technology and know-how, extension services and rural infrastructure.
- Supporting investment in research in the areas of high-yield crops and durable preservation and storage methods.
- Providing support for building national and regional capacity for multilateral trade negotiations, including food sanitation and other agricultural trade regulations.

On the surface, the initiative to address the structural constraints facing the development of land and agriculture on the continent appears to be comprehensive. But the reality is not as simple as the general provisions of the initiative seem to assume. When the general provisions of Nepad's main document were translated into specific targets and actions in the CAADP, only four pillars were selected:

- Extending the area under sustainable land management and reliable water control systems.
- Improving rural infrastructure and trade-related capacities for market access.
- Increasing food supply and reducing hunger.
- Agricultural research, technology dissemination and adoption.

The programme considered that the first three pillars could make an immediate difference to Africa's agricultural crisis, while research and technology is a long-term pillar. It is worth noting that a comparison of the general actions in the Nepad document with the four pillars of the CAADP shows that certain areas have been neglected or given less emphasis. This raises the question: can the 'comprehensive programme' be considered as such in addressing the problems of land and agriculture in Africa in general and the north African region in particular?



LAND AND AGRICULTURE IN NORTH AFRICA

An objective assessment of Nepad should be based on a review of the current problems related to land and agriculture in the north African region. About 70% of Africa's people live on rural land and are predominantly dependent on agriculture. The continent's agriculture remains rudimentary, with a limited technological development that has failed to adequately meet the needs of a growing population.

The continent has changed from a leading exporter of agricultural produce to become a net importer. African agriculture remains vulnerable to natural hazards of climate, and is frequently plagued by droughts and flooding. About 200 million Africans are chronically hungry, and nearly 30 million are in dire need of 2.8 million tons of emergency food every year. The largest share of food aid in the world comes to the continent (Nepad/FAO 2003:1).

One of the main reasons for this state of affairs across the continent is that the land and resource rights of the rural poor are threatened in many ways. This is attributed to unequal and inappropriate policies and neo-liberal reform programmes promoted by Northern donor countries and international financial institutions that do not favour an active role of the state in land matters. As Moyo (2003:1) has noted:

The land question and persistent rural poverty in Africa highlight the neglect of social justice and equity issues which underlie the unequal control and use of land and natural resources prescribed by neo-liberal development policy agendas and which represent external dominance of African governance reforms.

The situation in north Africa is not drastically different from that of other regions. Agriculture accounts for 40–60% of aggregate employment. This means that the welfare of the largest segment of the population in north Africa is entirely dependent on agriculture. However, the rights of these people are not secure (Desora 1997:2).

A historical review of land and agricultural policies in the region shows that strategies aimed at reforming defective agrarian systems were adopted during the initial stages of African independence in the 1950s and 1960s, as well as after the 1952 revolution in Egypt. In several countries, a ceiling on private land ownership was fixed, while redistributing the expropriated balance and expropriating foreign-owned farms with compensation.

After Algeria's independence, the government nationalised farms owned and managed by the French settlers and began a process of transforming the rural economy along socialist lines. Nearly 0.8 million ha of state-owned land were redistributed to tenants and a section of landless agricultural workers. The revolution-

ary reform was extended to benefit the pastoral nomads and the semi-nomadic people. The agrarian reform process of the 1965–82 period took place within a context of a centrally-planned economy.

In Tunisia, similar processes of restructuring the agrarian system for rural development started soon after independence in 1956. A new agricultural land property law was issued and implemented in 1964, resulting in about 16% of the total arable land being taken over by the government. The acquired land was the best in the country, purchased at market prices and partially nationalised, with a small portion allocated to landless people.³ In Egypt and Libya, public land was reclaimed and mostly allocated to landowners and tenants (Rihan & Nasr 2001:10–2; El Ghonemy 1993:3–4.)

However, the anti-poverty and egalitarian strategies of the 1950s–70s were disrupted by economic liberalisation policies imposed by foreign creditors in the form of the World Bank's structural adjustment programme (SAP) and the International Monetary Fund's stabilisation programme.

Agriculture, which was the main focus of these reforms, was one of the most affected sectors. Small farmers and pastoral populations experienced reduced institutional agricultural support. Rural unemployment, although generally lower than in urban areas, increased in several countries. In Egypt, for example, unemployment reached between 5.6 and 7.6% between 1987 and 1995. This occurred despite a significant out-migration of rural people to major urban centres and richer oil-producing neighbouring countries. When male members of a family emigrate, it is frequently the women, elderly people and children who grow food on the family plot or work as seasonal agricultural workers.⁴ In north Africa, these social groups have been especially negatively affected.

Although some north African countries, namely Egypt, Algeria and Tunisia, witnessed urban working class riots which delayed implementation of SAPs, the mounting pressure exerted on their economies by high annual debt servicing payments and the negative effects of prolonged economic recession in the West accelerated the adoption of the prescribed economic reforms, despite their negative impacts on wealth distribution.

The imposition and subsequent adoption of this paradigm in north Africa has limited government intervention in land and credit markets and ended redistributive agrarian reform. SAPs are based on the conviction that the efficacy of market and economic liberalisation would solve issues of agriculture productivity. The new policies ignored the fact that access to productive land is a fundamental insurance against the risks of poverty and malnutrition (El Ghonemy 1993:6–9).



In some countries, a legal framework of liberalisation provided space for imposing these reforms. In Egypt, for instance, the reforms in the agricultural sector which began in the mid-1980s were eventually matched in 1991 by economic reform and an SAP, with a renewed programme in 1996. The reforms included measures like gradual removal of government intervention in input and output prices, crop areas and procurement quotas; the removal of farm input subsidies; the removal of government constraints on private sector import, export and distribution of farm inputs and agricultural crops; gradual diversion of the role of the principal bank for development and credit from distributing agricultural inputs to acting as a bank and financing agricultural development projects; adjusting the land tenancy system; and adjusting the interest rate to reveal the real value of local currency.

This new policy was confirmed by Law 96 of 1992, known as 'the law for regulating the relationship between owners and tenants of agricultural land'. This reversed President Gamal Abdul Nasser's land reform measures adopted under Law 178 of 1952, 'the first agrarian reform law'. The new law ended security of tenure for farmers as landowners were given the right to evict tenants after a five-year transitional period which ended in October 1997. The new tenancy contracts were subject to market forces and regulation of civil law. This stipulated a compulsory increase in land rent, more than threefold. The law also allowed contracts to last for only 12 months and cancelled the inheritability of land rental contracts.

Law 96 led to widespread dispossessions and increased levels of poverty and rural indebtedness. It increased the desire of younger family members of ex-tenants to migrate to seek work. Repressive means were used to suppress any opposition challenging the new law. It was clear that economic reform in Egypt's countryside was used as a vehicle to promote and entrench landed interests (Bush 2000:235–9; Aal 1998).

The international financial institutions (IFIs) had failed to come up with an alternative strategy for Egypt, embracing unquestionably the Washington consensus of liberalisation and deregulation. In addition, government policies failed to promote an alternative to structural adjustment. Both led to the current land and agricultural crisis in Egypt, with its main symptoms of higher levels of rural poverty, insignificant increases in production, and poor export performance.

This was not too different from the situation in other countries of the region. Agrarian reforms led by Algerian President Houari Boumediene in the 1970s divided up large state-owned farms and distributed them among landless peasants. However, this was completely reversed by a new system of private-sector management led by President Benjedid in the 1980s.

In Morocco, the most agricultural country in the Maghreb region, the reorganisation of the agricultural sector was one of the principal areas of intervention of the SAPs introduced in the 1980s. These included privatisation of agricultural holdings (fertiliser, seeds and sugar factories) and institutions, and reductions in government expenditure on the agricultural sector. In 1986, public prices for water, transportation and electricity increased. In the meantime, taxes on agricultural resources and equipment were cancelled. Some lands owned by the state, as public projects, were turned over to the private sector. In addition, societies for water irrigation were established. Foreign enterprises were encouraged to invest in the agricultural sector by making the national currency convertible and providing various economic incentives.

The impacts of these structural adjustment programmes were especially severe on the lower and low-middle peasantry. Agricultural co-operatives have become weak. Small farmers now entirely rely on the market, from the purchase of seeds to the sale of their products, frequently lacking any reliable intermediaries to help them in the process. For many, making a decent living from their land has become an increasingly difficult task and understandably, those who have no land are even more exposed to the market forces and local oppressive systems (Rihan & Nasr 2001:120–2).

Another factor contributing to the agricultural crisis of the north African countries is a lack of market access. Although three of the countries signed free trade agreements with the EU under the umbrella of the Euro-Mediterranean partnership, many constraints are still hindering their access to the EU market, especially in the field of agricultural products. In Egypt, for instance, after six years of extensive negotiations, the EU is still sticking to its agriculture protection policy. This explains why the Egyptian agricultural sector, which benefits only from reduced tariffs and increased export quotas, opposes the agreement because it treats agricultural products and processed agricultural goods differently to industrial goods (Ghoneim 1999).

In addition to the malfunctioning governmental policies and constraints of market access, natural causes are also affecting the state of agriculture in the region. Drought is a critical problem, especially in Tunisia and Morocco. It is a structural and historical impediment to agricultural development. Historical evidence from north Africa suggests that drought is a structurally recurrent phenomenon in this part of the Mediterranean region.

The United Nations Food and Agriculture Organisation's 2002 *State of food and agriculture report* (FAO 2003) says all countries of the region rely heavily on surface and ground water, with 60–90% of water being used for agriculture. All over the region, water demand is steadily



increasing while water supply is steadily decreasing. The question of how to balance the water supply-demand equation remains a big challenge for decision makers.⁵

Available data confirms that Libya has been experiencing severe water shortages since 1995, as it has less than 200m³ per person per year to meet its domestic requirements. Projections show that Algeria and Tunisia will face the same kind of problems by 2025, while Egypt and Morocco are expected to experience severe water shortages by 2050 (FAO 2003:9–10).

The problems of drought and water scarcity represent a heavy burden affecting economic performance and growth. The Moroccan government, for example, earmarked around \$650 million – one-third of the country's entire annual investment budget – for drought relief and mitigation activities for the period April 2000 – July 2001 (FAO 2003:13).

As a result of urban-biased policies, natural disasters and other reasons, agriculture in the north African countries is not promising. According to FAO (2003), agricultural production in the region increased only 0.7% in 2000 after an output increase of 7.1% and 2% in 1998 and 1999 respectively. Crop production fell by 0.7%, with cereal output down by 9.7% for the second consecutive year.

In Morocco, agricultural output fell by 3.7% in 2000 after a decline of 10.5% in the previous year. Drought conditions severely hampered cereal production, which experienced a further 51.8% decline after dropping by 46.7% in 1999. Agricultural production stagnated in the 1990s largely because of the dominance of drought-sensitive crops such as cereals and the increased incidence of drought. The country experienced six droughts in the 1990–2000 period.

In Algeria, agricultural production fell by 4.7% in 2000. Cereal production decreased by 61% following a 36% drop in 1999. Also in Tunisia, the agriculture sector was adversely affected by relatively severe drought conditions in 2000, and overall agricultural output declined by 4.9%. Cereal production fell by 42%.

Agricultural production in Egypt grew by 4.4% in 2000, after expanding by 6.5% in 1999. Cereal production rose by 3.7% after expanding by 10.3% in 1999. Nearly 100% of food production depends on the Nile River and groundwater; hence it is more insulated from the effects of drought (FAO 2003:2–5).

IS NEPAD THE ANSWER?

Given the north African problems with land, agriculture and natural resources, can Nepad reverse this situation? Nepad has come under severe criticism from civil society organisations, intellectuals and analysts. Critics of Nepad have noted that although it alludes to infrastructural

development and access to resources like water, it is vague on the distribution of these resources.

Moreover, the land question is not adequately addressed. The role of the state in land ownership and distribution remains undefined, as well as how existing conflicts around access to land will be resolved. Accordingly, Nepad may not be able to address the issue of negligible investment of resources in African states.

Some critics of Nepad say that the initiative does not mobilise Africa's abundant natural resources wealth for the continent's development, but seeks to open the continent for further foreign exploitation and plunder. The initiative is silent on mobilisation, redistribution and utilisation of Africa's land for development, particularly for women (Moyo 2002).

Other critics note that although Nepad recognises the central role of agriculture, its tilt towards increasing productivity through enhancement of infrastructure and inputs; export-led growth through opening regional and international markets; and improving backward and forward linkages through agro-processing leaves the impression that there are still weaknesses in its conception of the overall picture of agriculture (Fakir 2003:2).

These arguments have their own logically accepted basis. It is true that African heads of states and governments agreed at the AU Summit in Maputo, Mozambique in July 2003 to make agriculture the top priority and to raise budget allocation for agriculture to a minimum of 10% of total public spending within five years (AU declaration 7, Maputo Summit 2003). However, even these steps cannot adequately address the root causes of the African agriculture predicament if there is a weakness in the comprehensive overall picture of agriculture.

One can reasonably doubt that a development plan, designed on the principles promoted by IFIs and Western donors, will address the real needs of the African rural poor or deal with the core issues which hinder Africa's development. Although Nepad is referred to as an initiative that emerged from Africa, the level of ownership of Nepad among Africans is questionable. The theoretical basis of Nepad is inspired by the same neo-liberal orthodoxy that has failed in Africa since the 1980s.

A review of the CAADP, prepared by the FAO in collaboration with Nepad's steering committee, sheds light on the potential challenges. It is significant that the document mentions land tenure as an institutional impediment to African agricultural renewal only once, and then not even as a central pillar of the programme (Nepad/FAO 2003:10).



Besides, in accordance with the Western view, the programme makes a clear separation between sub-Saharan Africa and the north African region – although the problems faced by the two regions in the field of land and agriculture are similar, as previously illustrated. The CAADP considers the north African region as more advanced, given that 40% of Africa's irrigated land is in that region (Nepad/FAO 2003:12). Besides, north Africa is reasonably well endowed with respect to investments in rural infrastructure and is more advanced in the use of agricultural mechanisation (Nepad/FAO 2003:34). However, this may not justify the sentiment that 'no situation in north Africa seems to call for significant external food and agriculture intervention' (Nepad/FAO 2003:48). It is unclear too, why the responsibility of ensuring market access and diversification of products was assigned to Egypt, a country from a region that is not seen to be the same as the rest of Africa.

Furthermore, the CAADP adopts the IFI diagnosis of the African agricultural crisis. The main challenges are assumed to be attributable to internal factors. Even where external factors are mentioned, these are largely defined as physical or environmental factors, unstable international market prices, or the inability of African countries to meet quality and quantity requirements for securing market access. The programme hardly mentions that the economic policies of the North and the multilateral rules of the particular operations of private multinational actors in the global agrarian system as main challenges to agriculture and market access (Nepad/FAO 2003:8-10).

For the CAADP, reversing the agricultural situation in Africa is mainly the responsibility of the African countries themselves. These countries are required to provide the enabling environment for agricultural development – including trade-related capacity building, appropriate knowledge and human capacities, supportive laws, policies and institutions and, above all, establishing and maintaining an open economy based on continued and enhanced economic reforms and liberalised exchange and trade systems (Nepad/FAO 2003:11). The CAADP introduces the neo-liberal model as a kind of magic solution for the African economic crisis in general and the agricultural predicament in particular. Change is required in Africa, as it is required elsewhere, but one may want to ask how different the situation would be if the African countries met the targets required of them while the main constraints imposed by the West remained the same.

Financing agriculture under the CAADP is based on the dual assumption that Africa itself will increase its level of investment and that its external partners will come forward with support. Such wishful thinking is likely to be dispelled by the absence of any serious action in this regard. President Abdoulaye Wade of Senegal has

expressed frustration about a plethora of Nepad meetings which have no follow up or implementation (*Afrol News*, 27 March 2002). During the G8 Summit in Evian, France in June 2003) France proposed a moratorium on agricultural export subsidies to Africa (excluding general-purpose farm subsidies), but this was opposed by the US. The G8's water plan for Africa has been criticised as being ill-defined and pushing for the privatisation of water services (*e-Africa*, June 2003).

The experience of the past two years has proved that the initiative needs more emphasis on South-South co-operation, something that has not been given any attention in the CAADP document which only emphasises partnerships with the donor community. The Indian interest in supporting African centres of excellence for agriculture and bio-technology and its offer of a \$200 million line of credit to finance Nepad is a clear example – raising the necessity of sharing best practices with other developing countries and diversifying financing resources (*Nepad Dialogue*, January 2004).

Finally, land and agriculture are used to raise issues of political and economic governance needed to provide the enabling environment for African agricultural renewal (Nepad/FAO 2003:7, 10). This may provoke debate about 'good governance' (a concept extracted from the language of the IFIs) and how it can be implemented in the African context.

The CAADP cannot be considered to be a suitable approach to addressing the roots of the African land and agriculture predicament in general, and north African problems in particular.

CONCLUSION

In spite of the many controversial issues related to the Nepad initiative, it cannot be dismissed outright as a non-event. It is noteworthy that Nepad is a continuous partnership process by African governments on three levels: the international level with Western countries, IFIs and international specialised organisations; the regional level among regional economic communities; and the local level with private sector and civil society organisations.

Being a continuous partnership process means that other elements could be added and discussed with the international and internal partners in future. Relevant meetings and conferences may bring the serious problems of African land and agriculture to the fore and present solutions to the structural constraints of the development of African agriculture, thus:

A programme on agriculture must remain living and open to continuing improvement and also be open to interpretation for each of Africa's sub-regions in order to best address that continent's diversity (Nepad/FAO 2003:1).



Adding agricultural research and technology dissemination as one of the main pillars of the CAADP and the explicit reference to gender are clear examples of the possibility for change. At least the partnership provides a collective forum in which African governments can negotiate with their partners and seek funding from the IFIs, which are increasingly showing a preference for directing funds to collective bodies, rather than individual states.

Although there was no participation from civil society organisations in the design of Nepad, hope remains that these entities could play an effective role in promoting land redistribution and other related issues in the absence of large-scale state support. Although the role of these organisations in Africa in general and north Africa in particular has been less than successful, they assist in engaging with social formations and help meet minimal requirements for participation and good governance. The role of community-based organisations in the mobilisation of tenants against the freeing of land rents in Egypt in the 1990s is a good example of this (Rihan & Nasr 2001:126).

It is a positive sign that the role of civil society organisations is mentioned more than once in the CAADP document. Recognising that there was no clear definition of the roles of public, private and civil society institutions in agricultural development, the meeting of the African ministers of agriculture held to consider the CAADP in June 2002 recommended 'a proactive plan of action for enhancing the role of the private sector and civil society institutions in the implementation of Nepad agricultural programmes' be prepared (Nepad/FAO 2003: Annex 1).

The document also emphasises the aspect of partnership between governments and civil society: 'Nepad needs to encourage partnership within Africa... governments, commercial private sector and civil society need to find effective cooperation modalities that are mutually beneficial' (Nepad/FAO 2003:58). Time will tell if these commitments will move from rhetoric to action.

As for north Africa, the region has a good share of the planned projects, although the agricultural projects in the Short Term Action Plan remain too limited (Nepad 2003:90–6) North African projects include a plan to combat drought and desertification in the Maghreb and support to the Nile Basin Initiative. This is significant, especially given recent tensions between countries on this river.

²In a survey conducted by the Centre for International and Comparative Politics (CICP) at the University of Stellenbosch, South Africa, about knowledge of Nepad in seven countries (South Africa, Nigeria, Senegal, Algeria, Kenya, Uganda and Zimbabwe), the least knowledge was found in Algeria. It is worth mentioning that this survey took only the views of opinion leaders into account – those who hold the most authoritative positions in the private sector, NGOs, civic organisations, the public sector, academics and analysts, trade unions, politicians and the media. One can imagine what the result of such a survey would have been if the general public was included.

³For more information about the development of land tenure system in Tunisia see Mars et al. 1998.

⁴For a detailed analysis of the economic, political and social impacts of SAPs in Egypt in the field of agriculture see Alsayyid 2001.

⁵The water crisis in the region was so serious in 2000 that FAO issued a special alert on 5 April of that year (FAO 2000). Recurring droughts have caused widespread fluctuations in north African crop production. Since the beginning of the 1990s, aggregate cereal production has ranged from 4–8 million tons in five drought years, and 10–18 million tons in five good years.

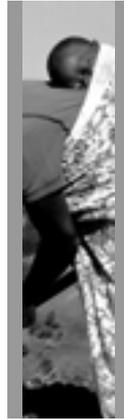
BIBLIOGRAPHY

- Aal, MH. 1998. *Agrarian reform and tenancy problems in upper Egypt*. Paper presented at the 'Land tenure in the developing countries' conference at the University of Cape Town, 27–29 January.
- Alsayyid, M. 2001. *What happened in the Egyptian countryside: The economic, political and social impacts of SAPs*. Cairo: Centre for the Study of Developing Countries, Cairo University. (Development issues series; no. 20.)
- Bond, P. 2002. *Fanon's warning: A civil society reader on the New Partnership for Africa's Development*. Cape Town: Alternative Information and Development Centre/Africa World Press.
- Bush, R. 2000. An agricultural strategy without farmers: Egypt's countryside in the new millennium. *Review of African Political Economy*, 84.
- Desora, A. 1997. *Agricultural trade and rural development in the Middle East and north Africa*. Washington, DC: World Bank. (Policy research working paper; no. 1732.)
- El-Ghonemy MR. 1993. *Land, food and rural development in north Africa*. London: IT Publications.
- Fakir, S. 2003. *Ensuring a pro-poor focus in agriculture and rural development through Nepad*. Southern African Regional Poverty Network. www.sarpn.org.za
- FAO (Food and Agriculture Organization of the United Nations). 2000. *North Africa faces another year of poor harvests*. Rome: FAO. (Special alert; no. 3, 5 April 2000.)

¹For reviews of some of these protestations see Bond 2002. (Note the absence of any commentary or contribution from the north African region.)



- FAO (Food and Agriculture Organization of the United Nations). 2003. *The state of food and agriculture 2002*. Rome: FAO.
- Ghoneim, A. 1999. *Anti-dumping practice under the GATT and the EU rules: Prospects for the Egyptian-European partnership agreement*. Paper presented at the 'Egyptian Exports and the Challenge of the 21st Century' conference organised by the Center for Economic and Financial Studies, Cairo University, 16–17 October.
- Mars, H et al. 1998. *Tunisian land tenure system: Between the challenge of modernisation, agricultural development and protection of natural resources*. Paper presented at the 'Land Tenure in the Developing Countries' international conference at the University of Cape Town, Cape Town, 27–29 January.
- Moyo, S. 2002. *The Nepad agricultural strategy*. The Third World Network. Africa. www.twnafrica.org
- Moyo, S. 2003. *The land question in Africa: Research perspectives and questions*. Paper presented at the 'Land Reform, the Agrarian Question and Nationalism' conference organised by the Council for the Development of Social Science Research in Africa (Codesria), Botswana, 18–19 October.
- Nabudere, D. 2002. *Nepad: Historical background and its prospects*. Paper presented at the 'African Forum for Envisioning Africa' conference organised by the Council for the Development of Social Science Research in Africa (Codesria), Kenya, 26–29 April.
- Nepad (New Partnership for Africa's Development). 2001. *The New Partnership for Africa's Development (Nepad)*. Abuja, Nigeria.
- Nepad (New Partnership for Africa's Development). 2003. *Annual report 2002*. Johannesburg: Nepad.
- Nepad (New Partnership for Africa's Development)/FAO (Food and Agriculture Organization of the United Nations). 2003. *The Comprehensive Africa Agriculture Development Programme (CAADP)*. Johannesburg: Nepad.
- Rihan, M & Nasr, M. 2001. Prospects for land reform and civil society movements in the Near East and North Africa, in *Whose land? Civil society perspectives on land reform and rural poverty reduction: Regional experiences from Africa, Asia and Latin America*, edited by KB Ghimire & Bruce H Moore. Geneva: United Nations Research Institute for Social Development:103–28.
- SARPN (Southern African Regional Poverty Network). *African civil society declaration on Nepad: 'We don't accept Nepad, Africa is not for sale'*. www.sarpn.org.za/NEPAD



SECTION 2:
LAND AND RESOURCE RIGHTS IN AFRICA:
EMERGING ISSUES AND THEMES



LAND TENURE AND LEGAL PLURALISM: THE WEST AFRICAN SITUATION

KOFFI ALINON

FOREWORD

In a forthcoming publication, I have written on the changing tendency of the tenure relationship in Francophone west Africa.¹ Some of the arguments presented in that piece are also discussed in this chapter. My collaboration, as a civil society member, with several research programmes based on the west African corpus led to my gaining experience from the particularities of the Anglophone sub-region. The Franco-British research programme on land tenure and resource access in west Africa also generated an interesting book (Toulmin et al. 2002) from which this contribution benefits.

I am grateful to Jean-Pierre Chauveau whose tenure regulations research unit at IRD (Institut de recherche pour le développement) Montpellier, hosts a part of my PhD investigations. The unit has jointly developed new qualitative approaches to land issues with what could be called the 'Marseille school'.

INTRODUCTION

Africa's rural masses comprise the largest section of national populations in virtually all the continent's countries and yet they are frequently ignored and neglected in national and international policy-making processes. The majority of these people are directly dependent on agriculture and natural resources and yet do not enjoy legal protection or other entitlement to such resources.

The lack of an enabling operational legal framework is considered in this paper as a consequence, not of a juridical or institutional vacuum, but an overcharged legal order, which leads to insecurity of stakeholders who are in turn obliged to navigate between various norms in an unstable context that threatens individual investments in rural activities. Rural people are unlikely to make long-term investments in measures to improve productivity of their soils without secure rights over the land. This partly explains why land tenure is central to the ongoing efforts to address issues of sustainable development in Africa today.

In many national contexts across Africa, there are various contradictory legal measures that do not secure the local poor people's access to land. This ambiguous situation is often a source of social conflict between community members. It is difficult to meaningfully involve such communities in the development process under these circumstances. Legal pluralism in tenure regimes is a consequence of historical evolution, and efforts to harmonise these regimes are necessary for development processes to proceed.

Differences often occur in the practical way in which west African Anglophone countries² manage the prevalence of indigenous practices in formal land administration and the rigidity of the legal tenure framework of Francophone countries.³ New developments over the last decade provide objective and qualitative insights that help us appreciate the differences. In this paper, I discuss the strategies undertaken by each country to manage the legal pluralism in the landholding system as a pillar of the current land policy. I largely comment on this aspect of pluralism, including references to its historical construction and some doctrinal approaches.

I also briefly examine other challenges of the influences of globalisation on property rights, natural resources management and regional integration.

LEGAL PLURALISM IN THE WEST AFRICAN CONTEXT

Landholding systems in the bulk of both French- and English-speaking countries in sub-Saharan Africa have undergone changes that have undermined the original forms of communal tenure by introducing state or individual private property, followed by so-called modern tenure reform. A rapid review of tenure practices reveals the following common features:

1. The existence of prior community rules governing access to land and other resources as an integral part of the social structure, with tenure being non-separable from social relationships, land-use and



rights. Individual rights were a result of negotiation in which the local land authorities acted as arbiters.

2. Colonisation added a radically new development to this institutional arrangement. The over-centralisation in French-speaking regions served to break the power of customary authorities and impose new mechanisms (like public registration) derived from the civil code.⁴
3. Independent states nationalised land and tried to redefine tenure rights in order to bring about development of rural areas.

'LEGAL DUALISM'

The notion of legal dualism dominated debate among scholars during the years 1950–70. The legal and institutional rules governing access to land in the colonised African countries, or newly independent ones, are characterised by two major 'legal systems' (the modern and the customary) which co-exist in a conflicting manner. The so-called 'modern law' and 'customary law' are separate and exclusive of one another. The modern legal system is considered the best way to manage state affairs and the continuing prevalence of traditional or customary laws is perceived a threat to development. Alliot (1964) expressed this conception by evoking the traditional 'resistance' to modern law.

In many societies, colonisation has provoked a division between the state-established universal legal principle and the one anchored in customs. Political regimes often have the ambition of establishing a unique and definitive system of law, and a single legislation in order to 'build the nation' and 'modernise society'. In former French-colonised African countries, the public legal practice has remained rigid and inflexible, seeking to anticipate every juridical situation with extremely detailed texts.

Opposing modern law in preference of customary law only offers a partial explanation to this phenomenon and institutional dynamics must be seen as results of 'piling up' effects.

THE 'EMPILEMENT' THEORY

Recent social scientists have tried to go beyond the apparent division between modern and traditional laws (Chauveau & Lavigne Delville 1999). They demonstrated that the so-called modern state law is not as unique as its makers thought it to be. In their attempt to impose the state's conception (in land tenure issues), legislators have not used the sole channel of formal law. They have largely used an 'informal land policy' which ignores, and many times breaks, official law principles (Chauveau & Lavigne Delville 1999:4). For example, encouraging some targeted social agents to resettle in less populated areas led to disregard of the principle of citizen equality. By doing so, informal policy has followed

similar political codes prevailing in local social 'arena' (in the sense of Moore 1978), then reinforced with common characteristics of African political culture, violence, clientelism and negotiation (Chauveau & Lavigne Delville 1999:5).

Experiences show that stakeholders pick and choose opportunistically between the different systems to further their own interests. Thus, farmers did not find the new reforms to their liking, which is why some 'deviation from the script' or 'slippage' can be seen (Olivier De Sardan et al. 1985). The authorities responsible for enforcing the law may also have a strategic interest in using the law to claim rights to which local rules do not entitle them.

The state action in this case has contributed to amplify the legal pluralism because new norms and institutions were enacted and encroach on prior norms, reorganising them and generating new ones afterwards – they seem 'superimposed'. It turned out that public intervention rendered the landholding system unclear and insecure as a result of the 'empilement' (or piling up) impression on the legal order. French colonial laws and the British indirect rule system impacted on land policy in Africa by adding a layer to the regulation and governing of natural resources in their colonies.

Conducting land policy in this pluralistic atmosphere seems to be a perpetual attempt in 'managing the confusion' (Le Bris et al. 1991). I now examine how west African legislators reacted to this situation.

WEST AFRICAN SOLUTIONS

Since colonialism, followed by African independence, did not succeed in instituting modern law, the solutions of the 1980s–1990s shifted from the idea of replacing one tenure norm with another. The fact that various norms co-exist must be taken as an inescapable reality. So one important step is not to consider legal pluralism as a pathological element which must be eliminated, but as a result of social and political dynamics.

Both colonial and post-colonial strategies tried to associate traditional rules and official law by recognising local practices. Le Roy (1998) identified three tendencies in conducting these strategies: codification, registration and subsidiarity. I add two other options, which are radically opposite to one another, namely nationalisation and privatisation.

CODIFICATION

The logic of codification seeks juridical definitions for tenure rules which are practised 'in the field', that means integrating customary systems into a positive legal order, which clearly defines and enforces them.

In Burkina Faso, land reform began in 1984 with a total nationalisation under the revolutionary regime of the late



President Thomas Sankara. In a revolutionary sense, the reforms tried to weaken traditional chiefs' power in land management, but to no avail. This was then followed by a complete review of the reforms in 1991 and later in 1996 by another land administration law called '*réorganisation agraire et foncière*' (Law No. 014/96/ADP).

The 1996 law returned virtual control of natural resources to local communities through the constitution of the customary rural domain (*domaine rural coutumier*), which represents 90% of the country's lands (Lund 1999). Beyond this recognition, the problem stakeholders are now facing is that official land dispute management procedures are so complicated that many of the conflicts and land speculations are resolved outside the legal system.

Although the Togolese land reform process ('*Reforme agro-foncière*') was established in 1974, it continues to offer a case of codification. Contrary to the land reform in Burkina Faso, the Togolese legislators did not nationalise land *en masse*. Customary access to land is recognised at the same level as modern acquisition. Law No. 12 (Article 2) of 6 February 1974 states that,

*The State guarantees the ownership rights of individuals and communities who hold land title issued in accordance with the law. The State also guarantees the ownership rights of any person or community who can claim to exercise customary rights over the land they use.*⁵

While the text is perfect, its application is problematic because it emphasises effectiveness of land-use as a condition of official recognition (Rouveroy 1995). The consequence is that since the reforms were adopted, little traditional ownership has been officially registered (Alinon 2000:7).

In Nigeria, regulatory measures are embodied in the Land Use Decree of 1978 (now the Land Use Act). Kolawole (2002) states that the decree has

sought to reform the system of land tenure with a view to enhancing agricultural productivity, residential construction and the development of social infrastructure in order to check land speculation and excessive rents.

The author mentions five types of property rights, which the decree drew, namely:

- user-rights with or without the right to dispose of or transform the resource
- rights to the land surface (excluding mineral rights)
- part-time collective rights (for example, pastoralists)
- part-time rights to trees
- non-material rights (for example, the right of passage).

One of the most problematic aspects of codification is the diversity of local practices. Even in the same society, with an agro-ecological or a cultural homogeneity, saving and formalising customs would only be a simplification

of rules. Which one of them will be taken as the model and will recover legitimacy for stakeholders? Furthermore codification generates many complicated legal texts that are hardly understood by the general populace.

REGISTRATION

Generally, land registration methods intend first to capture all the scope of land distribution by a systematic survey. In a second phase titles will be given to people who effectively own portions that are not subject to conflict. So, according to this method, only the field reality counts and the law comes later. It is a pragmatic logic, which starts from land possession as observed *in situ*. So such pretensions must be identified and registered in a first phase, then the land law must officialise them afterwards. Rural tenure plans (*plans fonciers ruraux*) in Côte d'Ivoire and Guinea-Conakry are typical cases of registration attempts.

The Ivorian experience started with a great objective:

to record the current tenure situation by taking note of the land rights (without modifying them) as they result from agreements between villages, families and eventually neighboring individuals. These land rights will be contradictory expressed before an official survey body (Guyon 1989:19).

Serious threats were made during the registration process, especially because stakeholders feared the finalisation of rights on a cadastral map. Despite this problem, certainly due to a failure to inform people and involve them in the process, Côte d'Ivoire can be considered to have the best cadastre among African Francophone countries. Observers are yet to be disappointed with the conservative aspect of the ultimate law that has resulted from the registration process. In fact, the law on land tenure adopted in 1998 officially denied access to non-Ivorians even though such people own land.

Guinea has also engaged the same registration method by launching the pilot operation of rural tenure plan (*opération pilote de plan foncier rural – OPPFR*) as part of the application of Law No. 0/92/019 issued on 30 March 1992. The objective of this operation is to establish a less expensive process for OPPFR, which must take customs as a basis for recognition of property rights. According to Camara (2000),

the OPPFR method of intervention permits a rapid and less expensive registration of land possession. It also offers the advantage of avoiding the main problem of conflict with the absolute private propriety right.

The rural tenure plan formula is also in use in Benin. The Natural Resources Management Project (*Projet de Gestion des Ressources Naturelles – PGRN*) was launched in 1990, and followed in 2000 by the Natural Resources and Soil Management Project (*Projet de*



Gestion des Terroirs et des Ressources Naturelles – PGTRN). These are nation-wide natural resources management programmes whose activities include local land rights recording. The two successive projects combined cartography and valuation survey methods to recognise existing local access rights through a public, participative (and contradictory) process.

The reformative caution inherent in these rural tenure plans could bring clarification in tenure relationship and better communication between stakeholders and the state. However, putting them into place is expensive. Furthermore, I must emphasize that the tenure plans are not by themselves a real land policy. They are only a partial means for categorising rights within a temporal legal framework.

SUBSIDIARITY

The subsidiarity method is based on a firm process of delegating land management power to local institutional structures. The local systems and their mediation modes are recognised. Procedure, not the formal law, is most important.

For example, in Niger, land reform that aimed to facilitate a smooth transition from a customary tenure regime to modern property was launched in the 1990s without provoking much conflict. Through Law No. 93/015 (of 12 March 1993), tenure commissions (commissions foncières) were established with responsibility for controlling the use of natural resources and recording families' rights over those resources. Members of the tenure commissions were elected from local administrative agents, traditional land chiefs and peasant associations. The commissions could be considered as micro-cadastral structures at local level. The initiative was welcomed by the public and was used in zoning communal properties.

Lund (2000) argues that the model of Niger has shown the difficulty of demarcating lines of authority between decentralised public servants and responsibilities of chiefs. So, cases which were decided under the aegis of one institution but disputed could be reintroduced for consideration through the other. Lund predicted that the primary goal of the reform (reducing land conflicts) was not attainable.

Taking into account all the local tenure systems, subsidiarity or a patrimonial approach offers a credible way to resolve current tenure issues in sub-Saharan Africa. It presents a new perspective for decentralised management of property rights and securing stakeholders. However, a necessary condition for such a strategy to work is political will on the part of the state to transfer decision making and financial powers to local-level institutions. This remains a weakness of the Francophone decentralisation system, with Madagascar's autonomous provinces being a notable exception.

For Kassanga (2002), customary land law in Ghana has not been abolished (that is beyond the power of any government, military or civilian). However, the state land machinery effectively monopolises all important land management functions in the customary sector. So, under the 1992 Constitution of Ghana, no formal transfer or development of 'stool' land (a category of land belonging to traditional chieftaincies) is permitted, unless the Regional Lands Commission certifies its consistency with the development plan. All revenue, income, and royalties emanating from the land are paid into a Stool Lands Account. Ten percent of this account is paid in tax to cover administrative expenses. The remaining revenue is disbursed to the 'stool' through the traditional council, to the traditional authority and to the district assembly. This appears to be a means of taking power from the customary traditional authorities, whether by accident or design. In practice, however, customary landholders continue to dispose of their lands as they wish, despite the high opportunity cost to the environment and local communities in general.

PRIVATISATION VS NATIONALISATION

Under the pressure of structural adjustment programmes (SAPs), reforms encouraging land privatisation were adopted from the 1980s. Liberal theorists assumed that when the continent was integrated into the world capitalist economy, the state, in response to the indigenous farmers' demands, would enforce a system of private property rights.

Some scholars asserted that the state, controlled by capitalist forces, would destroy indigenous systems, thereby creating a landless proletariat, or uphold indigenous systems of land tenure and exploit them to their own advantage. Although privatisation cannot be considered an option to solve pluralism of norms, the reforms conducted with this objective were not successful. Indeed, they have not made a qualitative departure from the past. Difficult procedures and repressive legislation on natural resources still exist. Furthermore, what came with privatisation policy was the amplification of the continuing grip of urban elites on productive lands.

I observe that the pro-communist movement, which occurred within Africa in the early 1950s–60s, brought about nationalisation of land in many west African countries after independence. Guinea and Burkina Faso experienced nationalisation for some years. Although the Senegalese land tenure system is a hybrid one, that country chose the option of nationalisation with the adoption of Law No. 64–46 (of May 1964), which established the national domain (Domaine National).⁶ The late President Leopold Senghor affirmed that Senegal wanted to go

from the Roman law to the Negro-African law, from the bourgeois conception of land to the socialist one, which was the prior system of traditional black Africa (Sidibe 1997).



Sidibe (1997:56) considers the national domain to be about 99% of the Senegalese territory, and is pro-nationalisation, referring to the ‘ambiguity and the anarchy of the land tenure situation in Senegal before the 1964 law’. The legislators argued that the law would ‘free peasants from ancestral servitudes and ensure them the greatest security’.⁷ However, nationalisation has been proved not to work in weak and non-accountable states.

THE NEW CHALLENGES⁸

The west African sub-region, as well as the rest of the continent, is faced with new challenges and issues including the following:

- The west African countries have, in general, all subscribed to new commitments at the international level and developed new initiatives at the national, sub-regional and regional levels, namely decentralisation policies; revision of land tenure and natural resource management laws; the Sahel 21 process and the food security strategy paper; national and sub-regional action programmes to combat desertification; preparation of poverty reduction strategy papers; the process of regional integration; and the New Partnership for Africa's Development (Nepad).
- Civil society has been consolidated and confirmed its legitimacy and capacity to take part in the search

for suitable solutions to land tenure problems and decentralisation.

All these changes show the importance of defining new policy guidelines for the land tenure and natural resources sector, in keeping with the progress made in sub-regional integration; renewed awareness of acute shared resource management problems; and the aggravation of potential or latent conflict situations at the national or inter-state levels. The situation in the Francophone west African sub-region is volatile, posing many threats to peace.

The current challenges include globalisation; growing scarcity of resources; recurrent droughts and desertification; fierce economic competition and the spectrum of murderous conflicts shaking up the continent. This is a clarion call for west African countries to work even harder towards the establishment of viable economic and ecological areas, and to anticipate the surfacing of latent conflicts connected with the management of national common and transboundary resources. In this context, an ambition for the next decade should be to strengthen a process that guarantees secure and equitable access to and sustainable management of natural resources. This process could result in the development of a regional charter on rural land tenure.

Table 1: An attempted synthesis of west African land tenure systems

	WHAT	WHO	ADVANTAGES	CONSTRAINTS
CODIFICATION	A main body of Acts whose provisions define and guarantee rights	Burkina Faso, Togo, Nigeria	The scope of access and use of land is coherent and unique	Complexity of texts and difficulties of balancing them with local rules
REGISTRATION	Builds on official recognition of relationships to land which already prevail on the ground	Cote d'Ivoire, Guinea	More pragmatic	Expensive, not a formal property title document
SUBSIDIARITY	Public recognition of the appropriate regulatory level/ authority	Niger, Ghana	Quite democratic	Representivity of the control body
NATIONALISATION	State-owning system	Senegal	Unique tenure source Social justice through a fair redistribution process	Difficult to implement in a weak and non-accountable state
PRIVATISATION	Individualisation and titling	Powerful international institutions encourage all countries to adopt it	Claimed to result in agricultural intensification	Keeps a number of landless out of the formal recognition process



The issue of women's access to land is a crucial one that is suffering lack of genuine and progressive approaches. The impact of HIV/Aids on agrarian labour is yet another challenge facing west Africa.

CONCLUSION

One of the interesting contributions of legal anthropology and sociology is that legislative and institutional instruments should no longer be seen as a sum of technical proposals, but as social phenomenon, as shown by the way that groups seize upon the development options made to them, while trying to bend them to suit their own interests. Griffiths (1986, following Moore 1978), has shown that the behaviour of those to whom a legislative provision is addressed is not solely determined by national legal rules, but also by rules deriving from so-called 'semi-autonomous social fields'. This baseline stage is an appropriate field of analysis on effective modes of tenure regulation.

It is important to lobby for official recognition of local land regulation modes. Legal and institutional pluralism makes the tenure framework complex, provokes ambiguity on ownership rights and pushes people to adopt opportunistic strategies that lead to conflicts. Arguing that land tenure systems need clarification is saying everything and saying nothing. Clarification cannot be the sole result of legal action, it supposes the involvement of many socio-political aspects like informal local arrangements, which currently constitute effective modes of regulation. I agree with Chauveau and Lavigne Delville when they say that 'those informal organisations with a strong political dimension appear surely like means of adaptation' (1999:19).

The pluralism of arbitration institutions and authorities must be managed because it leaves many conflicts perpetually unresolved. Local ruling systems must be taken into account, but with progressive introduction of formal items, namely written contracts, flexible local administrative institutions of landholding, for example Niger's tenure commissions, can be created.

Clarification of tenure systems must not be a top-down affair, there should be continuous research for compromise and consensus between the different systems – a crucial matter of reflection that requires innovative initiatives such as the Pan-African Programme on Land and Resource Rights.

¹Alinon, K. *Managing the legal pluralism by finding intermediary land policy for the west Francophone Africa: A comparative approach of national strategies*. Address to the Conference on Indigenous Political Structures and Governance in Africa, Ibadan, Nigeria, New York University at Stony Brook/Ford Foundation, 21 July 2001. (Forthcoming collective book to be published by Sefer Press, Nigeria).

²The Gambia, Sierra Leone, Liberia, Ghana and Nigeria. However, my remarks concern the last two countries.

³I mostly refer to the situation in Cote d'Ivoire, Senegal, Burkina Faso, Togo, Guinea, Niger and Benin. Mali and Mauritania are the other two countries which make up Francophone west Africa.

⁴The civil code is also known as the Napoleonic code. The famous French emperor generated a unified code containing the set of rules governing social relationship between citizens.

⁵Legal provisions in this section were translated by the author from the original French.

⁶The national domain concerned all lands that were not formally registered at this period (1964) and those that were out of the public domain of the state.

⁷Statement in the preamble of Law No. 64–46 of May 1964.

⁸A process towards the Praia+9 conference is ongoing in the sub-region; the remarks evoked in this section embrace many of the ideas developed by the civil society sub-committee in which I am involved. For the main report, see CILSS 2003.

BIBLIOGRAPHY

Alinon, K. 2000. *Improving tenure security in northern Togo: A means to address desertification*. London: International Institute for Environment and Development. (IIED issue paper; no. 92.)

Alliot, M. 1964. Les résistances traditionnelles au droit moderne par les Etats d'Afrique francophone et à Madagascar, in *Etudes de droit Africain et de droit malgache*. Paris: Cujas:235–56.

Camara, Y. 2000. [pages 277–83] in *Gérer le foncier rural en Afrique de l'Ouest: Dynamiques foncières et interventions publiques*, edited by Philippe Lavigne Delville, Camille Toulmin and Samba Traoré. Paris: Karthala; Saint-Louis, Sénégal: Université Recherche et développement.

Chauveau, J-P & Lavigne Delville, P. 1999. *Quelles politiques foncières intermédiaires en Afrique de l'ouest francophone?* Paris: Institut de recherche pour le développement (IRD)/ Groupe de recherche et d'échanges technologiques (Gret).

CILSS (Comité Permanent Inter États de lutte contre la Sécheresse dans le Sahel). 2003. *Rural Land Tenure and Sustainable Development in the Sabel and West Africa Project Document*. Ouagadougou, Burkina Faso: CILSS.

Griffiths, J. 1986. What is legal pluralism? *Journal of Legal Pluralism*, 24:1–55.



- Guyon, G. 1989. *Programme foncier Ivoirien: Objectifs généraux de l'opération*. Paris: Caisse Centrale de Coopération Economique (CCCE). (Notes et études; no. 21.)
- Kassanga, K. 2002. Land tenure, resources access and decentralization in Ghana, in *Dynamics of resource tenure in west Africa*, edited by C Toulmin, P Lavigne Delville & S Traoré. Oxford: James Currey:25–36.
- Kolawole, A. 2002. Access to agricultural and pastoral resources in Nigeria, in *Dynamics of resource tenure in west Africa*, edited by C Toulmin, P Lavigne Delville & S Traoré. Oxford: James Currey:110–20.
- Le Bris, E; Le Roy, E & Mathieu, P. 1991. *L'appropriation de la terre en Afrique Noire*. Paris: Karthala.
- Le Roy, E. 1998. Les orientations des réformes foncières depuis le début des années 90, in *Quelles politiques foncières pour l'Afrique rurale?* edited by P Lavigne Delville. Paris: Karthala.
- Lund, C. 1999. A question of honour: Property disputes and brokerage in Burkina Faso. *Africa*, 69(4):575–94.
- Lund, C. 2000. Les réformes foncières dans un contexte de pluralisme juridique et institutionnel: Burkina Faso et Niger, in *Inégalités et politiques publiques en Afrique: Pluralité des normes et jeux d'acteurs*, edited by G Winter. Paris: Karthala.
- Moore, SF. 1978. *Law as a process: An anthropological approach*. London: Routledge.
- Rouveroy, EAB. 1995. *La pauvreté judiciaire au Togo: Une question à suivre*. Lomé, Togo: Banque Mondiale.
- Olivier De Sardan, J-P et al. 1985. *Paysans, experts et chercheurs en Afrique Noire*. Paris: Karthala.
- Sidibe, A. 1997. Domaine national, la loi et le projet de réforme. *La Revue du Conseil Economique et Social*. 2, fév.–av :55–65.
- Toulmin, C, Lavigne Delville, P & Traoré, S (eds). 2002. *Dynamics of resource tenure in West Africa*. Oxford: James Currey.



THE IMPACT OF INTERNATIONAL TREATIES ON LAND AND RESOURCE RIGHTS

PATRICIA KAMERI-MBOTE

INTRODUCTION

International agreements have implications for land and resource tenure at local, national and international levels. Issues of land and resource rights should be addressed in the broader context of international treaties. The multilateral environmental agreements concluded in the last two decades seek to establish a legal framework for environmental resources management and also create favourable conditions for sustainable and equitable development.

To a greater or lesser degree, most of the agreements deal with or affect land and resource rights *vis-à-vis* national and regional processes. The agreements are of particularly central importance as regards resource rights – namely access, control and ownership of land and other resources.

The subject is of great importance, as it touches on secure and affordable access to and enjoyment of land and resource rights, a significant matter in the pursuit of poverty reduction and food security at the national, regional and international level. Access to land and natural resources is important in ensuring that citizenry contributes to and benefits from economic growth. Poverty reduction in Africa, for example, is largely predicated on land productivity in addition to access to basic services, markets, education and health care.

Furthermore, secure rights to land and other resources underpin secure livelihoods and shelter by reducing vulnerability to shocks, guaranteeing a level of self-provisioning and supplementary incomes from basic foodstuffs and enabling easier access to basic infrastructure, employment, markets and financial services. Moreover, insecure land and resource rights may result in societal unrest, which would greatly impinge on both long- and short-term development prospects.

Direct access to environmental resources by poor people is critical in ensuring economic growth that is environmentally sustainable. Therefore, national land policies, as affected by international agreements, underpin development. Furthermore, globalisation, as epitomised by the inter-connectedness of the international community and given effect through international agreements, also impacts on land and resource rights. More specifically, economic liberalisation and subscription to international treaties without political liberalisation intra-state affects the enjoyment of land and resource rights at national levels.

Land and resource rights in the international legal framework can be broadly categorised as being vested in three different entities: the state, the individual, and the community of states. International law, being state-centric, holds the state to be the locus for granting property rights. Consequently, in areas under national sovereignty, including all terrestrial ecosystems, states have full rights over their land resources. However, international agreements also provide for ownership, control and access to resources by private entities and individuals. In areas that are not subject to sovereign appropriation, common ownership regimes govern access to, control and ownership of, land and other resources.

It is important to point out that in international treaty-making, the equality of states is assumed. In instances where a particular state is unable to engage in the debates but proceeds to subscribe to the international regime for any number of reasons, the state will in essence be bound to abide by the treaty's rules. In many cases, African countries are unable to access international legal provisions, due to lack of capacity, even where these would benefit them. This paper sets out to inquire into the implications of international agreements on land and resources rights as regards access, control and



ownership. While these agreements represent consensus on issues, they can both enable as well as disable enjoyment of land and resource rights at different levels. I explore the link between these instruments and national and regional processes, paying particular attention to the Convention on Biological Diversity (CBD); the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA); the United Nations Convention to Combat Desertification (UNCCD); the International Union for the Protection of New Varieties of Plants (UPOV) Convention; and the Organisation of African Unity (now the African Union) African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (African Model Law).

Other agreements referred to include the African Convention, the Lusaka Agreement and the World Trade Organisation's Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement. All these international treaties have implications for land and resource rights with some underscoring the importance of common schemes for ownership, control and access to resources and others emphasising the role of states and private entities as the loci for the grant of property rights.

The paper examines the North-South dynamics of treaty-making to provide the context for discussing specific agreements. It concludes by pointing out that the wider economic contexts and engagements are critical to any exploration of the issue of land and resource rights and that it is important to identify those aspects of international treaties that enable the enjoyment of rights and their utilisation, while at the same time minimising the effect of the disabling provisions. In my view, the Pan-African Programme on Land and Resource Rights (PAPLRR) can contribute to enhancing the capacity of African countries to meaningfully engage and thus optimise the benefits of international agreements in the realisation of land and resource rights for the poor.

CONCEPTUALISATION

PROPERTY RIGHTS

Property is a claim to a benefit or income stream while property rights constitute claims to a benefit stream protected through institutionalised regimes from interference by other potential users (Bromley 1992). Property rights refer to rights, relationships, responsibilities and duties (Messerschmidt 1993). They constitute a social relationship defining the property holder with respect to something of value (Bromley 1992). There are different kinds of property rights for which different rationales are given.

The existence of property rights depends upon a limited supply of resources for which different users compete.

In this situation, law reacts by assigning property rights to regulate access to resources that was previously unregulated (Biblowit 1991). In the realm of land and resource rights, property rights can be broadly categorised into real and intellectual property rights.

REAL AND INTELLECTUAL PROPERTY RIGHTS

Real property comprises tangible commodities capable of exclusive possession and clear delineation (Swanson 1995:141).¹ Land and the accompanying rights that flow with it exemplify this kind of property. Ownership of land has historically constituted one of the main categories of property rights conveying an array of rights upon the owner (Megarry 1984).² Land is important in resource tenure because it hosts diverse species and also encompasses a variety of ecosystems. In this regard land tenure arrangements are crucial to the interaction between natural resources and property rights holding.

Intellectual property on the other hand deals with informational services, 'which are intangible and amorphous... not readily susceptible to either possession or delineation' (Swanson 1995:163). While real property is relatively scarce and therefore expensive to protect and capture, the value of intellectual property is associated with the creation of a shortage of information, by limiting the capacity of non-owners to capture it. This genus of rights also distinguishes between the treatment given to human creations as opposed to nature's creations (Walden 1995).

Intellectual property rights (IPR) generally fall into four categories: copyright, trademark, trade secrets and patents. While copyright protects the creative expression of ideas in tangible form, trademarks protect symbols, words and marks that are designed to distinguish services and goods in the market (Palmer 1989).

For an invention to be patentable, it must satisfy the requirements of novelty, non-obviousness and utility (Goldstein 1990). Patents can be granted for either products or processes.³ Trade secrets also protect ideas but rely on private enforcement measures such as employment contracts. A notable characteristic of IPR protection generally is the aspect of public good, which makes it available for use without necessarily having to pay for it. While production of a work of intellect involves time, effort and money on the part of the creator of the work, the person who accesses it through copying spends much less time and resources but has the same information as the person buying the original. This makes copying of the work more attractive than buying the original (Landes & Posner 1989). Allocating property rights to the creator of a work balances the private interests of the creator, by ensuring that he or she still has an incentive to create, against those of society at large having the information available for use.



Even though intellectual property does not diminish once it is shared, the role of IPR is to ensure that information providers do not lose rights to the information by disclosing it, since such information can be used by an infinite number of persons simultaneously (Baer 1995). Indeed one of the perceived philosophical underpinnings of IPR is to ensure disclosure of the information, the assumption being that lack of such right would discourage information holders from sharing their information for fear of losing it. The fear of losing exclusive rights to the information once shared is real because another person can use the same idea without having recourse to the originator of the idea.

Another major distinguishing factor of intellectual property from real or material property is the time limitation of the rights also known as the 'sunset clause' (Baer 1995). The effect of this clause is to limit the duration for which property rights can be held. The expiration of the duration entails a freeing of the rights from protection and consequently their unrestricted availability to the public.

Relevant IPR in the field of natural resources are patents and plant breeders rights (PBR). Traditionally, plants and animals were excluded from patentability and were governed by PBR.⁴ The gradual move towards patenting of life forms in the United States first affected plants, but patenting has also been extended to animals.⁵

ASCRIBING VALUE

Recognising property rights over land and natural resources requires valuation. This has proved to be quite a complicated and controversial task because of conflicting interests and value judgment systems. Natural resources, for instance, are in many cases both a public good from which it is difficult to exclude others and a private good whose consumption is subtractable (Gibson 1996). In the majority of cases, the ecosystem services that they provide are consumed directly and never get to the market place. This results in undervaluation of these services (which are in the public domain) and overstatement of private rights that are transacted in the market place (WRI/ IUCN/ UNEP 1992).

An anthropocentric and utilitarian view of natural resources tends to emphasise potential economic returns. In this view, raw materials only acquire significance when they reach the market place and can be assigned a monetary value. Thus the value of forest resources is broadly limited to the value of the timber that can be harvested and all other products whose market value is not known are disregarded. This overlooks other direct economic benefits that can be derived from the forest such as fuel wood, recreation or hunting and environmental services such as preventing the siltation of downstream areas.⁶

With regard to genetic resources and raw germ plasm, despite the recognised potential utility, assignment of

value presents insurmountable difficulties because of the very low probability of any given sample yielding commercial returns. It is also argued that the taking of germ plasm is different from extraction of timber because only a small part of the whole is taken while the rest is left on the ground.⁷ This reflects the incapacity of the market to ascribe value to products that may be useful to humankind but are not currently commercially exchanged (Radin 1996).

The dominance of the market precludes the search for non-market mechanisms of valuing such products (Radin 1996). The fact that the market is unable to ascribe value to something does not mean that the thing is valueless. It may point to the need for other kinds of valuation that fall outside the purview of the market. There are also social concerns that are relevant in natural resource management and are not commodified.⁸

Existing property rights regimes make it easier to ascribe value to genetic resources that have been transformed through biotechnology. This is not the case with land races.⁹ While the latter are designated as primitive cultivars, the former are characterised as elite varieties. This characterisation reflects value judgments that translate into potential monetary gains. The skewed valuation scale does not indicate a continuum from the raw material to a transformed product. There is a marked dichotomy between the valueless raw germ plasm and the commodified varieties that are processed in laboratories (Shiva 1993).¹⁰

The value of natural resources is also lowered by the standardisation of systems of production, knowledge and institutions across the world. While such standardisation has its benefits, it tends to disregard the need to preserve diversity and take into account the contribution of local knowledge and institutions.

RECOGNISED PROPERTY RIGHTS SYSTEMS

The way in which people vested with property rights deal with those rights determines to a significant extent the efficacy of those rights in promoting resource management objectives. Since property rights provide an incentive to conserve and sustainably use resources, it is important to assign the rights to those interacting closely with the resources. Open access situations are prevalent where there are no property rights and the resources are accessed on a first-come, first-served basis (Gowdy 1994). There has been a tendency to view common property regimes as synonymous with open access regimes (Bromley & Cernea 1989).

The major property rights regimes relevant in the realm of land and natural resources are individual/ private property, communal property and government control.¹¹ For this purpose I divide the property rights systems



broadly into two, namely common and individual property rights.

COMMON PROPERTY

Common property resources are those resources not controlled by a single entity. Access to these resources is limited to an identifiable community that has set rules on the way those resources are to be managed – and can exclude others. There are separate entitlements to the commons for each user and no one user has the right to abuse or dispose of the property. Any dealing with the property has to take into account the entitlements of others and is subject to approval by the community. Users of common property share rights to the resource and are subject to rules and restrictions, embedded in cultural or religious customs, governing the use of those resources.

Common property resources provide a basis for non-monetary and non-market economic relations (Singh 1986). Common property users do not usually perceive themselves as owners of the resources. They consider themselves as being merely in possession of their habitat. In the words of Singh (1986),

forest dwellers have traditionally not cognised their habitat as their property, common or private, since such a legal title did not exist in their world view.

Bromley and Cernea (1989) posit that common property is akin to private property and differs only because of the number of people who own it and can exclude outsiders. They also argue that common property is like corporate property, the members of the group having a relationship different from that of corporate property holders. Further, all members of the group are assured of access even when they do not actively participate in the activities of the community.

In the context of natural resources, the existence of global problems has led to the development of new regimes for regulating access to them. One example of these is the concept of common heritage of humankind that was first discussed within the purview of the Law of the Sea Convention.¹² A common heritage regime was developed in the context of deep seabed resources that do not fall under the jurisdiction of any state. Common heritage resources belong to all, but can only be exploited in a way that benefits all, even those that do not partake in the exploitation. The benefits derived from the exploitation should also be redistributed, so that countries that usually do not have the technological or financial capacity to undertake activities of their own can also gain from the resources. This implies that all potential users must receive a portion of any benefits and share the duties.¹³

STATE OWNERSHIP

State ownership constitutes another major form of property holding.¹⁴ This refers to situations where the

state has ownership and control over a resource. The state may directly control and utilise the resource through one of its administrative arms or it could grant user rights to communities and individuals (Bromley & Cernea 1989:27). States are in a peculiar position as grantors and guarantors of property rights, both at the local and international level, as well as holders in their own right. International law grants them permanent sovereignty over their natural resources.¹⁵ At the international level, a distinction exists between areas subject to *ab initio* appropriation on a first-come, first-served basis and common areas whose access is regulated and restricted by international law (Weiss 1995:17)¹⁶

States today still represent the most important property rights holders. In post-colonial societies, for instance, the destabilisation occasioned by colonial rule contributed to the breakdown of social, political and economic communal structures. States moved in to replace the centres of power in all areas, including property holding. In this process, they took over most of the properties previously held by communities.¹⁷ States thus have come to monopolise common property resources. This does not imply that such ‘privatisation’ makes resources commonly available to many people. In most cases, it is used as an avenue for channelling common property resources to individuals or companies for economic or political reasons (Singh 1986:29).

COMMUNITIES

The increasing trend of subsuming the discussion of common property rights within open access has led to community rights being ignored. As noted above, there is a marked difference between common property and open access. In the context of natural resource management, the traditional knowledge of communities in the preservation and enhancement of diversity has not been taken into consideration. This is due to the fact that raw genetic resources are not given a high commercial value because no IPRs can be ascribed at that stage.

PRIVATE PROPERTY

Private property rights denote ‘a bundle of entitlements defining the owner’s rights, privileges and limitations for use of a resource’ (Tietenberg 1992). Other attributes of property rights are exclusivity, universality, transferability and enforceability.¹⁸ The recognition and enforcement of these rights depend on the machinery put in place by the state. The holders of these rights are either corporations or individuals who can exclude others from the benefits of their property and regulate its use in so far as they comply with the laws of the state granting the rights.

Changes in property rights are generally towards individualisation and away from communal property rights. Patents in life forms and biotechnology patents are symptomatic of this general trend. The role of



corporations and transnational corporations (TNCs) is significant, originating mainly in developed countries. These have made their mark in property ownership, especially in the area of intellectual property. This trend has been facilitated by the globalisation of international trade. In biotechnology, the entry of TNCs to the fray has brought with it a culture of commodification. The biotechnology sector seeks to make seeds merely a raw material by replacing their regenerative biological processes. Through IPRs, the freedom of farmers to reproduce seeds is being circumscribed (Shiva 1994:128).

TRAGEDY OF THE COMMONS VS TRAGEDY OF THE ENCLOSURE

One of the most widely debated ideas in the area of resource use is that of 'the tragedy of the commons', which postulates that when property rights are not assigned in situations of open access, there is an incentive to over-exploit renewable resources (Hardin & Baden 1977). The flip side of this argument is that when property rights are assigned in these situations, the market will act to properly balance competing uses and force the participants to use such property in the most efficient way. Guided by the erroneous notion that common property is synonymous with property held in open access, the theory of the tragedy of the commons has been used to justify the grant of private property rights to resources held in common.

However, over-exploitation can also occur when common property resources are privatised. This is the so-called 'tragedy of the enclosure'.¹⁹ The transfer of authority over common resources from the realm of communal rules to the individual creates conditions for over-exploitation due to the sweeping aside of traditional structures that regulate use. If the mechanisms put in place for policing the use of this individualised property are not fully accepted as binding by the people upon whom they are to operate, or if they are not as far-reaching as the norms they seek to replace, the result is a tragedy of the enclosure. This may not necessarily mean that there is anything wrong with the property rights themselves, but it raises the question of whether the property rights are framed at the right level.²⁰

INTERNATIONAL TREATIES

The international legal framework alternates between two extreme positions, namely common heritage, broadly defined, and private rights, narrowly defined. There have been a number of international agreements on these issues. There are those that emphasise common heritage principles, such as the International Treaty on Plant Genetic Resources for Food and Agriculture and others such as the UPOV Convention²¹ and TRIPS,²² that provide for private/ individual rights. In between these two groups, are agreements such as the Convention on Biological Diversity, which provide for state, community and individual/private property rights.

The African Convention on the Conservation of Nature and Natural Resources,²³ the Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora,²⁴ the World Heritage Convention²⁵ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)²⁶ all have implications for land and resource rights. The state is responsible for granting property rights and access to areas that host wildlife resources is severely curtailed.

THE AFRICAN CONVENTION

The African Convention on the Conservation of Nature and Natural Resources is meant to help harness the natural and human resources of the continent for the total advancement of Africans in all spheres of human endeavour. The instrument holds that the utilisation of natural resources must aim to satisfy the needs of humans according to the carrying capacity of the environment. The convention creates 'conservation areas', defined as all protected natural resource areas, whether they be natural reserves, national parks or special reserves. These are, by definition, areas under state control, and access to them is therefore controlled by the state. Their boundaries may neither be altered, nor any portion alienated except by the competent legislative authority. They are, by implication and legislation, owned by the state, with the aim of conservation and protection of soil, water, flora and faunal resources. Under the convention, state parties assume legislative obligations to adopt adequate legislation aimed at the protection of these resources. It can be seen as having been instrumental in shaping the state policies of the parties as regards enhancing the conservation of nature and natural resources.

However, it cannot escape notice that, in many cases, the creation of conservation areas has limited access to the land and the natural resources on it. In some cases, communities have lost what they had always regarded as ancestral or communal land from which they had always eked out a livelihood. Article XI tries to remedy this problem by providing that the contracting states shall take all necessary legislative measures to reconcile customary rights with the provisions of the convention.

THE WORLD HERITAGE CONVENTION

The Convention concerning the Protection of the World Cultural and Natural Heritage affirms respect for the principle of sovereignty of the states on whose territory the cultural and natural heritage is situated. Without prejudice to property rights provided by national legislation, the states that are party to the convention recognise that such heritage constitutes a world heritage, and it is the duty of the international community to cooperate in its protection. It further requires states to set up a framework for national protection of cultural and natural heritage. This convention, unlike most of the



other international agreements, unequivocally recognises the sovereignty of the states on whose territory such resources are situated, and expressly confirms that it does not in any way prejudice any property rights provided by national legislation. While promoting the protection of the world cultural and natural heritage, the convention also ensures that its implementation does not involve national programmes/ policies that encroach on natural resource rights as conferred by national legislation.

Though this convention does not deal specifically with wildlife, it has potential to protect unique wildlife habitats. It was adopted within the general conference of the United Nations Educational, Scientific and Cultural Organization (Unesco) in 1972 and constituted the first international environmental agreement recognising the overriding interest of the global community in the management of domestic resources (Swanson 1992:65). It is noteworthy that state sovereignty is not infringed upon at all because the procedure, though internationally devised, is voluntary (Article 3). The incentives are the international recognition gained from recording the sites on the world list and the financial assistance accorded to members. This approach has been extremely successful in enlisting state support for conservation measures for sites of recognised international importance. It can, however, impinge on the rights of people to land and resources where designated sites enclose areas that are vital for a community, thus curtailing the community's access to the resources.

CITES

CITES was signed in March 1972 and came into force in 1975. It provides the primary international control structure for trade in wildlife products. It focuses on the identification of endangered species and their withdrawal from the world market through a listing process. CITES appendices list the species that currently are threatened with extinction and those for which there is some indication that they face the threat of extinction in the future. The conference of parties determines what species should be listed.

Any species listed in Appendix 1 may not be shipped without an export permit being issued by the exporting state. Such a permit may only be issued if the exporting state certifies that the export will not be detrimental to the survival of the species. The importing state on its part has to certify that the import will not be used for commercial purposes. Further, a 're-export certificate' certifying that the specimen was re-imported into the re-exporting country in accordance with the provisions of CITES is required for all Appendix I species. An Appendix I listing thus acts as an effective ban on trade of a species, because even if the exporting state wishes to continue trading in the listed species, the importing state is under an obligation to bar all imports other than

scientific ones (Swanson 1992; Glennon 1990). An Appendix II listing allows for trade in the listed species at the discretion of the exporting state. The importing state has an obligation to ensure that the export certificate has been issued. Appendix III of CITES provides the least protection and it includes species that are subject to regulation under the jurisdiction of any member state for the purposes of preventing or restricting exploitation. Appendix III listings are intended to assist countries with domestic regulations to enforce those regulations internationally. Restrictions on trade are limited to specimens from the state that has listed the species.

The permit system under CITES provides the mechanisms for trade regulation. Member states are required to provide annual reports to the CITES secretariat on the volumes of trade being carried out in the listed species. The secretariat acts as the intermediary between the exporting and importing states and confirms the authenticity of the trade documents. The management and scientific authorities set up at the national level by member states limit the number of permits issued and thus effectively establish quotas for the species concerned. The permits also facilitate the monitoring of international trade in wildlife.

One of the major weaknesses of CITES is its provision for exceptions for countries that have a reservation with respect to particular species, provided that the member notifies other countries of its intention not to comply with trade restrictions on the species. The insistence on reservations exemplifies the parties' increasing disenchantment with the fact that CITES is based on a protective rather than a management approach to wildlife conservation. As early as 1979, developing countries argued that wildlife conservation should not be at the expense of national economic development and that there ought to be economic benefits emanating from controlled species if the protection of their habitat from human encroachment was to be justified.²⁷

Conference Resolution 3.15 of the Conference of Parties meeting held in New Delhi in 1981 actually implied that a species listed in Appendix 1 could be removed from the list for purposes of sustainable resource management within the country in which the species resides.²⁸ While the inability of a country taking reservations to trade with other members of the convention may water down the value of such a reservation, trade with non-members of the convention who are not bound by its obligations may significantly hamper the protection of a species (Munyakho 1986).

CITES has, for instance, remained at the centre of the divergence between eastern and southern African countries with respect to the African elephant. The latter support wildlife management strategies and have put in place community-based programmes encouraging such



management while the former support preservationist strategies.²⁹ Most southern African countries have communal wildlife management projects where local communities participate in management activities and derive benefits from them. By contrast, eastern African countries maintain state control of wildlife management activities with minimal community involvement and consequently, local communities are opposed to wildlife presence on their land. All in all, the convention remains state-centred as opposed to people-centred, which could adversely affect its effectiveness if the needs of people to access land and resources are not taken care of by the states.

THE LUSAKA AGREEMENT

The Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora aims to reduce and ultimately eliminate illegal trade in wild fauna and flora. It arose from the realisation among African states that there exists a wide scope for illegal trade in fauna and flora, and that this situation has given rise to large-scale poaching and depletion of the continent's biodiversity. The agreement promotes enforcement measures applicable under both CITES and CBD and is in fact a regional instrument for the implementation of the provisions of CITES. States that are party to the agreement assume the basic obligation to individually and/or jointly investigate and prosecute cases of illegal trade in wild fauna and flora (Article 4). In so doing, most states have adopted policies and legislations that are meant to protect flora and fauna, but which have the practical effect of severely restricting the access, control and, in some cases ownership, of environmental resources such as forests and water – even to the in-digenous communities. Contrary to the desired effect, such restriction sometimes causes tension between institutional mechanisms that implement the policies and legislation and the local indigenous communities. The Wildlife Act of Kenya is a case in point. In implementing it, some local communities (for instance the Maasai) feel that they are wrongfully being denied access and control of natural resources.

Such tension serves only to cause conflicts, more so when such national policies are not 'home grown', but are rather put in place by a state in an attempt to conform to an international treaty obligation. This is more so where, without any intervention, there is perfect co-existence of the local communities and other natural resources/wildlife.

THE CONVENTION ON BIOLOGICAL DIVERSITY

This convention represents, as pointed out above, the middle ground in the debate on property rights and biodiversity conservation. The main concerns of the CBD are the conservation of biodiversity, the development of biotechnology, access to both biodiversity

and biotechnology, and international equity. The convention negotiators faced indomitable challenges trying to balance the interests of the key players (Barton 1992). The discussions leading to the conclusion of the convention were characterised by major ideological differences between the developing countries and the developed countries over the question of intellectual property rights, almost threatening the outcome of the negotiations.³⁰

While developed countries pushed for the consideration of biodiversity as common heritage of humankind that should be exploited and conserved for the benefit of all humankind, they were unwilling to concede to sharing its benefits. Developing countries demanded that biotechnology innovations arising out of biodiversity resources extracted from their territories be made available to them free of charge. Some developed countries attempted to have intellectual property rights to biotechnology innovations dealt with exclusively in the context of the General Agreement on Trade and Tariffs (GATT) negotiations because the purpose of the CBD should be primarily to conserve biodiversity.³¹

The resulting agreement is riddled with contradictions as it tries to accommodate the differences between the two sides. It affirms the rights of states to natural resources within their jurisdictions and effectively debunks the common heritage concept, introducing the notion of common concern. Common concern implies recognition of the global importance of biological diversity but does not diminish the ambit of the principle of permanent sovereignty over natural resources.³² It seeks to facilitate and promote global co-operation for the conservation of biodiversity without forcing any given state to participate in this process.³³ The central idea is that the benefits of access to the resource must be shared equitably. Like in human rights, reference to common concern is an acknowledgment that management of a state's own environment and resources is a matter in respect of which all states have standing (Boyle 1993).

The CBD recognises different potentially conflicting rights over resources. It recognises, for instance, the need to ensure equitable allocation of ownership rights and IPRs to biotechnology. The provisions on technology transfer may thus conflict with existing IPRs. The convention is silent on which rights should prevail in the event of a conflict (Sands 1995:748). Like other international agreements, the CBD does not specifically address the rights of communities apart from a cursory mention of indigenous and local communities in one article (Article 8j).

THE UNCCD

In countries experiencing serious drought and/or desertification, particularly in Africa, the United Nations Convention to Combat Desertification may have



implications on land and resource rights. The UNCCD recognises that national governments play a critical role in combating desertification and mitigating the effects of drought. The central role of local implementation of action programmes in this respect, and hence the impact of national processes on such programmes, is also noted. The convention calls for improvement of the effectiveness and co-ordination of international co-operation to facilitate the implementation of national plans and priorities. Under article 4(2) of the agreement, parties undertake to promote co-operation among affected parties in the fields of environmental protection and the conservation of land and water resources, as they relate to desertification and drought. Further, they undertake to strengthen sub-regional, regional and international co-operation in this regard.

The UNCCD requires that parties prepare national action programmes to achieve the objective of the convention, and requires that such programmes be closely inter-linked with other efforts to formulate national policies for sustainable development (Article 9(1)). Such programmes would include the re-settlement of communities where activities which threaten to cause desertification are carried out and regulation of access and control of other natural resources, especially water and forests. This has a direct impact on land and other natural resource rights, as it involves a re-definition of these rights through the national processes of legislation and implementation of other national policies aimed at the fulfilment of the obligations assumed under the convention. It is augmented by Article 10(2) which provides that the national action programmes shall specify the respective roles of government, local communities and land users, and the necessary and available resources. In essence, the article recognises that the programmes contemplated have direct relevance to the local communities whose access, control and ownership of land and other resources may be adversely affected.

Under the UNCCD, national action programmes may include, *inter alia*, the establishment of alternative livelihood projects that could provide incomes in drought-prone areas, and the development of sustainable irrigation programmes for both crops and livestock. Such projects involve the change and re-organisation of land use. Being national programmes, they may involve changes of land tenure. It is for this reason that local communities must be actively involved in the design of such projects, lest they view them as disruptive of their rights to land and other natural resources.

THE UPOV CONVENTION

The International Union for the Protection of New Varieties of Plants Convention seeks to protect new varieties of plants, both in the interest of agricultural development and of plant breeders. Member states undertake to create a system for granting plant breeders' rights within their domestic laws. The rights granted in

each member state are effective only within that territory, not internationally. The 1978 and 1991 revisions set out the minimum scope of protection that states must grant. The 1978 revision expanded the number of criteria that a plant variety must meet in order to qualify for PBRs. These include an element of distinctness, homogeneity, stability, commercial novelty and the submission of an acceptable denomination.

The 1991 revision provides that parties are free to protect plant varieties by PBRs or other types of IPRs such as patents. States may also grant simultaneous protection to the same plant variety by more than one type of IPR (Greengrass 1991). Further, it extends breeders' rights to all production and reproduction of their varieties, and to species as well as general and specific plant varieties. The remaining exceptions to commodification include acts done privately and for non-commercial purposes, experiments, and breeding and exploitation of other varieties. The effect of the 1991 revision is to bring the UPOV Convention in line with the trend towards patenting of plant varieties. Breeders are now granted exclusive rights to harvested materials and the distinction between discovery and development of varieties has been eliminated.³⁴

It is important to note that the latest revisions emphasise the increasing importance of patents in a world that sees PBRs as unnecessarily restrictive even after redefining the concepts of farmers' rights and breeders' rights. This regime's membership was mainly drawn from the pool of countries that are at the forefront of biotechnology developments. It now includes some developing countries including Kenya and South Africa. The link between ownership of plant varieties and enjoyment of land rights cannot be overemphasised. Monopoly rights over seeds and plant varieties as provided for under the 1991 version of the UPOV Convention will impact on the capacity of resource-poor farmers to reap benefits from their land

TRIPS

Other developments occurred during the Uruguay round of negotiations of the General Agreement on Tariffs and Trade.³⁵ GATT was originally conceived of as a mechanism to promote free trade. Its mandate has widened as international trade has grown to eventually include services and IPRs. The new World Trade Organisation now appears to be the chief multilateral institution addressing global uniformity of intellectual property standards and seems to be taking over part of the role played by the World Intellectual Property Organisation, whose mandate is to harmonise international IPR standards.

The United States led the initiative by developed countries to introduce more stringent IPR rules in trade because of complaints by American firms about counterfeiting and piracy, which necessitated the



protection of domestic biotechnology and other industries. The Trade-Related Aspects of Intellectual Property Rights agreement was initially meant to deal with trade distortions but later its scope was expanded to cover IPRs. Its main objective is to protect and enforce intellectual property rights and ensure that they contribute to the promotion of technological information, transfer and dissemination of technology. TRIPS only takes into account resource tenure in so far as it relates to patents.

Patents are dealt with in Section 5 of TRIPS, Article 27 of which addresses the question of patentable subject matter. The latter article allows member states to exclude from patentability plants, animals, medical processes for the treatment of humans or animals. They may also restrict the commercial exploitation of patentable innovations to protect public order or morality, including averting serious harm to the environment. Governments still retain the right to restrict research, development or use of technology for protecting the environment.

On another level, the CBD is seen as a possible solution to the difficulties in property rights to innovations derived from natural resources. However, the issues regarding knowledge, innovations and practices of indigenous and local communities as captured under Article 8(j) are problematic and can limit the access, control and ownership of natural resources to these communities. The protection of such knowledge, innovations and practices is problematic within the recognised IPR regimes, firstly because the rights involved are collective and intergenerational in character, and secondly, because such rights may not satisfy the criteria for patentability as novelty, inventiveness and capability of industrial application that are required for IPR protection under current regimes.

Such rights are mainly preserved through oral traditions, and this means that resource rights and land rights drawing from them will not be readily protected under the schemes of modern property regimes. As a result, underdeveloped countries run the risk of losing the ownership of these genetic and other natural resources to the industrialised countries, which are in a position to tap these resources industrially and protect them as their own.

CONCLUSION

This paper highlights the plethora of international treaties affecting the promulgation, enforcement and enjoyment of land and resource rights. It is critical in any exploration of land and resource rights to bear in mind the broader context of globalisation and international treaties. Most of the international agreements that affect land and resource rights tend to weaken the international law principle of state sovereignty over natural resources of the states in which such resources are situated.

Moreover, the conventions do not ensure that, in their implementation, the national programmes to be adopted do not encroach on the land and other resource rights of the local communities. The consequence is that a lack of goodwill develops between the local communities and overseers of the national policies/ programmes in place as a framework for the implementation of the provisions of the agreements. It should also be noted that where people have weak, temporary or unclear rights to land or other natural resources, they lack the incentive to invest or use such resources in a meaningfully productive way.

International agreements should, in accord with the above observation, take into account the land and other resource rights of local communities if such resources are to be used sustainably. This is in recognition of the fact that implementation frameworks of such agreements are critical to the achievement of their objectives. Moreover, there is need to ensure compensated restriction of access, control and ownership of resources in any national programme or process meant to be in accordance with international agreements' participatory approaches to land and resource-use planning. These can be adopted through national processes implementing the international obligations and should aim at matching land allocation and management imperatives to social needs and addressing potential conflicts among land users.

The rights of land users should be recognised, while simultaneously taking steps to ensure that land and other environmental resources are well-protected. The general ownership of land and other resources should not prejudice the interests of local communities. This would be counterproductive, as the communities would generally be averse to the objectives for which restrictions were imposed.

¹It is also referred to as immovable property. See, for example, Swanson 1995:141.

²It confers the right to extract minerals from the land, to use and abuse and dispose of it as the property holder wills. See Megarry 1984.

³Doc WIP/ACAD/E/93/22. Process patents are given less economic value because of the difficulty of monitoring them.

⁴See, for example, Eisenberg 1987:177.

⁵See *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) and *Walden* 1995:184.

⁶See, for example, Principle 2.b of the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation



and Sustainable Development of all Types of Forests, in Report of the United Nations Conference on Environment and Development, United Nations, Rio de Janeiro, 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Annex III (known as the 1992 Forest Statement). See also Weiss 1989.

⁷See, for example, Kloppenberg & Kleinman 1988.

⁸*Lujan v. Defender of Wildlife*, 112 S. Ct. 2130 (1992). See also Goulder & Kennedy 2000.

⁹Land races are defined as actively cultivated crop varieties that have been developed in traditional agricultural systems through both natural and human selection. See, for example, Witt 1988.

¹⁰See also Barton & Christensen 1988.

¹¹The importance of common property management systems should not be underestimated. It was, for instance, estimated that in India 64% of all land is in private hands whereas 36% is common land – see Beck 1994. In Uganda, about 70% of total arable land was held under customary tenure in 1971 – see Richardson 1993.

¹²UN General Assembly Resolution 2749 (XXV), Declaration of principles governing the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, 17 December 1970; Resolutions Adopted by the General Assembly During its 25th Session, 15 September–17 December 1970; General Assembly Official Records 25th Session Supplement 28 (A/8028) and Article 136 of the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982.

¹³Part XI of the Law of the Sea Convention, and United Nations: Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (done at New York 28 July 1994). See also Boyle 1991:7.

¹⁴See, for example, Allot 1990, who notes that sovereignty entails the idea of excluding anyone not authorised by the property owner from enjoyment of thing owned.

¹⁵See, for example, UN General Assembly Resolution 1803 (XVII), Permanent sovereignty over natural resources, 14 December 1962 and Sands 1995.

¹⁶See, for example, Weiss 1995:17.

¹⁷See, for example, Odhiambo 1996.

¹⁸Property rights have also been referred to as monopoly rights. See Swanson 1995:164.

¹⁹See, for example, Martinez-Alier 1991.

²⁰In situations where the best level at which to frame the property rights is the community, framing them at the level of the individual is likely to result in a tragedy of the enclosure.

²¹International Convention for the Protection of New Varieties of Plants (done at Paris 2 December 1961).

²²Agreement on Trade-Related Aspects of Intellectual Property Rights, in General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1C (done at Marrakesh 15 April 1994).

²³Adopted in Algiers on 15 September 1968.

²⁴Adopted on 8 September 1994.

²⁵UNESCO Convention for the Protection of the World Cultural and Natural Heritage – adopted 16 November 1972.

²⁶www.cites.org

²⁷Official Documents, Second Meeting of the Conference of the Parties San José (Costa Rica), 19–30 March 1979.

²⁸Official Documents, Third Meeting of the Conference of the Parties, New Delhi (India), 25 February–8 March 1981.

²⁹See, for example, Murphree, no date.

³⁰The debate on intellectual property rights and the transfer of technology from developed to developing countries first appeared in the 1960s and 1970s within the broad framework of proposals to establish a ‘new international economic order’ with developing countries seeking to obtain a better balance between private and public interests.

³¹These attempts were defeated, leading to the Bush administration refusing to sign the convention. See, for example, Goldman 1994.

³²The compromise exemplified in the notion of common concern is also apparent in the 1992 Forest Statement. See also Barber & Dickson 1995:121 (see endnote 6).

³³Since the convention does not mandate exclusive multilateral co-operation, bilateral and regional agreements have been concluded. See, for example, the establishment within the World Bank of the Pilot Program to Protect the Brazilian Rain Forest between a small number of donor countries and Brazil.

³⁴See, for example, Nijar & Ling 1994.

³⁵The results of which appear in General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations (done at Marrakesh, 15 April 1994).

BIBLIOGRAPHY

- Allott, P. 1990. *Eunomia: New order for a new world*. Oxford: Oxford University Press.
- Baer, KW. 1995. A theory of intellectual property and the biodiversity treaty. *Syracuse Journal of International Law and Commerce*, 21.
- Barber, JP & Dickson, AK. 1995. Justice and order in international relations: The global environment, in *Just environments: Intergenerational, international, and interspecies issues*, edited by David E Cooper and Joy A Palmer. London: Routledge.
- Barton, JH & Christensen, E. 1988. Diversity compensation systems: Ways to compensate developing nations for providing genetic materials, in *Seeds and sovereignty: The use and control of plant genetic resources*, edited by Jack R. Kloppenburg. Durham, NC: Duke University Press.
- Barton, JH. 1992. Biodiversity at Rio. *Bioscience*, 42.
- Beck, T. 1994. Common property resource access by poor and class conflict in West Bengal. *Economic and Political Weekly*, XXIX/4.
- Biblowit, C. 1991. International law and the allocation of property rights in common resources. *New York International Law Review*, 4:77–85.
- Boyle, AE. 1991. International law and the protection of the global atmosphere: Concepts, categories and principles, in *International law and global climate change: International legal issues and implications*, edited by Robin Churchill & David Freestone. London: Graham & Trotman.
- Boyle, AE. 1993. The Convention on Biological Diversity, in *The environment after Rio: International law and economics*, edited by Luigi Campiglio et al. London: Graham & Trotman/ Martinus Nijhoff:111–27.
- Bromley, DW & Cernea, MM. 1989. *The management of common property natural resources: Some conceptual and operational fallacies*. Washington, DC: World Bank.
- Bromley, DW. 1992. The commons, property, and common-property regimes, in *Making the commons work: Theory, practice and policy*, edited Daniel W Bromley et al.
- Eisenberg, RS. 1987. Proprietary rights and the norms of science in biotechnology research. *Yale Law Journal*, 97.
- Gibson, C. 1996. *Address at the East African Regional Symposium on Common Property Resource Management*. 28 March 1996.
- Glennon, MJ. 1990. Has international law failed the African elephant? *American Journal of International Law*, 1(11).
- Goldman, KA. 1994. Note: Compensation for use of biological resources under the Convention on Biological Diversity: Compatibility of conservation measures and competitiveness of the biotechnology industry. *Law and Policy in International Business*, 25.
- Goldstein, P. 1990. *Copyright, patent, trademark and related state doctrines*, 3rd ed. Westbury, NY: Foundation Press.
- Goulder, LH & Kennedy, D. 2000. Valuing nature, in *Earth systems: Processes and issues*, edited by WG Ernst. Cambridge: Cambridge University Press.
- Gowdy, JM. 1994. *Coevolutionary economics: The economy, society, and the environment*. Boston: Kluwer Academic Publishers.
- Greengrass, B. 1991. The 1991 Act of the UPOV Convention. *European Intellectual Property Review*, 13(12):466–72.
- Hardin, G & Baden, J (eds). 1977. *Managing the commons*. San Francisco: WH Freeman.
- Kloppenber, JR & Kleinman, DL. 1988. *Seeds of controversy: National property versus common heritage seeds*, in *Seeds and sovereignty: The use and control of plant genetic resources*, edited by Jack R. Kloppenburg. Durham, NC: Duke University Press.
- Landes, WM & Posner, RA. 1989. An economic analysis of copyright. *Journal of Legal Studies*, 18.
- Martinez-Alier, J. 1991. Ecology of the poor: A neglected dimension of Latin American history. *Journal of Latin American Studies*, 23.
- Megarry, RE & Wade, HWR. 1984. *The law of real property*, 5th ed. London: Stevens.
- Messerschmidt, DA. 1993. *Common forest resource management: Annotated bibliography of Asia, Africa and Latin America*. Rome: Food and Agriculture Organization.
- Munyakho, DK. 1986. CITES: The convention, its scope and limitations. *Svara: Magazine of the East African Wildlife Society*, 9(1).
- Murphree, M. No date. *The lesson from Mahenye: Rural poverty, democracy and wildlife conservation*. www.wildnetafrica.com/bushcraft/articles/document_campfire1.html (Wildlife and development series; no. 1.)
- Nijar, GS & Ling, CY. 1994. The implications of the intellectual property rights regime of the Convention on Biological Diversity and GATT on biodiversity conservation: A Third World perspective, in *Widening perspectives on biodiversity*, edited by Anatole Krattiger et al. Gland, Switzerland: IUCN (The World Conservation Union):277–86.
- Odhiambo, MO. 1996. *Liberalisation, law and the management of common property resources in Kenya: The case of public land and forests*. Paper presented at the East African Regional Symposium on Common Property Resource Management, Kampala, 26–28 March 1996.



- Palmer, TG. 1989. Intellectual property: A non-Posnerian law and economics approach. *Hamline Law Review*, 12.
- Radin, MJ. 1996. *Contested commodities*. Cambridge, Mass.: Harvard University Press.
- Richardson, BJ. 1993. Environmental management in Uganda: The importance of property law and local government in wetlands conservation. *Journal of African Law*, 37.
- Sands, P. 1995. *Principles of international environmental law I: Frameworks, standards, and implementation*. Manchester: Manchester University Press.
- Shiva, V. 1993. *Monocultures of the mind: Perspectives on biodiversity and biotechnology*. London: Zed.
- Shiva, V. 1994. The seed and the earth: Biotechnology and the colonisation of regeneration, in *Close to home: Women reconnect ecology, health and development worldwide*, edited by Vandana Shiva Philadelphia: New Society.
- Singh, C. 1986. *Common property and common poverty: India's forests, forest dwellers and the law*. Delhi: Oxford University Press.
- Swanson, TM. 1992. The role of wildlife utilization and other policies for diversity conservation, in *Economics for the wilds: Wildlife, wildlands, diversity and development*, edited by Timothy M Swanson and Edward B Barbier. London: Earthscan.
- Swanson, TM. 1995. The appropriation of evolution's values: An institutional analysis of intellectual property regimes and biodiversity conservation, in *Intellectual property rights and biodiversity conservation: An interdisciplinary analysis of the values of medicinal plants*, edited by Timothy Swanson. Cambridge: Cambridge University Press.
- Tietenberg, TH. 1992. *Environmental and natural resource economics*, 3rd ed. New York: HarperCollins.
- Walden, I. 1995. Preserving biodiversity: The role of property rights, in *Intellectual property rights and biodiversity conservation: An interdisciplinary analysis of the values of medicinal plants*, edited by Timothy Swanson. Cambridge: Cambridge University Press.
- Weiss, EB. 1989. *In fairness to future generations: International law, common patrimony, and intergenerational equity*. Tokyo: United Nations University.
- Weiss, EB. 1995. Environmental equity: The imperative for the twenty-first century, in *Sustainable development and international law*, edited by Winfried Lang. London: Graham & Trotman.
- Witt, SC. 1988. Biotechnology and genetic diversity, in *Biodiversity*, edited by EO Wilson. Washington, DC: National Academy Press.
- WRI/ IUCN/ UNEP (World Resources Institute/ The World Conservation Union/ United Nations Environment Programme). 1992. *Global biodiversity strategy: Guidelines for action to save, study, and use earth's biotic wealth sustainably and equitably*. Washington, DC: World Resources Institute.



CONSTITUTIONAL PROTECTION OF PROPERTY AND CONTEMPORARY LAND PROBLEMS IN SOUTHERN AFRICA

CLEMENT NG'ONG'OLA

INTRODUCTION

The 'land question' in southern Africa has yielded substantially similar problems, themes and issues in a variety of spatial, political, economic and social settings. The most prominent problems are reclamation of 'freehold' agricultural land from settler or alien control and indigenisation or localisation of 'ownership' of land; re-discovery and assertion of historical or aboriginal land claims and titles; reform or modernisation of tribal or customary forms of land tenure and administrative arrangements; accommodation of equity and gender concerns in land allocation and distribution; and regulation of squatting or 'self-provisioning of land'. This paper examines the extent to which the search for solutions to some of these problems is affected by constitutional protection of 'the right to property'. The emphasis is on the search for solutions to squatting and other problems related to landlessness.

The argument is often made that land problems must be addressed in a manner compatible with 'the rule of law'. AV Dicey, a famous English constitutional lawyer said, more than a century ago, that the purpose of the rule of law was to protect individual rights by requiring government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedure.¹ The rule of law is now firmly embedded in constitutionalism, which means that government should derive its powers from, and be guided and restrained in its conduct by, a written constitution (De Waal et al. 2001:7). The rule of law and constitutionalism in southern Africa probably have firmer foundations in the countries in which constitutional instruments were overhauled in the 1990s to accommodate modern, extensive human rights clauses, and a legal culture that permits ready application of international and comparative law, as well as international human rights standards and norms.

These countries, in the order of adoption of their constitutions, are Namibia (1990), South Africa (1993 and 1996), and Malawi (1994 and 1995).² The rule of law and constitutionalism are also, not without justification, reputed to be strong in Botswana. This is one country that has not seen fit to tamper with human rights clauses introduced in its independence constitution. Botswana has also sustained a multiparty, liberal democratic political tradition longer than any other country in the region.³ The issue to be determined from these 'case studies' is whether popular, political vilification and mystification of property guarantee clauses, as obstructive legal devices in the search for progressive solutions to contemporary land problems, is entirely justifiable, or whether the proverbial finger of blame should point elsewhere.

ELEMENTS OF PROPERTY GUARANTEE CLAUSES

FUNCTIONS AND UNDERLYING VALUES

Protection of property clauses in most constitutions employ obscure, legal concepts that give rise to complicated legal disputes and copious, inaccessible academic commentaries.⁴ It is not that difficult, however, to decipher what the core issues are for purposes of addressing land problems. Property guarantee clauses such as those annexed to this discussion generally have three main functions (De Waal et al. 2001:411).

Firstly, they may contain an affirmation of the right to have or hold property as a 'fundamental' right of the same stature as the so-called first-generation civic and political rights – such as the rights to life and liberty, or freedoms of expression, conscience, religious belief, assembly or association. In this respect, constitutional property clauses may echo Article 17 of the Universal Declaration of Human Rights which, in part, states that



'everyone has the right to own property, alone as well as in association with others'. Secondly, property guarantee clauses will almost invariably attempt to regulate loss of property rights at the behest of government, even if there is no affirmation of the right to hold or have property. In most constitutions, the main guarantee of property is restrictions on the possibilities and circumstances of loss. Thirdly, for those who have no property to lose, the constitution may try to provide the assurance that certain basic needs will be provided. This type of assurance may also be incorporated in constitutional clauses on second-generation socio-economic rights such as rights to health, education, water, a safe and healthy environment and housing.

Two sets of competing values or theories underlie and influence the structuring of property guarantee clauses. The dominant set of values would appear to be libertarian in outlook. According to Allen (2000:143),

Liberal theorists regard the constitution's purpose as the preservation of an area of individual choice in the face of governmental coercion. Property is part of this protected area of individual choice.

The description of the right to property in terms of rights of the individual in constitutions is a reflection of the influence of liberal theory. The countering set of values and theory are communitarian in outlook. The contention here is that the wider interests of the community may justify attenuation of the rights and liberty of an individual.⁵ It may be in the interests of justice, or for purposes of maintaining social order, that a person should not be allowed to retain even the fruits of his or her own labour. Some communitarian theories also regard rights to property as twinned with obligations, to serve the wider interests of the society or community in which individual rights are enjoyed.

In some political and academic circles, the mere inclusion in a constitution of a property guarantee clause, or the part of the clause that affirms the right to property, are regarded as affirmation of the pre-eminence of libertarian values, and as obstructive of social projects requiring attenuation of property rights in the public interest. On the other side, libertarians have been known to be sceptical, hostile even, to the inclusion of guarantees of socio-economic rights in constitutions, including assurances of land or housing for the landless. It is, however, the articulation of key defining terms in that part of the clause dealing with loss of land rights that is more relevant in the tilting of the scales in favour of one or the other set of competing values.

From the clauses quoted at the end of this paper, the key concepts are 'property', 'deprivation', 'expropriation' or 'acquisition', 'public purposes' and 'compensation'. An analysis of these terms and a few land cases in which they were interpreted suggests that claims about the extent to which the clauses have obstructed land reform or

redistribution programmes might have been exaggerated. It is also necessary to recall that human rights clauses with strong property guarantees were introduced into constitutional instruments for the independence of countries like Malawi and Botswana, partly for their psychological impact. There was no doubt in Britain that 'a bill of rights would stop a government determined to abandon democratic courses' (Allen 2000:58–9). But it was necessary to reassure European minorities and create the confidence that there would be economic and political stability in the new nations.

THE CONCEPT OF PROPERTY

This is a rarely defined concept in property guarantee clauses. It is also the most technical of the key defining terms. In ordinary everyday language it probably is understood as referring to the 'ownership' of an object or a thing that has physical shape. It could be something that can be moved about and kept with the person claiming ownership, or it could be an immovable object such as land. The legal understanding goes beyond the reference to the object, and focuses on the rights that can be claimed in reference to the object. The law of property can broadly be described as the law regulating competing claims of persons over or in reference to objects. In the system of legal thought prevailing in southern Africa,⁶ the focus in the law of property is on so-called 'real rights'. These are rights that can, if necessary, be enforced over the object of the claims. Claims enforceable against a person and not related to an object are personal rights, and are regarded as more appropriate in the law of obligations.

The complications of this understanding of property are, first, that other real rights less than ownership, such as tenancy rights, are equally deserving of protection in a constitutional clause. The right of ownership itself can also be unbundled into a number of incidences or entitlements of the owner – such as the right to possess, use, consume, or dispose of the object. Complications for constitutional protection of property arise where only one of these incidences, such as the right to dispose of the object, is taken away or restricted. For some, a constitution that protects all types of real rights and incidences of ownership may be overly protective of property interests. But, as was appreciated (or feared) during the making of the 'interim' (1993) South African Constitution, a clause that only guarantees property – understood as referring to 'ownership' – may be perceived to be ignoring other important property claims (Van der Walt 1995:478–88). In the context of this discussion, such a clause might be misconstrued as offering no protection to, for example, long-established squatters.

The second problem is that legal conceptions do not consider only real rights in corporeal objects as being worthy of protection. There is not much disagreement over the treatment of incorporeal 'objects', such as shares or intellectual property rights, as property being



worthy of protection under a property guarantee clause. The difficulty is with the extension of protection to some purely personal rights, such as the right to receive compensation, a pension, or some social welfare benefit. Some of these could be rights of economic value and worthy of protection by this yardstick. But there is no agreement in law as to how to apply such a test and where to draw the line. Admitting all such rights as property could also impose unbearable financial responsibilities on governments and other expropriating authorities. One legal device employed in some jurisdictions to limit the potential liability of expropriating authorities includes the exclusion of some of these rights from the concept of property (which may be unjust in some cases). Another device is to restrict in a property guarantee clause the types of losses for which compensation is payable.⁷

DEPRIVATION OR EXPROPRIATION OF PROPERTY

Some of the property guarantee clauses, including the South African clause, distinguish between deprivation and expropriation, acquisition or taking possession of property. The purpose of such a distinction is to empower the state or other expropriating authorities to interfere with and regulate property without facing compensation claims (Allen 2000:162–200). Some property clauses provide for the payment of compensation only for interferences resulting in the transfer of the property to the state or expropriating authority. In such instances the word ‘deprivation’ does not carry its full connotation in ordinary parlance of denying a person the use of his or her property, even by taking it away. Expropriation or compulsory acquisition is the taking away of property without the agreement of the owner or affected person. This partially artificial distinction between deprivation and expropriation may be regarded as supportive of communitarian interests. Deprivations in some instances may, however, cause as much loss or harm as acquisitions or takings. Some property guarantee clauses may therefore provide for payment of compensation even for deprivations. Constitutions or jurisdictions that permit recovery of compensation for deprivations may be regarded as more sympathetic to libertarian interests.

PUBLIC PURPOSES

Property guarantee clauses often require that deprivations and/or acquisitions should not be arbitrary; they should be effected under some law of general application, and for a public interest or purpose. Some clauses provide an indication of the public purposes or interests that should be served. As in the Botswana clause, the delineation can be effusive, covering a wide range of interests, including land reform and land resettlement programmes. Even where examples of public purposes are not indicated, the interpretation of this requirement by the courts can be generous.

It has been held in some jurisdictions in the British Commonwealth that the requirement would be satisfied if ‘the general interest of the community’ were likely to be served (Allen 2000:205–12). The requirement has been met even in cases where the expropriated property was destined for private use or commercial exploitation.⁸ As will be confirmed below, courts are also not inclined to interrogate assessment by public officers of the suitability of property for a perceived public need or interest. It is, therefore, not likely that an expropriation of private land for resettlement distribution to the landless would fail the public purpose requirement anywhere in the Commonwealth or in southern Africa. This is one element of a property guarantee clause on which communitarian interests are too generously served.

COMPENSATION

The requirement for payment of compensation for acquisitions, (and deprivations in some cases), is the most controversial of all the core elements of a property guarantee clause. The requirement is variously described as for payment of ‘full, adequate, just, fair, or equitable compensation’, or simply for payment of ‘compensation’. Where the measure or method of computing compensation is not carefully indicated, the traditional legal assumption is that the deprived or dispossessed person must be indemnified for the loss suffered, and that the market value of the property is the fairest way of measuring the loss. This is widely regarded as one aspect that most reflects the dominance of libertarian and property interests in property guarantee clauses. The employment of market value can lead to generous awards for property owners. The assessment of market value in land cases can involve taking into account speculative and subjective elements, and its value at the time of expropriation may bear little resemblance to the cost at which it was acquired and amounts expended on improvements (Ng’ong’ola 1989).

It should, however, be appreciated that there is no sacrosanct principle of constitutional law requiring that loss of property must invariably be indemnified in this manner. Under the European Convention of Human Rights, for example, it is acknowledged that it would be legitimate, in appropriate cases, to attempt to strike a fair balance between the demands of the general interests of the community and the requirement for the protection of individual fundamental rights.⁹ This might entail a departure from a full market value assessment. The challenge for African countries is to construct property guarantee clauses that allow departures from market value assessment in appropriate cases, but without permitting departures from adherence to the rule of law.

THE BOTSWANA CASE

The Botswana Bill of Rights in Chapter II of the Constitution was mostly a replication of the Bill in the Uganda Independence Constitution of 1962 (Fawcus &



Tilbury 2002:134). This, like other African independence constitutions devised at that time, was derived from the Bill prepared for the Nigerian Constitution, which, in turn, was inspired by the European Convention on Human Rights of 1950 (Allen 2000:54–69).

Botswana has dual or combined property guarantee clauses (Van der Walt 1999:509). The first guarantee in Section 3(c)¹⁰ offers protection ‘from deprivation of property without compensation’ alongside other guarantees of first generation civic and political rights, including ‘privacy of the home and other property’. Whether Section 3 is a mere preamble without independent effect, such that it could be interpreted as imposing no firm requirement for compensation for deprivations, was once a moot point in other parts of the British Commonwealth (Allen 2000:99–101). In Botswana, the issue was conclusively settled in the landmark case of *Attorney General v Dow*,¹¹ in reference to discrimination or differentiation under the law on the basis of sex or gender. The Court of Appeal said that the provision was not a mere preamble. It was the leading provision in the Bill with reference to which all allegations of human rights violations must first be tested. The court suggested that all other guarantees in the Bill should not be interpreted as restricting any of the guarantees offered in Section 3.¹² The Botswana provision cannot be read as suggesting that compensation is not payable for deprivations. This pro-libertarian position is, however, tempered by the limitations added to Section 3. The guarantees offered by the section are subject to limitations ‘designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest’. It is, therefore, possible to argue for moderation of compensation payable for deprivations in the interests of other individuals or the public, but the opportunity to test this contention has not yet arisen. There is as yet no case on deprivation of property in Botswana.

The second property guarantee is Section 8 of the Constitution. Although the side note refers to ‘protection from deprivation of property’, the clause offers ‘protection from expropriation or compulsory acquisition’. The first paragraph suggests that protection is extended to property in whatever manner it may legally be conceived, whether as things or objects, or as rights or entitlements in reference to objects or other persons. The provision protects property by imposing at least three sets of conditions or prerequisites for a valid expropriation. The expropriation, first, must be ‘expedient or necessary’ for certain specified public purposes and interests. It must, secondly, be effected under a law that provides for ‘prompt payment of adequate compensation’, and for reference to the High Court, directly or on appeal, for resolution of disputes pertaining to the legality of the acquisition and the

adequacy and promptness of the payment of compensation. The third requirement is that the person entitled to compensation should not be prevented from remitting the whole amount, (free of deductions), within a reasonable period, to any country of his or her choice.

The law authorising expropriations was already in place by the time the Constitution was passed.¹³ It was revised several times to accommodate constitutional developments in the country and, ultimately, the above requirements on expropriation of property.¹⁴ Section 16 of the revised Act¹⁵ prescribed the market value of the property on the date of the expropriation as the principal measure of adequate compensation, discounting factors such as the reason for the acquisition and the reluctance of the affected person to part with the property or his rights. In the only case so far to reach the High Court on this issue,¹⁶ the concept of market value was interpreted as referring to ‘market price’ or the price that the property would have realised if sold in an open market by a willing seller to a willing buyer. The court further held that the assessment should take into account potential uses to which the property could be put, for this is what a willing seller would take into account. The court suggested that market price or market value would not otherwise amount to ‘adequate compensation’ as required by the Constitution. The result in this case was an award that was slightly more than 100% of what the government had offered, on the basis of prices of comparable land.

The High Court was arguably wrong in its interpretation of ‘adequate compensation’ and ‘market value’, and in the computation of the compensation that was awarded. This notwithstanding, it is evident that the law in Botswana is exceedingly pro-libertarian, and can lead to over-generous compensation to property owners. This is compounded by the fact that the law authorising expropriations applies only to ‘real property’ or immovable property. It does not cover movables or other forms of property. In the absence of an enabling law, expropriation of other forms of property, but not deprivation, is arguably contrary to Section 8(1)(b) of the Constitution.¹⁷

Although the law in Botswana is *ex facie* exceedingly pro-libertarian, there is no evidence or suggestion from the Botswana government that this has impeded execution of its land reform and other economic development programmes. The solvency of the Botswana government, attributable mainly to revenues from diamond mining, places it in the enviable position of not having to resort to expropriations or deprivations to implement its programmes. But the government has also been assisted by other elements of the property guarantees that have not attracted as much attention. It is notable, first, that the description of the public purposes in Section 81(a) is typically expansive. It crucially also specifically authorises expropriations for ‘securing the development or



utilisation of the mineral resources of Botswana'. Section 8(3), secondly, indicates that the requirement on prompt payment of adequate compensation will be deemed satisfied if mineral rights are expropriated under a law that provides for payment of adequate royalties at reasonable intervals. The effect of these provisions is to shield expropriation disputes in an area critical to the economy of the country from excessive or intrusive scrutiny by liberal judges.

The Botswana clause, like its Nigerian antecedent, also has a long list in paragraph 5 of takings that do not amount to expropriation and do not therefore require payment of compensation. When compared to the South African clause, for example, it would not be necessary to debate in Botswana whether the transfer of the property of a solvent spouse to a trustee in insolvency is expropriation.¹⁸ Section 5(b)(iii) pre-empts the consideration of such takings as unconstitutional expropriations.¹⁹

Paragraph 6 exonerates takings that, in the Botswana context, are critical to land reform programmes. It states that there is no expropriation contrary to the Constitution where property is taken from a body corporate established by law for public purposes, which is wholly supported by moneys allocated by Parliament. In 1970 the government established land boards as such body corporates and transferred to them rights and titles to tribal land, as well as responsibilities for administration of tribal land in designated tribal areas or territories.²⁰ The exercise was surprisingly completed without contestation in the courts by chiefs and other tribal authorities who were at the same time deprived of their administrative functions over tribal land in their territories. A case could still be made that this aspect of tribal land reform amounted to deprivation of property rights without compensation at least. Tribal land constitutes about 70% of the total land area of the country (Republic of Botswana 1997:229; 326).²¹ The government can requisition as much land as it wants for its programmes, without paying compensation to the nominal legal owners, the land boards. Compensation is offered to persons deprived of subsisting 'customary rights of user',²² but the amounts do not compare favourably with compensation for rights in private or freehold land, since it is intrinsically difficult to assess market value for land that traditionally is not supposed to be for sale.

As for expropriation of freehold or private land, in the rare cases on the issue, government has been greatly assisted by benevolent interpretation and application of the public purposes requirement by the courts. In the fairly recent Molopo Ranch case,²³ the Court of Appeal maintained the position under colonial rule that courts should as far as possible avoid interrogating decisions of public officers.²⁴ The case involved a huge 121 613ha freehold farm, originally allocated to the Commonwealth

Development Corporation (CDC) during the colonial era. The CDC entered into negotiations in 1996 to dispose of its shareholding in the company registered as the owner of the ranch to two Botswana citizens of Boer (Afrikaner) extraction. This was after the government appeared to show no interest in acquiring the property.

When negotiations for the sale and transfer of the shares were about to conclude, the government hurriedly published an expropriation notice for the farm, as well as the cattle on it, claiming that the ranch and the animals were required for holding cattle destined for restocking in another part of the country where all cattle had been exterminated to contain an outbreak of cattle lung disease. The Botswana government acted with such haste that the Attorney General's office failed to notice that the Acquisition of Property Act, as noted above, only authorised expropriation of the land. The Court of Appeal quickly confirmed that this was a legitimate public purpose. It rejected the contention, accepted in the High Court, that relevant government officers had acted in bad faith, or with the ulterior or improper motive of pre-empting the transfer of shares to the applicants and thereby depriving them of a legitimate bargain. As it turned out, the ranch was put to commercial use not long after conclusion of the litigation. It was never used for the purpose for which it was expropriated.²⁵

The Land Control Act of 1975²⁶ is another law that is relevant to the expropriation of private land in Botswana. The Act attempts to create, for citizens of Botswana, an opportunity to intervene in a proposed transfer of an interest in agricultural land to a non-citizen. It imposes a requirement for prior ministerial approval of every 'controlled transaction'. This includes the sale, transfer, lease capable of running for a period of five years or more, exchange, partition or other disposal or dealing with agricultural land in the freehold sector, where the party acquiring the interest is not a citizen. It also covers the disposal of shares in a private company owning any agricultural land to a non-citizen. The citizenship of a company is, for these purposes, determined by reference to incorporation in Botswana as well as the nationality of individuals beneficially holding the majority of all classes of shares in the company. Before ministerial consent is sought, the proposed transaction must be advertised in a prescribed manner, to give citizens interested in the property sufficient time to intercede. It is suggested that citizens who express interest must be given priority, but the Minister's decision to grant or refuse consent is also final and may not be challenged in any court.

This Act was carefully and cleverly structured to avoid infringing the property guarantees in the Constitution. There is no expropriation of the property by the state, and the interposition of a different purchaser willing to purchase at the advertised transaction price cannot be a deprivation. The Act does not regulate the price and other terms upon which the property may be transferred



to an interested citizen. This may also be its main weakness. The land can be priced out of the range of most potential citizen purchasers. There is no evidence to suggest that the Act has significantly contributed to the localisation or indigenisation of agricultural land in the freehold pool during the 25 years that it has been in operation. The Act, however, assuages nationalistic sentiments by giving the impression that the problem has been addressed.

THE NAMIBIAN CASE

The Namibian Constitution was probably the first 'internally' developed independence constitution in southern Africa. Article 16, the property guarantee clause, was not assembled through cutting and pasting of models developed in London for the independence of other colonial territories. It resembles the First Protocol of the European Convention on Human Rights in its brevity, and it was also apparently constructed in the positive manner of German law (Allen 2000:71–3). It offers rights instead of protecting against violations of rights. Article 22 on limitations applicable to all constitutional rights is the other noted borrowing from German law.

Although spanning only two paragraphs, all but one of the main elements of a property guarantee clause can be located in Article 16. Paragraph 1 is an assurance or affirmation of the right to property in Namibia. It provides a positive assurance that 'all persons' may have or hold property 'in any part of Namibia', but promptly qualifies this with the indication that legislation may qualify the entitlement of non-citizens to the enjoyment of this right. Thus, legislation providing for localisation or indigenisation of land in Namibia, as in Botswana, would be difficult to assail on constitutional grounds.

The conception of 'property' in Article 16(1) is the typical 'thing-ownership' approach of Roman-Dutch common law. The assurance is for rights 'to own, dispose of and bequeath ... all forms of movable or immovable provable property'. This is, first, a specification of a limited range of 'real rights'. Rights to dispose of or bequeath property are also only a few of the incidences of ownership. As such, it may not have been necessary to specify them alongside ownership. The concept of ownership is also jurisprudentially troublesome, and probably should have been avoided. The specification of the right of ownership in this clause might be very reassuring to libertarian interests seeking constitutional guarantees over freehold land in constitutional negotiations, but the danger is that other, more personal, rights could have been written out of the property guarantee. The moot point is whether the Namibian clause recognises, as property, new types of wealth which cannot be readily understood in terms of movable and immovable things – such as the right to performance under a contract, or to a pension or a welfare benefit. It is also notable that property rights are

assured for both individuals and associations. This was, strictly speaking, an unnecessary detail. If the intentions were to ensure recognition and protection of communal pro-property rights under customary law, the description of property in terms of rights of ownership would have compounded the understanding and protection of such rights.

Article 16(2) is, again, a positively constructed expropriation clause. The state, or a competent organ, is authorised to expropriate, subject to compliance with prescribed conditions, instead of property being protected from certain types of expropriations. The requirements for the exercise of power are standard. The expropriation must be effected under a law; it must be in the public interest, and subject to the payment of 'just compensation'. There is no elaboration of the public interest requirement, but this is not likely to lead to a more restrictive interpretation of the concept in the courts. The compensation element reads like an invitation to Parliament to legislate on computation methods that in appropriate cases may deviate from market value assessment. If this has not been done, courts are not likely to interpret 'just compensation' differently from 'adequate', 'equitable', 'fair', or just plain 'compensation'.

There is no deprivation paragraph in the Namibian clause. Since the clause is constructed in a positive manner, the courts are not likely to interpret it as authorising expropriations as well as deprivations. What is not stated may be deemed as having been purposely excluded. This could seriously handicap the Namibian government in its efforts to regulate land affairs and generally exercise 'police powers' over property. The omission of a deprivation clause can be regarded as deference to libertarian and property interests.

Article 22, lastly, requires that any law abridging any of the fundamental rights as suggested by the Constitution shall be of general application, shall not target a particular individual, shall not negate the essential content of the right, and shall be more specifically drawn.²⁷ One moot point arising from this in reference to Article 16(1) is whether the law regulating property rights of aliens in Namibia can abolish their 'right to own' land without negating the essential content of the guaranteed right.

The tentative conclusion to be drawn from this purely textual analysis of the Namibian clause is that it leans towards over-protection of libertarian values and property interests. If the intention was to provide a property clause that would assist in the transformation of land ownership in Namibia, perhaps a brief clause was not what was required, and different language should have been employed in the conception of property. A clause such as this one leaves critical issues for interpretation by the judiciary, which in the early years of



decolonisation may be dominated by those more sympathetic to libertarian interests.

THE SOUTH AFRICAN CASE

South Africa has one clause, Section 25, combining guarantees relating to deprivation and expropriation of property. Section 26 on rights to housing can also be regarded as a guarantee of rights to a specific type of property. The third clause in the South African constitution meriting consideration is Section 36, the general limitation clause, which, like Article 22 of the Namibian Constitution, was a borrowing from German law.

The protection from deprivation of property in Section 25(1) is negatively couched. There are two prohibitions: deprivations not authorised by law, and laws permitting arbitrary deprivations. No provision is made for payment of compensation for deprivations that satisfy the requirements of the provision. This gives the South African government considerable latitude in regulating property matters without imposing a liability on the fiscus.

Section 25 employs the more general concept of 'property' and not the more specific references to 'rights in property' encountered in the Namibian Constitution. It thus offers protection to a wider range of rights and interests. It has been suggested that the South African clause would readily protect even performance rights or claims, if they are a source of wealth, and are 'vested' and not merely contingent (De Waal et al. 2001:415–6). With this expansive notion of property, it was probably unnecessary for paragraph 4(b) to confirm that 'property is not limited to land' for purposes of Section 25.

Whereas the expansive notion of property gives the South African clause a pro-libertarian outlook, the expropriation aspects are heavily underlined by public interest or communitarian concerns. Section 25(2) is cast positively. It authorises expropriation, in terms of a law of general application, for public purposes or interests, and subject to payment of compensation, which may be agreed upon or determined by a court. As if there would have been any doubt, Section 25(4)(a) confirms that public interest for these purposes includes the nation's commitment to land reform, and reforms proposed for redressing the iniquities of apartheid. One may venture to suggest that, anywhere in the region, regardless of the structuring of the property guarantee, land reform, equitable land re-distribution, land restitution, and the types of transformations required by paragraphs 5 to 8 of Section 25, would qualify as public interests (or purposes) for purposes of expropriation or deprivation of property. The contest would be over-compensation for the loss of the property.

The greatest innovation of the South African clause is in the manner that Section 25(3) attempts to guide the

assessment of compensation to balance property rights and public interest. It requires that the 'amount, timing and manner of payment' must be 'just and equitable', and the required balancing must take into account 'all relevant factors' including current use; history of acquisition and use of the property; the market value; state investment and subsidies in the acquisition or improvement of the property; and the purpose of the expropriation.

South African courts have had more than one occasion to apply these guidelines. In possibly the leading authority to date on the matter, the Land Claims Court (LCC) decided that striking the balance required involves establishing the market value first, and thereafter subtracting from or adding to the amount as the facts of the case may require. Compensation awarded under Section 25(3) may thus be lower or higher than the market value of the property.²⁸ Taking into account international standards and comparative law, as South African courts must, the LCC also held that the market value, established by taking note of prices in comparable transactions, discounting the effect on the property of the reason for the expropriation,²⁹ would otherwise be the best measure of just and equitable compensation. The LCC is inclined to rely on market value as the only factor in the list indicated in Section 25(3) that can be more objectively assessed.

As some of the cases from the LCC confirm, the assessment of market value is in fact far from an exact science. There is much conjecture, and the amount of the award often turns on impressions left on the court by particular valuers. It can be contended that reliance on market value as interpreted and applied in international and comparative law puts a libertarian spin on the application of Section 25(3) not intended by the framers of the South African Constitution. But the libertarian approach is not totally indefensible, if account is taken of the differing situations calling for determination of just and equitable compensation. A libertarian approach and generous compensation would probably be welcome when the award is in lieu of restitution as envisaged by Section 25(7), but not when it is for purposes of making land available to the landless, as envisaged by Sections 25(5) and 25(8). The difficulty for the courts is that the new legal and constitutional order in South Africa abhors arbitrariness and requires them to act consistently. They would probably be failing in their duties if the application of market value assessment were not consistent with these varying situations.

Sections 25(6) and 26 can be regarded as the provisions of the South African Bill of Rights that seek to assure property rights for those who have no existing rights to lose. Section 26, as noted above, is more specifically concerned with housing. It has both positive and negative attributes. Section 26(1) provides a positive



assurance that everyone shall have 'access' to 'adequate housing' while Section 26(2) delineates the obligations of the state in respect of this right. It 'must take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of this right'. Section 26(3) is a negatively couched protection from eviction from a home. It is structured like the deprivation clause, Section 25(1). It also imposes two sets of prohibitions: eviction from, or demolition of, a home without a court order; and legislation permitting arbitrary evictions.

Section 26(3) arguably marginally improves the position of the landless under the law, through the requirement that eviction and demolition orders should be issued by courts only after all the relevant circumstances have been taken into account. Sections 26(1) and (2), on the other hand, can be regarded as a significant advancement of legal theory in support of the landless. The South African Constitutional Court in the certification case³⁰ held that socio-economic rights in the Bill of Rights are justiciable, notwithstanding the financial burdens this could impose on the government. At least for South Africa, this settled the debate still raging elsewhere as to whether such rights should be regarded only as benchmarks for government policy. In the *Grootboom* case,³¹ the Court provided a real assessment of government performance in reference to ensuring access to housing under Section 26 and shelter for children under Section 28. Mrs Grootboom was one of 390 adults and 510 children forcibly evicted from a piece of land on which they were squatting. They relocated in desperation to a sports field and a nearby community hall where they were living in appalling conditions.

The provincial (Cape) High Court ordered the authorities to provide them with amenities as part of the children's entitlement to shelter under Section 28 of the Constitution. On appeal, the Constitutional Court held that although Section 26 did not provide every person with the right to demand access to housing, government programmes could be assessed for compliance with duties expected of it under the provision and Section 28. The court concluded that government performance in this case failed to comply with these provisions because no provision was made for the temporary relief of those in desperate need such as the respondents. The court perhaps demanded more from the responsible authorities in this case than was generally feasible in the light of the acknowledged scale of the squatting problem in the area and the country. But the salutary aspect of the case, from which other jurisdictions could pick, is in the eagerness of the court to subject government policy to critical legal assessment.

It may be noted, lastly, that unlike its Namibian counterpart, Section 36 – the South African limitation clause – does not explicitly state that derogation from a fundamental right shall not negate the essential content

of the right. It instead requires that limitations must also be assessed as 'reasonable and justified in an open democratic society based on human dignity, equality and freedom', taking into account all relevant factors including those indicated. When considered in reference to the property guarantee clause, because of the conditions attached to constitutional deprivations and expropriations, the point arises as to whether Section 36 could indeed be useful. A law that provides for deprivations or expropriations in the manner suggested in Section 25 is not likely to fail to satisfy the prerequisites for an acceptable derogation of a fundamental right in Section 36.

THE MALAWIAN CASE

A brief background to the Malawi property clauses is necessary. Malawi inherited a Bill of Rights and property guarantees similar to Botswana's in its independence Constitution of 1964. In 1966, Malawi adopted the status of a Republic under a Constitution, which replaced the Bill of Rights with a brief statement of fundamental principles. Article 2(1)(iv) of the statement held that 'No person shall be deprived of his property without payment of fair compensation, and only where the public interest so requires'. But Article 2(2) of the statement also stated that nothing done 'under the authority of any law shall be held to be inconsistent with or in contravention of the [fundamental principles] to the extent that the law in question is reasonably required in the interests of defence, public safety, public order or the national economy'.

This provided the justification for draconian legislation that trampled upon property as well as civil and political rights during the long period of single-party rule under Life President Kamuzu Banda from 1964 to 1994. One of the notorious pieces of legislation was the Forfeiture Act of 1966, which provided for seizure, without compensation, of property of perceived political foes of the regime.³² The other, more measured, property-related legislation was the Land Acquisition Act of 1970.³³ This provided for compulsory acquisition of land whenever it was deemed 'desirable or expedient in the public interest', and subject to payment of 'fair compensation'. It also provided for calculation of compensation in reference to the price paid by the expropriatee, or the price for comparable land, the value of unexhausted improvements effected by the expropriatee and, in appropriate cases, the appreciation in value of the land. The Act emphasised that under no circumstances should compensation exceed the current market value of the land. In keeping with the trend of legislation at the time, the Act also emphasised that an award determined by the Minister shall be final and shall not be subject to appeal or review in the courts.

Given this background, one would have expected property guarantees as strong as the guarantees of the



other civic and political rights in the Constitution for the Second Republic, finalised in 1995. But the structuring of the property clauses suggests that not much attention was given to this subject. The framers of the Constitution were more preoccupied with the other fundamental rights and mechanisms for governance in the new political environment. Section 28 is comparable to the Namibian clause in its brevity. It also begins with a positive assertion of the right to property, for persons or associations. But it only assures 'the right to acquire', and it does not anticipate that it might be necessary to restrict the enjoyment of this right by non-citizens. Section 28 also provides only for protection from arbitrary deprivation of property,³⁴ without any reference to payment of compensation.

Protection against expropriations is strangely covered in Section 44(4), in the limitation clause of the Bill of Rights. Expropriation 'is permissible only when done for a public utility', and for payment of 'appropriate compensation'. There must also be 'adequate notification' and a 'right of appeal to a court of law'. The first moot point is whether the reference to 'public utility' was a deliberate attempt to restrict the powers of the state and accord greater protection than was hitherto the case under the one-party regime. The Malawi Supreme Court of Appeal overlooked this point in the Press Trust case,³⁵ and proceeded to assess the justification for an alleged expropriation as if the Constitution provided for expropriation in the 'public interest' or for a 'public purpose'.³⁶ The second moot point is whether the reference to 'appropriate compensation' was also a deliberate attempt to continue with the frugal, pro-communitarian approach developed during the harsh dictatorial rule of Dr Banda. A further consideration of the limitation clause suggests otherwise.

Under Malawi's new constitutional jurisprudence, Section 44 is more notable for the listing in paragraph 1 of fundamental rights in respect of which 'there shall be no derogation, restrictions or limitations'. Property rights are not among the 'non-derogable' rights. They can be restricted under laws of general application that do not negate the essential content of the right,³⁷ and if the restrictions can be said to be 'reasonable, recognised by international human rights standards, and necessary in an open and democratic society'.³⁸ It can be argued that if international and comparative law standards are taken into account, appropriate compensation would not be less than the market value of the property expropriated. The question whether non-arbitrary deprivations should attract appropriate compensation would be difficult to resolve, even if international law and standards were taken into account. The differing approaches under the Botswana and South Africa clauses indicate the uncertainty of the law on this issue.

The National Assembly of Malawi initiated consultations and debate on a new land policy prior to the framing

of a new, comprehensive and consolidated land law. One of the issues, in the land policy, that has attracted some international attention is the right of non-citizens to retain or acquire freehold land, amounting to about 15% of the total land area of the country at independence. The policy proposes prohibiting non-citizens from acquiring freehold rights, or from transferring such rights to other non-citizens after 1 September 2001. The policy also proposes that non-citizens in possession of freehold land should be given seven years within which to acquire Malawian citizenship in order to retain their freehold titles. Failure to naturalise will, in the language of the policy, 'automatically trigger expropriation procedures, which will cause title to the land... to be converted to a renewable leasehold contract with reversion to the state'.³⁹

Although the policy uses the word 'expropriation' to describe the legal effect of the proposal to convert freeholds into leaseholds, it is a moot point whether this is indeed expropriation or deprivation. Since the Malawi property clause is silent on compensation for deprivations, it would be in the interest of the state to contend that the policy only affects deprivations, for which compensation is not payable. It may be noted in this regard that policy does not actually advocate transfer to or taking over of freehold land by the state. But it should also be noted that freehold land in Malawi generally attracts a higher price than state leasehold land, even where the lease is for as long as 99 years, and upon payment of a very nominal ground rent. The conversion of freehold rights into leasehold rights is likely to cause significant devaluation of land in some cases, and a court inclined to uphold libertarian values may conclude that this is 'constructive' taking or expropriation for which appropriate compensation should be paid, calculated, as suggested above, in reference to the market value of each property. The cost implications of the policy would be considerable and probably unaffordable in a country perennially grappling with its own financial viability.

The new land policy is, in this and other respects, difficult to reconcile with the property guarantee clauses, partly because of what has been described elsewhere as the hapless construction of the constitution for the Second Republic (Englund 2002:21). The Constitution was drafted, debated, passed as interim document, revised and finally adopted within a period of less than two years, between late 1993 and May 1995. The preoccupation with ridding the country of the ills of single-party dictatorship was such that other issues received inadequate attention, and the language of the Constitution was not scrutinised and revised to ensure that the will of the framers was properly reflected. It is striking that the property guarantees did not anticipate regulation of land holding by non-citizens, and did not consciously adopt or reject the land expropriation and compensation policies of the previous political order.



CONCLUSION

One observation that can be drawn from the textual analysis of the constitutional property guarantees in southern Africa is that all the clauses are sensitive to the need to balance protection of private property with public interest requirements. In various ways, all the constitutions provide governments with considerable latitude to extinguish property rights, especially for purposes of implementing land reform programmes and controlling 'foreign ownership' of land. The older (inherited) Botswana Constitution reflects very strong pro-libertarian values in the provisions for payment of compensation for deprivations as well as expropriations, and in the provisions for calculation of adequate compensation on the basis of the market value of the property. But public interest imperatives permeate the description of the purposes for which property may be expropriated, and in the long list of activities which government may take without triggering the requirements for expropriations.

Public interest imperatives under the brief Namibian clause are reflected in provisions restricting the right to property for non-citizens and prescribing payment of just compensation for expropriations. The dominance of public interest concerns over property rights is strongest under the South African Constitution. No provision is made for payment of compensation for deprivations, and the expropriation clauses contain the clearest indication that compensation need not be assessed on the basis of market value where the imperatives of land reform, distribution and restitution so dictate. The treatment of land and other socio-economic rights for the landless, under the South African Constitution, can also be recommended for emulation in other southern African countries. The Malawi clauses, consciously or otherwise, also reflect the dominance of public interest concerns in the provisions relating to deprivations and compensation for expropriations.

Thus, at least as far as the law reflected in texts is concerned, all the home-grown constitutions attempt to address the problem of over-compensating property rights that are expropriated, especially where the property is required for ameliorating land problems. The analysis presented here suggests, however, that these provisions could be interpreted and applied differently by courts that are dominated by personnel more sympathetic to pro-libertarian values. The irony does not escape notice that the rule of law embraced by the new home-grown constitutions dictates that these issues must ultimately be referred to the courts of law for resolution.

¹Dicey, AV. 1959. *Introduction to the study of the laws of the Constitution*, 10th ed. Basingstoke: Macmillan Education:xcvi–cli, as quoted in De Waal et al. 2001:9–10.

²Zambia (1991) and Lesotho (1992) also adopted revised constitutions suitable for political pluralism or multi-party democracy during this period, but their instruments retained or revived human rights chapters of the old type, similar to the Botswana Bill of Rights.

³In sub-Saharan Africa, Botswana shares this distinction only with Senegal.

⁴For excellent surveys on this subject see Van der Walt 1999 and Allen 2000.

⁵For an accessible discussion of theories underlying the property debate see Van der Walt 1995:445–501, especially 455–61.

⁶Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe apply Roman Dutch common law.

⁷The leading case in the region on this is the Zimbabwean case of *Hewlett vs Minister of Finance and Another*, 1982 (1) SA 490 which concerned the cancellation by the Zimbabwe government of compensation paid to 'victims of terrorism' under an old Rhodesian law. The Supreme Court held that the award of compensation was property, but it refused to award compensation on the ground that the cancellation of the award was not a taking of the property. It was a deprivation for which compensation was not payable under the Constitution of Zimbabwe at that time. For a critical assessment of the case see Roux 1996.

⁸One such case from Botswana is *President of the Republic of Botswana and Others vs Bruwer and Strumpher*, Misc 478/96 and 357/97 (Court of Appeal), discussed below. The Botswana government did not take long to put to commercial use a ranch that was expropriated for a different public purpose.

⁹Allen 2000:242–3, referring to the interpretation of Article 1 of the First Protocol of the Convention in *Sporrong and Lonnroth vs Sweden* A 52 (1982), para. 69; 5 EHRR 35.

¹⁰Provisions of the Botswana Constitution are referred to as sections, not articles.

¹¹1992 Botswana Law Reports, 119.

¹²However, in *Kamanakao I and Others v Attorney General and Others*, Misc 377/1999, (not yet reported), the High Court refused to declare as unconstitutional other parts of the Constitution that were inconsistent with Section 3.

¹³Bechuanaland Protectorate Acquisition of Property Proclamation 80 of 1954.

¹⁴HMC Order No 1 of 1963; LN 28 of 1965; Law 26 of 1966 and LN 84 of 1966.



¹⁵Acquisition of Property Act.

¹⁶Attorney General v Western Trust (Pty) Ltd, Civil Appeal No 12 of 1981, High Court, (unreported). For a more detailed discussion see Ng'ong'ola 1989:298–319.

¹⁷It is perhaps fortunate for the Botswana government that this came to light fairly recently, in 1996, in the Molopo Ranch case.

¹⁸In Harksen vs Lane NO 1998(1) SA 300, the South African Constitutional Court was invited to consider whether the vesting of property of a solvent spouse in a trustee in insolvency in terms of section 21 of the Insolvency Act 24 of 1936 amounted to expropriation. The court was constrained to conclude, not very convincingly, partly because of the compensation implications of expropriation under South African law, that there was no expropriation because the property did not vest permanently in the trustee.

¹⁹The moot point still remains whether this and all other takings and police powers exonerated under Section 8(5) are deprivations, which in Botswana must arguably be compensated for.

²⁰This was done under the Tribal Land Act 54 of 1968.

²¹The surface land area of Botswana is 579 276km². State land comprises 25% of this area and 5% is private or freehold land.

²²Section 33 of the Tribal Land Act.

²³President of Botswana and Others v Bruwer and Strumph, Misc 478/96 and 357/97. For a more detailed discussion of the case see Ng'ong'ola 1998.

²⁴In Tati Company Ltd v The High Commissioner for the Bechuanaland Protectorate (1959), High Commission Territories Law Reports (HCTLR), 32–53, the court refused to consider whether an expropriation decision was in fact wrong, inequitable or taken in ignorance of a relevant fact.

²⁵Another technical issue not properly considered in the case was whether there was expropriation or deprivation of 'personal property' represented by the expectation to receive transfer of the shares. The courts only found that the expectation was sufficient to establish the *locus standi* of the applicants.

²⁶Act 23 of 1975.

²⁷In British-made bills of rights, the comparable provisions would be the curious statements splattered in various clauses, including Section 8(5)(a) of the Botswana Constitution, suggesting that derogations from specified rights shall be 'reasonably justifiable in a democratic society'.

²⁸Former Highlands Residents, in re Ash v Department of Land Affairs, 2002 2 All SA 26, LCC Case No. 116/198:12–21. Another authority is MJ Khumalo and Others v HW Potgieter and Others, LCC Case No. 34/99, 17 December 1999 (not reported).

²⁹In Commonwealth expropriation law this is called the Pointe Gourde rule, from the Privy Council decision in Pointe Gourde Quarrying & Transport C. Ltd vs Sub-intendant of Crown Lands (Trinidad), 1947 AC 565.

³⁰Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996, 4 SA 744.

³¹Government of the Republic of South Africa and Others v Irene Grootboom and Others, Case CCT 11/00, 4 October 2002, Constitutional Court.

³²Act 1 of 1966. See Roberts 1966.

³³Act 21 of 1970. See Ng'ong'ola 1992, especially 127–32.

³⁴For an interpretation of this phrase see endnote 36 on the Press Trust case.

³⁵Attorney General v The Malawi Congress Party and Others, MSCA, Civil Appeal No. 22 of 1996.

³⁶One of the several constitutional issues in this case was whether an Act aimed at the reconstruction of the management mechanism of a trust effected arbitrary deprivation of property contrary to Section 28. The High Court concluded that it did, and it was arbitrary because the settler, the opposition party in the National Assembly, and other stakeholders were not consulted and given sufficient time to debate the measures in the Act. The Court of Appeal held that 'to act arbitrarily is to act without reasonable cause'. There was reasonable cause for the Act. Its sole purpose was to ensure that the trust was properly managed, in the interest of the beneficiaries of the trust, the people of Malawi. The Court added that if the Act effected an expropriation, it would have for a 'public utility' and valid in terms of the other requirements of section 44(4)

³⁷Section 44(3). This is comparable to Article 22(a) of the Namibian Constitution.

³⁸Section 44(2). This is in part comparable to Section 36(1) of the South African Constitution.

³⁹Republic of Malawi 2001:30, paragraph 4.12.

BIBLIOGRAPHY

- Allen, T. 2000. *The right to property in Commonwealth constitutions*. Cambridge: Cambridge University Press.
- De Waal, J, Currie, I & Erasmus, G. 2001. *The Bill of Rights handbook*, 4th ed. Cape Town: Juta.



Englund, H. 2002. Introduction: The culture of chameleon politics in Malawi, in *A democracy of chameleons: Politics and culture in the new Malawi*, edited by Harri Englund. Stockholm: Nordiska Afrikainstitutet.

Fawcus, P & Tilbury, A. 2002. *Botswana: The road to independence*. Gaborone: Pula Press.

Ng'ong'ola, C. 1989. Compulsory acquisition of private land in Botswana: The Bonnington Farm case. *Comparative and International Law Journal of Southern Africa*, 22:298–319.

Ng'ong'ola, C. 1992. The post-colonial era in relation to land expropriation laws in Botswana, Malawi, Zambia and Zimbabwe. *International and Comparative Law Quarterly*, 41:117–36.

Ng'ong'ola, C. 1998. Challenging the legality of an expropriation notice in Botswana. *South African Law Journal*, 115(IV):616–28.

Republic of Botswana. 1997. *National Development Plan 8, 1997/98–2002/03*. Gaborone: Government Printer.

Republic of Malawi Ministry of Lands and Housing. 2001. *Malawi National Land Policy, September 7, 2001*. Zomba: Government Printer.

Roberts, S. 1966. The Malawi Forfeiture Act: A surfeit of discretion. *Journal of African Law*, 10:131.

Roux, T. 1996. Constitutional property rights review in southern Africa: The record of the Zimbabwe Supreme Court. *African Journal of International and Comparative Law*, 8.

Van der Walt, AJ. 1995. Property rights, land rights, and environmental rights, in *Rights and constitutionalism: The new South African legal order*, edited by D van Wyk, J Dugard, B de Villiers and D Davis. Cape Town: Oxford University Press and Juta.

Van der Walt, AJ. 1999. *Constitutional property clauses*. Cape Town: Juta

ANNEXURE 1: BOTSWANA PROPERTY GUARANTEE CLAUSES

SECTION 3

[Fundamental rights and freedoms of the individual]

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely—

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such

limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

SECTION 8

[Protection from deprivation of property]

- (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say
 - (a) the taking of possession or acquisition is necessary or expedient—
 - (i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement;
 - (ii) in order to secure the development or utilization of that, or other, property for a purpose beneficial to the community; or
 - (iii) in order to secure the development or utilization of the mineral resources of Botswana; and
 - (b) provision is made by a law applicable to that taking of possession or acquisition—
 - (i) for the prompt payment of adequate compensation; and
 - (ii) securing to any person having an interest in or right over the property a right of access to the High Court, either direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.
- (2) No person who is entitled to compensation under this section shall be prevented from remitting, within a reasonable time after he has received any amount of that compensation, the whole of that amount (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Botswana.
- (3) Subsection (1)(b)(i) of this section shall be deemed to be satisfied in relation to any law applicable to the taking of possession of minerals or the acquisition of rights to minerals if that law makes provision for the payment at reasonable intervals of adequate royalties.
- (4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in



contravention of subsection (2) of this section to the extent that the law in question authorizes—

- (a) the attachment, by order of a court, of any amount of compensation to which a person is entitled in satisfaction of the judgment of a court or pending the determination of civil proceedings to which he is a party; or
 - (b) the imposition of reasonable restrictions on the manner in which any amount of compensation is to be remitted.
- (5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—
- (a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property—
 - (i) in satisfaction of any tax, rate or due;
 - (ii) by way of penalty for breach of the law whether under civil process or after conviction of a criminal offence under the law in force in Botswana;
 - (iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;
 - (iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;
 - (v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;
 - (vi) in consequence of any law with respect to the limitation of actions; or
 - (vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or
 - (b) to the extent that the law in question makes provision for the taking of possession or acquisition of—
 - (i) enemy property;
 - (ii) property of a deceased person, a person of unsound mind, a person who has not attained the age of twenty one years, a prodigal, or a person who is absent from Botswana, for the purpose of its adminis-

tration for the benefit of the persons entitled to the beneficial interest therein;

- (iii) property of a person declared to be insolvent or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the insolvent or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or
 - (iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court, or by order of a court, for the purpose of giving effect to the trust.
- (6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question makes provision for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided by Parliament.

ANNEXURE 2: NAMIBIAN PROPERTY-RELATED CLAUSES

ARTICLE 16

[Property]

- (1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.
- (2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

ARTICLE 22

[Limitation upon fundamental rights and freedoms]

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this chapter is authorised, any law providing for such limitation shall:

- a) be of general application, shall not negate the essential content, and shall not be aimed at a



- particular individual;
- b) specify the ascertainable extent of such limitation and identify the article or articles on which authority to enact such limitation is claimed to rest.

ANNEXURE 3: SOUTH AFRICAN PROPERTY-RELATED CLAUSES

SECTION 25 [Property]

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application—
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the 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.
- (4) For the purposes of this section—
 - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land 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.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the

extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
- (9) Parliament must enact the legislation referred to in subsection (6).

SECTION 26 [Housing]

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

SECTION 36 [Limitation of rights]

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

ANNEXURE 4: MALAWI PROPERTY-RELATED CLAUSES

SECTION 28 [Property]

- (1) Every person shall be able to acquire property alone or in association with others.
- (2) No person shall be arbitrarily deprived of property.



SECTION 30

[Right to development]

- (1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.
- (2) The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.

SECTION 44

[Limitations on rights]

- (2) Without prejudice to subsection (1) [describing rights not capable of derogation], no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.
- (3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.
- (4) Expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification and appropriate compensation, provided that there shall always be a right to appeal to a court of law.



FREE-MARKET WATER MANAGEMENT: THE EGYPTIAN HYDRAULIC CRISIS AMIDST PEASANT POVERTY

HABIB AYEUB

INTRODUCTION

A review of the work done on the management of hydraulic resources in Egypt reflects the complexity of the topic and the level of interest that the issue bears for researchers, observers, activists and political decision makers. However, given the critical relationship between poverty and the management of water, it is surprising that little research has been done in this particular area. How should water resources in the areas most affected by poverty best be managed? How does poverty aggravate the management of hydraulic resources? These are some of the critical questions which must be asked.

Although there is a threat of a grave water crisis in the next 20 years, Egypt does not currently have a chronic shortage. With approximately 850m³ of water per person per year, the country has not yet reached extreme water stress. By contrast, half of the country's four million farmers live below the poverty datum line and approximately a quarter of these live in absolute poverty.¹ Countering the threat of a future water crisis in Egypt requires better management of the waters of the Nile – the 'natural' capital of the country.

Since the end of the 1970s, the government's policy of liberalisation and structural adjustment has radically changed the agricultural sector. It has put in place a 'modern' and mechanised agriculture sector which has caused the progressive disappearance of poor and subsistence smallholding. It has privatised water resource management, and fixed a price scale for water. The choice to eliminate the poor peasantry rather than eradicate poverty is a serious failure of resource management. This is, in turn, causing a host of other problems inherent in liberal reforms, as witnessed in the former socialist countries. During negotiations on Poland's entry to the EU, officials from that country said that reforming the farming sector would remove more than 70% of the peasantry from their land.

In this chapter, I discuss the link between the poverty of the Egyptian peasantry and the management of water resources.

THE THREAT OF A WATER CRISIS

Egypt is one of the richest African countries in terms of water. The Nile supplies 55.5 billion m³ of the country's water,² catering adequately for the population of about 70 million people. However, what appears at first reading of the figures and hydraulic map of the country to be 'hydraulic comfort' hides a real urgency – the need to increase available water resources in order to keep the average availability over the hydraulic poverty line. Indeed, the threat of a grave hydraulic crisis is becoming more and more imminent. Although the current supply is about 850m³ per person per year, the availability of water is expected to decrease drastically with population growth and changes in modes of consumption.

Situated in the centre of a big desert band, extending from the north banks of the river Senegal to the Arab-Persian Gulf, Egypt hardly receives any rain. The maximum 100mm of precipitation a year evaporates almost immediately when it reaches the ground. Egypt's arable land is limited to the Valley and Delta of the Nile, and does not exceed 4% of the national territory. About 96% percent of the population lives on the habitable land around the Nile and almost all economic activities depend directly on river water.³ Egypt, it seems to me, is the only country in the world in which all life and human activity depend completely on a river as the only hydraulic resource.

The problem for Egypt is that it cannot artificially increase the water supplied by the great river. Although there are ancient water tables in the Libyan desert, their exploitation raises a double challenge. The costs of exploitation would be too high and the yield too short-lived – hardly a few decades. There is also a theoretical



possibility of artificially raising the contribution of the Egyptian Nile by increasing, with the aid of big hydraulic investments, the storage capacity upstream, particularly in Uganda, south Sudan and Ethiopia. A study of the geopolitical map of these countries and more generally of the high basin of the river hardly allows consideration of such an enterprise in the short term. The question for Egypt is thus finding a solution to avoid the hydraulic crisis without counting on a direct increase in the volume of water supplied by the Nile.

Possible alternatives would include reducing consumption, reuse of 'waste' domestic and agricultural water, desalination of sea water and finally, exploitation (with much discretion) of the ancient water tables of the Libyan desert.

The lack of water, which threatens to affect the whole country, will affect the farming sector more than any other. Farming is totally dependent on the contribution of the Nile, with approximately 70% of the total volume supplied by the river. Any reduction of irrigation water will inevitably be accompanied by a reduction of the cultivated surface, a collapse of production and a dangerous increase in poverty, which already affects more than 50% of the peasants. At the same time the growing population requires more agricultural land and production to satisfy food needs without aggravating the economic, and thus political, independence of the country. In other words, there is a double imperative: widen the arable land and increase agricultural production to match the population increase. This will require a sensitive augmentation of Egypt's hydraulic resources. The technological difficulties would be worsened by a serious and disturbing social situation.

It is the responsibility of the state to find a good compromise and an alternative to avoid the hydraulic crisis, while at the same time avoiding a social and economic crisis. It is upon this that the efficiency and fit of the political choices which have already been adopted will be judged. Economic liberalism, of which one of the aspects is the progressive pricing of irrigation water, seems a likely option.

PEOPLE, LAND AND WATER

There has been a relative reduction of the available agricultural surface, despite efforts to colonise part of the desert by reclamation. Physical urban expansion due to population growth took place largely on the agricultural space of the Nile valley and around the city of Cairo in particular. Urbanisation has covered, according to various estimates, a total surface of about 700 000 feddans⁴ of agricultural land: that is 12.8% of farmland in Egypt in 1976 and approximately 10% of the total surface cultivated today. Furthermore, during the period 1960–1970 (the decade which saw the construction of the High Dam and the formation of Lake Nasser),

150 000 feddans of agricultural land in upper Egypt were lost to urban expansion. The 1980s saw the trend reversed, with a gain of 250 000 feddans, which brought the total agricultural surface of upper Egypt to 2.57 million feddans in 1990. The Nile Delta's high demographic density has led to a relative decrease in cultivated land by an annual average of –0.21% between 1960 and 1981 and similar proportions during the years 1980 and 1990 (Ayeb 2002:93).

Today, the main obstacles to agricultural development in Egypt are the reduction of cultivable surface per capita due to population growth, the decline of farms, a paradoxical lack of labour, the risk of water shortage, and the relative decline of investment in the old lands.⁵ The proportion of harvested and cultivated land⁶ per capita in the country as a whole fell as per Table 1. Furthermore, the relative reduction of agricultural land due to population growth has been accompanied by a relative decline of agricultural production.

Table 1: Availability of agricultural land per person between 1960 and 1996

	CULTIVATED FEDDANS PER CAPITA	HARVESTED FEDDANS PER CAPITA
1960	0.22	0.39
1976	0.15	0.29
1996	0.11	0.2

Source: al-Sayyid 1995:175 and various other sources

Table 2 shows the correlation between population and agricultural production. The construction of the Aswan High Dam mitigated the decrease in agricultural production for four decades after it was constructed in the late 1960s, but the positive impact of the increased supply of water now seems to have been exhausted.

Table 2: Population and agricultural production in Egypt, 1887–1996

	POPULATION INDEX	AGRICULTURAL PRODUCTION INCREASE INDEX
1887	100	100
1907	138	172
1927	175	191
1947	235	219
1960	321	304
1976	453	445
1986	606	532
1996	796	728

Source: Fargues 2000:294

Even though it requires expensive irrigation, the establishment of new agricultural land by desert reclamation is necessary to meet the increasing needs of



the population and export markets on the one hand, and to compensate for the loss of agricultural land due to urban expansion in the Nile Valley and Delta on the other. This is a challenge for Egypt as it struggles under the pressure of its own demographic weight and the difficulty in accessing sufficient water.

DIMINISHING WATER RESOURCES

Egypt's population increased by 2.3% per year between the early 1980s and the mid-1990s, while the volume of available water remained the same. Forecasts of population growth are placed around 1.9% per year for the next 20 years (Ayeb 2002:77). Having had a population of around 30 million people in the 1960s, Egypt's population is almost 70 million today. Demographic increase has almost absorbed the additional

capacity provided by the Aswan Dam. In 1972, available supply ensured that each Egyptian had 1.604m³ of water per year, almost 4.40m³ a day.⁷ Since then, the amount of water per person has fallen, as per Table 3, and a sharp increase in demand is expected over the next decade.

The challenge is how to increase the amount of available water to meet the projected needs of the population in 2015.

AVOIDING THE CRISIS

REDUCING CONSUMPTION

How does Egypt increase its hydraulic resources in order to meet immediate needs and respond to the future increase in demand? There are only two possible courses of action: to improve the management of existing resources or to return to the river as a source.

Table 3: Water availability per person per year between 1972 and 2015*

YEAR	POPULATION (MILLIONS)	AVAILABLE WATER M ³ /YEAR	M ³ /DAY
1972	34.56	1 604	4.4
1976	38.00	1 460	4.0
1986	50.21	1 105	3.03
1996	60.00	925	2.5
2015	85.00	653	1.8

* Population size divided by the 55 million m³ of water supplied by the Nile per year

Table 4: The hydraulic situation in 2015 (in billions of m³)

TRADITIONAL SOURCES	WEAK HYPOTHESIS	STRONG HYPOTHESIS	AVAILABILITY IN 2015 (M ³ / INHABITANT / YEAR)
Nile	57.5	57.5 *	
Rains	1.4	1.4	
Sources	0.3	0.3	
Total traditional sources	59.2	59.2	
Non traditional sources			
Deep water tables	2.5	3.2	
Reused waste water	1.8	2.0 **	
Reused drain water	3	7.0 ***	
Delta+Valley water table	3	3.1	
Total non traditional sources	10.3	15.3	
TOTAL	69.5	74.5	786 or 843

Source: Ayeb 2002:78.

* Egypt's share of Nile water plus that amount captured during the first phase of the canal of Jonglai ** The reusable total of waste water in 2015 *** The reusable total of waste water in 2015

Table 5: Water in Egypt in 2015: Consumption, available funds and deficits (forecasts in billion m³ per year)

	CONSUMPTION	AVAILABLE SCENARIO 1	AVAILABLE SCENARIO 2	DEFICIT SCENARIO 1	DEFICIT SCENARIO 2
Agriculture	66.75				
Municipal and industrial	10.55				
Total	77.3	69.5	74.5	7.8	2.8

Source: CAPMAS (Central Agency for Public Mobilisation and Statistics) and Ministry of Hydraulic Resources and Public Works, Cairo



The first option is not infinitely extendable; management of water is not a simple quantitative prescription between availability and demand. It is about long-term politics that involves combining the massive introduction of new technologies, which limit water loss by modernising the entire water system, as well as the rationalisation of demand and modes of consumption. Such politics has to take into account the real financial, technological and political means of the country, which are limited at present. How will Egypt manage to do this when the whole transport system of irrigation water, covering seven million feddans, is almost completely open (uncovered)? How can consumption be limited when more than 60% of the rural population does not have access to piped drinking water?

There is another particularly inescapable constraint: how can the first consumers of water, the irrigation farmers, be subjected to cutbacks in water supply when approximately half of them already live in poverty? Herein lies the real challenge for the Egyptian planners and decision makers. No public policy will succeed without the massive and committed support from the majority of the country's four million peasants. Securing their support will require convincing them that at the same time as saving water, the state also aims to substantially improve their individual and collective quality of life by eradicating poverty. Currently, the peasants generally believe that they constitute the forgotten people. The last free-market programme adopted by the authorities – in particular the agrarian counter-reform inaugurated by the agrarian law of 1992 – is indisputable proof that politicians will marginalise the peasants yet again for the benefit of big landowners and investors. In one survey, more than 80% of Egyptian farmers interviewed felt they were badly treated by engineers and representatives of the water services.

MODERNISING THE HYDRAULIC SYSTEM

At the same time as technically modernising Egypt's water system, several political actors in the water sector have engaged in questionable behaviour aimed at limiting consumption. Proceeding from the erroneous assumption that the farmers are the biggest wasters of water, the actors think that if farmers are obliged to pay for water, they will limit their consumption and protect the resource against pollution. In fact, the biggest wasters are primarily in cities and the sources of pollution are unmistakably the factories, a large proportion of which continue to expel wastewater directly into the Nile.

Is it really necessary to charge for irrigation water in Egypt? In addition to being falsely identified as the culprits, farmers do not have the means to pay for their water consumption. How will the consumption of the farmers be accurately metred even if they could afford to pay? What is the true commercial value or price of water?

The international financiers of the World Bank and the International Monetary Fund (IMF) recommend putting a price on water in order to avoid waste; to reduce the actual or supposed scarcity; and to increase or restore the profitability of the hydraulic system by privileging access to the most powerful actors. This view has been parroted by politicians and other powerful actors. However, such an approach seems improper in the eyes of those for whom water, as a natural element indispensable to life, cannot be considered a simple consumer good. The issue stimulates discourse on the culture of water, on the representations of water and its identity. Water comes from a geographically situated and symbolically appropriate source – the river. Once it becomes a commodity it is no longer a bearer of identity and may be monopolised by the highest bidder, whether 'national' or foreign.

One of the challenges that charging for irrigation water poses is of a technical nature. A policy of price scale fixing would require the construction of a new distribution network and, most importantly, an effective, reliable and precise system of metering. The distributive network of open canals, which spreads out over approximately 120 000km, covering seven million feddans comprising four million farms, cannot be renewed, in its current state, within the framework of market-orientated policy. Losses, thefts and diversions would limit technical efficiency. Huge investment would be required to replace the current system with a new network of subterranean transport and distribution pipes with supply terminals and meters.

In any case, a policy of liberalisation of the water market, aiming at limiting consumption, wastage and losses, would inevitably produce unintended results. The introduction of charges risks provoking social instability or even a revolt among the four million peasants. This would threaten the very foundations of the political system and reduce all the political legitimacy of the authorities. Finally, agriculture would lose out because there are not sufficient investors interested in replacing the old agricultural lands with a modern and highly mechanised system of agriculture.

IMPOSING WATER TARIFFS

Research conducted among the Egyptian peasantry shows that they reject paying for irrigation water because they consider it inequitable and contrary to their understanding of their rights. For them, water comes from God and is a common good. Its usage and consumption should therefore be according to need and not the laws of the market or the singular will of political and technical decision makers. In their opinion, technocrats and other public officials should limit themselves to ensuring the equal distribution of this 'gift of God', according to the single criterion of producer and consumer need. About 45% of the rural population live below the poverty line,



so the refusal to pay for water is not only a political matter, poor farmers can simply not afford to pay anything.

To charge peasants for irrigation water would deprive them of their livelihood. Such a policy would push them out, leaving only those who have the means to invest in new technologies to participate in the capitalist mode of production. This would only aggravate social unrest, at a time when the new structural adjustment policies are causing social strife in several countries of the south Mediterranean. The law of 1992 which liberalised agricultural land rents provoked violence among the peasants, resulting in numerous deaths, several hundreds wounded and many arrested. It was unmistakably a struggle for survival by the most deprived and excluded of Egyptian society. Any attempt to charge them for irrigation water would risk setting off a dreadful chain reaction with dire social and political consequences.

QUANTIFYING PEASANT POVERTY

In spite of the development of agriculture during the last 50 years and the accompanying agrarian reforms, the number of rural inhabitants living below the poverty datum line keeps on growing. Between 1964 and 1975, the number of people in poverty increased from 3 million to 5.8 million. In 1981–82, 39.7% of all rural families were living below the poverty line (Keshk 1996:17). Today, this percentage is slightly over 40%. At the beginning of the 1990s, the spending of the poorest rural people fell to 17% of total rural consumption, while the spending of the richest 20% of the rural population was approximately 46% of total consumption.

The primary cause of poverty is related to the availability of farmland. About 70% of owners possess less than one feddan. The property of 90% of landowners averages less than four feddans. Half of the total farmland belongs to this category and the other half is in the hands of 10% of the land owners. Only 2% of owners own a third of all farmland (INP 1997:4).

Declining production means a large part of Egyptian peasants do not realise sufficient income from farming to meet their needs. Their agricultural production income

(animal and vegetable) is less than 35% of the amount that would bring them up to the poverty line (Keshk 1996:17). A lack of experience in commerce helps to explain the low incomes of the peasants, especially the poorest. The poverty which results from low farming incomes is all the more difficult to overcome as it is compounded by generalised poverty in Egyptian villages. Almost all villages lack the most basic services for education and health, as well as public utilities, agricultural infrastructure and assistance.

A 1992 inquiry showed that farms of less than two feddans cannot meet the needs of the families which farm them. Consequently, many farmers regularly take on other work, to the detriment of their own farms.

AGRICULTURAL INCOMES

In an investigation of agricultural labourers, the Egyptian sociologist and economist, Hassanein Keshk (1996) sums up the particularly difficult situation of the Egyptian population:

The (deprived) agricultural wage-workers constituted, in 1976, 49.4% of farmers, almost 2 million. And the population of poor producers (wage-earning farmers) in 1981/82 reached 1.3 million, from 12 to 64 years old.

In 1986, the number of labourers broke the 2 million mark, with more people sinking into poverty as a result of a policy introduced by government in the 1970s under the name of the economic *infita*: economic reform or structural adjustment policies.

Income data reveals that continuous impoverishment of the rural population has obliged them to opt for waged farm work to meet their needs. The entire landless peasantry and those farming a surface of no more than two feddans were forced into wage labour. Between 1970 and 1980, the nominal wage went up from 25 to 137 piastres a day, but if we take into account the rise in the cost of living in rural areas, real income has scarcely doubled in 10 years (Keshk 1996:68). Table 6 details the evolution of the nominal and actual wages between 1970 and 1985.

According to Abu Mandour (1995:185), between 1985 and 1991 the real salaries of farm labourers dropped by

Table 6: Wages of farm labourers (piastres)

	NOMINAL WAGE	REAL WAGE	DIFFERENCE
1970	25.0	21.4	3.6
1975	46.5	27.7	18.8
1980	137.0	44.1	92.9
1981-82	389.0	103.0	286.0
1984-85	484.0	182.6	302.6
Source: From information in Keshk 1996:68			

* Nominal wage is the daily wage and real wage takes the cost of rural living into account



60%. Official sources indicate a decline in actual salaries of about 50.8% between 1986 and 1992 (Keshk 1996:68–9).

THE EXTENT OF POVERTY

In 1990–91, more than a third (34.1%) of the rural population was considered to be below the poverty datum line. According to the *Egypt human development report* (INP 1997), in 1995–96 23.3% of the rural population were poor. Taking the ‘moderately poor’ into account, poverty in the rural areas stood at 50.2%. INP estimates that the rural zones accommodate approximately 58% of the poor (1997:26–7). The International Food Policy Research Institute (IFPRI) gives appreciably different figures, with 63% of the poor and 74% of the extremely poor living in rural areas (Datt et al. 1998:68).

The incidence of poverty is significantly higher among non-farmers than among farmers. In the rural zones, 39% of households are engaged in some form of agricultural activity. Approximately 35% of non-farmers live below the poverty datum line, while only 22.88% of farmers form part of this category (Datt et al. 1998:62).

There is a negative correlation between the head-count index and the size of the farmland, from 35.28% for the small farmers (those with less than 0.07 feddan per capita) to 23.82% for the medium farmers (between 0.07 and 0.24 feddans) and 7.08% for the big farmers (more than 0.25 feddans). The difference of the head-count indications between the big and small farmers is statistically significant (Datt et al. 1998:62–3). If the calculation is done by counting the total land cultivated at the household level rather than per capita, the results are as follows: 32.63% of the small farmers (per household), 22.81% of the medium and 13.97% of the big farmers are poor (Datt et al. 1998:64).

As is the case with the head-count index, the poverty gap index also reveals a concentration of moderate rural poverty. The poverty gap index works out between 2.4% in rural low Egypt and 6.9% in rural upper Egypt (INP 1997:27). In other words, in the countryside of low Egypt, the average household has 97.6% of its basic needs met as against 93.1% for their counterparts in rural upper Egypt.

IMPLICATIONS OF FREE MARKET SOLUTIONS

Although rural Egypt has always suffered from poverty, the situation seems to have worsened over recent years, notably because of the new economic policy’s agricultural content, which constituted an agrarian counter-reform. With the implementation of the last phase of the agrarian counter-reform (the law of 1992), the situation deteriorated once more. Indeed, when the new law, which governs the relations between tenants and agricultural landowners, came into force in 1997, more than 800 000 *fellahins* lost their farmers’ titles arising from the permanent rent contracts set up by the agrarian reform laws of the 1950s and 1960s (Müller-Mahn 1998:256).

THE COSTS OF LIBERALISATION

Faced with various agricultural problems and the increasingly urgent threat of a water crisis, the government – encouraged by big international financial and economic institutions – suggests that only modern and reliable farmers would be capable of dealing with the problems. They claim this would be achieved by investing heavily in a policy of technical and technological modernisation for highly mechanised agriculture, exporting and producing surplus value. In brief, they propose that a capitalist agriculture that is totally integrated into the international agricultural market is the solution.

The government’s problem lies in not knowing what to do with the four million Egyptian peasants and the approximately 20 million people who directly depend on the sector. To brutally expropriate and dislodge them from their lands for the benefit of big investors is out of the question. Another constraint is of a hydraulic nature. The country does not have a water surplus that would allow it to infinitely widen its cultivated land.

The government’s preferred option is an irreversible process that will play out over several decades – a process which will slowly but surely eliminate the weakest, and massively reduce the overall number of peasants. The small and medium farmers are now having to group together on big and heavily mechanised farms. It is clear that the choice has been made to treat the problem on a

Table 7: Distribution of incomes and poverty in Egypt

	NATIONAL	URBAN	RURAL
GDP/capita (lower Egypt) 1994/95	3 461.3	4 565.3	2 617.7
The lowest 40% by income (1995/96)	21.9	20.4	25.7
Poor population (% of the total)			
Total (1995/96)	22.9	22.5	23.3
Extremely poor (1995/96)	7.4	7.7	7.1
Source: Bishay 1998:39			



macro scale – a choice in keeping with the currently dominant neo-liberal ‘globalising’ discourse.

The big agricultural investors are already in place. All the new projects involving reclamation of desert lands are formulated to the advantage of these investors – whether they be the irrigated perimeters of the Peace Canal in the north of the Sinai; the Tushka project in the southwest extreme of the country; or other reclamation projects along the Valley and on the margins of the Delta. Besides the very low price of the reclaimed land, the new investors benefit from vast quantities of aid, subsidies and tax-breaks and, above all, the total absence of any ceiling to the appropriable surface. The only limit is the minimum acquisition of 500 feddans per investor.

In the opinion of numerous Egyptian investors, agriculture in the new lands is, today, one of the best investments in the whole country. While installing themselves on the desert margins, will the new and eager entrepreneurs wait for the eviction of the peasantry before taking their place? A progressive grouping of orchards in the southern part of the Delta is already underway, though at a slow pace. Today a feddan sells for between 80 000 and 150 000 Egyptian pounds (•17 000–32 000).

NEO-LIBERAL MODERNISATION

The modernisation and liberalisation of the Egyptian hydro-agricultural sector has been a long and gradual process since the 1970s when the Egyptian government abandoned the socialist experiment adopted by President Gamal Abdel-Nasser after the 1952 ‘revolution of the free officers’. This phase corresponded with the implementation of new global economic standards dominated by the free market and was called the *infītah*, which means (economic) opening or liberalisation, as opposed to the closure and separation associated with the socialist model. In reality, the term means opening to the Western world and more specifically to the capitalist models led by major capitalist powers. It is important to note that the Cold War was not yet over so the ideological significance of the decision to adopt this model was very different to what it would be today.

The next phase was the progressive liberalisation of the agricultural market and particularly the end of state monopolies, notably commercialisation of agricultural materials, inputs and harvests. These major reforms were accompanied by the end of the compulsory crop rotation system and the ‘collectivist’ form of agricultural co-operatives.

At the same time as it adopted these policies, Egypt was affected by a sharp increase in petroleum prices. It was also affected by the economic expansion of the Gulf monarchies following the first oil crisis of 1973. The oil crisis arose from these countries imposing an oil

embargo on the West for aiding Israel during the war of the same year.

Indeed, when the *infītah* policy was adopted in the mid-1970s, the farming sector was already suffering from a deep crisis. It showed all the symptoms of structural decay, namely an extremely poor farming community; a weak agricultural market disconnected from the mass of producers; increasingly smaller farms; and real agricultural wages that did not satisfy the minimum needs of those who could no longer survive off their lands.

The sudden and unexpected wealth of the Arab oil-producing states stimulated a very strong demand for immigrant workers, qualified or not, and in almost all domains. In a few months, several hundreds of thousands of migrants left their countries for the Gulf States. Over three million Egyptians joined this migration. A large portion of them came from rural areas, including many peasants – smallholders, landless farm labourers and the sons of poor and wage-earning farmers.

Some of the peasants found agricultural employment elsewhere, particularly in Iraq and in the Jordan valley. Even Jordan, not a country very rich in petroleum, offered an attractive income to the Egyptian migrants compared with their low incomes at home. Iraq, which received more than two million Egyptians, offered the best agricultural employment market in the Persian Gulf region owing to land and hydraulic resources matched only, ironically, by Egypt. The oil wealth of Iraq promised ‘unhoped-for fortunes’ for poor peasants newly-arrived from the Nile valley. This ‘receptive Eden’ would remain open until the war that followed Iraq’s occupation of Kuwait and the United Nations embargo, to which Iraq was subjected in 1990. This development turned formerly rich Iraqi employers into poor people in the Middle East. The Egyptian immigrants became ‘excess’ population and were forced to return home, only to find that the situation had deteriorated during their absence. This strong wave of emigration incited and encouraged by the policy of the *infītah* provided the Egyptian state with a piece of the oil prize in the form of migrant worker remittances.

The effect of migration on the Egyptian countryside was considerable. It resulted in urban expansion, which was generally to the detriment of agricultural land. There was also a surge in the development of services and other formal and informal commercial activities. The other visible change resulting from the expatriation was the rapid mechanisation of agriculture and especially that of irrigation, which provoked one of the fastest and most profound social and economic transformations of rural Egypt. In progressing from the *sakīyah*⁸ to the diesel pump for irrigation water, Egyptian peasant society moved from a social system organised locally in autonomous



users' associations around indispensable resources to an individualised system, where the (small or average size) individual investor and the engineer occupy central positions. At the same time, the status of water changed from an inalienable collective good to that of a raw material for sale. Metering to determine the cost of water used was no longer taboo – although, for political and symbolic reasons, it was done in a disguised way. Access to water, which was determined strictly according to the needs of peasant producers, henceforth depended on the means of those who wished to procure it.

As if dissolved in the very water it regulates, this change seems invisible, but it prefigures deep structural changes that will eventually radically modify the social, agrarian and agricultural landscape of rural Egypt and its hydraulic space. In the medium to long term, only those able to pay for water and for land will be able to continue to engage in agricultural activity.

The Egyptian countryside has known mechanisation since the beginning of the 20th century. At first there were steam pumps introduced around the 1880s, then diesel pumps in the 1930s and modernisation and mechanisation of the big Egyptian farmlands. The crisis of the 1940s and the agrarian reform of the 1950s slowed down the adaptation of pumps to the benefit of the traditional *sakiehs*. It was necessary to wait for the 1960s and 1970s to witness the victory of the diesel pump. Today it is increasingly difficult to find a working *sakiehs* in Egypt.

The direct reasons are evident. A pump can irrigate a feddan in two to six hours. The output of pumps is two to three times more than that of the *sakiehs* and they can cover surfaces seven times as large. The majority of these pumps – which are relatively handy and transportable if mounted on wheels – are owned by individuals. Although no systematic research has been done, it is likely that an expatriate in the Gulf States was the source of funds for almost every pump bought after the beginning of 1980s.

As mentioned earlier, the first consequence of the spread of the diesel pump (and the end of the *sakiehs*) was the disappearance of water users' associations. This launched a process of profound social upheaval, engendering a progressive individualisation of peasant society and consequent disappearance of the forms of domestic and rustic solidarity.

This cannot be seen as social progress, and even less as local development. The mechanisation of irrigation is not due to the growth of the farming sector. Instead, as I observed earlier, it resulted from the transfer of large sums of money from the Gulf States (emigration), which permitted the introduction of pumps along the canals of the Delta and the Nile valley. The paradox is that there is a massive mechanisation of irrigation in the countryside

where the majority of farmers, who are dependent on irrigation, live below the poverty datum line. These poor farmers cannot slow down the process, nor resist its consequences. The process imposes a new agro-social model that excludes the most deprived, particularly those who cannot bear the cost of this technical development. At the same time, they can no longer count on the rustic solidarity which used to protect them from the consequences of such developments.

The disappearance of the *sakiehs*, far from being an unfortunate outmoding of an exotic object on the Egyptian landscape, demonstrates the end of a social system that allowed the land of the Nile to continue to feed its poor. The poor farmers of yesterday will be the outcasts of tomorrow. If the reforms of the agrarian and agricultural sector of the country are recreating a class of landless peasants, the end of the *sakiehs* has created a class of peasants without water. Without land and water, this peasant class is condemned to disappear and will become part of the poorest class of Egyptian society.

The last phase of reform put in place by the government was the promulgation and execution of the agrarian law of 1992 which freed the market from the burden of land rental and the relationship between land owner and tenant. Since 1997 when the law was applied, the price of land (rent and sale-price) has been left entirely to market forces. The relationship between tenants and owners has favoured the latter: the period of lease is limited; the renewal is no longer automatic and is left to the discretion of the owner; and the lease is no longer automatically inherited.

The new law governing the sale of land has already begun to show its first consequences – the gradual, but inevitable return of large properties. This process is not likely to succeed in the very short term. On the contrary, the acceleration of the process could endanger social and political stability, so the authorities are not in favour of it. The real objective is the agglomeration of land, the inevitable outcome of the disappearance of small farmers who, as a result of the new law, are not allowed to pass their land on to their children. Thus, the first phase of the process, launched in 1997, was the beginning of the apparently irreversible process which caused the crumbling of farms, the impoverishment of peasants and the paralysis of agriculture. The risk now is a move towards a process of capitalist consolidation of the agricultural land around a small number of peasant-entrepreneurs – a change that would be accompanied by a definitive exclusion of the greater part of the contemporary peasantry.

The capitalist development of Egyptian agriculture would ruin millions of poor farmers who do not have the means to adapt to the new conditions, constraints and requirements of modern agriculture. Too poor to



withstand the rise in the cost of land and metering of water, and much too disconnected from the national and international market system to benefit from it, today's peasants may well adopt other strategies not necessarily more protected against misery, poverty and violence. It is often said that economic development must be paid for with the 'sacrifice' of current generations, especially the poorest. The ex-communist Eastern Bloc presently undergoing neo-liberal economic transition is often quoted as an example. It is important to point out the role that the West, and particularly Europe, plays in 'relieving' the damage of economic liberalisation of Eastern Europe. But, as we can easily imagine, Egypt, like other Arabic and African countries, will not benefit from such compassion and massive assistance.

Economic development discourse holds an important yet simple principle: water is a common good that must be accessible to all. Setting a price on it is a profoundly inequitable choice, one that will exclude all those who have no means to pay for it. In Egypt, the state is not capable of providing an alternative or a safety net for the poor farmers. But fixing a price scale for water is a political choice, made with the full knowledge of the likely consequences.

CONCLUSION

The Egyptian water problem can be elaborated in terms of an increasing gap since the 1970s, between the diagnosis of the hydraulic, agricultural and social situation and the political choices adopted to mitigate it.

It would indeed be difficult for any observer not to arrive at the same conclusion: an agriculture sector in a grave structural crisis;⁹ a large farming community deeply impoverished and disconnected from the national and international market and above all, limited hydraulic resources dwindling in relation to population increase; the intensification of agriculture and extension of the agricultural surface by occupation of the desert and creation of new irrigation perimeters.

Egyptian decision makers chose economic liberalisation as a solution to the problems of the country. In so doing, they provoked a deep upheaval and started a process for which the country was not fully prepared. The passage from a state-controlled economy to a market economy, without the political will and financial resources to ameliorate the shocks, victimised the most fragile fringe of society – smallholders and landless peasants. The strongest expression of the shocks of economic transition was indisputably the political violence that shook the country during the 1990s. The violence also revealed other dysfunctional factors in Egyptian society, but the situation of extreme poverty in the countryside, exacerbated by the politics of neo-liberal reforms, was a determining factor.

For years, the authorities have unleashed an assault on the last defences of the peasants. In a bid to end the

fragmentation of agricultural land, entice investment and consolidate agricultural space in the national market, they have aggravated the economic and social difficulties of the majority of peasants, forcing them into poverty, exclusion and dependence. But the development of large properties and the arrival of new investors in the agriculture sector have not yet realised the returns they hoped for.

On the one hand, to avoid a hydraulic crisis (which looks more and more inevitable), the Egyptian authorities seem to be opting for the gradual introduction of major reforms – the liberalisation of water services (infrastructure and consumer water supply) and the progressive setting up of a water pricing system. The former has been in the public domain for some time now, and the authorities refer to it as a fundamental political choice within the framework of the neo-liberal politics of structural adjustment. On the other hand, politicians rarely speak of the option of progressive water metering, which breaks a profound taboo anchored in social tradition.

In this context of economic liberalisation and market dominion, the fixing of a price scale for water is no longer taboo; the exclusion of poor peasants is seen as a happy disappearance of a constraint to the development of the farming sector; and the eradication of rural poverty is viewed as the necessary disappearance of the poor from the rural to urban zones.

Is there any guarantee that the liberal policies will bear fruit? Will the farming sector be able to climb out of its current crisis and will the expected profits benefit the national economy? Nothing is guaranteed. Agrarian counter-reform – the return of big landholdings and investment in Egyptian agriculture – will not produce real economic growth without the elimination of other constraints; notably those of the national and international markets. Most importantly, it is crucial to note that the policies of liberalisation and the metering of hydraulic resources cannot eternally deal with the hydraulic crisis. The population will continue to grow at a minimum rate of about 1.8% a year. In other words, it will increase by some 20 to 25 million people over the next 15 to 20 years. At present, at 850m³ per person per year and without any hope of augmentation, the average availability of water will decline with population growth. The farming sector will be seriously handicapped and investors are likely to find other sectors to invest their money in case of drought.

Today, the hydraulic crisis is taking place at two different levels. The first one, of an organisational order, has already begun. It consists of a crisis of decision making and political choices concerning the emergency. How can the consumption be reduced while everything that could achieve this has either already been done or is in the process of being realised? How does Egypt integrate



free market rules into the management of water without provoking social and political crises?

The second level, in the medium term, concerns a simple fact: Egypt cannot avoid a grave hydraulic crisis if nothing is done to increase the availability of water. A return to the river source for a collective management of the Nile, engaging all the riparian states, would first have to pass through Ethiopia – which since 1959, has been asking for a new sharing mechanism for the river's water. Egypt, which already consumes the biggest portion of available water, cannot contemplate a reduction in its share of the Nile. In this it confronts a real hydropolitical crisis (see Ayebe 1998).

¹The data concerning poverty in Egypt are drawn and sometimes calculated from the following references: INP 1997, Datt et al. 1998, Bishay 1998 and Müller-Mahn 1998.

²In terms of a 1959 agreement, Egypt may take 55.5 billion m³ of water per year from the Nile and Sudan may take 18.5 billion cubic meters. The annual average contribution of the river is 84 billion m³ of water a year. The remaining 10 billion m³ is the annual average volume of evaporation from the surface of Lake Nasser, formed by the construction of the High Dam of Aswan in 1964.

³This excludes resources such as petroleum.

⁴One feddan = 1 acre = 0.42 hectares

⁵By 'old lands' I refer to the agricultural lands situated in the valley and the delta and which were already under cultivation before the 1950s. More recent extensions, made possible by desert reclamation, are known as 'new lands'.

⁶On average every plot of land receives approximately 2 harvests a year (1.9 to be exact). This means the harvested surface is almost twice the cultivated agricultural surface of the country.

⁷This is water for the entire range of consumption, including drinking water, industry, irrigation, electrical production and navigation.

⁸Noria, bucket waterwheel.

⁹Agriculture, according to the last census of 1991–92, supplies 19.5% of the GDP and employs 4.5 million people, that is 32.7% of Egypt's working population. The principal source of food, it assures 20.3% of export receipts and produces an important part of the industrial input (al-Sayyid 1995:174).

BIBLIOGRAPHY

Abu Mandour, M. 1995. L'impact des politiques d'ajustement dans l'agriculture égyptienne. *Egypte/Monde Arabe*, 21.

al-Sayyid, MM. 1995. La libéralisation du secteur agricole. *Egypte/Monde Arabe*, 21.

Ayeb, H. 1998. *L'eau au Proche-Orient: La guerre n'aura pas lieu*. Paris/Le Caire, Egypt: Karthala/Centre d'Etudes et de Documentation Economiques, Juridiques et Sociales (CEDEJ).

Ayeb, H. 2002. Hydraulic politics: The Nile and Egypt's water use: A crisis for the twenty-first century? in *Counter-revolution in Egypt's countryside*, edited by Ray Bush. London: Zed.

Bishay, A. 1998. Sustainable development and poverty eradication, in *Poverty of environment and environment of poverty*, edited by Mohammed Atif Kishk. Cairo: Al-Ahmadu li al-Nashr.

Datt, G, Jolliffe, D & Sharma, M. 1998. *A profile of poverty in Egypt: 1997*. Washington DC: International Food Policy Research Institute. (Discussion paper; no. 49.)

Fargues, P. 2000. *Généralisations arabes L'alchimie du nombre*. Paris: Fayard.

INP (Institute of National Planning). 1997. *Egypt human development report 1996*. Cairo: INP.

Keshk, H. 1996. *The agrarian workers in Egypt (Ommal al-Ziraa fi Masr) 1953–1995: Economic and social situation of the agrarian workers*. Cairo: Kitab al-Mahrousah.

Müller-Mahn, D. 1998. Spaces of poverty: The geography of social change in rural Egypt, in *Directions of change in rural Egypt*, edited by NS Hopkins and K Westergaard. Cairo: The American University in Cairo Press.



LAND AND RESOURCE RIGHTS IN THE CAMPO MA'AN NATIONAL PARK AREA, CAMEROON¹

JOHN MOPE SIMO

INTRODUCTION

Most people in Cameroon, particularly the indigenous Bagyeli/Bakola² still live in rural areas and derive their livelihoods from land and natural resources. In the circumstances of globalisation where the interconnectedness of nations is increasing, the accountability of different actors with diverse perspectives, priorities and interests at the national and international levels is imperative in the quest for the realisation of meaningful land and resource rights.

From a conventional perspective of biodiversity conservation, protected areas are refuges of tranquillity and peace. This model or organisational style is distinctively top-down and authoritarian. In the perception of resident people in the vicinity of protected areas, such projects are not considered to be theirs and the designation of the sites do not necessarily share local interests and concerns (Harkes 1995:6).

Over the past 20 years there has been a shift from the defensive posture that protects nature from the impacts of development, to an offensive effort seeking to secure people's resource rights and to meet their needs from the natural heritage, while ensuring its sustainability. Increasingly, there is recognition of the crucial role of people-oriented conservation initiatives in the management of protected areas (Munashinghe & Wells 1992; Jeanrenaud 1999). This implies balancing local livelihood strategies and welfare; biodiversity protection; and sustainable management of natural resources for the benefits of current and future generations (Mope Simo 2001:vi).

There are several recurrent and unstable processes linked with inefficient and ineffective biodiversity protection in general, and with protected areas in particular. Some of the challenges include: government's

slow administrative procedures; absence of an enabling policy environment; inadequate personnel and equipment for monitoring and enforcement; market forces (commercial logging, land legislation and domestic/export agriculture); the '*plan de zonage*' (zoning plan); low awareness of the local people; the knowledge of the staff of the Ministry of Environment and Forestry and related ministries on the new forestry law; and poverty and inequality in resource distribution. All these factors have a bearing on understanding sustainability issues in protected areas. But the crux of the matter lies in the reform or regularisation of property rights, including land tenure, access to communal resources, and resolution of land-use conflicts.

Protected areas are increasingly becoming battlefields of resource conflicts. As discussed later, the frequent conflicts observed in the Campo Ma'an National Park (CMNP) area result from multiple stakeholders who have different perspectives, goals, values and interests.³ More powerful social actors, including the government, violate these. This is the case of the indigenous peoples – the Bagyeli/Bakola pygmy communities – who have historically inhabited or utilised the rich biodiversity within and outside the park.

Other important stakeholders are Bantu language-speaking villagers, migrants or settlers, and economic operators or agro-industrial complexes whose interests are focused on the conservation values of the park – such as tourists and hunters; as well as local, national and international NGOs which value the protected area for its flora, fauna, beautiful scenery, and wilderness characteristics. The variety of stakeholders and the interplay among local, national and international interests present challenges to anyone attempting to understand, manage, or resolve these conflicts (Lewis 1996:12).



The main assumption of this paper is that the security of land and resource rights access both inside and around the protected area can be a motivation for local populations – who are principal users of the forest, wildlife and water – to alter their behaviour from destructive and wasteful practices, to sustainable management. This policy option can also be an incentive for them to appreciate the relationship between their benefits (economic prosperity, welfare, cultural continuity, and empowerment) and the conservation of biodiversity. Another hypothesis is that good management requires the adoption of land uses that take into account the attributes of three dimensions: ecological sustainability, economic feasibility, and social and political acceptability.

This paper focuses attention on the scramble, by different stakeholders, for the diverse biodiversity around them, especially the Bagyeli and Bakola pygmy communities, who can be described as the poorest citizens, the most powerless and vulnerable interest group in Cameroon today. Following the presentation of the problem, the next section consists of a descriptive analysis of the study site. The third section examines land and resource rights issues in the CMNP area based on the argument that there can be no sustainable development without real land rights. It also dwells on the underlying conflicts that occur, with emphasis on the interests of local people because their lives and livelihoods are vulnerable. The fourth section poses the question whether the introduction of community forestry programmes in Cameroon can bring meaningful benefits to the local communities. In the final section, some concluding remarks and recommendations relating to people-oriented conservation initiatives in protected areas are made.

BACKGROUND

The Campo Ma'an intervention area has a surface area of 7 772km² and consists of several land use types (LUTs), of which the most important are: the CMNP (2 640km² or 34% of the area), four logging concessions (31%), an agro-forestry zone (26.5%), two rubber and oil palm plantations (7%), and collection of non-timber forest products (NTFPs). More than 60 000 people live in the Campo Ma'an area, of which 24 000 occupy the industrial rubber and oil palm concessions (Tropenbos International 2002:2). The people who have no work in the plantations or the forest concessions are subsistence hunters, fishermen and farmers who, in certain cases, obtain more than 75% of their protein needs from bushmeat. Bushmeat is increasingly commercialised, threatening its sustained harvest and pushing some animal species to near extinction.⁴

POLICY AND LEGAL CONTEXT

The government of Cameroon's policy on the management of protected areas centres on the maximisation of that portion of national territory set

aside for the conservation of biological diversity. The policy is given legal effect in Law No. 94/01 of January 1994, which lays down forestry, wildlife and fisheries regulations and provides that permanent forests shall cover at least 30% of the total area of the national territory and reflect Cameroon's ecological diversity. This policy and legislative strategy has since been extended and magnified at the sub-regional level, following Cameroon's initiating and hosting of the first Summit of Heads of State of the Central Sub-region on Sustainable Management of the Forest Block of the Congo Basin. The summit culminated in the signing of the Yaoundé Declaration. *Inter alia*, it obliges signatory countries to accelerate the process of setting up protected trans-border zones, and to strengthen the sustainable management of existing protected areas (WWF Cameroon 2002).

The government has since designed and is implementing a national blueprint for the implementation of obligations undertaken during the Summit (the Emergency Action Plan for the implementation of the Yaoundé Declaration, Prime Ministerial Order No. 089/CAB/PM, 19 November 1999) which includes a strong protected area component. The dawn of the summit also witnessed the creation of the 264 064ha Campo Ma'an National Park in 2000, as one of the three newly established developments with such status in the country. This policy came to light with the adoption of the Technical Operation Unit (TOU) in 1999, an approach through which national parks are managed within a complex of other categories of management recognised by law (Hazeu et al. 2000). Thus the TOU for the protected area under discussion was created in 1999. On the one hand, its conservator and manager is the Divisional Delegate of the Ocean Division, and on the other, it is governed by the Provincial Delegate of the Environment. Both of these local administrative authorities are in the South Province (Tropenbos International 2002).

ECOLOGICAL CONTEXT

The Campo-Ma'an TOU is located in the extreme southwest corner of the South Province. It is bounded by Equatorial Guinea to the south, the Atlantic Ocean to the west and the Kribi-Akom-Ebolowa highway to the north. It lies between latitude 2°09' and 2°53'N and the longitude 9°48' and 10°54'E. Undulating plains towards the coast give way to broken and hilly terrain in the east, reaching a maximum elevation of 1 020m. Significant physical features include the Ntem Canyon, a deep and remarkably straight canyon in the southeast, and an unusual feature of elevated swampland settled on very hard substrates along the Ntem River. It has a humid equatorial climate, with a mean annual temperature of 26°C and average rainfall of 2 000mm that has two peaks, in May and October (Hazeu et al. 2000).



Although its biological integrity has been compromised over extensive areas by logging and hunting, the CMNP is considered important for conservation primarily due to its highly biologically diverse Congolese coastal forest. Its importance as a protected area is enhanced by its extensive area of forested seashore, which is virtually the only protected area of unspoiled sand/rocky shoreline in Cameroon, with reasonably high tourist value. It begins with a dense humid forest at sea level, then transforms into legumes at higher altitudes. It is rich in a wide range of species, and a refuge for various taxonomic endemics (Tropenbos International 2002)

Campo-Ma'an is most important for its rich diversity of plants, (some of which include *Lophira alata*, *Afzelia sp.*, *Khaya inorensis*, *Pterocarpus* and *Aframaomum*). The addition of the Ma'an Forest reserve to the overall conservation area has enormously increased the biological value of the Campo Ma'an site. In the local and regional context, its role is primordial as a sanctuary for the protection of the elephant, the lowland gorilla, the chimpanzee, hippo, giant pangolin, black colobus, mandrill and leopard. Research opportunities are consequently high. The avifauna is also rich and diverse. The grey-necked rockfowl (*Pithacartes oreas*) is found in the park, and it is an important migration site for hornbills (Bucerotidae family, *Tockus sp.*) from Dja. The coastal portion provides an important habitat for sea turtle nesting.

SOCIO-ECONOMIC AND CULTURAL CONTEXT

The CMNP falls within a complex of resource use management categories managed within a central structure (the TOU of Campo Ma'an) set up by the government of Cameroon. This supervises the management of the park and implements sustainable use of natural resources within the buffer zones. The multiple of local peoples include the Bulu and Ntumu (mainly farmers and hunters respectively), Batanga and Iyassa (fishers), Mabea and Mvae (farmers, hunters, and freshwater fishers), and the Bagyeli/Bakola or pygmy communities (traditionally hunters and gatherers). Most members of this marginalised group are peasants, hunters and gatherers. As a result of the sedentarisation process initiated by the state years back, proximity to Bantu villages has motivated some of them to attempt farming. The heterogeneous populations comprising people from different social structures and cultures can and has often led to abuse and neglect of the land rights of the powerless and minority Bagyeli/Bakola communities.

Today, as always, the pygmy communities have a marginal socio-political and economic position (Loung et al. 1990; van de Sandt 1997:48). Between pygmy groups and Bantu villagers there is a clientelistic dependency relation in which the latter act as patrons.⁵ The different Bantu tribes seem to hold ambivalent and ambiguous views about the Bagyeli/Bakola people.

Inter-racial marriages have been contracted between the different ethnic groups, and this goes a long way to lessen the tensions as the people exploit and manage common natural resources derived from their rich, dense, humid forest. An acculturation process has permitted the minority pygmy communities to borrow and integrate into their culture 'foreign' cultural values such as the export crop, cocoa, enrolment in the formal education system, Christianity, and so on. At the same time they have successfully maintained their cultural identity and independence.

Though perceptions vary among the different Bantu groups, the Bagyeli/Bakola seem to be perceived as deprived, marginalised, 'uncivilized' and perhaps 'sub-human tribes' (van de Berg 1994:4) The fact that Bagyeli/Bakola men are seen to be unfit for marriage with Bantu women is illustrative of this negative perception. On the other hand, pygmy people are feared by their Bantu neighbours because many of them are believed to be endowed with exceptional magical powers which can be used to cause destruction and dangerous illnesses to their enemies.

The total population of the TOU is estimated at 59 199 inhabitants (ERE-Développement 2001) distributed in 119 towns, villages and labourers' encampments. This complex of resource use management categories (four logging concessions and an agro-industrial zone) has attracted thousands of people from outside the area in search of jobs. The influx has been overwhelming, owing to the fact that the resources on the periphery of the park were already under serious pressure from the riparian communities. As the pressure on the area has increased, the resources on the periphery of the CMNP have dwindled, and illegal activities were transferred to the park itself. An important part of the population is made of immigrant workers employed by the logging company Société Forestière de Campo, the Hevecam (rubber) and the Société Camerounaise des Palmeraies (Socapalm) (palm oil) companies.

The ERE-Développement study (2001) notes that 60.5% of the population in the TOU are engaged in agriculture, 12% depend on salaries from various institutions present in the area, 11.5% depend on fishing, 6% depend on official hunting (have hunting permits or are legally recognised as hunters), and 10% live off small business and trade. Agriculture is for subsistence, with surplus produce sold on local markets. Hunting is the predominant occupation of some communities, and most animals (mammals, reptiles and birds) are killed by guns or trapped. There is a vast influx of hunters from communities outside the TOU.

Observations of the way of life of the indigenous people have revealed that they are almost totally dependent on forestry products for subsistence and, increasingly,



income. All their economic activities are directly linked to the extensive exploitation of the forest in which they live and which is subject to many demands from others. It is also the basis of their socialisation (Mope Simo 1998a, 2001; Hazeu et al. 2000).

Permanent dwellings have since sprung up in areas of rich biodiversity in the park, and the roads constructed by logging companies to ferry timber out of the concessions are so close to the park that they serve as access routes for poachers. Anti-poaching activities are inconsistent and impromptu due to a lack of park personnel and inadequate equipment for monitoring and enforcement.

According to Fines et al. (2001), the fauna has a substantial social, economic and cultural influence on the livelihoods of the forest dwellers. Almost all animals mentioned above are seriously threatened due to commercial hunting practices. Several hunting techniques are used, mostly short guns and traps. In the past, animals were killed for subsistence and local consumption. Both the Bantu and Bagyeli/Bakola communities consider bushmeat to be their main source of protein and, with the fluctuations in the prices of cocoa in the world market over the years, the demand has increased. Bushmeat has, therefore, become one of the main sources of income to many hunters. Trade in bushmeat has increased tremendously. Hunting activities are of major concern because many of the hunted animals are endangered and the hunters submit that the incidence of many species has declined rapidly over recent years.

In this alarming context, and considering the disadvantages inherent in the particular socio-economic status of the indigenous people, the Cameroon Oil Transport Company (COTCO) has taken action to promote and develop the communities stretched out along the pipeline. This was done through a specific plan being implemented by the Foundation for Environment and Development in Cameroon (FEDEC).

Socio-economic development in the face of increasing and changing needs has direct and indirect deleterious effects on the rich biodiversity in and around the CMNP. This is because conservation and development are not recognised by all interested parties as inseparable strategies for the achievement of sustainable resource management and local livelihood systems. Any exclusion of local communities from the planning and management of the large areas of forest ecosystems has a negative effect on their land and resource rights.

LAND TENURE, USE AND CONFLICT

It is the excesses of human beings that most threaten the resources of the CMNP and its buffer zones on which

the local communities live. Be they excesses of greed or excesses caused by deprivation, they are both destructive. Where guarantees of intergenerational land tenure systems are weak or absent, local communities are less likely to pay attention to the management of natural resources. The lack of outright title or long-term lease increases the likelihood that cultivators will abandon land after a while to search for more fertile land elsewhere. Such farming practices contribute to unsustainable use of the permanent and non-permanent forest estates.

Do other stakeholders in need of forests and cultivable lands operating in areas adjacent to the park (mainly timber companies and agricultural plantations) have secure property rights and control over their lands? If the answer to this crucial question is yes, then the local populations living in the vicinity of the CMNP, most of whom are poor, will not lodge complaints about the expropriation of their land, and/or loss of the rights and benefits embedded in their cultures. There is ample evidence that prior to the establishment of the park, the local people had such rights and freely enjoyed the numerous benefits from their resources (Tropenbos International 2002; WWF Cameroon 2002). Such is the crux of the dilemma of land and resource rights in the study area.

Protected areas and their surroundings are refuges of tranquillity and peace, yet they are also places where various types of conflicts occur. The CMNP rainforest is among the most species-rich ecosystems in Africa and provides a habitat for humans and wildlife, as well as a source of livelihood for indigenous people. However, vast areas are disappearing annually because of demands for timber and new farmlands. Conservation of biodiversity, shifting cultivation, collection of non-timber forest products, production of timber in natural forests, plantation agriculture, village and home-gardening/animal husbandry, and sacred places are some of the land-use types in the study site (Hazeu et al. 2000:21–31). However, timber companies realise that, though renewable, the forest's resources are finite, and that harvesting methods and management plans should be sustainable.

LAND TENURE SYSTEMS

Land tenure institutions determine the rights and obligations of individuals, local communities, corporate bodies and the state with regard to access to land, forests, water, and other natural resources; as well as the distribution of benefits. Land tenure relationships are a good indicator of social relationships in the wider society. Traditional land tenure arrangements still prevail among the original inhabitants of the study site. Although encouraged by state policies, these are rapidly being replaced by freehold land rights held by individuals or corporations. A typical farm operated by an indigenous or migrant farmer comprises a small perennial



homegarden and a perennial tree-crop area of cocoa, under the forest canopy. This is interspersed with fruit trees and bananas, and a food crop area involving the rotation of cropland with second growth forest cover. Food production activities take place mainly within the CMNP, where there is fertile soil. In any event, much of the land was already used by the local populations before the creation of the park in 2000.

The greatest confusion lies with land tenure arrangements. The 1974 national tenure reform, favouring a free holding system of individual and corporate private property rights, has caused disruption of traditional communal land tenure practices, but has not been able to replace them.⁶ Local communities frequently contest the state's control over customary common property resources, such as land and forest ecosystems. This generates little interest in the local communities' protection of forests and soils – even those that have been classified as parks. The state agencies do not have the capacity to do this by themselves (Mope Simo 2000:120–2).

Sustainable management of the CMNP and its buffer zones cannot be achieved in the present circumstance of an inappropriate land-tenure system or without the security of common property regimes. This is a complex bundle of overlapping and hierarchical rights, claims and obligations in law.

LAND USE TYPES

There is a diverse set of arrangements and laws by which different users gain access to land and other forest products. The relatively intense pressure on land and the constant recourse to different access procedures are linked to local social and economic systems.

Although some new areas are cleared in an attempt to grow plantains and other food crops for the market, peasants continue to clear fallows that they have farmed in the past. This is because land clearance is easier in secondary forest areas than in dense virgin forests. Local level pressure on large-scale deforestation in the area seems to be relatively low. An exhaustive and systematic description of each LUT – including objectives; output; markets; labour and capital input; the technology involved; infrastructure needs; and scale of operations – is not possible here but an outline of the different types will suffice.

BIODIVERSITY CONSERVATION

Up until 2002, when the Tropenbos-Cameroon Programme wound up its activities in the country, the CMNP was the core of the intervention zone. It has rich and varied biodiversity, with many endemic plant species and rare or endangered animals. This is the main reason the park was proclaimed as one of the compensation areas for the environmental damage related to the

implementation of the 'Chad Export Project' – which included the construction of a 1000km-long oil duct from Chad to Cameroon, ending 5km north of the Campo-Ma'an area. Human actions had a severe negative impact on the enormous biodiversity. Conservation of diversity within species, between species and of ecosystems is internationally recognised as a priority for management and nature conservation. Conservation of biodiversity in protected areas can and should be complemented by efforts in other areas. Ecologically sustainable production of timber and NTFPs provides suitable habitats for many forest species (Fines et al. 2001:44).

NON-TIMBER FOREST PRODUCTS

Two population groups living in the study area depend on forest products for their livelihood. The first group, with about 98% of the inhabitants in the area, consists of Bantu villagers belonging to the Bulu, Fang, Bassa and Ngoumba tribes. For them, the extraction of NTFPs is complementary to agriculture. The second population group consists of forest dwelling Bagyeli/Bakola pygmy groups that have been rather mobile and marginalised, despite the process of sedentarisation that they have experienced (Biesbrouck 1999).

Notwithstanding the inducements of the Catholic mission in Bipindi to modernisation and especially the government's sedentarisation policy, most pygmy groups have not completely abandoned their traditional way of life – dependence on the forest for physical, social, material and spiritual survival (van de Sandt 1997:50). Most families have only settled for a limited period, creating villages and their agricultural fields in the forest at a considerable distance from the roads. Others skilfully combine their former tradition with a more sedentary lifestyle. For example, after the harvest period, the families move back into the forest to practice hunting for a short period of up to a few months. Even the relatively permanently settled groups maintain close relationships with their more nomadic family members. These contacts provide them with an 'exit' option when the sedentary living pattern becomes less attractive for them (van de Berg 1994:3) Although some of the pygmy communities are beginning to feel the effects of change on their way of life, the vast majority of them are still much more dependent on the forest ecosystem for survival than the other, relatively more 'developed' ethnic groups described earlier.

It is clear that much of the vegetation structure and plant species composition have not been changed as a result of the opening of patches of land and the felling of selected trees. Despite the presence of many logging concessions in the study site, numerous culturally valuable trees can still be identified. The sustainable extraction of NTFPs by local people for subsistence and the local market ensures the continued presence of forests near human



settlements. A few highly valued products such as the *Irvingia gabonensis* (bush mango) and *Gnetum africanum* (eru), are commonly sold in the national and international markets. For the latter, intermediates are involved in the trade.

NTFP activities are relatively labour-intensive. Local knowledge of species and ecology are required for good selection and harvesting. The traditional division in tasks, by gender and age, ensures that almost the whole household participates in the collection of these forest products. Because of the low intensity of extraction and the wide array of species involved, this LUT contributes to the conservation of genetic variation and habitat protection of endangered species; erosion control and watershed protection; as well as the regulation and maintenance of ecological, physical and chemical processes and cycles (Hazeu et al. 2000:22–4).

PRODUCTION OF TIMBER IN NATURAL FOREST

Timber is an important product in Cameroon. Production in the park area covers harvesting as well as the regeneration period of the forests. Resource management is aimed at both presently traded timber species and species that provide timber with good technical properties but are less well-known on the national and international markets.

According to Fines et al. (2001:45) the permanent forest cover of the production forest contributes to regulation and maintenance of many ecological, physical and chemical processes and cycles (for example, microclimate; hydrological and nutrient cycles; oxygen-carbon dioxide balance; and protection against erosion). Timber harvest and extraction should be based upon reduced impact logging methods, and integrated into the silvicultural management of the stands.

SHIFTING CULTIVATION

Shifting cultivation is the most widespread agricultural land-use in the CMNP area. Land is left fallow after a maximum of three years, allowing the forest to re-establish. Today, the traditional shifting cultivation cycle is, however, gradually changing due to the use of chain saws, limited available labour, and the scarcity of new land in the vicinity of villages. More farmers are clearing young fallows where they plant groundnut with macabo, cassava, maize, potatoes, and yams, depending on the capacity of the individual. The system of shifting cultivation is adapted to the local environment and can be a sustainable land use option, especially with a low population density, such as in the study area. Problems may however arise when changes occur in the socio-economic environment. This is the case with more and more logging companies asking for licences to exploit the variety of woods, on the one hand, and the establishment of the Chad-Cameroon Pipeline Project on the other.

It has been observed that attempts to offer farmers alternatives to shifting cultivation have failed, because of inadequate understanding of the decision-making processes involved. Certain factors determine the role of shifting cultivation in the livelihood patterns of rural people. Some researchers suggest that these factors be identified and proposals made to the government, instead of blaming the peasant farmers.

PLANTATION AGRICULTURE

The requirements for shifting cultivation are also important for plantation agriculture. The types of plantation agriculture considered here are cocoa, oil palm, pineapple, and rubber (*Hevea*). These include large-scale production of marketable agricultural goods. All commercially-oriented plantations have a high requirement for hired labour. Cocoa produces dried beans sold to local traders. The oil palm plantations produce palm nuts for processing factories and the local market. Rubber trees are tapped and the dried products sold to local traders, while pineapples are sold fresh on the local markets (Fines et al. 2000:30–1).

The government has many contradictory agricultural policies. On the one hand, it is actively promoting agricultural expansion for cash crop production and export. On the other hand, it has sought to protect forest and water resources by creating parks and reserves and restricting access by customary peasant users. At the same time, production in the peasant sector is increasingly directed towards markets over which the producers have no control. At the local level, agricultural intensification; improved social services; clear and equitable land tenure and resource rights; as well as greater local participation in the protection and use of natural resources are crucial.

The level of dependence of the local populations on the land and natural resources – and its cultural significance to them – remains high. Where access to land and forest resources is relatively unrestricted, income generated from the sale of other resources is important for poorer groups and households within the different communities (Mope Simo 2001:39–54). It is inconceivable, therefore to plan for conservation of the natural resources without putting the local people first.

EMERGING CONFLICTS

There is growing recognition that the successful management of protected areas ultimately depends on the inclusion of local people, who by virtue of the numerous benefits they reap from the forest ecosystems are rightly the principal stakeholders. Wanzie (1992:353) concurs:

In areas where new protected areas are being developed, local residents must not be cut off from access to resources upon which they have depended for their livelihood. If they



do not receive some benefits... there will certainly be conflicts with the officials of the said protected areas.

Prior to the creation of the CMNP, the numerous Bantu villages and most particularly the transhumant⁷ Bagyeli pygmy communities had enjoyed virtually 'unlimited' rights and access to the natural resources in the present-day park and its buffer zones. Evidence suggests that the establishment of the park incurred restrictions on locals' rights, without compensatory actions on the part of the government (Tropenbos International 2002:5). The indigenous people still perceive the abundant forest ecosystems and the buffer zones as belonging to them. Legal exploitation is being carried out in the surrounding area, which still has a considerable volume of commercial timber.

Conservation of the highly diversified plants and animal species found in the park and its environs is not effective because of hunting/poaching, illegal occupation of land, and habitat destruction and fragmentation through the construction of the Chad-Cameroon Pipeline. Recently, the indigenous people are lodging complaints about their deprivation and expropriation by wealthy and powerful social actors (particularly the state) and the loss of vital and rare medicinal plants.

By virtue of the exceptional biodiversity of the CMNP and the adjacent areas, suitability for numerous land-use types, the fact that it attracts different stakeholders, and the setting up of the Chad-Cameroon Pipeline project, conflicts over land and resource rights are inevitable. Moreover, unclear boundaries to demarcate the park have become a frequent source of conflict with local communities. It is, therefore, important to work with the communities concerned, to agree and clearly mark the limits of this newly-created protected area. Failure to take concrete action will exacerbate horizontal and vertical conflicts.

It is important to make a distinction between the phenomena of horizontal and vertical conflicts in the study area today. Some observers have described 'horizontal' conflicts – either between the same, or sometimes between different social categories of actors (Yobol et al. 1995:15–26). From my observations in the study area, vertical conflicts occur between the state apparatus (government) and more powerful stakeholders such as the logging companies and agro-industrial complexes.

COMMUNITY FORESTRY

The study revealed that the indigenous people living in and around the CMNP do not have the institutional means nor the capacity building skills to get involved in the effective management of natural resources. Both government and the local communities want economic development in order to boost political stability and improvement in the standards of living. Local

populations perceive conventional conservation approaches as holding them back, retaining huge portions of the best natural resources and human beings in a sort of primitive state. The social and economic values of protected areas should be rationally used so that the biodiversity is not destroyed by resident people (Mope Simo 1998b:4).

The issue is which participatory approach will be most beneficial and inclusive of the indigenous people who are most vulnerable and powerless stakeholders,⁸ yet depend heavily on the resources of the CMNP and its environs for their livelihood and survival? There can be no sustainable development without real land and resource rights, especially for poor people. Community forestry is an alternative approach to mitigate the loss of security of tenure, rights and benefits by linking protected area management with social and economic development in local communities.

The lifestyle and cultures of local people are symbiotic with nature. Their survival is directly at stake due to the unregulated uses and destruction of the natural resource base. It is therefore imperative that they participate in the management of the resources around them, especially within the protected area, because of the scope and validity of their indigenous knowledge. Recognition of the utility of people's knowledge and its use are powerful tools for enhancing communication and collaboration between local communities and other forest managers, for the empowerment of the communities.

In order to evaluate the sustainability of forest management in a given environment, one of the first steps is to find out who has the right and power to use/manage any forest ecosystem. What local people know, and how what is known is used in the context of natural resource management, can be described as 'authoritative knowledge' (Mope Simo 1997:60).

The methodology outlined above falls in line with a new approach to forestry management in Cameroon – that is community forestry. Community forestry seeks to:

- involve all local people in the control, use and management of natural resources
- improve their living standards through various social and economic activities
- create awareness among local people
- ensure that the local people have equitable access to forest resources, which does not rule out a gender dimension.

Community forestry initiatives therefore would constitute all activities geared towards achieving any of the abovementioned aspects of management forestry. Community forestry does not only concentrate on the management of forests and trees or the establishment of community forests, but also focuses on the management of wildlife. However, to ensure the sustainability of



community forestry in Cameroon, it is necessary to critically review some issues that could hamper the progress and smooth running of community forestry activities.

Almost all the projects and related organisations have embraced community forestry as a participatory approach that leads to the empowerment of local communities; capacity building; as well as the equitable and sustainable management of their lands and forest resources in Cameroon. However, there are some recurrent issues that need to be urgently addressed. If not critically reviewed, these issues can hamper the progress of community forestry activities. The most important of these difficulties are: the 'plan de zonage'; tenure rights (in trees and land); alternatives to shifting cultivation; and slow government administrative procedures (Mope Simo 1998b:2–5).

THE 'PLAN DE ZONAGE'

This is a macro-level planning exercise, which experience to date shows is in conflict with local-level perceptions and planning initiatives. Some organisations have proposed a re-zoning exercise be conducted – this time increasing the land available for community forest establishment (Mope Simo 1998b:11–6).

TENURE RIGHTS

As discussed earlier, the national land law conflicts with customary perceptions of rights and resources, and this is often an obstacle to long-term and community involvement in the planning of resource use. To resolve this problem, government should review the national land law and recognise traditional land rights (Mope Simo 2001).

SHIFTING CULTIVATION

Some people hold that shifting cultivation is one of the major causes of deforestation, but rural people have no problems with this practice. In fact, the long fallow rotation periods allow diverse and rapid growth of secondary forests. This kind of cultivation by the local population favours a rapid recovery of the natural forest cover. Other views hold that because less than 20% of primary forest is cleared for cultivation and very little is converted into treeless plots, it has very little impact on the forest. It is still not clear whether shifting cultivation can directly be blamed for the high levels of deforestation in Cameroon.

CONCLUSION

There are indications of a strong political commitment by the government to conserve Cameroon's biodiversity. However, capacity, effective conservation and implementation strategies, with the necessary law enforcement, are weak. This is in part due to lack of funds for logistical support and the hiring and training of staff.

Limited government resources sacrifice 'biodiversity conservation' in the face of other politically strategic demands and national priorities. But the issue – especially as it concerns the marginalised and minority pygmy communities in the CMNP area – lies in the reform or regularisation of property rights, including land tenure, access to common resources and resolution of land-use conflicts.

Sound policy is required for the preservation of biodiversity, sustainable production of forest products, secure land and resource rights, as well as subsistence for indigenous people. It is important to develop long-term solutions to the currently insecure land tenure rights of the Bagyeli through extensive community consultations, capacity building initiatives, and strengthening of institutions. Over the years the plight of the Bagyeli has been worsened by the domination of the different Bantu ethnic groups and, in the recent past, by the Chad-Cameroon Pipeline Project. Apart from the confiscation of land, with rare species of medicinal plants and NTFPs, the unusual noise from the sophisticated machines used in the plantations has not only scared away some endemic species of wildlife, but also polluted their environment.

Any attempt to plan for the management of land and forests in the CMNP and the adjacent areas that does not involve the local communities directly and meaningfully is bound to fail. Expressed differently, in order to involve local people in long-term conservation and development, the different interest groups will have to enjoy greater use-rights and reap higher benefits than before.

The creation of the CMNP and construction of the pipeline across the south Cameroon moist tropical forest has further complicated the land and resources rights claims of the forest people. On the one hand, they have lodged complaints that the CMNP has drastically reduced the land and forest from which they had been deriving their livelihoods. On the other, construction of the pipeline has destroyed the habitats for wildlife and plant cover and is a threat to biodiversity.

The future of biodiversity conservation in the CMNP area is inextricably linked to the welfare and livelihood security of the local communities. Policy makers, development practitioners and the scientific community have given insufficient attention to the important social, cultural, economic and political role that local people can play in the protection and sustainable management of protected areas, and the achievement of long-term sustainable development.

To meet its responsibility for productive resources, the government should undertake a comprehensive reform of current land legislation. One way of doing this is by developing a partnership system consisting of all



stakeholders, including all social classes of rural people. Local communities should be afforded the opportunity to live according to their traditions in keeping with sustainable management and conservation. In the face of the ambiguities identified in the current land law, the customary land tenure systems in which most local communities have confidence must be adapted to suit the changing social and economic circumstances.

¹The author undertook the collection of primary data in the study area between February and March 2001, funded by the WWF Programme Office in Cameroon. Unless otherwise noted, the other materials used resulted from a review of secondary data in the literature on management of biodiversity in protected areas established in the country's humid forest areas.

²The terms Bagyeli/Bakola are used in this paper in the plural when referring to the pygmy communities that live in the villages and camps adjacent to the study site.

³The term 'interests' is used throughout this paper to mean people's fundamental needs and concerns. Most often such interests are violated or sidelined by more powerful stakeholders, including the state apparatus.

⁴If hunting around the park is not well controlled, over-harvesting of animal species will take place and have an immediate negative effect on the animal populations within the park, as hunters will hunt indiscriminately inside the park if the animal densities are low outside the protected area. (Tropenbos International 2002:8).

⁵In their dependent position the Bagyeli/Bakola peoples suffer from injustice and discrimination. They are frequently accused of theft and punished without fair trial. For example, when a case is presented to a village tribunal, the pygmies concerned are treated with prejudice from the outset. Besides, various sanctions such as fines, have disproportionate effect on them because, apart from the quick money they can earn from the sale of bushmeat, they have relatively little cash income.

⁶The national land law conflicts with local traditional perceptions of land and resources rights, and this is often an obstacle to long-term and community involvement in resource use planning. To achieve a solution to this problem the government should review the 1974 national land law and make it possible for the different customary land tenure arrangements to be recognised (Mope Simo 2000, 2001).

⁷According to Professor Loung, a Cameroonian expert in pygmy studies, many observers often mistakenly describe the life style of the Bagyeli pygmies as nomadic instead of transhumant (see Dyson 1992:220).

⁸As Mary Dyson (1992:215) rightly argues, the vulnerability of indigenous people can be described and predicted most simply as a consequence of the loss of natural forest, which is their social, economic, and cultural environment.

BIBLIOGRAPHY

- Biesbrouck, K. 1999. *Bagyeli forest management in context*. Wageningen, The Netherlands: Tropenbos-Cameroon Programme. (Tropenbos-Cameroon reports; no. 1–2.)
- Djeumo, A. 1998. *Etudes des Cas de Forêts Communautaires: SOLIDAM (Akonolinga), COFAYET (Bengbis), et BIMBOUE (Abong-Mbang)*. Yaoundé, Cameroon: Projet de développement des forêts communautaires (PDFC).
- Dyson, M. 1992. Concern for Africa's forest peoples: A touchstone of a sustainable development policy, in *Conservation of west and central African rainforests*, edited by K Cleaver et al. Washington DC: World Bank:212–21.
- ERE-Développement. 2001. *Etude Socioéconomique dans l'UTO de Campo Ma'an . Rapport Principal de la Phase 1 : Analyse Synthèse des Données Générales et des Enquêtes*. Final document. Yaoundé, Cameroon: SNV Netherlands Development Organisation/ Ministère de la Recherche Scientifique et Technique (MINEF).
- Fines, JP, Leseuyer, G & Tchatat, M. 2001. *Master Management Plan for the Tropenbos Cameroon Research Site*. Wageningen, The Netherlands: Tropenbos Foundation.
- Harkes, I. 1995. *WWF workshop on community-based resource management in Cameroon*. (Preliminary report). Leiden, The Netherlands.
- Hazeu, G, van Gemerden, BS, Hommel, PWF & van Kekem, AJ. 2000. *Biophysical suitability classification of forest land in the Bipindi-Akom II-Lolodorf Region, south Cameroon*. Wageningen, The Netherlands: Tropenbos Foundation.
- Jeanrenaud, S. 1999. People-oriented conservation progress, in *Partnership for protection: New strategies for protected areas*, edited by S Solton & N Dudley. London: Earthscan:126–34.
- Lewis, C (ed). 1996. *Managing conflicts in protected areas*. Gland, Switzerland: IUCN (The World Conservation Union).
- Loung, J-F, Ngima, GM et al. 1990. *Les recherches sur les Pygmées à l'Institut des Sciences Humaines*. Yaoundé, Cameroon: Institut des Sciences Humaines.
- Mope Simo, JA. 1997. *Community forestry development in Cameroon: Study of the First Pilot Zone (Ocean Division), South Cameroon*. Commissioned by Community Forestry Development Project, Department for International Development. Yaoundé, Cameroon: Ministère de la Recherche Scientifique et Technique (MINREST).
- Mope Simo, JA. 1998a. *Population involvement in the management of protected areas in Cameroon: Case study of Korup and Waza national parks*. Yaoundé, Cameroon:



Ministère de la Recherche Scientifique et Technique (MINREST).

Mope Simo, JA. 1998b. *The socio-economic context of community forestry management in the Ocean Division, South Cameroon*. Revised version of a paper prepared and presented at the Workshop on Social Sciences Research in Cameroon, Yaoundé 27–28 January 1999. Yaoundé, Ministère de la Recherche Scientifique et Technique (MINREST)/ Le Centre National d'Éducation.

Mope Simo, JA. 2000. The quest for social considerations in forest management certification in Cameroon: Case study from the Southern Bakundu Forest reserve area, in *The anthropology of Africa: The challenges of the 21st century*, edited by PN Nkwi. Yaoundé, Cameroon: International Center for Applied Social Sciences, Research and Training (ICASSRT):115–25. (ICASSRT monograph; no. 2.)

Mope Simo, JA. 2001. *Conservation and development: Socio-economic/ anthropological study of selected sites in the Cross-Sanaga-Bioko Coastal Forests Project Area*. Report prepared for WWF (The Conservation Organization) Cameroon Programme Office. Yaoundé, Cameroon: Ministère de la Recherche Scientifique et Technique (MINREST)

Munashinghe, M & Wells, M. 1992. Protection of natural habitats and sustainable development of local communities, in *Conservation of west and central African rainforests*, edited by K Cleaver et al. Washington, DC: World Bank:161–8.

Tropenbos International. 2002. *Biodiversity conservation in the Campo Ma'an National Park and its buffer zone*. Project proposal to the Foundation for Environment and Development in Cameroon (FEDEC). Wageningen, The Netherlands: Tropenbos International.

van de Berg, J. 1994. *Forest exploitation and management in south Cameroon: Claims over forest lands*. Unpublished research proposal, Department of Agrarian Law, Wageningen Agricultural University, The Netherlands.

van de Sandt, J. 1997. *Changing mutual perceptions in Bagyeli-Fang relationships: A case study in the Bipindi region (south-west Cameroon)*. Department of Agrarian Law, Wageningen Agricultural University, The Netherlands.

Wanzie, C. 1992. Mount Cameroon: A case study for ecotourism development in Cameroon, in *Gestion des ressources et des réserves de la biosphère et éducation relatives à l'environnement*, edited by MD Kabala & T Njine. Paris: Unesco:348–55.

WWF Cameroon. 2002. *Biodiversity conservation in the Campo Ma'an National Park and its environs*. Project proposal to Foundation for Environment and Development in Cameroon (FEDEC). Yaoundé, Cameroon: WWF Cameroon Programme Office.

Yobol, MM, Tsobze, AA, Bigombe, PL, Nguiffo, S, Balibonak, PR & Ndjatsana, M. 1995. *Étude sur la gestion alternative des conflits liés à la gestion des ressources forestières dans le cadre de la gestion des terroirs*. Yaoundé, Cameroon: Service d'Appui aux Initiatives Locales de Développement (SAILD).



DOES NEPAD ADDRESS THE LAND AND RESOURCE RIGHTS OF THE POOR?

DANIEL A OMOWEH

INTRODUCTION

This paper examines the New Partnership for Africa's Development (Nepad) in the context of its strategy for dealing with the rights of the rural and urban poor to land and other resources, taking note of institutions created to tackle these issues, their strengths and limitations. In doing so, it describes and analyses the origin, context and structure of the regional initiative. Furthermore, the chapter examines how the strategy deals with food security issues in the context of the concern of the African poor. It also discusses the roles of civil society organisations (CSOs) and the challenges they face in actualising the rights of the poor to land and natural resources under the regional framework. Finally, the paper charts a land initiative for the regional agenda.

The Nepad initiative represents a bold step by African leaders to design an alternative path for Africa's sustainable development. Premised on good governance and democracy, and Africa's ownership of the development process, the initiative is a remarkable departure from previous efforts. Yet, the projects and strategies for actualising its objectives remain general. In particular, the initiative has no clear-cut measures and institutions for tackling the land and resource crisis that lies at the root of numerous wars in Africa. Prolonged droughts across sub-Saharan Africa are drying up most sources of water like oases, shallow wells and ponds on which the majority of African poor depend for drinking, irrigation/agriculture and livestock. As a result, women and children trek long distances in search of clean water, while food production continues to decline. In the urban slums where the poor live, the prevalence of pit latrines is polluting shallow wells and underground water, causing outbreaks of water-borne diseases like cholera and diarrhoea. Urbanisation has also forced most of the urban poor to the fringes, where the development of satellite estates accentuates their landlessness.

Furthermore, increasing urban-rural migration is exerting pressure on land and other natural resources. In turn, this breeds new conflicts over land, as individuals, families and communities reclaim lands previously loaned or sold. Externally-driven economic reform policies are precipitating land privatisation and speculation, setting the state on a collision course with indigenous people over their resource rights. The resultant landlessness particularly hits the rural poor who subsist on land. Reclaiming of wetlands for farming, as a survival strategy among the rural poor, has also extended the frontiers and caused more ecological crisis. All this casts doubt on the commitment of the architects of Nepad to the land question in Africa.

However, after the Group of 8 (G8) Summit in Kananaskis, Canada in June 2002, the Nepad process entered a new phase. The G8 reiterated the Nepad message; that Africa should finance its development, and that the initiative is about partnership, not aid *per se*. This has posed severe challenges to the Implementation Committee of the Heads of State, forcing it to begin to engage professional bodies, civil society groups, national governments, and international donor agencies, to formulate projects and modalities for implementation. The committee has created various task forces to tackle specific projects under Nepad, using existing relevant continental, sub-regional and national institutions, civil society groups, and international organisations.

As the discussions on the regional agenda move from the general to specifics, one of the challenges before the Pan-African Programme on Land and Resource Rights (PAPLRR) Network, among other land and resource rights-based civil society groups, is how to take advantage of the lacuna in the strategy document to advance resource rights of the rural and urban poor. The second section of this paper examines the origin,



structure and content of Nepad. The rest undertakes a preliminary evaluation of the Nepad framework and strategies for dealing with land and resource rights of the rural and urban poor; the role of civil society and advocacy for land and resource rights under Nepad; and concluding remarks.

THE NEPAD INITIATIVE

At the end of the 1990s, Africa's economy was at a critical juncture between total disintegration and reconfiguration. For four decades, Africa's efforts at development have yielded marginal positive returns, with the majority of Africans worse off than they were at independence. With decaying infrastructure, health and the HIV/Aids pandemic, nutritional problems and a worsening general trend of food insecurity, Africa's economic growth rate was 1.5% in 1999. This was even worse than the 1980s when an annual growth rate of only 1.8% was recorded. Per capita gross domestic product (GDP) in Africa fell to US\$716 in 1993 from \$806 in the 1980s (World Bank 2000). Africa's agricultural production declined from an annual growth rate of 2.9% in the 1960s and 1970s to -2.4% in the 1990s. Africa, which exported food in the 1960s with a food self-sufficiency ratio of 102 that declined to 75, has become a net recipient of food aid. Arable land per capita declined from about 2.5ha in the 1960s to less than one hectare in the 1980s with no sign of recovery, and with negative consequences for food security (see Omoweh, forthcoming). The quantum of official development assistance to Africa was \$17.2 billion in 1990, which fell to \$12.3 billion in 2001.¹

While several studies trace the causes of Africa's economic malaise to colonialism, corruption, inadequate technical assistance, unfavourable trade regimes, lack of skilled management, among others, there are few studies that have demonstrated that the greatest impediment to Africa's development is politics. As Claude Ake (1996:1) rightly remarks, 'the problem is not so much that development has failed as it was never really on the agenda in the first place'. If Africa is to matter in the international community, there is a need to reconceptualise the African crisis as less than purely economic, recognising the political dimension, while emphasising a holistic approach.

This partly informs the 'African Renaissance' vision of the South African President, Thabo Mbeki. In a profound speech he gave in 1998, Mbeki declared that the African Renaissance project was key to Africa's success in the 21st century. From that point, post-apartheid South Africa seeks to play a major political role in southern Africa and Africa, and indeed, the world. Mbeki's speech, however, triggered off mixed feelings among scholars, political leaders and activists across Africa and the international community. While Taylor and Nel (2002) saw the project as almost transforming Mbeki into a philosopher-king, Melber (2002) submitted

that it provided a new basis for policy formulation. At the same time, President Abdulahi Wade of Senegal launched his own initiative, the 'Omega Plan for Africa'.

By the time President Mbeki briefed the World Economic Forum on the 'Millennium Partnership for the African Recovery Programme' (MAP) on 28 January 2001 in Davos, Switzerland, there was a gradual de-emphasis of the concept as it entered into international discourses on African development. The MAP document was the product of a process that started in 1999, when the presidents of South Africa, Nigeria and Algeria were empanelled by the extraordinary Organisation of African Unity (OAU) Summit in Sirte, Libya to seek the total cancellation of the continent's debt. At the South Summit in Havana, Cuba, in April 2000, the three African presidents were authorised to convey Africa's debt cancellation pleas to the G8 Summit in Okinawa, Japan, in July of that year. At the OAU Summit in Lomé, Togo, in July 2000, the 'trio' was mandated to prepare MAP.

The draft MAP was presented by the South African government at the May 2001 Conference of Ministers of the United Nations Economic Commission for Africa (Uneca) held in Algiers. It was at the same meeting, that President Wade of Senegal presented his Omega Plan. According to Wade, the Omega Plan was 'a practical initiative for overcoming Africa's economic difficulties, while MAP was more of a manifesto'. While the Omega plan was largely a technical reduction of the challenges facing Africa, MAP was a much more comprehensive attempt to bring the developmental challenges into a historical, cultural and economic framework. Idiosyncratic factors among African political leaders have always undermined the feasibility of a continental development strategy. As Taylor and Nel (2002) rightly noted, it took hard bargaining to prevent Wade's insistence on his Omega Plan from sabotaging African unity before it even began.

At the Algiers meeting, it was agreed that since the documents were similar they should be merged and submitted to the next OAU Summit in Lusaka, Zambia. At the Lusaka Summit of 12 July 2001, the MAP and Omega Plan were fused into the New African Initiative (NAI), which the Heads of States meeting adopted. An Implementation Committee of Heads of States was constituted at that meeting, with President Olusegun Obasanjo (Nigeria) appointed as chairman, and President Thabo Mbeki (South Africa) and President Wade Abdulahi (Senegal) as members. The inaugural meeting of the Implementation Committee was held on 23 October 2001 in Abuja, Nigeria, where it was agreed the New Partnership for Africa's Development would replace the NAI. The Nepad document drawn up at that time is the original text which embodies the philosophy; objectives; priorities and implementation modalities of



the initiative – pending the conclusion of ongoing consultations with individuals; national governments; civil society groups; regional organisations and development agencies – in the hope of improving the regional agenda and possibly arriving at a revised version. The initial ambiguity about the relationship between the OAU (now African Union, AU) and the Nepad initiative was slightly redressed by Jacob Zuma, Vice President of South Africa, in a speech delivered at the Third African Development Forum on 2 March 2002 in which he endorsed the new regional agenda as an OAU/AU document. The thrust of the document is that Africa's developmental strategy must not be imposed. Nepad seems to be the final appellate of the initiative as there has been no opposition to this term since the Implementation Committee met in Abuja on 30 October 2002.

At the G8 Summit (Genoa, Italy, 2001), the member states endorsed the NAI, renamed Nepad. The G8 appointed partner representatives, known as the Action Group Plan for Africa (AGPA) charged with fashioning programmes flowing from the Nepad agenda, which each member country would support. This was further discussed at the G8 Summit in June 2002, in Kanaskis, Canada. To date, the G8 has identified five project areas for support under the Nepad initiative. These are: education and health (United States of America); trade and investment (Germany and France); conflict resolution and good governance (Britain); good governance (Canada); and foreign aid (Japan). Not only were Belgium and Russia yet to identify project areas, but none of the pledges made at the summit had been honoured by December 2003. The European Union, however, is opposed to the request by the Africa Group to adjust its Common Agricultural Policy, because its priority is to sustain the policy and projects of the member states in the agricultural area. This partly explains the absence of agriculture in the G8 project areas.

Nepad's long-term objectives, as contained in the document (Articles 174–88) are to eradicate poverty in Africa; place the continent on the path of sustainable development; and promote the role of women in all activities. Its short- and medium-term objectives are to strengthen mechanisms for conflict prevention, resolution and management; promote and protect democracy and human rights; restore and maintain macro-economic stability; institute transparent legal and regulatory frameworks for financial markets; revitalise and extend the provision of education and health – especially HIV/Aids, malaria and communicable diseases; promote the development of infrastructure; and give impetus to Africa's development so it can catch up with developed parts of the world.

These objectives are intended to enable Nepad to achieve its set goals of recording and sustaining an average GDP growth rate of 7% yearly for a period of 15

years, as enshrined in the Millennium Development Goals (MDGs) (see Article 68). Other goals of the plan are to reduce the number of people living in extreme poverty by half between 1990 and 2015; to enrol all children of school-going age by 2015; to reverse the loss of environmental resources by 2015; to provide re-productive health services for all who need them by 2015; and to reduce infant and child mortality by two-thirds between 1990 and 2015. The association of Africa's goals with those of the MDGs is welcome. However, the greatest obstacles to achieving these goals are: the time frame – as evidenced in Nepad having just three years to implement strategies for sustainable development expected to end in 2005; and how to generate the US\$64 billion needed annually to implement the projects.

Regarding management of the Nepad process, the Heads of States and Government Implementation Committee (HSGIC), chaired by President Obasanjo, with Presidents Buteflika of Algeria and Wade of Senegal as vice-chairpersons, is tasked with directing the initiative's affairs. The committee, composed of membership drawn from all the sub-regions of the continent, meets once every four months. Its basic functions include marketing of the regional initiative, aimed at generating support for its projects within and outside of Africa; and mobilising financial resources for implementing their objectives. The HSGIC was initially composed of representatives of Algeria, Egypt, Nigeria, Senegal and South Africa. To allay fears of domination by a few countries, 10 other African countries were appointed to the committee on the basis of regional representation. They are Botswana, Cameroon, Ethiopia, Gabon, Mali, Mauritius, Mozambique, Rwanda, Sao Tome and Principe, and Tunisia.

Though the Peer Review Mechanism was not originally on the agenda, the concern raised by the G8 about the crisis of leadership in Africa compelled Presidents Obasanjo, Mbeki and Wade to consider creating a modality for African leaders to censure each other where necessary. This was the origin of the African Peer Review Mechanism (APRM). It is about a voluntary accession of members of the African Union (23 members at the time of writing) to offer themselves for political peer review. All indications are it is still government-led – raising questions as to why people and civil society were excluded from the process leading to its formation, given that African political leaders are at the root of the African crisis.

The Nepad's temporary secretariat is located at the Development Bank of Southern Africa, headed by an interim chief executive. The HSGIC created task forces to deal with specific issues under the Nepad agenda. For this purpose, sub-committees were established to deal with the following priorities: Peace and Security, chaired



by South Africa with Algeria, Gabon, Mali and Mauritius as members; Capacity Building for Peace and Security with the AU as the lead institution; Economic and Corporate Governance under the leadership of the Economic Commission for Africa; and Infrastructures, led by the African Development Bank. Africa's central banks are charged with maintaining financial standards. The task force on Agriculture and Market Access is to be led by the AU. There is no task force on land.

The African 'Strategy for Achieving Sustainable Development in the Twenty-first century' is contained in Chapter V of the Nepad document (2001) as follows:

- 1) **Conditions for Promoting Sustainable Development.** These include the Peace, Security, Democracy and Political Governance Initiative; the Economic and Corporate Governance Initiative; and the Sub-regional and Regional Initiative, but all are discussed in general terms. The Peace, Security, Democracy and Political Governance initiatives (Articles 71–8) have had African political leaders pledge to work, both individually and collectively, in promoting these principles in their countries, sub-regions and the continent (Article 71). In particular, they agreed to promote long-term conditions for development and security, building the capacity of African institutions for early warning, and the capacity to prevent, manage and resolve conflicts in Africa.
- 2) **Democracy and Political Governance Initiative.** This is contained in Articles 79–84. African political leaders have undertaken to respect global standards of democracy. The core components of democracy include political pluralism; multi-political parties; workers' unions; and fair, open and periodic free democratic elections (Article 79). This initiative is aimed at strengthening the political and administrative framework for upholding the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of rule of law (Article 80). These initiatives are supported by the Economic Governance Initiative (Articles 85–98) to eradicate poverty and build capacity for development. The initiative will rely on a task team from the ministries of finance and central banks, charged with reviewing economic and corporate governance practices in the various countries and regions. It will make appropriate recommendations on standards and codes of good practice for consideration by the Heads of States and Government Implementation Committee. It will also sustain the commitment of participating countries to create and consolidate governance processes and practices, and foster good governance and institutional reforms. The institutional reforms will focus on administrative and civil services; strengthening parliamentary oversight; promoting participatory decision making; adopting effective

measures to combat corruption and embezzlement; and undertaking judicial reforms.

- 3) **Sectoral priorities.** These include Infrastructure Gap, Human Resource Development, Agriculture, Environment, Culture, and Science and Technology initiatives (Articles 99–146). African governments have been unable to reverse the objective of the colonial powers of building infrastructure to foster exportation of African raw materials and importation of industrial goods into Africa (Article 102). Therefore, the intention of bridging gaps in infrastructure under the Nepad process is to construct roads, highways, seaports, railways, waterways and telecommunication facilities that are sub-regional and continental in focus (Article 99). This will enhance the transportation of agricultural products between sub-regions in Africa, thereby helping to reduce food insecurity.
- 4) **Agriculture Initiative.** This notes the setbacks facing the industry – such as climatic uncertainty; instability in world commodity prices; institutional weakness; and inadequate support for rural development from national and bilateral/multilateral donor agencies (Articles 132, 134–7) – and recognises the need to overcome these constraints in order to achieve food security [Article 132]. In June 2002, the HSGIC requested the United Nations Food and Agriculture Organisation (FAO) in Rome, Italy, together with ministries of agriculture in Africa and other relevant agencies, to fashion detailed projects for Nepad. The product of this effort is Nepad's Comprehensive African Agricultural Development Programme (Nepad-CAADP) (Nepad-FAO 2002). The major objective of this programme is to increase agricultural production, bring more land under cultivation through irrigation, and ensure food security in Africa. This is discussed in more detail below.
- 5) **Environment Initiative.** This recognises the need for a healthy and productive environment as a critical condition for the success of Nepad, especially in boosting agricultural production and food security, thereby helping to reduce poverty (Article 138). In particular, the eight sub-themes of the initiative emphasise arresting desertification (rehabilitating degraded land), conservation of wetlands and cross-border areas, preservation of the ecosystem, management of the coastline, global warming, environmental governance, and the financing of all these (Article 141). Under the Culture Initiative is a concern to protect and effectively utilise indigenous knowledge that represents a major dimension of the continent's culture, and to share this knowledge for the benefit of humankind (Article 143). This implies sustaining traditional ways of managing the environment (inclusive of rights over resources in Africa, though not explicit in the document). The Science and



Technology Initiative is aimed, among other things, at generating a critical mass of technological expertise in targeted areas that offer high potential, especially in biotechnology and natural sciences (Article 145). Part of the action plan to accomplish this objective is to work in concert with the United Nations Educational, Scientific and Cultural Organisation (Unesco), the FAO and other international organisations that will help conserve Africa's biodiversity and indigenous knowledge by improving agricultural productivity and developing pharmaceutical products (Article 146).

- 6) Mobilising Resources Initiative.** This is aimed particularly at capital flow and market access (Articles 147–73). The Capital Flow Initiative (Articles 147–55) is aimed at achieving the 7% annual growth rate needed to meet the MDGs and, to accomplish this task, Africa needs US\$64 billion. Some of this is to come from domestic savings and public revenue collection, but a greater proportion has to be sourced externally. Part of the external funding for Nepad is expected to come from debt reduction (which should reduce poverty) and official development assistance; the rest will come through capital flows from the hope that good governance will create the right environment for more foreign investment in Africa.

The Market Access Initiative, especially the sub-section on the diversification of production (Articles 156–8), notes the vulnerability of Africa's primary production and narrow export base and recognises the urgent need to diversify its economy and promote linkages between the agricultural, manufacturing and service sectors. Its objectives are: to improve agricultural production, paying attention to small-scale and women farmers; to ensure food security for all people; to ensure environmental sustainability; to integrate the rural poor into the market economy; to make Africa a net exporter of agricultural products; and to become a strategic player in agricultural science and technology (Article 157).

The action plan to realise these objectives at the continental level includes: increasing the security of water supply for agriculture by establishing small-scale irrigation facilities; improving local water management and exchanging expertise in this area with the international community; improving land tenure security under traditional and modern forms of tenure and promoting necessary land reform; and establishing early warning systems for monitoring droughts and anticipating failure in crop production. At the international level, new partnership schemes are to be developed to address donor fatigue for individual, high profile agricultural projects; promote access for African food and agricultural products (especially processed products); to meet international standards; and to

support investment in the research of high-yield crops, among others (Article 158).

For the sub-section on tourism, its objectives include, but are not limited to, the identification and development of key projects at the national and sub-regional levels with capacity to generate spin-offs that could deepen integration schemes in Africa (Article 163). As part of the strategy to actualise this and other objectives, African countries are encouraged to enter into joint tourist-related activities. The basis for the new global partnership is contained in Articles 174–88, with the implementation strategies being spelt out in Articles 189–203.

An initial reading of the document conveys a bright future for Africa, as Africans are expected to own and fund the development with little support coming from the developed countries and donor agencies. This, perhaps, endeared the document to the Organisation for Economic Co-operation and Development (OECD), the EU and the G8 countries. However, with the increasing role that the Bretton Woods institutions have come to play on the continent, through their economic reform projects that have seen 'adjusting' economies worse off, Nepad may not be the last strategy. Many more will follow with the same result. Nepad's obsession with neo-liberal economic reform heightens the pessimism of the policy framework. The major driver of the initiative, the African state, has been indicted for working in tandem with foreign capital to sustain the underdevelopment of Africa in the past. Is Nepad not another false start? (See Omoweh 2003.) An evaluative analysis of the regional initiative's attempt to address the quest of the rural and urban poor for land and resource rights is necessary.

NEPAD AND LAND AND RESOURCE RIGHTS

Across Africa, the land question – including the agitation by the poor for rights to land and other natural resources – was too glaring not to be addressed in the Nepad document. By 2000, the Zimbabwean government renewed its forceful seizure of land from the minority commercial white farmers, although its land reform policy and redistribution did not favour the poor peasant farmers, but the elite, as had been described in earlier literature (Moyo 1995). In Ghana, the reform of the forest did not redress the rural farmers' rights to timber in their farmlands (Amanor 2002). In Nigeria, the Mineral Act of 1914, refurbished as the Land Use Act of 1978, still vested land and its content in the state. In Niger, the lack of clean water resulted in the multiple use of the 40ha pond at Allimboule (by people and animals), and the filth generated in the process has constituted a health hazard to the people (Haroun 2003). Primary water was already commercialised in Africa as evidenced in the sale of a bucket of well water at 5 CFA² (less than



US\$1) in Niger³ and 25 CFA in Central African Republic.⁴ In Uganda, the national rural water coverage is about 55% and the urban coverage 6%, and yet less than 10% of the urban population is linked with sewers and the rest use pit latrines (Museveni 2003:28). Studies have shown that – contrary to expectations of the state that land registration and titling will enhance security of tenure, increase collateral and generate investment in agro-business in Africa – the rural poor lost more lands to the urban elite and their rights over land were appropriated.⁵

Furthermore, the African state is itself at the root of the land crisis on the continent. In the 1960s and 1970s, agitation for land and resource rights was minimal because of the authoritarian nature of the African state. Like its predecessor, the state exercised absolute ownership of land and other natural resources because it furthered the process of surplus extraction in the African agrarian economy. With agriculture as the mainstay of the African economy, the continent was relatively self-sufficient and a net exporter of food.

The changing global context, especially since the 1980s and through to the 1990s, moved rural and agricultural development in Africa into a new phase. Rural and agricultural development was increasingly commercialised partly because of externally-driven economics. With the reforms came privatisation of lands and natural resources, leaving the rural and urban poor particularly vulnerable. The growing population also heightened the pressure on land, resulting in declining hectares of farmland per capita. New cases of land disputes emerged and old ones were renewed: over village boundaries and trans-border natural resources; individual claims and counter-claims of titles over land; between families and clan members over rights of inheritance; rural and urban dwellers over multiple sale of the same plots of land; between rural dwellers and governments over rights to minerals, forests and water; and between communities, governments and foreign investors over forceful acquisition of lands for real estate, commercial agriculture and tourism; between peasants and pastoralists over rights to grazing lands; between the state and indigenous people over natural resources/protected areas; and between men and women over the right of inheritance. The economic crisis closed off many livelihood options for the majority of Africans, and the emergence of the structural adjustment programme of the World Bank and International Monetary Fund further weakened the state.

The clamour for a return to traditional methods of land and resource management, because they held a greater prospect for the security of tenure for the rural poor, began to gain ground. The land question and possible ways of resolving it were integrated into the initial development projects of countries that gained political independence in the 1980s, such as Zimbabwe. But, the

‘willing buyer-willing seller’ clause in the Lancaster Agreement largely halted the land redistribution process in that country until 1990 (Moyo 1995). After the civil war, the Ethiopian state began to show concern for the teeming landless rural poor, which explained its efforts to incorporate equity into its land reform and redistribution projects. All this was aimed at incorporating the land matter into its democratisation projects, though with limited success. In Tanzania, the Land Bill passed by Parliament in 1997, which sought to redress security of tenure and resettlement schemes among others, was initially well received, but was later opposed by growing smallholder resentment because of political patronage.

There were female gender-biased land reforms in countries like Uganda in the 1990s, where the diminished rights of women to own land and their rights to transfer the same were gradually redressed. Customary land law still denies women rights to land and resources in most African countries. Tenure security for smallholder plots is key to increasing agricultural production, food security and sustainable livelihoods in rural areas, yet the discussions for optimal tenure arrangements still revolve around land registration. Land and resource rights are not tackled from the perspective of social, political and economic relationships and as outcomes of the processes of negotiations, but unfortunately as rules, regulations and movement. This was the context of the land crisis in Africa when the regional initiative, Nepad, was launched – a context that called for the need to broaden the perspective on the land question, especially land and resource rights of the African poor.

Yet, Nepad has no specific strategies for tackling the land and resource rights among the rural and urban poor to resolve the broader land question in Africa. Rather than treat land as one of the pillars of the regional agenda, it is either mentioned in passing or implied in the initiatives on agriculture, environment, culture, energy, mining, tourism, market access, water and sanitation, and diversification of Africa’s productive base.

As noted, the agriculture initiative recognises the need to overcome constraints of the sector in order to achieve food security in Africa, but only discusses land in the context of arresting the trend of decreasing farmland due to man and technology. To avoid the current situation of relying on rainfall in order to bring more lands into cultivation, the strategy is emphatic about government’s support for private investment in irrigation (Article 135).

Furthermore, the Nepad-CAADP is aimed, among other things, at tackling food security and increasing agricultural production with long-term positive implications for poverty reduction. Planned for the period 2002–2015, the programme is based on four pillars. These are:

1. Extending the area under sustainable land management and reliable water control (new and rehabilitated) to 20 million ha, with an estimated investment of US\$37 billion.



2. Improving rural infrastructure and trade-related capacities for market access, for which an estimated US\$92 billion will be required.
3. Increasing food supply and reducing hunger by increasing the productivity of 15 million small farms, at an estimated cost of US\$49.5 billion.
4. Agricultural research, technology dissemination and adoption totalling US\$4.6 billion.

An annual investment estimated at US\$17.8 billion will be needed for the major activities under the four pillars, with a significant part coming from Africa, and the remainder as official development assistance (Nepad-FAO 2002).

The authors of the Nepad-CAADP seem more concerned with safety nets and emergency-related food and agriculture than a long-term approach to collective self-reliance in Africa's agricultural development. It is not clear how the rural and urban poor will benefit from the programme, in spite of the central role of the rural farmer to food production and food security on the continent. As its authors rightly noted, the CAADP is not a blueprint, but only a proposal, awaiting further refinement to suit the African situation. Irrigation schemes are not new to traditional agricultural practices in Africa, particularly in the water-stressed belt where rural farmers apply their indigenous knowledge as a coping strategy.

However, what is new about the kind of irrigation schemes driven by external forces and in whose mould the CAADP is cast, is yet another collaboration between the state, FAO and foreign agro-capital to engage in mechanised farming of export crops, not food crops. In the process, the majority of the rural farmers will be dispossessed of their already declining farmlands. For instance, the Geriza irrigation project was aimed at boosting cotton production, funded by the World Bank, IMF and African Development Bank. To execute the project, the state first dispossessed the majority of rural Sudanese farmers of their farmlands before the forces of state-transnational capitalism turned them into daily paid workers in the plantations, deepening their misery in the process.

All this has cast doubt on the real intentions of the CAADP, rooted as it is in the neo-liberal approach of the FAO to food and agricultural production. Hence, the programme's strategy for making more land available for agriculture is not pro-peasant farmers. For a programme that needs an annual investment of US\$17.9 billion and with a larger part being sourced externally, it is doubtful if the rural poor farmers will be part of the 15 million small farms expected to help reduce hunger in Africa. It is little wonder that land and resource rights of the African poor are not addressed under the comprehensive agricultural framework of Nepad.

As environmental resources, land and other natural resources like water, forests and wetlands ought to have been expressly dealt with under the Environment Initiative, but this is not the case. In spite of the fact that the success of the eight priority areas of this initiative are intricately tied to the question of land and resource rights, this is profoundly lacking in the initiative document. The basic problem with the degradation of the environment in Africa centres on the state. As landlord, the state believes it cannot be sanctioned for polluting the environment. Because it colludes with foreign capital in exploiting land and minerals with reckless abandon, it shields capital. Shell and other oil companies' pollution of the environment of the Niger Delta of Nigeria is a good example.

All this explains, in part, why Nepad has no clear strategy, nor a framework for enforcing environmental governance in Africa. Good governance would require democratising the process and structure of governing environmental resources, entailing having to deal with the various locales of power and authority (individuals, families, clans, communities, council, state and national governments) and the redistribution of power over high-value environmental resources. It would mean adopting the ground-up approach to the governance of environmental resources in Africa as opposed to the current top-down way of doing things. Environmental governance, especially in the context of land, forest and water rights, might require a constitutional approach, in which case the rights of the poor to these resources will be enshrined in national constitutions. In a situation where the state leads constitutional reforms on its own, rather than in co-operation with civil society, it is unlikely that the rights of poor people over environmental resources will be ensured constitutionally. For example, in Nigeria, people overwhelmed members of the Presidential Constitutional Review Committee with demands to repeal the Land Use Decree of 1978, but the state has kept the law in place on the grounds that it is in the national interest to maintain the status quo.⁶ The existing undemocratic structure and repressive politics of African states will suffocate ground-up environmental governance, posing serious challenges for CSOs.

The Culture Initiative of the Nepad document is emphatic about the need to protect and effectively use indigenous knowledge, implying its concern for the involvement of people in the process. This is significant, given the agitation for a return to traditional land tenure systems and resource management. But there is nothing in the document that expressly deals with the rights of the poor, especially at a time when the power of the World Intellectual Property Organization (WIPO) is gaining ground. If the architects of the regional strategy were concerned with furthering the cause of the rural and urban poor over land and resource rights, they would at least refer to the instrumentality of WIPO.



Increasing pressure from externally-driven economic reforms to commercialise water is making water one of the most contested economic resources between people, the state and foreign capital. One of the basic concerns of the rural and urban poor is secure access to potable water. But this cannot be achieved, partly because of the state's collaboration with powerful local and foreign interests to commercialise water. This reduces the access of the poor to water, and makes it unaffordable. Not surprisingly, the Water and Sanitation Initiative, as contained in Article 116 of the Nepad document, merely mentions the rights of the poor to clean and safe water.

It is only in the initiative on diversification of Africa's narrow production base that Nepad comes close to addressing the needs of the rural poor. The document recognises the need to integrate the rural poor into the world economy. It also shows concern for improving land tenure security under traditional and modern systems. At issue is not just the recognition of the need to enhance traditional land tenure systems, but the absence of a carefully designed framework in the document to achieve such a goal. The rural poor have long been incorporated into the world economy through ruthless exploitation, first under colonialism and now under globalisation, that the concern now is whether further integration into the global capitalist system will improve their well-being. Nepad lacks a clearly defined framework to deal with this issue.

CIVIL SOCIETY ADVOCACY

What kind of advocacy initiatives should civil society organisations engage in to further the concerns of the African poor for their rights to land and resources under Nepad? Nepad is a land initiative, because the African economy is land-based. However, the state remains suspicious of CSOs, as evidenced by the exclusion of the CSO sector from the initial processes leading to the formulation of Nepad. This is all the more so with regard to volatile issues like land and resource rights.

However, recognising criticisms of Nepad, coupled with the challenges the G8 posed to African political leaders in June 2002, the Implementation Committee decided to engage CSOs, such as the African Business Group, to help initiate new projects and modalities for their implementation. The state is not breaking new ground, unlike NGOs which opposed economic reform policies and projects of the Bretton Woods institutions, and which provided input for alternative development approaches. Nor is the state democratising, as it still stifles NGOs critical of its policy, while supporting the friendly ones.

Previous efforts by Africa's civil society groups and sub-regional land networks to help redress the diminishing access and rights of the poor to land and other natural resources were not very successful. This was because of

the resistance of various governments to collective land reform and redistribution. Other constraints are the irreconcilable interests of the domestic and external forces over the land and natural resource question, lack of funding, and varying levels of awareness among land NGOs. The proposed Land Initiative, described below, deserves the support of all concerned organisations and individuals.

A PRO-POOR LAND INITIATIVE

PHILOSOPHICAL FRAMEWORK

The state's appropriation of the people's rights to develop themselves amounts to a negation of those who are the means, agents and end of development itself—the very principle of all forms of development. The path the African states took to exploit land and other natural resources reinforces alienation rather than promoting self-reliance among the people. African leaders have preferred keeping people dependent rather than making them self-reliant in the way natural resources are governed, because promoting self-reliance involves sacrificing control. Self-reliance in the context of resource exploitation is about equity and the production of resources to sustain the development process, taking cognisance of the poor as well as concerns at the household, community, federal, national, sub-regional and continental level. Destroying or not inculcating a sense of self-realisation in the exploitation of natural resources disempowers people. The proposed Land Initiative therefore has to be people-driven so as to cater for the interests of the rural and urban poor, recognising that the elite will oppose it.

CONTEXT

Land and natural resources are too central to the African development process to be treated lightly or ignored in the Nepad initiative. Africa's huge resource endowment accounted in part for its colonisation by the imperial powers. The struggle between domestic and external forces to retain or regain access to these resources continues after independence. About 75% of Africa's population is rural-bound and lives off land, complemented by fishing, crafts, logging and exploitation of other natural resources.

Unfortunately, land and other natural resources have come under stress, largely as a result of a combination of domestic and external forces. The inability of the African state to reproduce itself has compelled it to rely on foreign financial assistance. The state's neo-liberal approach to the crisis of landlessness among the rural and urban poor has reduced its ability to arrest the decline in rural and agricultural development. The reckless exploitation of natural resources by the state and foreign capital is crippling the capacity of the environment to regenerate itself. With the exception of a few countries like Uganda, where pressure by women's groups to have title to land has gained ground, most



women have no title to land in most African countries. The search for fuel wood among the rural poor has, together with prolonged drought, deepened desertification. Access among the urban poor to safe and clean water is deteriorating, while in the rural areas people continue to walk long distances in search of water. Lack of rain in Africa's water-stressed regions is retarding food production, thereby increasing the number of food-insecure people across the continent.

Incessant agitations by the rural and urban poor, including the indigenous people, for rights to land, water, forests and wetlands have – rather than precipitate pro-poor land reforms and redistribution – seen elitist land policy remain in place. The rural poor have had their lands appropriated by the urban elite, the state and foreign capital. The legislative and institutional frameworks for managing land and natural resources are still controlled by the state, with little or no input from civil society. Plural legal systems governing land and natural resources still impede efforts to improve security of tenure. Advocacy to have the rights of people entrenched in national constitutions has been rebuffed by the political class. Even then, there are no assurances that 'constitutionalising' the rights of people over land and resources will benefit them.

STRATEGIES AND STAKEHOLDERS

Democratising governance of land and natural resources. This is aimed at promoting equitable redistribution of land, and the security of tenure for lands and other environmental resources in favour of the people. It provides a rigorous basis for dealing with resource wars. The stakeholders include the government, environmental CSOs, community leaders, peasant farmers' associations, livestock producers, traditional loggers, local hunters, youth farmers, sand diggers, and community-based organisations. They should debate and dialogue over land and resource rights from the grassroots to national, sub-regional and continental levels.

Sustaining indigenous knowledge-based land and resource management and conservation. The objective here should be to protect indigenous knowledge of land, resource and environmental management, community-based farming systems in which the rural farmers have competence, while accepting the role of appropriate technology. Stakeholders include indigenous people, civil society groups, community-based organisations, peasant farmers, local herders, and the various age groups involved in natural resource management who should enforce compliance with traditional resource conservation measures.

Upholding traditional land tenure and security. This strategy should aim to empower the rural poor to resist appropriation of their right and access to land and

resources by the state, the elite and capital. It ought to conceive of the peoples' rights to land and resources in the context of social and cultural relationships and as a result of negotiations, not administratively, through rules and laws. The strategy should uphold the customary rules and norms, and institutions governing land and other natural resources. Stakeholders include indigenous people, settlers, families, communal leaders, peasant farmers, civil society groups, government, capital, lawyers, traditional institutions and sociologists who should discuss land and resource issues at proposed 'community land forums'.

People-oriented land policy. The aim of this should be to support the rural and urban poor by redistributing land in their favour; protect vulnerable groups like women at the household level, thereby promoting gender equity; and check the scope of urban development to empower the urban poor through rights and access to land and basic amenities. Stakeholders include poor people, government, foreign capital, civil society groups, women, youths, traditional rulers, and community-based organisations.

CONCLUDING REMARKS

In spite of the initial criticisms levelled against Nepad, the initiative is gradually being internalised across Africa and emerging as the continent's blueprint for development. This poses a major challenge to the stakeholders – a challenge of helping to formulate new projects and modalities for implementation to facilitate the regional development agenda.

Regarding the rights of the rural and urban poor to land and other natural resources, the document is deficient in terms of practical steps, modalities and an enabling policy framework or relevant institutions. In particular, it has no land initiative, despite the agrarian nature of the African economy. Part of the strategy for redressing the concern of the African poor to land and resources could be a mass-driven Land Initiative, premised on the full engagement of relevant civil society organisations, the state and the poor people. This is very important, given the existing undemocratic nature of the African state and its anti-people stance on land and resources. Hopefully that the wave of democratisation blowing across Africa will impact positively on this. Herein lies hope for the right of the African poor to land and resources.

¹ Abstracted from World Bank 2000.

² Communauté financière africaine franc.

³ Haroun 2003:9.

⁴ Ekomo-Ikoli 2003:26.



⁵ See, for instance, Platteau 1995.

⁶ See, The Report of the Presidential Constitutional Review Committee, Abuja, 2001.

BIBLIOGRAPHY

Ake, C. 1996. *Democracy and development in Africa*. Washington DC: Brookings Institution.

Amanor, K. 2002. Shifting tradition: Forest resource tenure in Ghana, in *The dynamics of resource tenure in west Africa*, edited by Camilla Toulmin. London/Oxford: International Institute for Environment and Development/James Currey.

Ekomo-Ikoli, L. 2003. Water wells and engine of growth in Central African Republic. *Choices: The Human Development Magazine*, March:26.

Haroun, G. 2003. Clean water at the heart of fight against poverty in Niger, *Choices: The Human Development Magazine*, March:7.

Melber, H. 2002. The New Partnership for Africa's Development (Nepad): Old wine in new bottles? *Forum for Development Studies*, 6(1).

Moyo, S. 1995. *The land question in Zimbabwe*. Harare: Southern Africa Political Economy Series (SAPES) Trust.

Museveni, Y. [Interview]. *Choices: The Human Development Magazine*, March:28.

Nepad (New Partnership for Africa's Development). 2001. *The New Partnership for Africa's Development (Nepad)*. Abuja, Nigeria, October.

Nepad /FAO (New Partnership for Africa's Development/United Nations Food and Agriculture Organization). 2002. *The Comprehensive Africa Agriculture Development Programme (CAADP)*. Johannesburg: Nepad.

Omoweh, D. 2003. The New Partnership for Africa's Development (Nepad): Another false start? *Nigerian Social Scientist*, 6(1).

Omoweh, D. Forthcoming. Political economy of food security in Nigeria, in *Food security in Nigeria*. Lagos: United Nations Development Programme.

Platteau, JP. 1995. *Reforming land rights in sub-Saharan Africa: Issues of efficiency and equity*. Geneva: United Nations Research Institute for Social Development. (UNRISD discussion paper; no. 60.)

Taylor, I & Nel, P. 2002. 'New Africa', globalization and the confines of elite reformism: Getting the rhetoric right, getting the strategy wrong. *Third World Quarterly*, 23(1).

World Bank. 2000. *World development report*. New York: Oxford University Press.



LAND RESEARCH, POLITICS AND ADVOCACY: REFLECTIONS ON THE FRANCOPHONE WEST AFRICAN EXPERIENCE

HUBERT MG OUÉDRAOGO

INTRODUCTION

Across its length and breadth, Africa is undergoing a process of unprecedented and fundamental change. The West African Long-term Perspective Study (WALPS – published as Brunner et al. 1995) was conducted in the mid-1990s and led by the Club du Sahel documents the important changes affecting this part of the continent.

According to the study, the dynamism of the informal economy sector is leading west Africa towards sub-regional integration. This is expected to lead to tremendous social and economic change. The study concluded that, by 2020, millions of west Africans from the poorest regions of the Sahel (Burkina Faso, Mali and Niger), will leave their countries and settle in the wealthier regions (mainly Ivory Coast, Ghana and Cameroon); and the informal sector will continue to be the main employer in African economies, a trend observed since the 1960s. An emerging class of urban and rural informal sector entrepreneurs will change the face of west Africa forever.

One of the main findings of WALPS, of interest for land researchers, was that west Africa will become increasingly urbanised over the coming decades (Table 1).

Table 1: WALPS projections

	1960	2020
Population	87 million	430 million (taking into account the Aids pandemic)
Size of the informal sector	18%	60%
Urban population	14%	40%
Rural population	85%	15%
Source: Elaborated from WALPS data.		

This raises the role of land in west Africa's development. African land researchers seem to focus on the commodification and scarcity of rural land. These phenomena have been linked on the one hand to increasing population in most countries in spite of HIV/Aids, and to the degradation of the environment in traditionally poor regions on the other. Another factor contributing to land scarcity is free migration – within a country (from the north to the south); outside a country (from inland countries to countries on the coast); as well as forced migration (war refugees). This makes land a major social, political and economic issue. A last field of interest for west African land researchers is the accelerating pace of urban development, accompanied by a continuous conversion of rural farming land into urban land.

West African land researchers also focus on signs of a serious land crisis linked to national policies; support of large-scale farms; and the development of new rural businesses to the detriment of traditional family farming; and increasing land conflicts. Moving from local and national issues to inter-state and even sub-regional issues,¹ the emerging and newly structured movements of popular resistance towards governmental land policies – and in particular urban policies – is giving a new political dimension and significance to most land conflicts in the subregion.² It is a real challenge for African researchers to understand and explain the social changes and to formulate development alternatives.

Unfortunately, one can note that land research in west Africa is weak and has poor links with national policies. There is a clear need to strengthen locally-driven research and to build new and innovative approaches for land security, based on national land policy dialogue processes and involving all key land stakeholders

Based on the outcomes of the Comité permanent Inter États de lutte contre la sécheresse dans le Sahel (CILSS)



Praia conference in 1994 on land and decentralisation, researchers from the Sahel formulated new approaches to land policies and legislation based on:

- the promotion of principles of justice, peace and equitable access
- the implementation of the principle of subsidiarity;³ responsibilities on land issues are shared between the state and other institutions
- the promotion of framework laws on land instead of long, technical and detailed regulations.

In order to take on the challenge, African research and training on land issues must play an important role in the design of a realistic, efficient and appropriate approach of securing the land rights of rural people. What role can African land research play in assuring efficient land policies and in promoting land management based on principles of justice, equity and fair governance on the continent?

In this paper I attempt to answer this question through a discussion on the state of research and training on land issues in Francophone West Africa; the link between land research and public policies of development; and the role of different parties in the issue of land.

RESEARCH AND TRAINING ON LAND

Francophone West Africa has only a small number of academic institutions and research projects involved specifically in training and researching land issues. The St Louis conference (Senegal 1995) on training and research on land issues in the Sahel region demonstrated that the most dynamic research centres on land issues in Africa are situated in the North, in institutions known as 'Africanist' (France, The Netherlands, Great Britain and the United States). The findings of the few research and teaching institutions that show an interest in land issues in Francophone Africa have not been widely publicised. As a result, academic production is scarce and generally limited to supervision of masters' theses, and as an exception, to doctoral theses in Senegal.

A 1999 survey by the author on research on land issues in Francophone West Africa showed that there is no consistent academic bulletin dedicated to land policies and legislation. As a result, the African land issue has almost no influence on the ongoing national and international debates on land policies for developing countries. The survey demonstrated that training options on land matters were also very limited. West African universities do not offer courses on land issues. Major constraints on the development of indigenous land policy research are management challenges in university research programmes, and the lack of development of local private research institutions.

And last but not least, one should not underestimate the fact that the situation of poverty in which researchers

find themselves heavily handicaps research itself. It is time to challenge the increasing tendency of the African research community to succumb to the financial lure of consultancy projects.

Recent progress has been seen with the development of action-research and the setting up of African land networks such as LandNet West Africa. Action-research was initiated mainly by NGOs involved in practical activities in the communities. The action-research process is based on a good understanding of local dynamics. An interactive process allows NGOs to improve their reflections on field experience and thereby learn to improve their practice on the basis of better knowledge generated from their own experience. NGOs are increasingly able to analyse local management experiences of natural resources and to report on good local practices, as well as find appropriate solutions for sustainable and participative management of these resources.

It is through action-research that new options on securing land have emerged – for example, promoting local conventions and taking pastoral land rights into account. However, action-research not conducted by professional researchers has its limitations, particularly in terms of the methodology used and the relevance of some analyses. Some NGOs drift into practices that are neo-missionary when they decide for local communities or impose on communities by making their assistance conditional.

The professional or occasional researchers of the south, taking the opportunities offered by short-term consultancies, have often been able to contribute to revitalising reflections on land policies.⁴ However, in spite of the quality of data collected and the relevance of the preliminary analyses, there is seldom any possibility of developing this work into research programmes.

Collaborative research projects involving research teams from the North and the South make an important contribution to the development of research in Francophone Africa. These collaborative research projects, funded by Northern-based donors, have helped in formulating new understanding of African land issues at various levels. For example, they have questioned colonial references to land and assisted the understanding of the conflict between the illusion of modern state law and the mirage of 'customary' law. Collaborative research projects showed, for instance, that instead of so-called customary land rights being presented as static, they are dynamic and progressive local land practices that can adapt to the fast-changing social and economic context.⁵

However, researchers of the South should critically judge their participation in collaborative research projects,



since they are sometimes not used as real scientific partners but as front partners for fundraising purposes. Southern researchers are only occasionally involved in the formulation of research topics. They may be involved in the data-gathering phase, but are often marginalised during analysis of the results.

RESEARCH AND DEVELOPMENT POLICIES

West African land research activities are not really linked to national and sub-regional development policies. Budgets allocated to research are trivial and do not allow for independent research projects to be conducted. As a result, local research institutions depend only on outside funding for their programmes. The field of social sciences and the tradition of joint research are not well developed in Francophone West Africa and, as a result, the meagre funds that are available are not used to their full potential. The small amount of research funding allocated by states and the African sub-regional institutions reflects the low priority these institutions give to local research.

The marginalisation of west African research can partly be explained by the constant tension felt by African decision makers between, on the one hand, the urgent need for the implementation of development policies and, on the other, the need for researchers to establish the role of research as necessary for sound medium- to long-term development planning. African decision makers do not seem to fully realise the role research has to play as a driving force for development. Few decision makers at the national level or at the sub-regional level refer to local research to understand constraints on policy implementation. African decision makers usually prefer co-operating only with national or international consultants, whose proposals are not always based on deep knowledge of local situations and the social and political stakes. The lack of publication of African research also contributes to its marginalisation. Very few academic journals are published on a regular basis and some journals are no longer being published. At the same time, publishing in international journals is not easy for budding researchers who are not yet known.

Because they do not encourage local research, decision makers find themselves unable to formulate policies based on up-to-date, qualitative and sound knowledge. They have to rely on research initiated and done by researchers from the North or accept, without challenge, key policies imposed by international institutions. Foreign funding may influence the outcome of research. The role of African research is therefore diminished and it does not assist politicians to understand issues and make better decisions.

Finally, one should not forget to mention the crucial issues of academic freedom and independence of

African researchers. Deprived of national funding, local research has to adapt to the agendas of big international institutions in order to survive. Many African researchers have become professional consultants to make a decent living. Paradoxically, despite the democratisation process, there is suspicion and even hostility from politicians towards the academic community and researchers. Independent work, usually critical, is mostly viewed as hostile towards political authority and is interpreted as a lack of trust in official policies. The researcher would then have to face political repression. Others prefer to be silent or leave for research centres in the North (France, but increasingly, Canada and the United States).

THE ROLE OF THE DIFFERENT PARTIES

It is not an over-statement, but is nonetheless provocative, to argue that land issues in Africa are too important to be left to researchers only. This is not meant to under-estimate the contribution of research in the definition of land policy options, but only to reposition the issues.

Research on land has made progress in understanding local land issues and the analysis of customary rights to land. Unfortunately these findings do not result in enhanced research capacity, nor proffer solutions for secure land tenure for rural communities. The answers do not come from decision makers and international development institutions either. Interesting operational approaches have been initiated by NGOs, but their pilot projects have been limited by poor links with official policies and legislation. Defining appropriate and efficient approaches to securing land remains a challenge to African researchers. African civil society has to focus on creating new space at local and national level for policy dialogue on land issues. It is a matter of urgency to promote the synergy between the knowledge of researchers, the political will of decision makers, and the abilities of local NGOs. In particular, the research community is challenged in its capacity to communicate efficiently with the other actors of social change. How then can researchers promote their findings in a comprehensible form in order to empower civil society with sharp lobbying arguments?

Substantial progress can be achieved by the promotion of participative democracy in the process of designing land policies and laws. The practice of participative democracy is essential for African development, in particular the formulation and implementation of efficient land policies. The land systems in specific countries are a converging result of social dynamics, power struggles and compromise negotiations between the different land stakeholders. In the rural societies of west Africa, several forces are acting at the same time – namely very powerful local authorities; internal and external migration dynamics; and active young people.



State land legislation has not been effective in ensuring enhanced security on the ground – clearly legislation is not enough in itself.

There cannot be a single ideal land reform model applicable to every country. The ideal land reform in each African country is a search for a balance between the different specific interests of the various stakeholders. Today, three main social bodies are dealing with land issues with specific strategies: the state, local rural communities and the private sector. However, local communities may have divergent interests, as case studies on local land conflicts demonstrate.

In many countries of Francophone West Africa, the state inherited colonial legal principles, which claim the monopoly for ownership of land through the establishment of a 'national land estate'. The Francophone West Africa state aims at controlling the use of land in order to guide beneficiaries towards rational land development as well as an increase in agricultural production.

In its development ambitions, the state is confronted by rural communities who claim ancestral ownership of land. Claiming the legitimacy of their presence on the land, the communities contest the state's monopoly on the land. The communities and their traditional leaders want to keep their traditional power over land and want to get the social (tutorial system),⁶ political (electorate for traditional leaders) and economic (control of part rent) benefits.

However, the local communities are affected by internal conflicts related to the appearance of new rural land stakes, such as the saturation of the rural areas; rights being claimed by women, young people and pastoralists; and the surge of migrant farmers and refugees.

The private sector is a new major party, which has played an important role for the last few years. This sector is made up of business people who want to make profit by investing in land speculation or farming. The private sector has formed an alliance with the state and has caused conflicts with local communities by also forging alliances with traditional leaders.

All these dynamics could lead the west African sub-region to a serious land crisis. Such a crisis could have enormous social and political consequences. These dynamics have to be managed, renegotiated and channelled towards an elaborate consensus on an appropriate land policy for each country.

What role can research play in the construction of such a national consensus on land policy? It is the duty of research to establish what the dynamics are. Land research must demonstrate the specificity and legitimacy

of the interests on land claimed by all parties involved – the state, rural communities and the private sector. Research should also be able to verify whether claims are legitimate.

Can research go further than formulating issues and proposing solutions? Research should not take on a different role. The results of qualitative research on land issues have power to influence policies. If research is to keep its traditional role of knowledge generation and understanding, it must avoid the false claim that it can be, or is, neutral. Research fulfils its duties when it chooses to work with hypotheses that are compatible with values like equity, justice, peace and citizenship, and which contribute to the fight against poverty. It is up to research to clarify the ongoing dynamics and trends, to analyse them, and to identify the appropriate assumptions to face the current challenges. It is also the role of research to critically review land laws and regulations and to question their relevance and effectiveness.

One should also question the validity of participative institutions that are supposed to ensure that all parties, mainly local communities and peasant organisations, are involved in the formulation process of land policies and legislation. Today, it is politically correct in Francophone West Africa to state that all local communities should participate in the land debate, as well as the implementation and follow-up of policies and legislation on land and natural resources. In practice, what is really done to ensure participation at these levels?

In west Africa, participation is supposedly achieved through so-called 'validation' workshops – where projects are presented, discussed and amended before they are sent to the relevant authorities for approval. The idea of these workshops is to hand projects that have already been approved by the parties to decision makers. This is a real change in practice. A decade ago, decision makers considered the concept of a participative democracy to be heretic. This change would be perfect if it implied that all parties were involved efficiently in the discussions. Indeed, the representatives for local communities are generally designated by the local administration. Farmers who are invited to these national workshops are not well informed. The lack of information, as well as the fact that the workshops are in an official language (French), deprives the local communities of actively participating, given that most farmers do not have a good command of French.

The participation of rural community representatives in national debates on land policies is effective and productive only if they have access to independent, representative and functional institutions. The strengthening of these organisations must not aim at getting them to agree with the opinions formulated by researchers or



at supporting NGOs. It should aim at giving the local communities tools to appreciate the issues in a critical manner. The strengthening of local community organisations must also allow these communities to formulate their own views, based on their specific interests.

In order to strengthen the capacity of local communities for efficient participation in national debates on land policy, there is need to build national land alliances composed of researchers, civil society and representatives of local communities.

The twenty-first century is a time when ideas are the main strength of societies. African land research must meet the standards of international land research and promote African views on how land policies should be formulated and implemented.

¹The land crisis in the Ivory Coast is only the tip of the iceberg in the west African sub-region.

²In Burkina Faso, for example, the 2001 and 2002 riots were against the non-transparent process of housing estates (protest march to the Moroh Naba Palace,

traditional emperor of the Mossi people) or against the urban restructuring of the city centre (riots in the areas cleared for restructuring).

³This means certain issues are only dealt with by local authorities who are competent to do so.

⁴One can quote, for example, the work done in Burkina Faso or Mali on land securitisation.

⁵Numerous studies have been done on land transactions and local conventions.

⁶With the tutorial system, the beneficiary of a customary settlement has to comply with the legal obligations of the transaction as well as social obligations that recognise and secure the land relations (obligation of acknowledgement, assistance and solidarity). If these obligations are not respected, the land transaction can be cancelled.

BIBLIOGRAPHY

Brunner, J, Henninger, N, Deichmann, U & Ninnin, B. 1995. *West Africa Long Term Perspective Study*. Washington DC: World Resources Institute, in collaboration with the Club du Sahel, Paris.



SECTION 3:
ADVOCACY AND LOBBYING
FOR LAND AND RESOURCE RIGHTS



NATIONAL LIBERATION, LAND REFORM AND CIVIL SOCIETY IN SOUTHERN AFRICA

STEPHEN GREENBERG

GEO-POLITICAL CONTEXT

Land reform in post-national liberation southern Africa has been a failure. Factors both external and internal to the countries in the region are responsible for this. Among the external factors are the narrowing of political and economic choices in a global context where neo-liberalism has become the dominant force for change, and of the strength of multilateral institutions (the World Bank, International Monetary Fund (IMF) and, increasingly, the World Trade Organization) in dictating the terms of reform. Internal factors include the weakness of independent progressive civil society; the political trajectory and class leadership of the national liberation movements; and the internal balance of forces at liberation and beyond. Nevertheless, an organised response is emerging from the grassroots. While this remains fragile, it has the potential to instigate a more radical transfer of land than has been witnessed to date. These factors will be explored in Mozambique, Zimbabwe and South Africa to reveal the situation of land reform in these southern African countries, emerging responses and implications for change in the region.

Each of the three countries experienced national liberation in significantly different contexts. Mozambique gained political independence in a period when 'development' was still associated with heavy state intervention that was a feature both of the Stalinist countries and the Western capitalist countries. Zimbabwe achieved political liberation in the midst of a growing global economic crisis where the World Bank and IMF were using their power to impose structural adjustment programmes (SAPs) on 'developing' countries. The SAPs were designed to restructure the location of subordinate economies to fit into the newly emerging global division of labour and trade regime. South Africa, in turn, experienced national liberation in the era of the consolidation of neo-liberalism as the hegemonic political project after the collapse of the Stalinist bloc at the end of the 1980s.

Mozambique is primarily rural in character, with more than three-quarters of the population living in the rural areas at independence, and marginal to the global economy. In contrast, the Zimbabwean and South African economies were far stronger with larger industrial bases. Nevertheless, Zimbabwe also had more than three-quarters of its population living in the rural areas (Roussos 1988:59) and land was one of the key issues for the national liberation movement. Even in South Africa, nearly half the population continues to live in the rural areas, although this can be seen as 'displaced proletarianisation' rather than a true reflection of the economy. Because of the relative strength of their economies and their greater integration into circuits of global capital, the post-liberation governments in Zimbabwe and South Africa had greater international pressure exerted on them to conform to the requirements of global capital.

THE AGRARIAN STRUCTURE BEFORE LIBERATION

In each of the three southern African countries under discussion, a political and legal dualism was evident in the agrarian structure, with a complex but unified economic structure (O'Laughlin 1996:15). White settlers occupied high quality land out of proportion to their numbers and the indigenous population was pushed into reserves managed by tribal authorities subordinated to the colonial administration. The indigenous tenure system was distorted in these areas, tended to exacerbate gender inequality in access to land and resources, and was subject to numerous transformations aiming to serve the interests of the white oligarchies at various times. In each case, the tenure system was established on the basis of forced dispossession through a series of wars between the settlers and the indigenous population – a process that was completed in all three countries by the 1890s. Subsequent legislation merely legalised the division of land resulting from these wars. Policies and laws, the construction of private property rights for the settlers,



and the restructuring of land tenure systems were interconnected with colonial accumulation strategies (Tshuma 1997:22). Political and legal dualism served to integrate the oppressed rural population into a unified economic system premised on migrant labour. Insecure access to land performed the function of reducing wage costs for mines, industry and commercial farmers by allowing an element of subsistence production to complement artificially low wages.

Unlike in Zimbabwe and South Africa, the peasantry in Mozambique played a dominant role in agricultural production prior to independence (Wuyts 2001:3). The majority of the indigenous population remained on the land, but with insecure tenure, under conditions of forced labour and subordinated to the needs of the extractive colonial economy (Wuyts 2001:2). As such, the peasantry depended for survival on wage labour, combined with household agricultural production, and was thus tied into the capitalist economy as a migrant labour force (O’Laughlin 1996; Wuyts 2001).

In Zimbabwe and South Africa, land dispossession was more extreme, with the majority of the indigenous rural population either living in reserves or working as landless labourers on white commercial farms. In Zimbabwe, white farmland constituted 47% of the rural land, while in South Africa this was in excess of 87%. The overcrowding and poor quality of the land made it all but impossible for the African rural population to generate agricultural surpluses. This was compounded by artificial constraints imposed on the African peasantry, such as taxes and lack of access to marketing facilities (Thebe 1993:102). Nevertheless, most of the population in the communal areas relied on the land for at least part of their subsistence.

In both countries, as a result of heavy state support and protection from competition, the white commercial agricultural sector made a significant contribution to the economy. The direct share of agriculture to gross domestic product (GDP) was between 13% and 18% in Zimbabwe in the years leading up to liberation in 1980 (Roussos 1988:52). In South Africa, it stood at only 4–5% of total GDP. However, in both cases, backward and forward linkages into manufacturing and other sectors of the economy made agriculture’s overall economic contribution far more significant.

Contrary to the tendency to view access to land primarily as a rural issue, lack of land for residential and even for small-scale (but not necessarily agricultural) productive purposes in urban and peri-urban areas was and is a major issue. In South Africa housing policies at the height of apartheid (1962–77) curtailed building programmes in African townships, with the aim of relocating the ‘surplus’ urban African population to the ‘homelands’, with a particularly negative impact on African

women (Hart 1987:3). *De facto* land occupations led to the mushrooming of informal settlements, especially with the loosening of ‘influx controls’ from the 1980s onward, showing the rapidly escalating demand for residential land near the urban areas. Land disputes since the end of the war in Mozambique in 1990 have centred on the densely populated areas around Maputo (Lahiff & Schoones 2000:16). In Zimbabwe urban areas have also seen their share of land occupations in the past two decades (Marongwe 2002:41–2).

In Mozambique and Zimbabwe, the national liberation struggles took the form of guerrilla war aimed at establishing liberated zones in the rural areas. As such, the peasantry and rural villagers formed the backbone of support for the liberation movements, and the return of the land was a key mobilising point in the struggle. In contrast, South Africa’s national liberation struggle was rooted in the urban areas, especially among the industrial proletariat. While the African National Congress (ANC) and the Congress movement – ANC/Congress of South African Trade Unions (Cosatu)/South African Communist Party (SACP) alliance – had mass political support in the rural areas, this was never converted into an articulated demand for land or an economic programme of rural transformation. In the urban areas, there was a high expectation that the post-apartheid government would immediately address the housing crisis and provide access to residential land.

POST-INDEPENDENCE LAND REFORM

The changing global context fundamentally shaped the approaches adopted by the new ruling classes in each of the three countries.

MOZAMBIQUE

Mozambique achieved independence in a period when ‘development’ focused on building large-scale infrastructure with heavy state involvement in the economy. On coming to power Frente de Libertação de Moçambique (Frelimo) chose to adopt a statist development model – centralising planning and capital, and establishing a state monopoly over the distribution of goods. This included the nationalisation of the land, made easier because white landowners abandoned the land (although not without first stripping the assets) after the collapse of the fascist regime in Portugal. Frelimo established state farms and made an effort to set up peasant co-operatives. Both these strategies failed, for reasons detailed elsewhere (see O’Laughlin 1996; Lahiff 2000; Wuyts 2001). Changes in land ownership did little to alter the conditions under which the majority of peasants laboured. At the same time, growing international competition and the increasing inability to contain global capital within national borders saw the decline of the statist development model (Binns 1994:64). Internally, military and economic destabilisation directly and indirectly by Rhodesia (now



Zimbabwe) and apartheid South Africa brought the rural economy to a halt in the 1980s (see Davies 1993; O'Laughlin 1996; Lahiff 2000).

These factors forced Frelimo into making compromises in order to survive. In 1983, it shifted to a strategy of 'market socialism' that saw a rapid increase in support for private commercial farming, and the distribution of some state farm land to multinationals, individual commercial farmers and some peasants (O'Laughlin 1996:3). At the end of 1986, in line with global trends, the adoption of an IMF-backed SAP extended and consolidated these developments (O'Laughlin 1996:3; Davies 1993:82–3). Poorer (mainly women-headed) peasant households were marginalised in the process (O'Laughlin 1996:32). Donor support for the richer peasantry and private farmers made this worse (Wuyts 2001:11). The overall result of the economic reforms was the accentuation of social differentiation and a new wave of peasant dispossession (Lahiff 2000:5).

A process to reform land policy followed the peace agreement in 1992, culminating in the passing of a new land law in 1997. Under the new law, land remained the property of the state, with communities, individuals or companies only gaining use rights. Use rights could be transferred but not sold or mortgaged, and were established on the basis of occupancy or through grant by the state of a lease of up to 100 years. Formal title could be provided to communities and groups, and verbal evidence was to be acceptable in a court as evidence of community occupation. If communities or individuals occupied the land for more than 10 years, they would be entitled to permanent use rights without requiring title documents. The rights of local communities were to be addressed before any title was given, and communities were required to participate in the administration of natural resources. The rights of women were theoretically recognised, although references to customary law and customary occupancy remained (Lahiff 2000:6–7).

ZIMBABWE

A 'politically moderate' Zimbabwe was seen by the West as a key to regional stability after the rise of liberation movements to power in Mozambique and Angola (Thede 1993; Bond 1998). Pressure from these imperial powers was combined with that from destabilisation-weary Frontline States to encourage Zanu-PF (Zimbabwe African National Union Patriotic Front) to make concessions and reach a political resolution with the white oligarchy (Tshuma 1997:38). The political and class background and interests of the leadership, lack of mobilisation of the peasantry during negotiations, and acceptance of nebulous British offers of support for a land reform programme also contributed to compromise (Thede 1993:100). The resultant Lancaster House agreement ensured the sanctity of private property rights for at

least 10 years after independence, with land reform taking place on a 'willing buyer-willing seller' basis with compensation to be paid in foreign currency.

Despite continually increasing official targets for re-settlement throughout the early 1980s, less than 3.5% of rural land had been transferred to the African population by 1990 (Tshuma 1997:70). This was partly the result of the adoption of a 'home-grown' structural adjustment policy from 1983 that saw the state devalue the currency and reduce its budget deficit, resulting in the reduction of the land reform budget (Roussos 1988:69; Tshuma 1997:55). The state itself engaged to some extent in productive activities, although nowhere near the levels of Mozambique. A small number of state farms produced a range of commodities, and the state controlled markets and prices for a number of key crops including grain, cotton, dairy and meat. Subsidies to marketing boards also increased significantly after 1980, especially for maize and beef (Roussos 1988:61–7).

Economic growth in the first years of liberation was steadily reversed from 1982, with the poorest sectors of the population hardest hit (Thede 1993:104). In the face of growing balance of payments deficits, the government adopted a development plan in 1986 that constituted a major acceptance of IMF objectives. It prioritised deficit reduction and debt service, cutting state spending in social services, increasing support for capital-intensive production, promoting the rapid increase in exports, and creating more favourable conditions for foreign investment (Thede 1993:105). There was a related shift in emphasis in the land reform programme from redistribution of commercial land to the reorganisation and increased productivity of the communal areas (Roussos 1988:68; Thede 1993:102). This incorporated support for a 'master farmer' class of producers (Tshuma 1997:95–6), and a contradictory relationship between the state and the chieftancy. While formal power was transferred to elected district councils, chiefs retained an important role in land administration and management. This 'neo-traditionalism' was used to mobilise political support and legitimacy in the communal areas (Tshuma 1997:89). While peasants retained rights to use of communal land, these rights were only secure in relation to other peasants but not in relation to the state, which held ownership of communal land and had the right to remove those living on it if it so decided (Tshuma 1997:139). Therefore, tenure insecurity persisted in the communal areas.

In 1990 the government formally adopted the Economic Structural Adjustment Programme (ESAP). The Constitution was amended in 1990 and the Land Acquisition Act was passed in 1992, finally putting to rest the Lancaster House limitations on compulsory acquisition of private property by the state. However, this happened in the context of the neo-liberal shift that



placed the market at the centre of development. Black private accumulation, frowned upon in the early days of socialist rhetoric, received official blessing under the new dispensation. The new laws therefore established the conditions for the state to facilitate – ‘hot house fashion’ – black bourgeois and petty bourgeois accumulation in the agrarian sector and elsewhere (T'shuma 1997:134). The criteria for access to land shifted from landlessness to ‘capability’ and ‘productivity’. However, the economic reforms benefited mainly the white commercial farmers, offered little new investment to black smallholders, and did nothing to redistribute land, water and infrastructure (Moyo 2002:7). This failure set the scene for the re-emergence of land reform on the agenda of the peasantry and the government alike, especially as the negative economic and social impacts of ESAP began to be felt.

SOUTH AFRICA

In South Africa a purely internal settlement saw the permanent inscription of the sanctity of private property rights in the Constitution. After just two years the government formally adopted a neo-liberal macro-economic stance and more recently a regional and continent-wide agenda aligned to the global neo-liberal political project (see Bond 2002).

A number of factors combined to extinguish any attempt at a radical agrarian or land reform programme. These included the perceived strength of the commercial farming sector, the failure of the liberation movement to develop alternatives to the agricultural restructuring process already well under way, and the rise of liberal democracy in the national liberation movement after the collapse of Stalinism (see Greenberg 2003). Land reform was to serve the purpose of stabilising the rural areas and maintaining the integrity of the land market while export-oriented restructuring of the commercial agricultural sector, initiated under apartheid, was completed. The post-apartheid state shut down state-owned agricultural enterprises, reduced subsidies to almost zero (including subsidies to new black farmers) and entirely dismantled monopoly marketing infrastructure.

The result of the government's orientation was a ‘willing buyer-willing seller’ model of land redistribution. Less than 2% of agricultural land was transferred through the programme five years after liberation, against a stated target of 30%. In 1999, the redistribution programme was re-engineered, marking a shift from group-based projects focusing on poverty alleviation to individual projects with the primary aim of establishing a black commercial farming class. In 2001 the new programme was integrated into a national plan for agriculture drawn up by commercial farm organisations at President Thabo Mbeki's request. The plan identified black economic empowerment and enhancing the profitability of agricultural industries as the key strategic thrusts for the sector (NDA 2001:3).

Restitution of land for those unfairly dispossessed after 1913 was sent down a bureaucratic and legalistic path. Progress towards resolving the 68 868 lodged claims was extremely slow, prompting a review in 1998 that emphasised once-off cash payments to claimants rather than the return of land. As a result, although the percentage of settled claims rose to 42.7% at the start of 2002, only 0.33% of the total land area of South Africa was transferred under the programme (DLA 2002). Post-apartheid laws to secure tenure in communal and commercial farming areas alike have maintained the status quo, rather than transforming social relations. In the commercial areas, tenure legislation created a legal framework for evictions rather than preventing them or enhancing the security of farm workers. Few labour tenants have gained ownership of the land, despite a law designed for this purpose – thanks to an excessively bureaucratic and legalistic process. In the communal areas, reforms have been bogged down by an uneasy balance of power between local government and traditional authorities, limited independent civil society organisation, and a continuing lack of certainty by government on which approach to adopt.

The post-apartheid state has been unable to resolve the growth in informal settlements through an expansive programme of formal housing delivery. Despite the construction of more than a million houses since 1994, delivery has not kept up with demand nor has it wiped out the backlog of an estimated three million housing units inherited from apartheid planning. Between 1994 and 1999, formal housing stock only grew by 12%, compared to the 97% increase in informal dwellings (rising to 142% in urban areas) (Radebe 2001). There was an increase from 667 000 to 1.3 million informal dwellings in this period.

INDEPENDENT CIVIL SOCIETY RESPONSES

MOZAMBIQUE

In Mozambique, the liberation movement had not progressed far beyond the northern provinces when the Portuguese revolution took place in 1974. As a result, the society at large was not necessarily mobilised for national liberation. The consequent statist approach saw the subordination of civil society organisations as arms of the party-state. For example, one of the main rural civil society organisations at present, the National Union of Peasants (UNAC), was previously a wing of Frelimo. The civil war that escalated rapidly in the 1980s destroyed the possibility of sustained civil society organisation and it was only after the end of the war in the early 1990s that civil society was able to consolidate itself into more enduring organisations.

Nationalised land ownership, coupled with the devastating effects of the civil war, had resulted in tenure



insecurity for the majority of the population. This was made worse when displaced people began returning to their homes at the end of the war, often to find that the land had been redistributed to the private sector (Lahiff 2000:5). The review of land policy and the formation of an *ad hoc* land commission by the government at the start of the 1990s opened up the opportunity for civil society participation in land debates. In 1995 the commission merged with a committee set up to manage World Bank projects in Mozambique, and representatives from civil society were also invited to participate. The NGO Forum appointed UNAC and the Association of Mutual Assistance (ORAM – a membership organisation of peasant associations) to represent civil society in the commission (Lahiff & Schoones 2000:18).

On the release of the draft law in early 1996, ORAM assisted peasants to form associations, contributed to resolving land conflicts and began the process of securing land titles (Lahiff & Schoones 2000:18). When the Bill was passed into law in 1997, organised civil society was in support of it, because it represented an advance for the rural population with regard to tenure security. However, the law's impact was likely to be limited if rural families and peasants did not know about it. As a result, dissemination of the law to the rural population became a common platform for a civil society thrust that brought together around 200 NGOs, churches, associations, co-operatives and other civil society organisations (Negrao 2002:21).

The Land Campaign emerged out of this. Representatives were sent to each province to get input on the form of the campaign and the type of materials that should be produced. Provincial organisational committees were formed to support the campaign. A national committee comprising the leading national civil society organisations and a number of international NGOs/donors was established to co-ordinate the campaign at central level. The committee decided that the campaign should be decentralised and driven by provincial and district-level organisations (Negrao 2002:21).

The campaign was designed not to speak on behalf of the peasantry and rural population, but to inform them about the contents of the law and how it was applicable to them. It also had the objectives of enforcing the application of the new law and stimulating discussion between commercial and family farmers (Negrao 2002:22). The campaign was designed to exist for a fixed period (6–9 months) only, after which time it was up to the individuals and organisations to ensure that the provisions of the law were applied to their advantage. Limited financial resources partially shaped the activities and strategies that were adopted. In 1999 the campaign made way for a national Land Forum that intended to continue the work of consciousness raising, mass mobilisation and defence of the land rights of the rural poor (Lahiff & Schoones 2000:18).

Demands that have been articulated through the campaign have focused on tenure security, gender equality in access to land, retention of customary rights (but not necessarily mediated by traditional leaders), popular participation and improved access to services (Lahiff & Schoones 2000:20). The campaign served to bring Frelimo to a better appreciation of the smallholder sector, traditionally marginalised by the rhetoric of large-scale production and statist methodology. One of the central messages of the campaign was on urban land rights, with a focus on participatory decision making, in particular in the allocation of plots (Negrao 2002:23).

ZIMBABWE

In Zimbabwe, civil society found it difficult to retain organisational independence from the post-liberation state. Civil society organisations were either crushed – (as in the case of Zapu (Zimbabwe African People's Union) or the student organisations of the 1980s), bought out (as with traditional leaders or the war veterans), or subordinated to the party (as with the Zimbabwe Congress of Trade Unions, for most of the 1980s). In the absence of an independent peasant movement at liberation, land reform was essentially driven by the state. However, the rural areas were characterised by low-intensity land occupations, throughout the period since independence. The state variously supported or tolerated, deliberately engineered or ruthlessly suppressed these activities, depending on the political dynamics of the moment.

In the first few years, sporadic peasant occupations were tolerated by the state because they mainly targeted land abandoned by settler farmers who fled the country during the war (Dladla & Munnik 2000:7). As such, they did not threaten commercial agriculture. According to the state, the political objectives of land reform were to neutralise the crisis of expectation on the part of those in need of land, and to stabilise existing social relations (Zimbabwe government, cited in Tshuma 1997:72). As long as the demand for land could be channelled into other tenure regimes that did not threaten freehold land, self-provisioning was acceptable to the state (Dladla & Munnik 2000:6). However, once abandoned and underutilised land started drying up, the state began clamping down on any independent activity outside the officially-constituted land reform programme (Tshuma 1997:64).

After a hiatus in independent peasant activity in the mid-1980s, a second wave of occupations took place around 1990, mainly on state land but also on communal land cleared by tsetse fly eradication programmes (Dladla & Munnik 2000:8). Once again the state supported the activity, to some extent as a populist manoeuvre ahead of the 1990 general elections. Closely related to this was the impending expiry of the ten-year limitation on the entrenched constitutional provisions (Tshuma 1997:124). These issues created the context that allowed Zanu-PF to



present itself as the party that would carry out unrestrained redistribution if re-elected. Nevertheless, although the state engaged in a successful formal effort to challenge the imposed rules after 1990, it did not succeed in using the instruments so created to redistribute land in the 1990s (Moyo 2002:22). This failure of the formal programme of redistribution, combined with a sharp decline in the economic conditions of the majority of the population and a growing loss of legitimacy for the ruling Zanu-PF, raised the levels of popular dissatisfaction to crisis proportions. This was reflected in another more significant wave of community-led land occupations that targeted large-scale commercial farms (Marongwe 2002:22–3), ‘food riots’ in 1993, 1995 and 1997 (Bond & Manyanya 2002:85) and Zanu-PF’s humiliating loss in the 2000 referendum on a new draft constitution as a result of mass-based opposition.

The political and economic crisis was made worse when Zanu-PF took a decision to buy off more than 50 000 war veterans after protest demonstrations in Harare in 1997. The World Bank immediately suspended balance of payments support. Popular resentment against war veterans also materialised when sales taxes were imposed to cover part of the costs (Bond & Manyanya 2002:39). In November 1997 a generalised collapse of the Zimbabwean economy began. The war veterans, appeased by the pay-out, were pushed directly into an alliance with Zanu-PF with the electorate’s rejection of the draft constitution. The war veterans had focused primarily on a clause allowing for compulsory acquisition of land, with payment only for improvements but not for the soil. The urban-based opposition had other interests in opposing the draft constitution, but their call for a ‘no’ vote was perceived (perhaps opportunistically) as being an opposition to more radical land reform (Marongwe 2002:43).

The government did not fully support the 1998 community-led land occupations, even using force to remove villagers from some farms (Marongwe 2002:25). Use of the war veterans as a paramilitary force to lead farm occupations allowed Zanu-PF to increase its anti-imperialist rhetoric, deflect attention from the economic crisis and absorb the independent land occupations into a state-directed process. It also shored up Zanu-PF’s rural support base, given the erosion of urban support in favour of the Movement for Democratic Change (MDC). The land occupations in 2000 were therefore a combination of a top-down state-driven populist initiative and a bottom-up locally-driven process. Local actors included peasants and the landless, Zanu-PF and state district and provincial structures, traditional leaders, and war veterans and their supporters (Moyo 2002:23; Marongwe 2002:48–51). Moyo (2002:23) argues that both Zanu-PF and the state followed behind the land occupations movement and tried to co-opt and contain it

within the framework of the evolving land acquisition programme.

SOUTH AFRICA

On coming to power, the ANC had the support of the vast majority of the population, who were prepared to be patient for the ANC to carry out its mandate of transformation of the state and economy. Most NGO workers and activists were committed ANC supporters, although there was a left flank both inside and outside the Congress alliance prepared to raise critical questions regarding the limits of political democracy without an overhaul of the state’s economic model. The hegemony of the Congress alliance ensured that popular participation in strategies for change, and even opposition to policy, were channelled into officially defined processes in the first years of national liberation.

The marginalisation of rural issues in relation to the well-articulated demands of the mobilised and powerful urban core of the liberation movement was reproduced after 1994, with the result that land reform was not given prominence. Initial responses were in line with the generally close relationship between organised civil society and the post-apartheid state. In 1994 the National Land Committee (NLC), the leading land NGO network, hosted a Community Land Conference attended by over 1 000 delegates from 350 rural communities (Lahiff & Schoones 2000:34). A Land Charter emerged from the conference but disappeared without a trace. Although the conference gave NGOs a better insight into the land demands of rural communities, these demands were partly a reflection of the framework being adopted by the NGOs themselves – one of ‘apolitical’ developmentalism. Over the next five years, NGOs adopted a lobbying approach to convince government to change policies in various ways. The main outcome was that government increasingly viewed NGOs as toothless and without any ability to mobilise a mass base.

In 1999 another attempt was made to influence government policy via a conference when the Rural Development Initiative (RDI) was formed. The RDI was broader than the land conference, focusing on rural development as a whole, with land and access to natural resources as components. At the conference itself, more than 600 delegates from communities and NGOs spent three glorious days in posh hotels and in the process finalised a Rural People’s Charter covering 12 focal areas (see Greenberg 2000). Once again, the charter sank without a trace.

None of the content or the organisational lessons of the land conference were carried forward into the RDI. While there was a process of community consultation at provincial level, and an attempt to set up provincial structures that would endure beyond the conference, the process remained top-down and driven by the



assumptions and interests of the NGOs (not least to secure funding). One of the primary failures of both conferences was the lack of post-conference follow up to develop a systematic strategy to ensure the demands were met. Provincial community delegates chosen at the RDI conference were left without any functions immediately following the conference. Funding had not been raised for any follow-up work, but this was partly the character of the NGO-driven process that tended to be most interested in short-term funding than in establishing a durable and independent movement of rural people. A related problem was the failure of the NGOs leading the process to relate to communities or groups actively involved in struggles around land or specific rural development issues like access to water, opposition to environmental degradation, or accountability in local government.

The lack of a meaningful response by organised civil society to the failure of transformation and delivery has been coupled with an increasing alienation of the mass of the population from the discourse of national liberation and 'politics' (defined as active membership of political organisations) as a whole. The result has been the emergence of sporadic grassroots resistance to the state – especially around evictions, urban service delivery and land. While these grassroots movements remain small and fragile, they potentially signify the revival of a broader social movement for genuine transformation beyond formal political democracy.

A recent spate of state-initiated forced removals of people who are in the way of the state's 'rational' plans – especially around the major urban centres of Cape Town (Tafelsig), Durban (Chatsworth) and Johannesburg (Alexandra and Tembelihle) to name a few – have sparked sporadic resistance. In addition, land occupations in urban and peri-urban areas are on the increase in response to the slow pace of housing delivery and lack of land for settlement. Cases hitting the headlines in recent years have been at Bredell farm near Kempton Park and at Khayelitsha outside Cape Town, both in 2001. The immediate response of the Department of Housing was to propose amendments to the Prevention of Illegal Eviction and Unlawful Occupation of Land Act of 1998 to criminalise instigators and participants involved in land occupations (Mvoko 2001).

A significant development has been the emergence of the Landless People's Movement (LPM) in 2001. Although heavily supported by the NLC, the formation of the LPM marks a qualitative shift in the relationship between independent grassroots activism and the NGOs. The LPM has its own elected leadership, and has embarked on independent and co-ordinated actions without the help of the NGOs. The movement is made up of a number of rural committees that were built in close collaboration with the land NGOs over the past decade.

Its core leadership comes from the small but militant labour tenant and farm worker committees in the east of the country who have reached the limits of their patience in the face of lack of land transfer and government intransigence. Restitution claimants who have been left too long in the government queue have joined them. There are also increasing links between these 'rural' groups and urban communities resisting eviction and forced relocation. This connection represents a real advance in the struggle of the landless.

The LPM made a very successful intervention at the World Summit on Sustainable Development (WSSD) in August 2002. Particular highlights included the mobilisation of thousands of landless people from all over the country to participate in a march that explicitly identified the global and national neo-liberal projects as the focus of attack. The mobilisation was also important from the point of view of forging urban and rural links, both within the landless movement – with the emergence of militant urban landless formations – and between the landless movement and other urban-based independent movements.

In the months leading up to the WSSD, civil society in South Africa was riven with divisions on how to approach the WSSD. Most of the NGOs chose to engage with the process, attempting to make inputs in the hope of swaying the direction of the conference and the agreements that would be reached there. However, a small group elected to stand apart from the official process and mobilise the grassroots in opposition to another mega-event where the issues of the day were to be discussed without meaningful participation. It is interesting to note that, of the NGOs that finally decided to organise outside of the UN framework, it was the rural networks – in particular the National Land Committee and the Rural Development Services Network (RDSN), with some support from environmental NGOs – that led the way.

As it turned out, the NGOs that sought to provide some input to the conference were entirely marginalised. The WSSD came across as an event where governments and private corporations sat together to plan how to work together to carry out an agenda that favoured a neo-liberal development approach. Although the NGOs were given a venue and resources to meet and make submissions, these were basically ignored when it came to the official meeting. This has been the experience of NGOs in UN meetings for some time, and the WSSD was different only in the sense that their inability to influence anything was far more obvious than in the past. If anything, the WSSD signified the explicit harnessing of national government agendas to that of multinational corporations – based on the agenda carried forward from the World Trade Organisation ministerial meeting held at Doha, Qatar, in November 2001 and the International Conference on Financing for Development in



Monterrey, Mexico, in March 2002. The WSSD was merely another in a line of events that sealed the pact between governments and big business.

As for civil society, those who elected to mobilise against the WSSD rather than within its fold emerged with greater power from the event. The LPM, which from the outset had recognised the incompatibility of working within the structures of the UN while expecting radical land reforms, was a significant force outside the official process. The movement held a week-long gathering with over 5 000 delegates from around the country, to plan its activities for the next years and to prepare for a march to oppose the WSSD.

In the lead-up to the WSSD, the movement was required to respond to a heightening of evictions and the use of state force against its membership. Farm workers and labour tenants marched in the rural town of Ermelo and were arrested by police for an 'illegal gathering'. In the week before the WSSD, residents of informal settlements around Johannesburg marched to the provincial premier's office in the centre of Johannesburg to demand a moratorium on evictions and to be included in development planning in their areas. Police forcibly dispersed them, arresting 72 and detaining them for three days in John Vorster Square (the notorious police station in Johannesburg where detainees were pushed to their deaths by the apartheid police in the 1970s and 1980s). A march was called by the Anti-Privatisation Forum (APF) – an urban social movement fighting electricity and water cut-offs and evictions – to march on the police station and demand the release of the imprisoned LPM members, as well as their own members also detained without trial at John Vorster Square. Heavily armed police used stun grenades to disperse the march, which included international guests in South Africa to attend the WSSD, just 200m after it had started.

The LPM members were released just before the start of the Week of the Landless. Subsequently, the courts threw the case out on the basis that the police were acting beyond their powers and the march had been a legal one. Charges were also dropped against those who had earlier protested in Ermelo. Despite the illegality of the police actions against these protests, and rifts within the movement itself (of which more below), the LPM was able to turn out a significant number of people on the big protest march from the township of Alexandra to Sandton on 31 August 2002. They were joined by a number of NGOs, the APF and other independent urban movements from around the country on a march fairly estimated at 20 000-strong. Until the day before the march, the LPM was planning to march separately on Sandton. However, on the eve of the march, leadership of the landless and that of other movements managed to agree to march together, despite a number of tensions between them. The movements agreed to march under

the banner of Social Movements United, with the LPM's slogan of 'Land! Food! Jobs!' as the main slogan. Each of the movements was to receive a platform to put forward its ideas.

Symbolically very important was the failure of the ruling ANC to attract more than 5 000 people to its own march held on the same day and also from Alexandra, one of its traditional strongholds. The ANC was joined by its alliance partners, Cosatu, the SACP as well as the South African National Civics Organisation (Sanco) – a shell of the once vibrant civics movement in South Africa. The aim of the ANC-led march was to highlight the need for a developmental outcome at the WSSD. As such, it was not at all in opposition to the WSSD, but was in favour of a particular agenda there, including support for the New Partnership for Africa's Development (Nepad). It was literally on the eve of the marches that the South African NGO Coalition (Sangoco) – the official NGO umbrella body in South Africa, which had been in an alliance with the Congress movement throughout the period leading up to the WSSD – decided to withdraw from the alliance. Internal divisions meant that some individuals threw their lot in with the independent movements, although Sangoco had no organised presence at either of the marches as a result. Some individual unionists also chose to align themselves with the independent movements, with the South African Municipal Workers' Union (Samwu) coming out as an organisation. Samwu, a Cosatu affiliate, has been one of the organisations at the forefront of struggling against privatisation in the past few years. A number of international organisations also aligned with the independent movements, suggesting that the image of the ANC government as a progressive leader of the global South is beginning to be exposed as inaccurate.

It is valuable to know this detail because it reveals a potential shift in the political terrain in South Africa on which the LPM operates. It shows the initial growth of an alternative to the dominant ideology, where under-resourced but focused grassroots organisations were able to attract far better resourced organisations to an alternative vision of the future. It may well be true that part of the reason for the failure of the ANC's own march was that it did not put much effort into mobilisation. However, this reveals precisely how the ANC and its alliance partners have chosen to emphasise negotiations between elites rather than popular pressure and mobilisation. In the process, they have lost ground to the independent movements.

NGOs, CLASS AND POPULAR MOVEMENTS

The independent mobilisations at the WSSD have been a milestone in exposing the bankruptcy of the development paradigm with its never-ending meetings, plans and resolutions that are seldom translated into anything



useful to anyone but development experts. The events reveal a sharpening divide between support for independent movements and 'developmentalism' harnessed in the employ of the neo-liberal project.

However, the very success of the mobilisation has exposed and hastened the growth of divisions in the movement and in the NGOs that have supported it so far. These divisions have not failed to penetrate the NLC itself, the strongest supporter of the LPM to date. There is a political basis to the divisions that has both influenced, and been influenced by, divisions within the LPM about which direction to take. On the one side stand those in favour of developmentalism with, at best, a mobilisation of the grassroots to access government programmes. This tendency is generally supported by NGOs, though within NGOs there are also differences of opinion. On the other hand, there are those who seek to encourage and support independent mobilisation outside the official framework of development.

Mobilisations to date have revealed the limitations of NGOs as organisational vehicles for supporting the emergence of independent social movements. First, NGOs tend to focus narrowly on specific projects planned long in advance and usually with limited active and ongoing participation of communities. When specific and urgent issues arise in communities, NGOs find it structurally difficult to adapt their plans and approaches to provide immediate support. Second, and perhaps partly as a result of the close association with the state, NGOs have failed to engage in rigorous intellectual work that situates their activities in a clearly defined political and social context. Most NGOs carry out projects with limited regard for the context and without a vision beyond welfarism/social work or vaguely defined 'development' (which ends up being both process and outcome without any defined goal) (Mngxitama 2002:1–2).

The potential revealed by the mobilisations around the WSSD should not be taken to suggest there is a clearly defined counter-hegemonic pole in existence. The ANC and the Congress movement have hegemony over civil society in South Africa, and are likely to do so for some time to come. To date, discussion in South Africa on civil society has tended to see civil society and the state as two separate spheres that contest with one another for power. Though it is mainly accepted that the state holds greater formal power in this relationship (because of its monopoly of state force, the resources at its disposal and so on), civil society is cast as the challenger for power. This debate is limited because it does not look at the social forces that cut across the divide of the state and civil society. Therefore, it would be a crude simplification to suggest that the ANC represents neo-liberalism while civil society represents its opposite – a progressive or radical alternative.

Civil society is constructed from a number of different social forces that do not necessarily have an explicit class base. This is important since a durable hegemonic (or counter-hegemonic) pole is necessarily organised around a particular class that is able to absorb popular democratic demands into its own project. For a class to become hegemonic, it must have the ability to direct popular energies and demands in a manner that allows it to consolidate its rule and ensures consent to its leadership among the populace. This requires an element of compromise on the part of the class seeking hegemony, because it has to adapt its own project to absorb popular demands. In South Africa, the working class both inside and outside the Congress movement failed to articulate an independent project in the struggle against apartheid. This meant that other classes were able to occupy the space created by the crisis of apartheid hegemony. Thus, restructuring, the reorganisation of society and transformation came to be formulated around the interests of traditional and nascent capital. These classes were able to hegemonise the failure of the working class to articulate its own programme.

The collapse of a hegemonic project results in the reorganisation of social forces and the emergence of new forces and conditions that creates a different basis for hegemony in the future. The post-apartheid hegemonic project – led by the ANC and representing the interests of big capital and emerging ('petit bourgeois') capital – is built on the basis of four key ideologies: developmentalism, national liberation, neo-liberalism and the rule of law. These ideological strands are like threads in a rope that support and strengthen one another rather than like pillars that stand alone. In the regional context, the power of South African hegemony means other, weaker, regional powers are drawn behind this dominant project.

Developmentalism is a globally dominant ideology emanating from the United States in the aftermath of the Second World War, in response to the political and social crisis of the time. It sought to absorb the potentially anti-systemic struggles against colonialism by offering a framework for decolonisation and economic reconstruction in the former colonies that did not threaten the interests of the US as the globally hegemonic force. In post-apartheid South Africa, developmentalism has served a similar purpose of absorbing the potentially threatening anti-systemic movements thrown up in the struggle against apartheid through channelling their energies into an apolitical fight against poverty. Although the historical roots of poverty are highlighted in this developmental approach, the continuation of economic and social systems that reproduce poverty and inequality in South Africa are buried. Developmentalism also extends markets for the production of social goods. Where the provision of the infrastructure and services are not profitable, it is either left to the state or passed to communities to maintain.



This shift from 'resistance to reconstruction' – as it was explicitly put in the period of transition to political democracy in South Africa – was only possible because of the strength of national liberation ideology on the populace. In the struggle against apartheid, the unity of the oppressed was a central organising principle. Given the racial basis of apartheid it is not surprising that the oppressed were defined in racial terms. However, this tended to obscure and relegate other divisions in society – in particular gender and class – to a subordinate status. The entirely dominant theoretical approach to national liberation saw the identity of race and nation. Once the nation had managed to defeat apartheid, the task was to undo the legacy of apartheid – the poverty and deliberate underdevelopment of the nation. By this logic, it remains essential in post-apartheid South Africa to retain the unity of the nation and a breaking of ranks of any sort is characterised as treachery. The conception of the 'nation' is presented as ideologically neutral, but disguises the interests of the hegemonic class forces. The historical underdevelopment of the nascent black middle classes is a key target for transformation. Big (white-owned) business has an interest in the deracialisation of capitalism, since the alternative is the delegitimisation, not only of the capitalist economic system, but also of the ANC as the political driver of reconstruction in post-apartheid South Africa.

Reconstruction has taken a particular form in South Africa. The failure of the working class in South Africa to impose (or even clearly articulate) its own agenda to resolve the crisis of apartheid-capitalism allowed other classes to regroup and assert their own agendas. The result was a gradual drift away from social democracy towards neo-liberalism. In the economic sphere, this was formalised in the Growth Employment and Redistribution (Gear) macro-economic strategy in 1996. The characteristics of this strategy resemble in all respects the structural adjustment programmes imposed by the IMF on African countries in the 1980s and 1990s. While the post-apartheid government was able to determine its own timeframes to some extent, it elected to implement aspects of structural adjustment at a rapid pace. The main elements of the strategy are a reorientation to export production; liberalisation of trade relations; repayment of the apartheid debt ahead of other priorities; and the creation and sustenance of a (multiracial) middle class that could ensure economic expansion through increased domestic consumption. The increasing marginalisation and poverty of the mass of the population has paralleled the expansion of conspicuous consumption by the middle and ruling classes. Developmentalism, unhitched from a transformative project, offers welfare and social containment to those further marginalised by reconstruction.

Neo-liberalism is not confined to the economic sphere. The project aims to reorganise society and the values in society to meet the requirements of the ruling classes

under new conditions. Rather than balking at the notion of civil society, the concept has been resurrected under neo-liberal ideology, which has injected its own content. In the advanced capitalist countries, civil society takes over the responsibility for providing services previously performed by the welfare state and abandoned by the neo-liberal state. In countries that never had a welfare system, civil society plugs the leaks and patches over the damage created by the most recent bout of restructuring. Not only does an autonomous practice of solidarity get converted into a social obligation, but social organisation outside the state is also drained of its political content (Zehle 2002).

The rule of law underpins the social and political passivity of the marginalised in the face of the effects of these ideologies. The law is a component of hegemony that ensures consent to be ruled. In the struggle against apartheid, the law was frequently disobeyed because it was unjust and unfair. However, people experienced the injustice of the law through racial lenses. The basis of law in property relations was obscured by the specific way that laws were constructed to discriminate on the basis of race. Therefore, post-apartheid laws are generally accepted as legitimate, since the most obvious elements of legal racial discrimination have been abolished. That race discrimination served the purpose (though not solely) of constructing a specific property regime in South Africa was not always clear. In South Africa, the law was built on the reality of land dispossession in the 19th century, and was designed to control the dispossessed population and drive them into working for white property owners. The law and its enforcement constructed these relations, only limited by the struggles that were waged around the extent to which these laws would be enforced. The law legitimises and regulates specific relationships between people and property, while preventing others. It governs what may or may not be done with or to property, but acknowledges and legitimises a particular pattern of property ownership.

In the struggle against apartheid, these links were occasionally made, and this constituted part of the crisis for the ruling classes. The ruling class won a very important ideological battle when it managed to separate property relations from political and economic transformation in the negotiated compromise. The recognition of status quo property rights without exception during the negotiations destroyed opportunities for radical redistribution in the constitutional democracy. From the point of view of the creation of alliances required to cement hegemony, the acceptance of the status quo of property ownership signified one concrete instance of the ANC and Congress movement electing to form alliances with property owners rather than with those without property.

These, then, are the key elements of the ideologies that are at the base of consent to be ruled in South Africa. A



counter-hegemonic pole of attraction will need to question and present alternatives to each of these areas – the developmental paradigm; the national interest; the neo-liberal reorganisation of society and the economy; and property rights and the rule of law. Alternatives have to reflect the demands and interests of the range of new social forces, but from a working class perspective.

The LPM is situated among the new forces that have emerged since 1994. It is a popular movement without a clearly defined class base, reflecting a growing demand for access to and ownership of land. The movement is a mix of different class and social forces, ranging from labour tenants and farm workers to chiefs and other local elites. The struggle over the direction of the LPM has already started to occur both internally and externally by an array of forces. At present, the working class does not appear to be prepared for a struggle for hegemony in the society as a whole. The key institutions of the class, the trade unions, are mainly locked in a defence of the interests of their members conceived of in narrow workplace terms. There are some indications of attempts by union leadership to extend alliances to other sectors of civil society, especially around HIV/Aids with the Treatment Action Campaign (TAC), and on the budget and various other policy initiatives with Sangoco and the South African Council of Churches (SACC). At the same time, they have expressed hostility towards the new movements that have taken a more overtly antagonistic stance towards the ANC and the state. It would not be accurate to suggest that civil society is under the influence of a dominant tendency that favours socialism or a radical path of change. Although such tendencies do exist within civil society, as a whole it is not hegemonic even within the realm of civil society. This state of affairs leaves the movement in an extremely vulnerable position and open to forces that would seek to bind it to the existing hegemonic project.

Because a radical counter-hegemony at present has limited power in the broader society, an alternative political and social vision to the one presented by the dominant classes has so far failed to emerge with any clarity in civil society generally, but also within the landless movement. The LPM is in the phase of a nascent popular movement, and the issues it raises and the struggles it is taking up are crucial to placing land more firmly on the popular agenda than it has been in movements past. But the movement can be taken in many different directions, depending on the ways that classes organise themselves within the movement, and the way external class forces absorb popular demands around land and integrate them into their own class projects.

STATE RESPONSES

As the government, the ANC has responded with a classic combination of repression and reform. Re-

pression took the form of open force as indicated in the lead-up to WSSD. The ANC has engaged in a two-pronged strategy, simultaneously trying to marginalise the independent movements and seeking to extend the Congress movement's hegemony by redefining the political playing field. An aspect of the hegemonic framework built by the ANC has been the portrayal of the Congress movement as the home of all progressive political activity. Any political formation outside the Congress alliance is characterised as counter-revolutionary – whether subjectively (as in the right wing) or objectively (as in the left wing). 'Objectively counter-revolutionary' has long been the term used for any left opposition that threatens to undermine nationalist unity in the alliance. The new independent movements will not find a voice in the official discourse until they are located within the Congress alliance. This is the aim of the ANC's attack on the left.

This ideological reorganisation has been accompanied by a flurry of statements and proposed interventions that aim to undermine the power of the critique against the failure of the land reform programme to date. Soon after the WSSD, the Department of Land Affairs (DLA) announced its intention to expropriate an abandoned farm in Limpopo province for redistribution. This is a clear indication of intent to appropriate one of the demands of the LPM. But the underlying class basis of the ANC's hegemonic project was revealed in the methodology to be adopted in the threatened expropriation. Instead of a straightforward expropriation, money owed by the landowner to the agriculture department was to be paid by DLA in return for the land. This allows the government to absorb the demands of the popular movement while simultaneously remaining within the market-led land reform model.

These and other statements by the state show there is an attempt to absorb the landless movement into the hegemonic field of the ruling bloc. But in the absence of a sustained grassroots campaign for land reform, even these efforts to absorb some elements of the demands of the movement are likely to peter out. A continued mobilisation around land redistribution and an end to evictions will force the ANC into compromises to retain its hegemony. How far they are willing and capable of travelling along this path without resorting to force depends on many factors. Not least of these factors is the extent to which the landless can remain mobilised, extend their movement beyond its current base, and connect with a working class counter-hegemonic project. Some of these are outside the control of the movement.

LESSONS FOR GRASSROOTS ORGANISATION

One of the most important lessons for building sustainable grassroots land organisations is the importance of not only capturing, but also holding onto,



space in which they and their occupation of land is recognised – however the latter may have come about. While formal land programmes and policies may shift in a radical direction fairly rapidly in response to events on the ground, these shifts require movements prepared to act ahead of policy as well as within it. Social movements have to lead the state rather than tail it. In most cases of successful land occupation around the world, the context and balance of forces has been such that the state has been compelled to recognise and even support occupations through *post hoc* legalisation and infrastructure and service delivery support.

Given the class character of states as they are currently constituted, sustained organisation will have to withstand opposition in various forms. The state, landowners and capital will variously dismiss, oppose, co-opt or physically attack independent movements – depending on the strength and the nature of the threat the latter pose. The questions are: what sort of support is required to build and maintain independent grassroots organisation, and how best can this support be provided? In particular, how can the radical middle class engage fully with emerging grassroots movements without imposing its own prejudices and assumptions on the movement?

The first issue is the broad political approach adopted by those wishing to support the movement of the landless. There needs to be an identification of interests between the radical intelligentsia and the landless, based on the imperative that the majority of the population – all who want and need it – should have secure access to land. The reduction of landholdings by current land owners, be they individuals or companies, is a prerequisite for the achievement of secure land access to all who need it. These themes of an equitable distribution of land and natural resources, and the necessary end of monopoly ownership, need to be carried forward wherever one is able to express an opinion.

A related political and organisational matter is the willingness of the radical middle class to work directly and consistently with the landless and their organisations, in order to learn together, make mistakes together and achieve victories together. This requires an approach to people's organisations that avoids the pitfalls of 'paternalist vanguardism' (attempting to own and control the movement on the assumption of superior learning and knowledge) and 'romantic idealism' (the view that 'the people are perfect' and an unwillingness to exert power) (see Mngxitama 2002). The middle classes have power, and they have resources and skills that, if wielded correctly, can make a critical contribution in building and supporting grassroots organisation. What defines the 'correct' use of power and resources is a practical and context-specific question that can only be determined in practice.

While NGOs may provide valuable assistance in nurturing and maintaining grassroots independent or-

ganisations, there are limits – especially in the context of growing NGO professionalism and the pressures towards individualism encouraged by neo-liberal ideology. An 'activist' (a voluntary, politically and morally-based) approach is preferable. It allows for individuals to remain outside circuits of institutional power and influence that tend to draw them towards adopting methods that are not driven and directed by the mass-based movements. While debates on methods and forms of support should be encouraged in the workplace as well as outside, the limits of support from inside developmental institutions needs to be understood and transcended.

CONCLUSION

The shift to neo-liberalism in southern Africa reflects the subordinate location of the region in the global economy. While liberation movements in the three countries discussed here came to power on an agenda of social and economic transformation in favour of the poor and marginalised, the adoption of neo-liberal policies has entrenched the power of large-scale capital. The migrant labour system and the economic structures inherited from colonial and apartheid days have not been dismantled. Indeed the policies adopted, whether under pressure or by choice, have reproduced these structures of inequality.

The landless movement in South Africa in particular has thrown up the possibility of connecting rural and urban grassroots movements for resources and services in South Africa in a real way. The definition of the landless to incorporate both rural and urban people has enabled the movement to forge creative links between the struggles of dispossessed rural communities to regain their land and the struggles of urban and peri-urban communities to remain on the land without fear of eviction. A step further will allow these groups, identified as landless, to forge alliances with other urban grassroots movements that have focused on access to water and electricity services, but are increasingly responding to issues of housing, evictions, and participation in planning. Opposition to evictions and forced removals, and access to housing, are the immediate points of overlap.

However, for the movements to present a more durable political challenge to the systems that continue to allow evictions and forced removals, they are going to require greater political clarity. This brings into focus the questions of class alignment and which classes are driving the movements. This does not necessarily mean formal organisational links with the trade unions, although it may be fruitful to pursue this path in specific circumstances. The class needs to act through the movements, and this is not something that can be willed. It is part of the structural conditions that have shaped the responses of the working class to oppression and exploitation in South Africa, that in turn have shaped the



responses of ruling elites. The existing conditions include a working class under pressure from job losses and the informalisation of large sections of the economy, greater insecurity of livelihoods, and the hegemony of the traditional elites under the leadership of the erstwhile national liberation movement. At present, the working class does not exhibit its own organic leadership and consents to be ruled by other classes. Inside the struggles of the landless, tendencies that seek to promote working class leadership of the movement should be supported and encouraged. This involves ideological clarification, but also methods of struggle.

Given the structural conditions existing in South Africa, it may be premature to expect leadership of the popular movements by the working class. However, the very existence of popular movements (even if fragmented and weak) suggests the potential to affect the structural conditions. Political action can contribute to the creation of different relations between social forces, and open up new opportunities for the reinvigoration of a grassroots movement for social justice led by the working class. This suggests a concrete struggle for political clarification through practice, and efforts to broaden organisation on a class basis. It is only then that the theoretical rights won in the struggle against apartheid will become real for the dispossessed and marginalised.

BIBLIOGRAPHY

- Binns, T. 1994. *Tropical Africa*. London: Routledge.
- Bond, P. 1998. *Uneven Zimbabwe: A study of finance, development and underdevelopment*. Trenton: Africa World Press.
- Bond, P. 2002. The New Partnership for Africa's Development: Social, economic and environmental contradictions. *Capitalism, Nature, Socialism*, June.
- Bond, P & Manyanya, M. 2002. *Zimbabwe's plunge: Exhausted nationalism, neoliberalism and the search for social justice*. Pietermaritzburg: University of Natal Press/Merlin Press.
- Davies, R. 1993. South Africa and Mozambique: Past and future, in *A post-apartheid southern Africa?* edited by N Thede & P Beaudet. London: Macmillan.
- DLA (Department of Land Affairs South Africa). 2002. Restitution statistics as at 31 January 2002. (http://land.pwv.gov.za/restitution/updated_stats.html)
- Dladla, S & Munnik, V. 2000. 20 years of people's land reform. *Land & Rural Digest*, 13:6–12.
- Greenberg, S. 2000. Building a people-driven rural development strategy: Lessons from the RDI, in *At the crossroads: Land and agrarian reform in South Africa into the 21st century*, edited by Ben Cousins. Cape Town/Johannesburg: Programme for Land and Agrarian Studies, University of the Western Cape/National Land Committee:361–82.
- Greenberg, S. 2003. Land reform and transition in South Africa. *Transformation*, 52:42–67.
- Hart, T. 1987. *South Africa: Housing policy and modernizing apartheid, 1948 to 1986*. Unpublished document. Johannesburg: Human Sciences Research Council.
- Lahiff, E. 2000. *Background paper: Land issues in Mozambique*. Unpublished document, 1 September 2000. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape.
- Lahiff, E & Scoones, I. 2000. *Sustainable Livelihoods in Southern Africa (SLSA): Institutions, governance and policy processes*. Unpublished document, draft 1.02. (SLSA working paper; no. 2; Land theme paper.)
- Marongwe, N. 2002. *Conflicts over land and other natural resources in Zimbabwe*. Harare: ZERO (Zimbabwe Environmental Research Organization) Regional Environmental Organization.
- Mngxitama, A. 2002. *Supporting people's organisations: The dangers of paternalist vanguardism and romantic idealism*. Unpublished document, March 2002.
- Moyo, S. 2002. *Land reform and transition in Zimbabwe*. Draft paper presented to Ford Foundation Environment and Development Affinity Group conference, Cape Town, 21 January 2002.
- Mvoko, V. 2001. Jail proposed for land grabbers. *Business Day*, 11 September:12.
- NDA (National Department of Agriculture, South Africa). 2001. *The Strategic Plan for South African Agriculture*. (www.nda.agric.za/Sectorplan/sectorplan.htm)
- Negrao, J. 2002. *The land campaign in Mozambique*. Unpublished document.
- O'Laughlin, B. 1996. Through a divided glass: Dualism, class and the agrarian question in Mozambique. *Journal of Peasant Studies*, 23(4):1–39.
- Radebe, S. 2001. Slums threaten state's delivery record. *Business Day*, 11 December:2.
- Roussos, P. 1988. *Zimbabwe: An introduction to the economics of transformation*. Harare: Baobab Books.
- Thede, N. 1993. Zimbabwe: From structural transformation to structural adjustment, in *A post-apartheid southern Africa?* edited by N Thede & P Beaudet. London: Macmillan.
- Thede, N & Beaudet, P (eds). 1993. *A post-apartheid southern Africa?* London: Macmillan.
- Tshuma, L. 1997. *A matter of (in)justice: Law, state and the agrarian question in Zimbabwe*. Harare: Southern Africa Political Economy Series (SAPES) Trust.
- Wuyts, M. 2001. *The agrarian question in Mozambique's transition and reconstruction*. Tokyo: United Nations University, World Institute for Development Economics Research. (Discussion paper no. 2001/14.)
- Zehle, S. 2002. Beyond neoliberalism: Civil society as a transnational project. *Sand in the Wheels*, 141, 21 August. <http://attac.org/indexen/>



NGO ADVOCACY FOR LAND POLICY REFORMS IN KENYA, UGANDA AND TANZANIA: LESSONS AND PROSPECTS

MICHAEL OCHIENG ODHIAMBO

INTRODUCTION

This paper is a reflection on the experiences of civil society in advocating for land policy reforms in east Africa. It looks at the process and substance of land policy advocacy; interrogates the ideological underpinnings and struggles within the process; considers the opportunities and constraints on lobbying and advocacy around land issues; and identifies lessons to be learned from the experience.

Although Kenya, Uganda and Tanzania have distinct challenges with regard to land and resource rights, this discussion takes a regional approach. This is because, for the most part, recent policy initiatives in the area of land and natural resource management in these countries are being developed in response to imperatives at the global level. The challenges faced by the three countries in the face of economic liberalisation and globalisation are the same, as are the demands made upon them by global frameworks of multilateral and bilateral donors. The constraints they face in addressing these challenges and engaging these frameworks are also similar (Okoth-Ogendo 1999, 2000, 2001). One of the factors behind the revival of the East African Community (EAC) has been the desire of these countries to consolidate their efforts in order to better manage these challenges (EAC 1999, 2001)

At the level of government, the need for a regional approach to these issues within the framework of the EAC has been acknowledged. Similarly, the private sector has organised itself within the framework of the East African Business Council (EABC) to concretely explore opportunities for a regional approach. However, the same cannot be said of civil society. Although civil society is mentioned in the Treaty for East African Cooperation, its role has not been specified in concrete terms. Moreover, unlike the private sector, no institutional framework exists for the participation of civil society in the processes of the EAC. There is thus an

urgent need to analyse the opportunities and constraints for NGO collaboration across the region in land policy advocacy and lobbying.

The second section sets out the context in east Africa for land policy advocacy and lobbying. I argue that the three countries share a common heritage of colonialism, which was driven in large measure by an interest in land and natural resources. The resulting imposition of colonial property laws and systems interfered with traditional norms and frameworks for the management of land and other natural resources. The result was a dualistic system that undermined traditional frameworks for sustainable resource management.

The third section identifies the major issues for advocacy and lobbying across the region. While there are specific issues peculiar to each country, the three countries have many issues in common. Moreover, as the EAC takes form, with its emphasis on opening up the region to investors as a single market, the region is increasingly having to face and address common challenges.

I then discuss the experiences of NGOs in the three countries with regard to land policy and advocacy and lobbying in section four. It is acknowledged that the experience of civil society in Uganda has been the most outstanding in the region. The institutional framework of the Uganda Land Alliance (ULA) offers a model upon which Tanzania and Kenya could build. The recent regional initiative of LandNet East Africa is also examined and its prospects considered.

Section five identifies and analyses the lessons learned from the experience of land policy advocacy and lobbying in east Africa. Effective civil society lobbying and advocacy must be informed by shared vision and ideological commitment developed through a process of consultation. In this connection, I recognise a need for capacity building on issues of land policy development, analysis and administration. This is because civil society



organisations (CSOs) can only lobby and advocate effectively if they are able to propose viable policy and legal options grounded in research and analysis of the concrete realities of the local farmers and herders.

The last section derives conclusions from the discussion and suggests a way forward. It is evident that much progress has been made at the national level but that a lot of the lobbying and advocacy work still has to be done at the sub-regional level. However, much more still needs to be done in linking the local struggles at the national level in the three countries, to the wider regional picture and framework in East Africa and pan-Africa wide. Initiatives like LandNet and the Pan African Programme on Land and Resource Rights (PAPLRR) need to be supported and strengthened for greater effectiveness.

CONTEXT

Land and natural resources occupy an important place in the political history, social organisation and economics of the three east African countries. All three were colonised because of their natural resources, principally land and minerals. Over the years, the politics of land has pervaded the discourse at the national level in each of the countries. The main components of the national economies of these countries are based on land/agriculture, mining, tourism, fisheries and forestry.

A large proportion of the population of these countries lives in the rural areas and derives their livelihood directly from land. Subsistence farming and pastoralism constitute a substantial component of the livelihoods of the local people. Even the quest for industrialisation in these countries is based in large measure on land, the greatest potential as an entry point in this regard being industries for adding value to primary commodities. These states recognise the importance of productive land to livelihoods and economies, so policy and legal stipulations for the sustainable management of land and natural resources are constantly being reviewed.

The common colonial heritage of the region has ensured that the existing policy, legal and institutional framework for the management of land and natural resources is an interface between colonial jurisprudence and political economy on the one hand, and traditional norms, systems and institutions of natural resources governance on the other.

At the local level, population increase has resulted in greater pressure on land, while concern for sustainable land-use practices has heightened with the rise in environmental awareness. At the global level, the pressures for liberalisation of economies have translated into a push for privatisation of the management of land and natural resources, specifically with a view to putting land in the market place.

Uganda was the first of the three countries to undertake a comprehensive review of the framework for the

management of land, leading to the enactment of the Land Act in 1998. Tanzania followed with the enactment of the Land Act and the Village Land Act in 1999. Kenya was, for a long time, the only country in the region that had in place an elaborate institutional and legal framework for the management of land. However, over the years it has become clear that this framework failed to ensure equitable access to land. In 1999 the Presidential Commission of Inquiry into Land Law Systems was appointed to review the legal framework and to put together a national land policy. This initiative, coupled with the ongoing process of reviewing the constitution, has opened up possibilities for a fresh look at the policy, legal and institutional framework for managing land and natural resources.

Even in Uganda and Tanzania where new land legislation has been enacted, the debate on the management of land and natural resources continues. The implementation of the new land laws in the two countries, including funding the institutions created under these laws, have provided their own challenges. Uganda is presently developing a new land policy.

The pressure for reform of land policy is closely linked to the democratisation process, which offers a good opportunity for civil society to play an important role in these reforms. The demand by citizens for a greater say in decisions affecting their livelihoods has implications for control of land. This provides an opening for CSOs to affect both the process and direction of change.

ISSUES FOR POLICY ADVOCACY

The issues for land policy advocacy in east Africa can, for ease of analysis, be divided into two major categories. In the first category are issues that affect all the three countries jointly. These are mainly issues arising from global imperatives to which the three countries, like other countries in the developing world, are subject. Others are issues that emanate from the common colonial history of the three countries. A number of these issues are listed in Box 1.

BOX 1: ISSUES FOR LAND POLICY ADVOCACY IN EAST AFRICA

- Securing land tenure for land-based communities.
- Land use for poverty alleviation.
- Customary land use systems and institutions.
- The state and the administration of land, especially public land.
- Land markets and foreign investors.
- Land use, planning and environmental sustainability.
- Land administration and management.
- Democratisation of the management of land.
- Conflict management.

Source: Odhiambo 1999



The issues may manifest themselves differently in each country, depending on a variety of circumstances, but they are pertinent to all the three countries. In particular, the governance structure in each country determines the level of NGO involvement with these issues, and the impact of such involvement. Uganda has had the most vibrant NGO involvement in issues of land policy. In Tanzania, NGO involvement peaked during the run-up to the enactment of the Land Act and the Village Land Act, but tapered off as a result of differing perceptions of how effective the exercise was.

In Kenya, individual NGOs have been actively engaged in land issues for a long time, but only in the last four years has an organised national framework emerged – the Kenya Land Alliance (KLA). Because Kenya went through a land reform process in the 1950s and has had a comprehensive statute for the administration of land since independence, the major issues for land policy advocacy relate to the implementation of that framework. After more than three decades of operating under the existing regime of land law, it has become evident that the system has failed to secure the rights of land users, especially the poor who depend on land for their livelihoods. What has emerged is a bloated bureaucracy that is acknowledged to be among the most corrupt in the government. Major issues for advocacy in Kenya are listed in Box 2.

BOX 2: ISSUES FOR LAND POLICY ADVOCACY IN KENYA

- Security of tenure for customary land holders.
- Linking land access to food security and poverty alleviation.
- The grabbing of public land.
- Informal settlements and labour tenants (squatters).
- Democratisation of the management of land.
- Historical injustices.
- Landlessness and inequitable land distribution.
- Land rights of married women and widows.
- Sustainable land use and environment management.
- Hoarding of land by the political and commercial elite.
- Inefficiency of land registries and registration systems.
- The constitutional basis of land administration.
- The need for a national land policy.

Source: Republic of Kenya 2000

In Tanzania, apart from the colonial heritage, two factors that have defined the issues for land policy advocacy are *Ujamaa* and villagisation.¹ With the advent of liberalisation, these issues have been exacerbated. The main problem, as was confirmed by the Presidential Commission of Inquiry into Land Matters, is one of tenure, especially for the smallholder farmer and pa-

storalist. The commission defined the problem as one of governance, arising from the need for land users to have control and say over the management of land. Box 3 sets out the issues for land policy advocacy in Tanzania.

BOX 3: ISSUES FOR LAND POLICY ADVOCACY IN TANZANIA

- Governance of land, including issues of title and the centralised and bureaucratic framework for the management of land.
- Land markets, alienation of land to foreign investors and liberalisation.
- The relationship between village lands and national lands.
- Land accumulation and distribution.
- Land administration: survey, adjudication and registration.
- Customary land rights under the new land laws.
- The land rights of married women and widows.
- Urban expansion and issues of peri-urban land.
- Protected areas and the rights of indigenous peoples.
- Sustainable land-use and environment management.

Source: Odhiambo 1999

In Uganda, the processes leading to the passing of the Land Act of 1998 helped define the major land issues for the country. Although major problems relating to implementation emerged after the legislation was enacted, even these have helped define the agenda for government and NGOs. Efforts to draft a national land policy have come about as a direct consequence of the difficulties experienced in implementing a comprehensive land law without a national policy framework to lead the process. Box 4 sets out the major issues for land policy advocacy in Uganda.

BOX 4: ISSUES FOR LAND POLICY ADVOCACY IN UGANDA

- The need for a national land policy and environment policy.
- Women's land and property rights.
- Institutions and infrastructure for the implementation of the Land Act.
- The impact of decentralisation on national imperatives over the management and administration of land.
- Customary land tenure and its operationalisation under the Land Act.
- Implementing title to land among the citizens of Uganda.
- The efficacy of the multiple tenure systems recognised by the Constitution and the Land Act.
- The need for a land use policy.
- Conflict management.

Source: Odhiambo 1999



NGO LAND ADVOCACY

It can be asserted that NGO advocacy for land rights predates the post-colonial state in east Africa. CSOs existed in the three countries, in the form of local associations, before the colonial state. No doubt they were not as organised as they are today, but communities have organised themselves in pursuit of common interests for as long as they have been in existence. It was CSOs in the form of trade unions, farmers' and herders' associations, and neighbourhood organisations that spearheaded the mobilisation of African communities to agitate for political independence, long before Africans were allowed to form political parties. Even when political parties were formed in the early 1950s, they relied heavily on CSOs for mobilisation. At least in this sense, governments and states can be said to be creations of civil society formations.

CSOs have an important role to play in policy formulation, implementation, monitoring and evaluation. This is particularly true in the area of land policy, which has a bearing on the livelihoods of every individual in society. The complexity of the modern global political economy means that it can no longer be assumed that east African governments will always serve the interests of their citizens or even the majority of them. Instead, governments have to make choices between different ideas, ideals and priorities from various sectors of the citizenry.

In this competition, it is the best organised interests that are capable of mobilising public opinion and political processes that triumph. Influencing political processes in favour of specific interests has thus become a major engagement in modern governance, resulting in the emergence of civil society groupings that address specific interests, including land rights (Kanji et al. no date).

CSOs mobilise members of the public to participate effectively in processes of policy formulation and review, ensuring that the diverse interests within society are properly represented in these processes. They ensure that the policy formulation process is undertaken in such a way as to facilitate the meaningful participation of the public in making inputs to the process. In this way, the involvement of CSOs in policy processes ensures public ownership and identification with the outcome. With respect to land and natural resource policy, this is an important means of empowering the public for management of the resources.

While in the past, governments were the only real sources of material and human resources, in recent years CSOs have become alternative sources of resources. They are thus in a position to make meaningful intellectual inputs into policy processes in which they become involved. Failure to involve CSOs may in fact deny the countries of valuable contributions.

At the end of the policy making process, CSOs are able to follow up the output to ensure that it represents the will of the public as expressed in the formulation process. Once the output of the policy process is ready, these organisations educate the public on the new policy and how they can benefit from it. Thereafter they monitor implementation and enforcement and ensure that the public receives the benefits promised.

While all these processes take place at the national level, there is a lot to be gained from networking between national advocacy groups at the sub-regional and regional levels. Frameworks for such networking, where they exist, allow advocacy groups in different countries to learn from the experiences of other countries in tackling the same issues. Moreover, as countries integrate, these frameworks become important means for engaging with regional policy processes (MWENGO 1999a; 1999b).

LANDNET EAST AFRICA

Networking on land policy as a specific area of concern is a new phenomenon in east Africa. While networks on different sectoral resources have existed across the region for a long time, the idea of a sub-regional network on land policy can be traced to the formation of LandNet East Africa in 2001. Although still in its infancy, the network, when fully operational, aims to fill the existing gap with respect to a regional framework for civil society engagement between organisation and with governments on land policy.

The origin of LandNet East Africa can be traced to the Land Tenure Conference organised by the UK Department for International Development (DFID) in Sunningdale, London, in February 1999. The conference identified the need for an African land tenure network to provide a framework for networking around land issues. An east African sub-regional land tenure networking study commissioned by DFID at the end of the conference found that while the need for a networking framework was appreciated, there was a general scepticism about the practical utility and feasibility of an Africa-wide network. More enthusiasm was expressed for networking at the sub-regional level to share experiences across countries of the sub-region, and at the national level. Most importantly, concern was expressed about the ownership of the network, and how this could be made manifestly African, both in substantive and process terms.

Similar consultancies were conducted in west and southern Africa, with similar findings. A regional planning workshop was subsequently held in Addis Ababa, Ethiopia, in January 2000, bringing together delegates from all over sub-Saharan Africa. The regional planning workshop endorsed the idea of a sub-regional approach to the implementation of networking and



called for sub-regional planning processes to be organised in east Africa, west Africa, southern Africa and the Horn of Africa.

A sub-regional planning workshop for east Africa was held in Nairobi, Kenya, in August 2000, bringing together delegates from Kenya, Uganda, Tanzania and Rwanda. The planning workshop provided an opportunity for potential participants in the network and other stakeholders to consider, endorse and internalise the idea of the network. The participants defined the issues and activities for the network and agreed on the structure, membership, management and infrastructure needed to operationalise it.

Following the August 2000 planning workshop, an interim co-ordinator and a steering committee were constituted and mandated to oversee the institutionalisation of LandNet East Africa as a framework for networking on land issues within the east African region. An inaugural meeting was held in Naivasha, Kenya in August 2001. The network was formally launched, a secretariat and steering committee constituted, and a workplan agreed.

Under the agreed workplan, the co-ordinator and secretariat are required to develop a strategy for the network to function effectively within the region. At a meeting organised by the World Bank and other donors in Kampala, Uganda, a number of donors expressed the desire to work with the network, but little has been forthcoming in terms of real support. It is, however, envisaged that the network, once it takes off in earnest, will provide a useful framework for CSOs in the sub-region to influence processes relating to land administration and management.

LandNet initiated a regional programme on pastoral land rights with the support of the sub-regional office for the United Nations Food and Agriculture Organization (FAO) in eastern and southern Africa, which saw a review of the policy, legal and institutional framework for managing pastoral land conducted in Kenya, followed by a national stakeholder workshop. Similar reviews and workshops were planned for Uganda and Tanzania, leading to a regional workshop on the issue, but these never took place.

While interest in the work of LandNet is still strong in the sub-region, the restructuring of DFID in the last couple of years, especially with regard to work on land policy, affected the impetus for the work of LandNet. (At that time, DFID was LandNet's primary source of support.) The secretariat for the network transferred from the Resource Conflict Institute (RECONCILE) in Kenya to Uganda Land Alliance.

A regional initiative that has supplemented and scaled up the work that LandNet East Africa was doing is

PAPLRR. This regional initiative is organised at the pan-African level and covers eastern, southern, western and northern Africa. Funded by the Ford Foundation, the programme seeks to provide a forum and mechanism for Africans to think through and design their own policy and institutional solutions to problems pertaining to land and natural resources. It is working with African CSOs to build capacity for effective engagement with regional and global policy processes that have a bearing on land and natural resources.

KENYA LAND ALLIANCE

Until 1999, advocacy on land issues in Kenya was done by individual CSOs, each with its own sectoral focus. Groups like the Greenbelt Movement, the East African Wildlife Society, Mazingira Institute and the Kenya Human Rights Commission have undertaken various useful initiatives, but these have not translated into a long-term programme of advocacy for meaningful change. While these individual initiatives made a commendable contribution to the land policy discourse in the country, they were sporadic and not focused on any particular programme. As such, they did not last long and had little impact on actual policy formulation.

In order to address this anomaly, a consultation was held in Nairobi in May 1999, with funding support from Oxfam. The consultation provided an opportunity for CSOs involved in land policy issues, from different backgrounds – research, advocacy and activism – to conduct a situational analysis of the status of land policy advocacy in Kenya, and design a way forward. The consultation meeting concluded that the country lacked an organised framework for effective advocacy, change and reform of the policy and legal framework for the management of land and natural resources. It recommended the establishment of an umbrella body to coalesce the activities of CSOs to push for an all-embracing, participatory and thoroughgoing land policy and law reform process. Thus was born the Kenya Land Alliance, formed on the model of the Uganda Land Alliance.

When KLA was mooted, one of its major envisaged objectives was to mobilise the government and people of Kenya for a comprehensive land policy review process. Given the hostility and sensitivity of the government of the time to discussions about land, and the highly politicised nature of the land question in Kenya, persuading the government to initiate a process of reform of land policy and law was expected to be difficult. Surprisingly, before the end of 1999, the government announced the appointment of a Presidential Commission of Inquiry into Land Law Systems. The commission's terms of reference covered the entire gamut of land policy concerns, many of which KLA had proposed as areas for advocacy activities.



After some hesitation, KLA focused its work around facilitation of community engagement with the commission. KLA monitored the sittings and activities of the commission and mobilised the public to raise specific issues. In June 2002, the alliance hosted a national conference on the land question, again with the objective of focusing the attention of the presidential commission and the Constitution of Kenya Review Commission on issues of land.

The effectiveness and impact of KLA can be judged from the fact that it is now recognised by government as a key stakeholder in land policy formulation processes. Following the change of government in December 2002, the new government launched a presidential commission to investigate illegally acquired public lands and appointed KLA's co-ordinator as a member. A national land policy formulation process is currently under way, in which KLA is working closely with the Ministry of Lands and Settlement. That this process is under way is partly on account of the work of the alliance, as it has consistently insisted that the solutions to the land problems bedevilling the country can only be addressed comprehensively through the formulation of a national land policy.

UGANDA LAND ALLIANCE

The Uganda Land Alliance emerged from the discussions and processes of engagement that preceded the enactment of the Land Act. The Constitution of Uganda, passed in 1995, had provided that within two years of its first sitting, Parliament would enact a comprehensive land law.

ULA started off in 1995 as an informal group of interested individuals who met in the offices of its different members. In time, however, it grew into an important framework for civil society engagement with government on the land issue. It was registered in May 1999 as an umbrella NGO with a membership of 39 NGOs and two individuals.

The founding of ULA was informed by a concern over the implications of land policy on the poor and disadvantaged. It set out to ensure that land policies and laws are reviewed to address the land rights of the poor and to protect access to land for vulnerable and disadvantaged groups and individuals. During its existence, ULA has evolved into a major player on land issues in Uganda. Its model is being used in other countries in the region. It has cultivated such good relations with the government that it now sits in major policy formulation and implementation committees.

Bazaara (2000) has studied the contribution of ULA to the process of formulating the Uganda Land Act, and identified six areas of focus in its campaigns on the Land Act:

1. It attacked the principles upon which the different versions of the Land Bill were based and sought to demonstrate that these were detrimental to the poor.
2. It critiqued the institutional framework for controlling land and mediating the land market.
3. It sought to demonstrate the need to protect the rights of wives and children, suggesting that land should be co-owned by the spouses and proposing that the consent of wives and children be a requirement for sales of land.
4. It advocated that communities should obtain titles to their land.
5. It advocated for, and succeeded in getting, the number of years during which non-citizens could hold land reduced from 999 to 99 years.
6. It pressurised members of Parliament to ensure that certificates of occupancy carried the same weight as existing land titles.

Although fears have been expressed in certain circles that ULA risks being co-opted by government, there is no dispute that it has played an important role in rallying CSOs around the land issue. In recent times, ULA has started to redefine its role and place in Uganda to ensure that it remains relevant and useful to its constituency. Issues of sustainability have had to be addressed. It has also taken a more active part in networking at the sub-regional and regional levels, thereby spreading its influence and expanding learning base.

TANZANIA

The National Land Forum (NALAF) was born out of the efforts of NGOs to engage the process of land law formulation in Tanzania. The Presidential Commission of Inquiry into Land Matters identified the problems of land management in Tanzania, singling out governance problems and the absence of a policy and legislative framework as key areas for intervention. The commission was funded from the public budget, and did a thorough job. But once the commission's report had been presented to the President, it became clear that government was not keen to implement the recommendations. Indeed, it transpired that at the same time as the commission had been doing its work, a parallel process was going on within the Ministry of Lands, headed by a British consultant paid by DFID (Shivji 1998). It was this parallel process that gave rise to the National Land Policy, which became the basis of the new Land Act.

NALAF was driven by a commitment to see the recommendations of the commission acted upon. The intention of government to sidestep the recommendations of its own commission became clear when the Land Bill was published. A number of gender, media and pastoral NGOs came together to campaign against the proposed Land Act and to promote a national debate on land. They issued a declaration entitled *Azimio la Uhat*² setting out the issues that needed to be addressed by the government in the framework of new legislation, and



offering a comprehensive critique of the Land Bill. They resolved to form the National Land Forum to be known by its Kiswahili acronym UHAI³ and elected a National Land Committee to co-ordinate their activities. The committee would be known by its Kiswahili acronym KATAA (*Kamati ya Taija ya Ardhi*).⁴

Although NALAF managed to raise public awareness over pertinent issues of the land law, in the end, its efforts were defeated as differences emerged among members of the coalition on what its priorities should be. Issa Shivji, who was a central figure in the coalition, has blamed donors for the collapse of the coalition. His views on this point merit quoting in full:

In the case of NALAF, foreign funding bodies – mostly associated with their governments or IFIs [international financial institutions] – had invested in the process of land legislation with their own ideological agendas. They could not therefore see the process taken over by independent minded civil society with an alternative social vision. At the same time they needed a modicum of legitimacy by involving the NGOs... Hence some of the funding agencies went out of their way to make offers of funds and set timetables within which they ought to be spent. A number of us therefore got busy writing proposals and organising seminars, workshops, printing tee-shirts, etc. (and duplicating efforts) to justify getting and spending funds. The spending spree had to be conspicuous so that our erstwhile funding 'partners'... could send home glorious reports of their 'achievements' (Shivji 1999).

Whichever way one looks at it, the collapse of NALAF was a real shame. It pushed back the advocacy for land in Tanzania many years, and its impact is still felt today. A Gender Land Task Force was created by gender organisations after the collapse of the forum, to carry on the debate from a gender perspective. The organisations that were involved in NALAF have continued with land advocacy, and they continue to reach out for each other, with the hope that a national framework for advocacy over land issues will once again emerge.

LESSONS LEARNED

The experience of NGOs in east Africa shows that advocacy at national or sub-regional levels is best undertaken within a networking framework. Individual NGOs, however powerful and well-endowed, cannot have the same impact on governments and other policy bodies as networks can. Operating within a networking framework allows CSOs to take advantage of numbers, while pooling resources, both human and material, and sharing expertise and experiences. As a democratic process, policy making is a game of numbers, and networks give NGOs the leverage they need to deal with governments.

Yet, therein lies the tragedy for NGOs interested in advocacy. Networks are difficult to operate and difficult to fund. Member NGOs are themselves starved for

funding, with no funding bases of their own. They have to raise funds through writing proposals for their own programmes and projects. They are thus not likely to have funds to spare for networks. Moreover, as no organisation exists solely for the purpose of networking, NGOs consider their involvement in networks as creating additional responsibilities that invariably take second place to their own programmes. Donors, too, are wary of networks. Few donors will fund networking as a distinct activity, as it is not considered an end in itself.

Thus the first great challenge for advocacy NGOs is the funding of networks which are so essential for effectiveness. The difficulties associated with accessing funding may compromise the independence of the NGOs as they position themselves to be eligible for donor funding. Discussing this aspect of the matter with respect to the Uganda Land Alliance, Bazaara (2000) makes an observation which applies across the board:

The dependence on donors equally diminishes its capacity to operate. In turn the money from donors may serve to undermine the ability of membership to address real issues. Membership of ULA is mainly institutional organisations which have no direct core interest. Some may be in ULA as public relations. Some of these organisations do not have land as part of their in-house activities. Donor money may actually cause internal strife and conflicts that will undermine ULA.

Land remains a very sensitive issue in east Africa. Even where donor funds are available for work on land policy, questions arise about the real intentions of the donors. This is especially true of the bilateral donors. For instance, in recent years, DFID has become a major player in land policy advocacy in east Africa, funding not only the Kenya Land Alliance but also the Uganda Land Alliance, and even LandNet East Africa. What is interesting about the role of DFID in this regard is that it is also providing support to the governments to address the land question in each of these countries. It has provided support to the Presidential Commission of Inquiry in Kenya, the Land Act Implementation Unit in Uganda, and the regulation-making process in Tanzania. None of this is likely to have raised any questions were it not for the fact that, until a few years ago, DFID would not provide support for any activity touching on land, arguing that it was too politically sensitive. The question in the minds of most observers is: Why the change of heart?

This is not an idle question, especially in the light of pressures from Western-based multinational corporations for the liberalisation of the land market in east Africa. That these pressures may be influencing the agenda of bilateral donors in their support for land policy advocacy cannot be ruled out. That the World Bank has also joined the bandwagon in working on land policy just serves to strengthen these fears.



The diversity of national NGOs in their focus, interests, priorities and approaches is another major challenge in this area. This produces substantial difficulty in creating a common vision, a problem that becomes compounded in a regional network like LandNet. The experience of the National Land Forum in 1999 when the Land Act and the Village Land Act were passed by the Tanzanian Parliament demonstrates this problem. While gender NGOs were happy and celebrated the new legislation as marking an important threshold for gender equality, pastoral and other NGOs in NALAF saw little cause for celebration. These differences saw to the collapse of the forum.

The national political governance environment has much to do with the effectiveness of NGO advocacy on land issues. The impact of ULA is due, at least in part, to the specific circumstances of Uganda in the middle of the 1990s when, emerging from long years of repression, the government of the National Resistance Movement brought a breath of fresh air to the political arena. The national debate on the new Constitution and subsequently on the new land law was characterised by an air of openness and receptiveness to ideas that may only be explained by the specific circumstances of the moment.

Similarly, it took the change of government in Kenya for the Kenya Land Alliance to be acknowledged by the government as a legitimate player in the policy debate. During the rule of the Kenya African National Union (KANU) led by Daniel arap Moi, individual government officials may have been receptive to ideas from CSOs, but the official government position was one of suspicion and hostility towards NGOs. In spite of the rhetoric about participatory processes of policy-making in the wake of the Poverty Reduction Strategy Paper (PRSP), the government never got to accept that NGOs had a legitimate role in policy processes. In Tanzania, there is space for NGO engagement in policy processing, but the extent to which NGO positions affect the final policy product depends in part on the level of government interest in the issue, as the land policy debate has amply demonstrated.

CONCLUSION

This paper has traced NGO experience of land policy advocacy in Kenya, Uganda and Tanzania in recent years, and identified lessons learned and challenges faced. In each of the countries discussed, a networking framework has emerged to coalesce CSO initiatives for advocacy over land issues. At the sub-regional and regional levels, LandNet East Africa and PAMPLRR have potential to offer new forums for sharing experiences and expertise.

A number of challenges have been identified both at the regional level and at the national level. In particular, it has been observed that problems of funding are a major impediment to land policy networks. Where they obtain funding from donors, especially bilateral donors, they

have to contend with agendas that may not necessarily concur with local interests. The risk that the financial support may be aimed at achieving objectives other than those that inform the advocacy processes is quite real.

It is nevertheless clear that CSOs need to be intimately involved with land policy processes if they are to make their input into securing the livelihoods of the rural poor as Shivji (1999) observes:

...there is now a need to think in terms of a Grand Coalition based on and integrating the triangular set of burning questions around Land, Food and Democracy. This trio constitutes the most urgent burning issues of our societies. Within their fold, many other issues are embedded. We need to engage in struggles and a discourse around these issues, which will in turn generate a cohesive social vision to guide the struggle of the working people for emancipation in our countries.

¹Under the leadership of founding President Julius Nyerere, Tanzania pursued a socialist policy known as 'Ujamaa' (Kiswahili for 'familyhood') under which rural populations were encouraged to move into villages and villages became communal production units. The system failed in delivering rural development but is widely acknowledged for creating a sense of nationhood among Tanzanians (see, for instance, Hyden 1980).

²Literally, the Life Declaration, although it is also a play on the Kiswahili acronym for the National Land Forum.

³Stands for *Ulingo wa Kutetea Haki za Ardhi*, meaning Forum to Advocate for Land Rights (National Land Forum).

⁴Kiswahili for National Land Committee.

BIBLIOGRAPHY

- Bazaara, N. 2000. *Civil society struggle for land rights for marginalised groups: The contribution of the Uganda Land Alliance to the Land Act 1998*. Unpublished document.
- EAC (East African Community). 1999. *Treaty establishing the East African Community*. Arusha: EAC.
- EAC (East African Community). 2001. *East African Community development strategy 2001–2005*. Arusha: EAC.
- Hyden, G. 1980. *Beyond Ujamaa in Tanzania: Underdevelopment and an uncaptured peasantry*. London: Heinemann.
- Kanji, N, Braga, C & Mitullah, W. No date. *Promoting land rights in Africa: How do NGOs make a difference?* London: International Institute for Environment and Development.
- MWENGO (Mweleko wa NGO). 1999a. *Sub-Regional Reflection Forum: NGO action on land in southern Africa*



workshop report 15–18 November 1999. Windhoek, Namibia. Harare: MWENGO.

MWENGO (Mweleko wa NGO). 1999b. *Sub-Regional Reflection Forum: NGO action on land in east Africa workshop report 29 November–1 December 1999.* MS Training Centre for Development Co-operation (MS-TCDC), Arusha, Tanzania. Harare: MWENGO.

Odhiambo, MO. 1999. *Towards a regional land tenure network in east Africa: A report of a consultancy in east Africa.* June 1999.

Okoth-Ogendo, HWO. 1999. *Land issues in Kenya: Agenda for the 21st century.* Confidential brief to the UK Department for International Development, Eastern Africa, 30 September 1999.

Okoth-Ogendo, HWO. 2000. Legislative approaches to customary tenure and tenure reform in east Africa, in *Evolving land rights, policy and tenure in Africa*, edited by Camilla Toulmin and Julian Quan. London: Department for International Development/

International Institute for Environment and Development.

Okoth-Ogendo, HWO. 2001. *Principles of national land policy framework for Uganda.* Paper prepared for the Uganda Land Alliance, October 2001.

Republic of Kenya. 2000. *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration.* Nairobi: Government Printer.

Shivji, I. 1998. *Not yet democracy: Reforming land tenure in Tanzania.* London and Dar es Salaam: International Institute for Environment and Development (IIED) and Hakiardhi Land Rights Research and Resources Institute (LARRRI).

Shivji, I. 1999. *The Land Acts 1999: Cause for celebration or celebration of a cause?* Paper presented at the NGO Action on Land in East Africa Workshop, 29 November–1 December 1999. Arusha: MS Training Centre for Development Co-operation (MS-TCDC).



THE TYRANNY OF EGYPTIAN LAW ON CIVIL SOCIETY

ABDEL MAWLA ISMAIL

INTRODUCTION

Civil society is one of the most important elements in the evolution of developed and developing societies. This is especially true in the light of the destructive global economic changes wrought by the Bretton Woods institutions (the International Monetary Fund and World Bank). The neo-liberal policies of these international financial institutions were adopted by the Egyptian authorities in June 1991 in the belief that such policies would attract foreign investment and maintain the balance between available resources and the needs of the population. But the adoption of neo-liberalism has diminished the influence and power of the government, opening more space for the private sector to enhance its own interests. This shows up the role of civil society as an independent sector of society.

Studies show the importance of civil society and its ability to promote the growth of the economy, especially by enhancing people's lives and assisting them to fully enjoy their human rights. I believe that the Egyptian government should make space for civil society, in line with international practice. However, the Egyptian government still has a narrow view. It still maintains laws that oppress the civil society movement and impedes its progress.

The experience of Egypt, especially between the first quarter of the 19th century and the first half of the 20th, reflects the important role civil society played in the growth and development of the nation.

There are numerous examples of what Egyptian civil society has done to challenge repression and mobilise creative energies. The Egyptian civil law of 1875 underscored the importance of the role of civil society and provided a number of rights. The 1932 Constitution was one of the best Egypt has ever had, but in 1958 new laws severely undermined the country's institutions of civil society, causing them to regress enormously.

This paper addresses the relationship between the civil society movement in Egypt and the law. I first discuss the development of the laws that enabled the movement and then discuss the laws which have subsequently impeded civil society, especially Act 153 of 1999. Finally, I discuss the future of the movement in the aftermath of Act 84 of 2002.

STAGE ONE

The National Association of Egypt and the Greek Association of Alexandria were established in 1828. The Egyptian Association began in 1859, followed by the al-Ma'arif Association in 1868, and the Geographical Association in 1878 (Qandil & bin Nafisa, no date:51). These associations were established before the civil law of June 1875 was issued, and were responsible for the work of the National Association in Egypt. They drafted Article 54, which states: 'The Association is in every party; it is permanent and has many members. It is natural and legal but it should not be aimed at materialistic profit. Article 58 of the law grants the Association its legal personality immediately from the time of its establishment'.

About 95 years ago, the Egyptian civil law was the first to put in place the foundations and criteria for establishing associations, including the right of individuals and groups to establish such organisations. This accords with the rules of international contracts concerning civil rights, issued in 1968. The Egyptian civil law encouraged the formation of many national associations – such as the Benevolent Islamic Association of 1878. The Coptic Association was established with similar charitable objectives. Shaykh Muhammad Abdu and others were the forerunners in the renaissance of modern Egypt (Qandil & bin Nafisa, no date:51). Thereafter, many associations that played an important role in political and social activities were established. This development helped in the progression of political life in Egypt at the time and instilled an Egyptian spirit. Among the associations were leftist and progressive ones such as *al-fajr al-jadid*.



The legislation of 1923 legalised institutions of civil society, and acknowledged their rightful place. Egyptians could then formalise their associations and other civic institutions. The 1923 legislation also provided many rights, including the right to have a legal personality, and the right of individuals to freely become members. It excluded the military associations, which serve specific political parties according to Act 17 of 1938. The 1923 legislation further provided rights for civil institutions not working for profit. The monies of charitable organisations had to be allocated to charitable work and general welfare in perpetuity according to Acts 69–78 of the Egyptian civil law.

STAGE TWO

Act 32 of 1964 was issued 12 years after the inauguration of Jamal Abd al Nasir,¹ who became President of the Arab Republic of Egypt in July 1952. He removed the system of kingship and brought about social changes for the benefit of workers and farmers. However, the government established control over all institutions. It abolished all parties established before 1952, and nationalised political activity. Act 32 of 1964 changed the goal and foundation of national associations to orientate them to serve the policy of the state, and to serve the one legal political party. This served to restrict the activity of all civic organisations.

ESTABLISHMENT OF ASSOCIATIONS

Article 8 of the 1964 law specified that permission had to be granted by the Ministry of Social Affairs before an association with legal personality could be established. Reasons given for refusing registration included no need for such an association; opposition to government reforms; or that it did not meet security requirements.

Article 13 also imposed restrictions on who could establish an association. People working for professional organisations or organisations of workers had no right to establish national associations of their own. This went against the international standard which gives individuals the right to establish civic organisations of their choice (Abboud, no date:11).

These were not the only restrictions placed on organisations. It was not sufficient for the Ministry of Social Affairs to accept an application. All other relevant administrative authorities also had to agree, including the security apparatus.

ACTIVITIES OF ASSOCIATIONS

The law placed many restrictions on the activities of national associations. The associations could work only in one particular field. If the associations wanted to engage in activities beyond the one field, they could only do so with the permission of the relevant administrative authority (Abboud, no date:17). The associations were not permitted to receive gifts of charity from overseas

and also were not allowed to link themselves with any associations outside the country. In addition, the administration had the right to combine associations if they were considered to be similar.

WITHDRAWAL OF REGISTRATION

Article 57 of the Act allowed the Minister of Social Affairs to withdraw registration of any association that was not able to achieve the purpose for which it was established; if it used its money for purposes that were not in accordance with its aims; if it had not had a general meeting in two years; and if it had committed a crime.

After terminating the registration of an association, the authorities could take its money and documents and association members had no right to appeal in court. The effects of Act 32 of 1964 still reverberate in subsequent legislation governing civil society organisations (Awad 2002:63).

STAGE THREE

Civil society opposition to Act 32 of 1964 started with an international conference in 1994. A committee of 400 national associations was formed to demand the repeal of the law. The new Minister of Social Affairs (Dr Mervat al-Talawi) formed a committee to study the provisions of the Act. By the end of May 1998, the ministry had prepared a draft law. Egyptian civil society organisations were surprised that the draft had many restrictions and was not very different from the existing law (Isaac 2000).

As a result of these developments, a group of civil society organisations issued a document entitled *Defence of the National Work*. They brought together 70 organisations in what was known as the Meeting of National Work (MNW). The Minister then called a meeting of 80 national organisations, called the hearing committee (Masirah tatwir:5).

The MNW challenged the Minister's committee proposals by issuing a number of documents rejecting clauses of the draft law. It prepared its own document with alternative proposals (Masirah tatwir:37). The MNW invited many national organisations to conferences where the government's proposals were denounced. It published *Announcement of the National Work Principles*. It insisted on recognition as an independent body with the right to determine its own policy and activities and to appoint its own administrator (Masirah tatwir:49).

Many civil society organisations criticised the draft law and representatives of different political parties were also present at Parliament hall to oppose the Bill. But Parliament passed Act 153 of 1999 anyway. The Act was not very different from Act 32 of 1964 in so far as the restrictions imposed on civil society associations was concerned.



Under the new Act, only the courts, not the administrative authority in the Ministry of Social Affairs, had the right to withdraw the registration of an association. The Ministry had to apply to the courts for an order before it could terminate the registration of an association.

Although Act 153 was slightly more observant of human rights, it was just as restrictive as Act 32 in many ways. Civil society pressurised the Egyptian government to repeal the Act, and presented its own alternative proposals. In April 2000, the committee on economics and social rights discussed the MNW report at the United Nations, and recommended the repeal of Act 153. One of the organisations challenged the Act in the supreme legislative court and, in June 2001, the court rejected the Act and put forward certain principles and criteria that had to be followed in drafting a new law.

The court's principles for the establishment of a future law included the following:

- citizens should have the right to establish associations without conditions from the administrative authorities
- associations are intermediaries between individuals and the government
- associations alone are responsible for their own development, and this is very important for the progress of the whole society
- democracy is an essential value in associations to spread awareness of a culture of democracy through the organisations of civil society, which are to promote social and economic progress
- clear accounting is required for public money inside the government system

(*Al-jarida al-rasmiyyah*, June 2002.)

The court also ruled that the Act contravened the Constitution and it therefore had to be sent back to Parliament. The ministers of the executive authority passed it to the Egyptian parliament via the Council of the People. However, it was not passed through the Council of Consultation.

STAGE FOUR

When it was finally passed, the new Act 84 of 2002 did not meet the expectations of many people, especially those working in civil society. Its basic philosophy is no different from Act 32, and it omitted some of the good points of Act 153. Act 84 was intended to be a rejection of Act 153, but it implicitly included the more repressive rules of Act 32.

Associations can only be established with government consent. No association by individuals is recognised, unless they have the agreement of the authorities. The government also has the right to close an association without reference to a court, contrary to the rights which apply in many democratic countries.

Another problem is that a list of names for candidate office bearers must be given to the administrative authority, and the authority has the right to exclude certain candidates from standing for election. If office bearers fail to comply with government policy, the association may be closed. This conflicts with the international law principle of the right of individuals to stand for office, a principle which the Egyptian government has agreed to adhere to.

Article 84 states that an association cannot get finance from inside or outside Egypt without the permission of the administrative authority. Such permission is also required if the association wants to network with other associations outside Egypt. It is not clear how the authorities could possibly know about every one of the estimated 36 000 networks in the world (Kendil 2002). How can the administrative authority decide what the association can join or not? Furthermore, it is not permissible for any association to engage in political activities.

Since the passing of this law, opposition parties and civil society have formed a committee to defend democracy and human rights in Egypt. The committee hosted a conference the day after the law was passed, and threatened to use the courts against its provisions. The press conference hosted by the committee was supported by 20 civic organisations, including political parties and national organisations.

EMERGING ISSUES

Civil society had more freedom in 1952 than it does today. This regression has taken place within a so-called democratic context. Civil society organisations, especially human rights organisations, are facing many obstacles with the new registration regulations and loss of the little freedom of movement that existed before the law was passed.

Human rights organisations and civil society are trying to have the law overturned by the high legislative court. I wish civil society success with its cause, especially on those aspects which contravene the Egyptian Constitution and international human rights law. The 'committee for defence of democracy' should lend its support to all the institutions that can challenge this law.

Jabal (1998:21) has made the following suggestions for civil society advocacy on a new law:

- Individuals and institutions must have the right to obtain financial help internationally without the permission of the authorities.
- Individuals and institutions must have the right to participate in local and international networks.
- Members of public associations must have the right to freely stand for office without any government restriction.

- Only the courts should have the power to finally adjudicate on unresolved disputes.
- Associations should only have their registration terminated if a court orders this.
- Given that the activities of associations are voluntary, all disincentives must be eliminated.

¹Frequently spelt 'Nasser' in English

BIBLIOGRAPHY

Abboud, SS. No date. *Musbkilat al-Amal al-Ahli fi daw'I al-qanun 32, sannab 1964*. Cairo: Markaz al-musa'adah al-qanuniyyah li-huquq al-insan.

Al-jarida al-rasmiyyah, June 2002.

Awad, S. 2002. *al-Haqq fi tajammu' al-silmi wa-takwin al-jam'iyyat*. Cairo: Jam'iyyat Musa'adah al-Qanuniyyah.

Isaac, G. 2000. *Dimna fa'aliyat al-warsha al-khassa bi-qanun al-jami'yat fi'l fatra*. al-Barnamij al-Arabi li-nushata-huquq al-insan, 3–4 October 2000.

Jabal, M. 1998. *Musa'ma fi al-jadl al-da'ir hawla qanun al-jam'iyyat*. Markaz al-ard li-huquq al-insan.

Kendil, A. 2002. *Jaridat al-abram*.

Qandil, A & bin Nafisa, S. No date. *al-Mujtama' al-Madani fi-Misr*. Markaz al-Ahram li-Dirasat al-siyasiyah, wa-al-stratijiyyah.

Masirah tatwir al-amal al-ahli wal-qanun al-jam'iyyat multaqa tatwir al-'amal al-ahli, Cairo.



COMMUNAL LAND RIGHTS, DEMOCRACY AND TRADITIONAL LEADERS IN POST-APARTHEID SOUTH AFRICA

BEN COUSINS AND ANINKA CLAASSENS

INTRODUCTION

This paper discusses debates over land rights, democracy and traditional authority in communal tenure systems in South Africa from the colonial era through to the present, with a particular focus on the changing character of state policies in relation to these systems. This sets the scene for a discussion of current controversies over communal land rights and democracy in the communal areas of the ex-bantustans, and in particular on key provisions of the recently approved Communal Land Rights Bill (CLRБ).

Communal tenure is shown to have two faces – one revealing advantages for ruling (or aspirant) elites, including traditional authorities, and one revealing key strengths for the rural poor – although these broad groupings are not homogeneous, but internally differentiated in various ways. Contrasting perspectives result in very different policy prescriptions, and precisely which policies come to be implemented depends on the outcome of struggles between contending interest groups. These struggles take place both at the local level, and within the broader national political arena, as demonstrated by the intense behind-the-scenes lobbying and public debates accompanying the recent passage through Parliament of the CLRБ.

WHAT IS 'COMMUNAL TENURE'?

Most land tenure systems in Africa are still 'communal' in character, although, as Bruce (1993) points out, this is in some respects a misnomer, since it is taken to imply common ownership of *all* resources and collective production, which is rarely the case. What 'communal' generally means is a degree of community control over who is allowed into the group, thereby qualifying for an allocation of land for residence and cropping, as well as rights of access to the common property resources used by the group. Groups often restrict alienation of land to outsiders, and thus seek to maintain the identity,

coherence and livelihood security of the group and its members.

In these systems, allocations of residential and arable land usually result in strong and secure rights for individuals or families, the household being the basic unit of production. Families and larger clusters of households sometimes also have preferential rights to some common pool resources such as water points, or areas of dry season grazing. The result is that 'communal tenure' systems are *mixed* tenure regimes, comprising bundles of individual, family, sub-group and larger group rights and duties in relation to a variety of natural resources.

The overall character of communal tenure is that rights to land and natural resources are *shared and relative*, with *flexible boundaries* between a variety of social units, but nevertheless conferring *high levels of security of tenure*. Relative rights are nested within a hierarchy of social and administrative units or levels. Okoth-Ogendo (2002:2) puts it thus:

... the [African] commons are managed and protected by a social hierarchy.... the family, the clan and lineage, and the community... are decision-making levels designed to respond to issues regarding allocation, use and management of resources comprised within the commons on the basis of scale, need, function and process.

Sansome (1974) describes the nested nature of the land administration dimension in pre-colonial southern African societies in terms of a set of 'estates'. The supreme independent political authority (for example, a chief or paramount chief) controlled a primary estate of administration, the entire 'tribal territory', which was divided into estates of lower orders (for example, sub-chiefs or district heads), or secondary estates of administration. In some societies a third, or tertiary estate, existed. Administrators did not (unlike feudal lords) own their estates, but regulated access to resources and protected individual and communal rights. A key



element of land administration was the setting of boundaries for resource use, in both space and time, and these could vary by season and by type of land use.

Western ideas about property tend to equate it with 'ownership' and, even more narrowly, with private ownership. Western legal systems often do not recognise non-Western systems of property rights, and this has been widely used to discriminate against indigenous land rights holders. One important difference between Western and non-Western systems of property is the degree of exclusion involved. Key features of private property and the 'ownership' model are clearly defined (often surveyed) physical boundaries between areas of land, unambiguous definitions of who has what kinds of rights and who does not, and the exclusion of non-owners. As Peters (1998) points out, this is not necessarily the case with non-Western systems, where inclusivity and the 'right not to be excluded' are often core features.

These tenure systems are ubiquitous in Africa, where, despite rapid rates of urbanisation, the majority of households still derive the bulk of their livelihoods from land-based activities (cropping, livestock production and natural resource harvesting). Common property resources make a vital contribution, providing grazing and browse for livestock, water for domestic use, livestock and irrigation, habitats for wildlife (yielding food, cash and medicines), building materials, medicinal plants, fuel, edible plants, and raw materials for tools and handicrafts. The role of communal tenure systems in securing access to these resources is often underestimated (Cousins 2000).

Thus communal tenure systems in all their diversity must be understood in terms of their embeddedness within social relations, the manner in which they articulate with characteristic modes of production and livelihood, and the central role of political authority in their day-to-day administration.

HISTORICAL DYNAMICS

Conquest and incorporation of African polities in South Africa by the colonial state brought the imposition of new forms of authority, law and economic organisation, and the subordination of indigenous forms of land tenure and governance. Over two centuries whites took possession of the bulk of the land, and state policies attempted to mould African livelihood and land tenure systems to the needs of the dominant classes. These policies were actively resisted by rural communities, in high profile rebellions or less obviously in 'hidden struggles' of various kinds (Beinart & Bundy 1987). Both kinds of struggle shaped policies and their outcomes.

Subordination of indigenous land rights took place in two main ways. Firstly, African 'reserves' were created, at first as a way of containing resistance to dispossession, and later as reservoirs of cheap labour for the emerging

capitalist economy. The reserves also facilitated the creation of a system of indirect rule, in which traditional leaders undertook local administration on behalf of the colonial state. Some core elements of the indigenous tenure systems survived, but the governance and land administration components in particular were severely distorted. Those leaders who collaborated with the colonial state tended to wield their power in support of their personal and political interests. Some chiefs led resistance to domination, and were then deposed by government officials as a result (Mbeki 1964; Levin & Mkhabela 1997:156; Mamdani 1996:195–6).

Secondly, many Africans continued to live on white-owned land outside the reserves, and for decades remained the main agricultural producers on that land, either as sharecroppers or as labour tenants. The new owners were either speculators or Boer farmers unable to use much of the land productively. As capitalist agriculture slowly took root in the countryside, African producers were gradually stripped of their rights to engage in farming and transformed from being sharecroppers or labour tenants into highly exploited farm workers (Morris 1976).

COLONIAL LAND TENURE

Within this overall pattern there were many regional variations in policies and their impacts. In the Cape Colony, for example, various measures attempted to restructure land tenure and to provide individual titles. The Native Locations and Commonage Act of 1879 allowed the Governor to divide land in the Ciskei into individual 'quitrent' titles with areas reserved as communal grazing but quitrent was extended to Africans in a diluted and discriminatory form – no conversions to freehold were allowed, and a key condition was that the title-holder could not alienate the land without permission. The response was disappointing to policy makers. There was a widespread failure to take up titles, in part because of reluctance to pay the costs of survey and titling. One of the reasons for this state of affairs was a 'preference for tribal or common tenure' (cited in Delius 1997:10).

The Glen Grey Act of 1894 also sought to introduce individual tenure. The act was portrayed as 'modernising', but in fact sought to reduce the size of individual arable lands and facilitate the supply of migrant workers to the emerging mining industry. Married men were entitled to only one arable plot, and only title-holders were entitled to graze their livestock on the commonage. Security of tenure was not very strong – titles could be revoked for rebellion, non-beneficial occupation and non-payment of quitrent or surveying costs.

In Natal, by contrast, individualisation of land rights was not pursued. The British recognised customary law, the role of chiefs in local administration, and pre-existing systems of land tenure. Attempts were made to give



chiefdoms jurisdiction over clearly defined territories, but in reality boundaries were ill-defined and members of different chiefdoms intermingled, leading to many conflicts (Delius 1997:19).

In the Transvaal, a relatively weak Boer state and determined resistance by Africans meant that for much of the 19th century 'competing systems and conceptions of land rights co-existed in varying degrees of tension and conflict' (Delius 1997:24). There were debates about establishing reserves for African settlement, but none were designated until after 1881. Before then, to secure their independent land rights many Africans had no choice but to attempt to purchase farms. Since only white burghers could buy land, many communities requested missionaries to purchase farms on their behalf, using monies collected from cattle sales or migrant wages. Large areas of land were set aside for blacks because they were already owned and occupied. After 1881 Africans were allowed to acquire land, as long as it was registered in the name of the Superintendent of Natives. Although the boundaries of African land were established through market transactions or administrative fiat, internally the tenure systems continued to operate along customary lines (Delius 1997:19).

INCREASING STATE REGULATION

The 1913 Land Act was intended to lay the basis for a 'segregationist social order' in the newly established Union of South Africa. It did not create the reserve system so much as entrench the existing locations and overall distribution of land. The Act was a holding measure while the Beaumont Commission developed recommendations for a permanent land dispensation. The scheduled 'native areas' covered 7% of the land area of the country, but Africans actually occupied a much larger area.

There were long delays in the making of policy, and the impasse created a need to allow African land purchases outside the scheduled areas, which was possible if the Governor General gave his approval. Land so acquired was held in trust by the Minister of Native Affairs, and had to be effected on a 'tribal' basis rather than as a purchase as community or a partnership.

The 1936 Land and Trust Act added another 6% of the country to the area in which Africans would be allowed land rights. A body called the South African Native Trust was established, in which all crown land set aside for 'native occupation' would vest. The Act also allowed regulations to 'prescribe the conditions on which natives may hire, purchase or occupy land held by the Trust' and to control soil erosion. The Native Affairs Department was determined that land purchased by the trust, in order to be allocated and occupied by Africans, 'will not be ruined by malpractices'. Proclamations followed in 1939 that allowed the department to declare 'betterment'

areas, in which stock numbers could be assessed and surplus animals culled.

Regulations were passed that drastically reduced tenure security. Land-holders' rights to transfer or bequeath land were limited, the size of allotments were set, and women's land rights were severely circumscribed.

Access to land depended upon the whims of white officials and strict observation of a host of regulations', and there was 'a reduction in the scope for flexibility and diversity in land holdings which had characterized 'customary' systems (Delius 1997:38).

Resentment of this pattern of intensified state intervention in land tenure helped provoke major rural revolts (as in Sekhukhuneland and Pondoland) from the 1940s to the early 1960s (Chaskalson 1987). Trust land was also used by the state to accommodate the victims of forced removals or farm evictions from the 1950s onwards.

Large numbers of farms purchased and long-settled by Africans became known as 'black spots'. They were targeted for forced removals when apartheid policies were implemented after 1950. Often operating systems of communal tenure within their boundaries, these areas also accommodated large numbers of evictees from farms, usually as tenants, partly due to the continuing strength of an African 'land ethic'. The high population densities that resulted often led to severe strains on the tenure system (TRAC 1992).

The drive towards uniform approaches and increased levels of state interference in the operation of communal tenure systems was evident in the Native Administration Act of 1927. Africans were to be governed in a distinct domain legitimated by 'custom' and chiefly rule, but control was exerted from above. The Governor General, as 'supreme chief of all natives in the provinces of Natal, Transvaal and the Orange Free State' could recognise or appoint anyone as a chief or headman and define the boundaries of any tribe or location.

The Bantu Authorities Act of 1951, coming on top of betterment planning and authoritarian regulation of land rights under trust tenure, was the last straw for many rural residents, and a key factor in the rural rebellions of the 1950s (Mbeki 1964). It involved the establishment of 'tribal authorities'. The version of 'traditional rule' imposed was highly authoritarian,

stripped of many of the elements of popular representation and accountability which had existed within pre-colonial political systems and which had to some extent survived within... the reserves (Delius 1997:39).

Many chiefs used their newfound powers and reduced accountability to allocate better quality land to themselves and their supporters, and to demand higher



payments for allocations. Tenure security and the legitimacy of customary systems were thus further weakened.

Proclamation R188 of 1969, issued under the powers vested in the State President (formerly the Governor General) under the Native Administration Act and the 1936 Land Act, was intended to regulate further the operation of land tenure in black areas. Two forms of tenure were defined – quitrent for surveyed land and ‘Permission to Occupy’ (PTO) for unsurveyed land. Severe limitations on the content of the rights of holders were laid down, for example, one man-one lot; restrictions on plot size; a rigid system of male primogeniture to govern inheritance; and no recognition of land for women. Officials were given extensive powers to appropriate land and to cancel quitrent titles and permissions to occupy. Chiefs and headmen undertook the task of allocation, agricultural officers surveyed the boundaries of sites and fields, and magistrates issued PTOs. Registers of permit holders were kept at the magistrate’s offices.

In the bantustan era large areas of land occupied by Africans (including, in the Transvaal in particular, a large number of purchased farms) were transferred to the jurisdiction of ‘self-governing territories’ and many communities were placed under the jurisdiction of government-recognised chiefs and tribal authorities. The governments of the bantustans often passed laws to further regulate the operation of land tenure systems, but none undertook fundamental reforms of the prevailing legal and administrative regimes.

COMMUNAL TENURE, MIGRANT LABOUR AND CAPITALIST DEVELOPMENT

High levels of state interference in and regulation of ‘traditional’ tenure systems in the colonial era and in the subsequent decades of white minority rule emerge clearly in this brief historical overview. Interventions took two very different forms: (a) largely unsuccessful attempts were made to create forms of individual title and do away with communal tenure, which was seen as backward and constraining of capitalist-style development and enterprise; and (b) the dominant type of intervention was a policy of preserving communal tenure, with chiefs and headmen playing key roles in land administration, but increasingly under the direct supervision of government officials. Communal land rights were increasingly circumscribed and limited by government regulations. A distorted and legally insecure form of communal tenure resulted.

What were the underlying motivations of these policies, and what were the wider political and economic dynamics that informed them? These are issues of ongoing controversy and debate. Three strands of

thought will be summarised here.¹ Firstly, Wolpe (1972) and others have argued that early processes of capitalist accumulation depended upon the maintenance of pre-capitalist relations of production in the reserves. Traditional social and economic relationships provided a significant proportion of the means of reproduction of the migrant labour force, through agricultural production together with a range of ‘social security’ functions (for example, care of the young, the aged, the sick, and ‘resting’ migrants). This meant that employers could pay wages to migrants that were significantly lower than they would have to have been if workers and their families had been permanently resident in urban and mining centres. Access by migrants to both agricultural production and social service functions depended on the preservation of networks of reciprocal obligation between migrants and family. This is why the state recognised African law and custom, enhanced the powers of chiefs, and accepted the existence of communal tenure.

However, the rough equilibrium between production, distribution and social obligation in the reserves was fragile. The absence of male migrants, together with growing population pressure, led over time to impoverishment of the reserve economy, and a decline in its capacity to contribute to the reproduction of the work force. At the same time, a number of workers began to be permanently urbanised, with reduced access to rural social networks. Both factors led to increased levels of conflict over wages. According to Wolpe, apartheid policies developed by the National Party government after 1948 were a response to this political challenge, and the function of the reserves was now:

exercising control over a cheap African industrial labour force in or near the ‘homelands’, not by means of preserving the pre-capitalist mode of production, but by the political, social, economic and ideological enforcement of low levels of subsistence (Wolpe 1972).

By contrast, Mamdani (1996) stresses the political rather than the economic significance of communal tenure. He suggests that across Africa policies of indirect rule and the creation of native reserves created a ‘bifurcated’ state. Power in urban areas was characterised by the discourses and institutions of civil society, citizenship rights and the separation of powers; but in rural areas by community, custom and the fusion of powers in a unitary traditional authority. Communal tenure rather than private property was deemed the appropriate system for holding land. Traditional authority, based in part on control over land, constituted a ‘decentralised despotism’ of subjects ruled by chiefs. These measures considerably lowered the cost of colonial rule.

Mamdani also discusses democratic struggles against the ‘clenched fist’ of repressive traditional authority. These took the form of a ‘civil war within the tribe’, and as in the South African cases he cites (for example, the



Witsieshoek, Sekhukhuneland and Pondoland revolts), could involve violence against collaborationist chiefs. Notions of the accountability of chiefs to the community at large were often invoked in the course of these struggles: 'a chief is a chief by the people' (Mamdani 1996:195). Thus,

... the customary was never a single, non-contradictory whole. Not only the Native Authority but also many peasant movements spoke the language of the customary. For every notion of the customary defined and enforced by the state, one could find a countermotion with a subaltern currency. A democratic appreciation of the customary must reject embracing modernism or traditionalism. As a start, it needs to disentangle authoritarian from emancipatory possibilities (Mamdani 1996:299).

In a third line of argument, Beinart (1982) asserts that social change in rural social formations and the trajectory of class formation in South Africa was not determined solely by the needs of capital or the state, but was moulded in part by the internal character of these societies, and the active responses by their members to larger processes. In a detailed study of Pondoland he describes how capitalist penetration was met with tenacious resistance when it threatened communal access to land and resources, since these forms of independent livelihood provided rural people with a defence against loss of control over their lives. Communal tenure and the ethic of 'universal access' to land also constrained emerging class differences between rich and poor peasants, peasants and proletarians. Beinart argues that the specific form taken by proletarianisation in South Africa (migrant labour) arose from the internal dynamics of rural society as much as from state policy. Similarly, the retention of communal tenure is explained in part by the pressure that the people and chiefs maintained on the state. The interests of chiefs and the people in protecting access to rural resources coincided to a degree, and

the chiefs could, on some issues, serve as a spearhead of popular opinion. It was partly for this very reason that the state found it necessary to incorporate them into the administrative hierarchy (Beinart 1982:6).

In this discussion the two faces of communal tenure are clearly revealed. On the one hand, the retention of a form of communal tenure facilitated cheap labour policies and cost-effective control of rural populations from above; on the other, systems of communal land rights underpinned independent land-based livelihoods, and facilitated resistance to policies of exploitation and external control, and were therefore often actively defended by rural communities. Rural struggles sometimes showed the 'emancipatory possibilities' of invocations of custom and community (Mamdani 1996). Chiefs were caught between these contending forces, and played different roles in different times and places in response to local political realities.

THE LEGACY OF COLONIAL AND APARTHEID POLICIES

By the early 1990s a range of problems afflicted communal tenure systems in rural South Africa, and these persist today, forming the backdrop to contemporary policy debates and struggles. Central to these are unresolved questions of jurisdiction and authority, the key actors being: (i) elected local government, (ii) traditional authorities; and (iii) a range of interest groups at community level who are in favour of land administration being the responsibility of either local government, or traditional leaders, or democratically elected local committees. At present land administration is a 'messy matrix' of institutional relationships characterised by ambiguity, confusion, uncertainty and ongoing power plays, which contributes in large part to insecurity of land tenure within communal areas (Cousins 1997; Claassens 2001).

The fundamental legacy of past interventions in systems of communal land rights is the second-class status of these rights in law, which provides few protections from arbitrary decisions by those wielding authority over land allocation or land use. Underlying historical rights of occupation have never been adequately recognised in law, and are still not acknowledged by bodies such as provincial departments or local government authorities. Closely linked to the weak legal status of black land rights is the overcrowding and forced overlapping of rights that derives from South Africa's history of conquest, forced removals and evictions. While some accommodation between original residents and new arrivals often took place in the apartheid years, when both groups resisted forced removals, latent tensions over land rights have emerged strongly since the advent of democracy.

A consequence of past policies of control from above is the partial breakdown of the legitimacy of group systems of land tenure. One manifestation of the malaise is corruption and abuse of authority by chiefs and tribal authorities (Levin & Mkhabela 1997; Ntsebeza 1999), sometimes challenged by civic organisations or local residents' associations, which can lead to a vacuum in legitimate authority. Communal tenure is also subject to internal pressures for individualisation in some areas – from aspirant entrepreneurs who seek titles as collateral for bank loans, from women who cannot own land in their own name under 'traditional' tenure and seek greater security through titling, and in areas near towns and cities where an informal land market already exists (Cross 1998).

Tenure insecurity is increased by the near-collapse of land administration systems in the former homelands, where magistrates no longer play a role in land matters. PTOs are not issued in some areas, in others the procedures followed are *ad hoc* and unclear, and registers are often not kept up to date (Turner 1999). In peri-urban



areas that are nominally under traditional tenure, as well as in some densely settled rural areas, it is not uncommon to find shacklords allocating land in return for cash and warlords building a power base through control over land. Discrimination against women in the allocation of land and the holding of rights is a fundamental feature of tenure systems in most of rural South Africa (Meer 1997).

Lack of clarity on land rights is constraining infrastructure and service provision in rural areas, and there are tensions between local government bodies and traditional authorities over the allocation of land for development projects (for example, housing, irrigation schemes, business centres and tourist infrastructure) (Oomen 2000:66). It constrains effective management of common property resources, which are key to rural livelihoods. Other problems include constraints on investment in small-holder irrigation schemes; poor performance of agricultural projects; under-utilisation of arable land; and tensions over mineral rights or benefits from mining on communal land.

How widespread are these problems? The available evidence (for example, analysis of 61 cases brought to the Department of Land Affairs (DLA) between 1995 and 1999 – see Cousins 1999) suggests that tenure-related problems receive recognition only when the underlying lack of clarity in respect of legal status is brought to the fore by development planning or investment projects on communal land, such as Spatial Development Initiatives (Kepe 2001), or within land reform programmes such as restitution or redistribution (Lund 1998). It may be the case that the majority of occupants of communal land have a degree of *de facto* tenure security, because existing

systems, many of them now informal as a result of the breakdown of administrative systems, work reasonably well on a day-to-day basis. However, there is also evidence that these systems are failing to facilitate efficient use of arable land (for example, through share-cropping or land rental) and that lack of clarity is negatively affecting management of common property resources (Turner 1999).

Tenure insecurity in the communal areas of South Africa thus takes two forms: (a) a relatively small number of high profile cases where conflicts and contestations over land rights and competing jurisdictions are explicit and obvious, and (b) a larger number of chronic, low profile situations where lack of clarity and certainty are constraining land-based livelihoods, but no immediate threat to occupancy and use is evident.

TENURE REFORM AFTER 1994

Between 1994 and 1998 tenure reform by the newly created Department of Land Affairs focused mainly on securing the rights of labour tenants and farm workers, as well as creating a new form of legal entity for holding land rights in common. Since 1998 the main focus has been reform of communal tenure, both in the former 'coloured' reserves and in the former African 'homeland' areas.

1994–1998

Between 1994 and 1998 laws and programmes to secure the tenure rights of labour tenants and farm workers were actively pursued (see Box 1). In addition, legislation passed in 1996 allowed for the formation of communal property associations (CPAs) as a mechanism for group land holding. These were intended primarily for use by

BOX 1: KEY TENURE LEGISLATION SINCE 1994

- *Land Reform (Labour Tenants) Act 3 of 1996* – protects the land rights of labour tenants on privately-owned farms and provides a process whereby such tenants can acquire full ownership of the land they occupy. Labour tenants are largely concentrated in Mpumalanga and KwaZulu-Natal.
- *Communal Property Association Act 28 of 1996* – a new legal mechanism whereby groups of people can acquire and hold land in common, with all the rights of full private ownership. CPAs have been established by groups receiving land under both restitution and the redistribution programme. By late 2002, a total of about 500 CPAs had been registered.
- *Interim Protection of Informal Land Rights Act 31 of 1996* – intended as a temporary measure to secure the rights of people occupying land without formal documentary rights, pending the introduction of more comprehensive reform. In the absence of such legislation, the Act has been extended annually and remains in force.
- *Extension of Security of Tenure Act 62 of 1997* – protects occupants of privately-owned land from arbitrary eviction and provides mechanisms for the acquisition of long-term tenure security. Experience has been mixed: some cases of illegal eviction have not come before the courts and few permanent settlements have been approved to date.
- *Transformation of Certain Rural Areas Act 94 of 1998* – provides for the repeal of the Rural Areas Act 9 of 1987 that applied to the 23 so-called coloured reserves in the Western Cape, Northern Cape, Eastern Cape and Free State. Deals primarily with the control of commonage land but also provides for the transfer of township land to a municipality.

Source: Lahiff 2001



beneficiaries of land restitution and redistribution programmes, and designed as an alternative to trusts, which were seen as allowing too much control to trustees as opposed to members of land-holding groups. CPAs and trusts take full private ownership of land, on behalf of their members, and are governed by constitutions.

Group titles have been issued to over 500 CPAs and community land trusts, but many of these are now dysfunctional. Constitutions have been poorly drafted and often misunderstood by members, and the rights of members (especially in relation to land and resource use) are often ill-defined. Members have often retained ties to their original communities, rather than seeing themselves as belonging to the new social entity. In some cases traditional leaders have contested the authority of elected trustees, and in others elites have captured the benefits of ownership (Cousins & Hornby 2002). A policy lesson often drawn is that the main problems in CPAs and trusts derive from inadequate government oversight of and levels of support to these groups.

THE LAND RIGHTS BILL OF 1999

Since 1998 the major focus of attention in tenure reform policy has been a new law to provide improved security of tenure in communal systems, and thus give effect to the Bill of Rights (Section 25(6) of the Constitution):

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

Key concerns have once again been the nature of the rights to be created in the new law, the vexed issue of jurisdiction over land administration, and the question 'who will benefit from reform?'

Drafting of a Land Rights Bill (LRB) was initiated in early 1998. It attempted to embody the principles of tenure reform set out in the White Paper on Land Policy of 1997 and provide full recognition of the underlying land rights of people who occupy areas registered as 'state land' in the Deeds Registry. The land rights specified in the LRB were thus to be vested in the members of group systems, not in institutions such as legal entities, the chieftaincy or tribal authorities. From the distinction between ownership and governance set out in the White Paper flowed the result that group members have the right to choose which institution should manage and administer land rights on their behalf. Group systems had to provide 'bottom line' protections for their members, consistent with constitutional principles of democracy, equality (including gender equality) and due process. In situations of overlapping and contested rights, transfer would only take place after a rights inquiry, with government providing incentives to local stakeholders to negotiate

solutions, mainly in the form of funds for additional land to relieve overcrowding.

At first policy was based on a paradigm of transferring ownership from the state to its rightful owners. However, experience in a number of test cases revealed inherent difficulties (Claassens 2000), and as a result the 1999 LRB did *not* adopt a 'transfer of title' paradigm. One major difficulty arose in relation to defining the 'unit of ownership' in communal areas: should land be transferred to 'tribes', or 'nations', often consisting of hundreds of thousands of people, or to wards, or to villages, or to groups at tribal authority level? Vesting land ownership in the larger group could make it difficult for smaller groups to make meaningful decisions about land within their own localities; conversely, vesting rights at the local level might deny some rights inherent in the larger group. These questions derive from the nested and hierarchical character of land rights in communal systems. The test cases provided important lessons in relation to the processes involved in land transfers. Investigation and consultation with the prospective rights holders was necessarily resource-intensive, intricate and time-consuming. They showed that the prospect of transfer triggers intractable conflicts; '... the irrevocable nature of land transfer is an effective alarm clock for latent social tensions' (Claassens 2000:254).

As a result of these difficulties, the drafters of the LRB moved towards a paradigm based on statutory rights which are secure but do not convey full ownership. The law would create a category of protected rights, for which the majority of those occupying land in the former 'homelands' would qualify. Rights holders would be the key decision makers on matters related to their land, and derive the full benefit from its use or transfer. The Minister of Land Affairs would continue to be the nominal owner of the land, but with strictly delimited powers. Her ownership would be an 'empty shell', with high-content statutory rights held by the occupants.

These protected rights would vest in the individuals who use, occupy or have access to land, but in group systems these rights would be subject to those shared with other members, that is, individual rights would be relative to 'group rules', as decided upon by the majority of members. These in turn would require the definition of the boundaries of the group – also a key difficulty, as pointed out above, for the 'transfer of ownership' paradigm. The solution proposed in the LRB was as follows:

... 'boundaries' must be seen as flexible. In other words, the boundary of the group would be determined with reference to who (which group of people) is affected by the particular decision. Thus, if the decision is about a change in grazing practice then the people affected by the change must be consulted, not the entire 'tribe' (Claassens 2000:255).



Protected rights, defined by statute, would thus confirm in law the rights of the 2.4 million households (the *de facto* rights holders), occupying and using land in the communal areas of South Africa, without having to first resolve, in each and every case, disputes over the extent of rights. The possible content was set out in the LRB and allowed for rights to occupy and use land, to bequeath, transact and mortgage the right, to benefits from the land, and to evict others. To balance individual and group rights, and to maintain a necessary element of flexibility, a local process of defining or limiting the specific detail of the content of rights would have to take place.

The LRB established the right of those with protected rights to choose or create their own preferred local institution for the purpose of managing land rights. Where existing local institutional structures were able to meet certain criteria (for example, majority support), they would be accredited by government, but were thought to require ongoing support from government in order to carry out their functions (Cousins 1997; Sibanda 2000). This would be through 'land rights officers', who would help rights holders enforce their rights and assist (and monitor) accredited structures.

There is a constitutional imperative for the state to provide tenure security or 'comparable redress' to those whose tenure was made insecure as a result of previous policies, for example, forced removals and the overlapping rights that resulted. The LRB attempted to provide a mechanism for unpacking these situations through recognition of legitimate claims, albeit of differential strengths, and allowing for 'tenure awards' to protected rights holders who cannot all be accommodated on the same land, commensurate with their rights (Makopi 2000). Awards were envisaged as involving a combination of the confirmation of the occupation rights of some rights holders together with compensation or additional land for others.

THE COMMUNAL LAND RIGHTS BILL OF 2002

In June 1999 a new Minister of Agriculture and Land Affairs took office,² and work on the LRB was stopped. The Minister's view was that the LRB was too complex, that it would be too costly to implement, and that it assumed that a 'nanny state' would protect people's rights on their behalf. She was in favour of a law that transferred title of state land to 'tribes', that gave a key role in land administration to traditional leaders, and that did not require such high levels of institutional support to rights holders. In her view ordinary people, including women, should take greater responsibility for protecting their rights themselves.

Following several false starts, a Communal Lands Rights Bill was drafted and discussed at a national conference in Durban in 2001. This third draft included several pro-

visions that appeared to privilege traditional leaders, for example it allowed 'traditional communities' operating under 'customary law', as well as authorised representatives (chiefs), to be recognised as 'juristic persons' for the transfer of state land in full ownership. This pleased the traditional leader lobby at the conference, but was seen by many other delegates as highly problematic, sparking heated debates.

In August 2002 the CLRBB was published for public comment, and many civil society organisations sent submissions to government. Critical articles on the CLRBB appeared in the media, initiating a public debate on communal tenure reform for the first time since 1994. At the same time a civil society grouping initiated a project³ to promote awareness of the Bill amongst affected communities in five provinces, and to assist them to express their views on tenure problems and on the CLRBB proposals. In this period government made no attempt to convene community consultation processes, but met several times with traditional leaders.

The August 2002 draft provided for 'transfer of title' of communal land from the state to its current occupants. Complex procedures for transfer included a rights inquiry, community meetings, and adoption of community rules on tenure. Registration of these rules would convert the community into a 'juristic person' capable of owning land. Once the rules were registered a land administration committee could be elected, made up of community members.

Traditional leaders had to be on the committee in an *ex-officio* capacity, but could comprise no more than 25% of members. This was been controversial: groups such as the Congress of Traditional Leaders of South Africa (Contralesa) argued for the transfer of title to traditional authorities, on the basis that they have always held land rights in trust for their communities, and that they are not inherently undemocratic and unaccountable.⁴ This lobby objected vehemently to the '25%' rule.

Civil society organisations as well as many members of rural communities expressed highly critical views of the CLRBB (Claassens 2003), and a large number of written comments on the Bill was submitted to government. A range of problems was identified, including inadequate provisions for land administration. One key flaw identified in the Bill was the underlying paradigm of a transfer of freehold title, requiring clear boundaries between communities to be drawn. This could open up and exacerbate boundary disputes and ethnic differences. In addition, community representatives, and in particular elected councillors, feared that transferring title would effectively 'privatise' communal land. Since government refuses to provide services and infrastructure on privately owned land, the effect would be to insulate poor rural areas from local government



development programmes. This would force rural people to choose between ownership rights and infrastructural development.

Other problems were identified as the long-winded and intricate procedures for transfer of title,⁵ and until transfer occurred, the unclear status of people's existing rights to occupation and use. In addition, women's land rights were not adequately provided for. Civil society submissions generally approved of the provisions for awards of alternative land as a form of comparable redress for tenure insecurity, citing the need for tenure reform to contribute in a significant manner to land redistribution 'beyond the 13%' of land allocated to Africans in the past.

The 30% limit on traditional leader representation on land administration committees was welcomed by some civil society organisations as a victory for democracy, but others were concerned that this measure did not in itself deal adequately with the problem. This was due to the fact that it was unclear what impact this rule would have in areas where traditional leaders are contested, or in areas where land administration functions are undertaken by traditional leaders that have significant support.

Alternatives to the approach adopted in the CLRБ were discussed in community meetings (Claassens 2003). One approach would be for the new law to recognise existing occupation and use rights and give them the status of secure property rights, without waiting for a time-consuming and expensive process of transfer of title for which government is unwilling to devote sufficient funds or to create enough capacity to meet demand. Measures to secure individual rights could be complemented by mechanisms to support management of common property and other land matters of common concern. This approach would require ongoing support from government officials to rights holders and to local land administration bodies, as one component of a coherent programme of rural development. These proposals were similar to the approach taken in the 1999 Land Rights Bill.

AMENDMENTS AND DEBATES IN 2003

In response to mounting civil society criticism, the Bill was amended in several drafts between August 2002 and October 2003. In April 2003 the South African Local Government Association (Salga), representing all the country's local government bodies, asked for a legal opinion on the powers granted in the Bill to land administration committees. This opinion expressed concerns that a 'fourth tier of government' was being created, and indicated that the privatisation of communal land via titling would create difficulties around service provision by local government. In response, a June 2003 draft of the Bill introduced the provision that a 'communal general plan' (that is, a land use plan) must be

registered with the Surveyor-General prior to any transfer of title. This would allow the Minister to reserve part of the land for the state, this for the provision of infrastructure and municipal services, and it was hoped that this would be a solution to the service provision problem.

Other changes resulted from attempts to shorten the Bill, and many provisions were now to be dealt with in separate sets of regulations. Civil society critics pointed out that a critical omission was the absence of community consultation on whether or not they desired a transfer of title, or on the form and content of land rights. The Minister was given sweeping powers of determination in relation to a range of key decisions, including the boundaries of the land to be transferred to 'communities'. A continuing problem was the lack of clarity on how the different processes set out in the Bill (for example, the drawing up of the communal general plan, the rights enquiry, the drafting of community rules, the making of determinations by the Minister) relate to one another, and in what sequence these different processes were supposed to occur. On the other hand, the Bill still did not recognise the complexity and onerous nature of the land administration tasks (registration, recording, land use and development planning, and dispute resolution) to be carried out by local committees, and did not provide for a dedicated system of government support to these committees.

In a presentation to the Deputy Minister of Land Affairs and senior officials in July 2003, community members pointed out that women's land rights were not adequately secured by the Bill. For example, it provided for the registration of existing rights, which generally vest in men, without any proviso that women's rights should be asserted or registered. Earlier sections explicitly barring discrimination in community rules had disappeared. Concerns were also expressed that the status of people's land rights prior to transfer and registration remained unclear and hence potentially insecure; this called into doubt the constitutionality of the Bill.⁶

Government drafters paid little heed to these concerns. A 13th draft of the CLRБ, similar in all important respects to the June 2003 version, was approved by Cabinet in early October 2003, and published in the Government Gazette. Notice was given that the Bill would be debated in Parliament within a matter of weeks. However, within days another version, containing a highly contentious new provision, was submitted to and approved by Cabinet. This was in relation to the land administration committees that the Bill required all communities to establish, to 'represent the community owning communal land', and which would have 'ownership and administrative powers conferred on it by the rules of the community'.⁷ The new clause stated that where a community has a 'traditional council', the functions and



powers of the land administration committee 'must be performed by such a council'.⁸

This provision cross-referred to the Traditional Leadership and Governance Framework Bill (TLGFB) then being debated in Parliament's portfolio committee on local government. This Bill (subsequently adopted by the House of Assembly on 11 November 2003, and now an Act) sets out to clarify the long-unresolved issue of the roles and powers of traditional leaders and their relationship to local government (Murray 2004). The Act provides for the establishment of 'traditional councils', sets minimum requirements with which such councils must comply, and lists the functions of traditional leaders and councils. These functions are fairly 'soft' (Murray 2004:11), including such roles as 'facilitating development'. However, they include the wider function of 'administering the affairs of the traditional community' (including in relation to land).

The final version of the TLGFB required that 40% of the members of the traditional councils be elected and that 30% be women, and these are seen by government as 'transforming' traditional leadership to bring them into line with the country's democratic dispensation. The Act also contains a provision for a transitional arrangement which deems existing tribal authorities, created in terms of the Bantu Authorities Act of 1951, to be traditional councils, and gives these authorities a year to 'transform' (but without any specified sanctions should they fail to do so).

The proposal that land administration committees be traditional councils wherever these existed was greeted with jubilation by the traditional leader lobby, and considerably reduced their unhappiness over the 'softness' of the somewhat vaguely defined powers conferred on them by the TLGFB. Control over land has long been seen to be the material basis of the power of traditional authorities (Levin & Mkhabela 1997; Ntsebeza 1999; Mamdani 1996) and their reaction to the new legislation would appear to confirm this diagnosis. In contrast, the new clause was met with dismay by NGOs and community groups, provoked considerable public controversy, and became one of the key aspects of the Bill that was debated in parliamentary portfolio committee hearings in November 2003.

Civil society groupings saw the new clause as the imposition of structures dominated by un-elected traditional leaders, undermining fundamental democratic rights. According to a press release, the clause 'deprives rural people of the right to choose who will administer their land rights'. The press statement pointed out that the Bantu Authorities Act, which established tribal authorities and gave them considerable power over rural communities, was prime apartheid legislation designed to secure rule from above, and had provoked

rural revolts across South Africa in the 1950s (Mbeki 1964). Together with the sweeping powers of determination given to the Minister, this lack of choice over how a land administration committee should be composed gave the Bill an authoritarian character at odds with the strong emphasis on democratisation of decision making within communal tenure in previous policy documents (for example, the 1997 White Paper on South African Land Policy).

NGOs and community groups were also angry that so little consultation with rural communities had taken place, and that the new clause on traditional councils had been introduced so late in the process. It seemed to them that the Bill was being rushed through Parliament at the last possible moment because of wider political dynamics and 'deal-making' in the run-up to the general election of April 2004. According to Murray (2004:15), three issues appeared to underlie government's willingness to accommodate traditional leaders: the need to avoid pre-election violence in KwaZulu-Natal,⁹ the fact that traditional leaders are perceived to command votes in rural areas; and the need for government to work with traditional structures in delivering services to rural people, given the real weakness of elected local government in many rural municipalities. Murray speculates that another reason may have to do with culture and identity, since 'many South Africans are in search of a political culture that feels less imposed than the one we inherited from our colonial rulers' (2004:16).

The character of the portfolio committee hearings and subsequent passage of the Bill through Parliament confirmed the suspicion that a political decision to pass the Bill had been made at the highest levels of the African National Congress (ANC). Concerted opposition to the Bill from the ANC's partners in the Tripartite Alliance – the Congress of South African Trade Unions (Cosatu) and the South African Communist Party (SACP) – and from within the ANC itself (for example, members of Parliament's joint monitoring committee on the status of women) did not lead to a postponement of this clearly controversial piece of legislation until after the election, when more debate and consensus building could have occurred.

PARLIAMENTARY DEBATES

A total of 35 submissions were made to public hearings on the Bill called by Parliament's portfolio committee on agriculture and land affairs in the last two weeks of November 2003. These included 13 submissions by community groups¹⁰ and 12 by NGOs.¹¹ Other bodies which presented submissions were two statutory bodies (the Commission for Gender Equality and the Human Rights Commission), a committee of Parliament itself (the Joint Monitoring Committee on the Status of Women), Cosatu, two academic research institutes,¹² the Coalition for Traditional Leaders, and the railway



parastatal Spoornet. Of these, 32 submissions were highly critical of the Bill on a variety of grounds, and were unanimous in calling for its withdrawal and a fresh start. Only three submissions were in favour of the Bill, those by Spoornet, the traditional leader lobby, and the Bafokeng Royal Nation (a 'community group' represented by their monarchy, and closely aligned to the traditional leader lobby).

The critics argued that the Bill was deeply and fundamentally flawed, and was probably unconstitutional in a number of respects. In addition to the criticisms mentioned above, the following arguments were made:¹³

- The nature and content of the 'new order rights' to be created in the Bill are not clearly defined, and instead the Minister of Land Affairs is given wide and sweeping powers to determine these rights on a discretionary basis.
 - The Minister is not explicitly required by the Bill to define land rights in a manner consistent with the Bill of Rights, and leaves decisions on equal land rights for women to the discretion of the Minister.
 - The wide discretionary powers given to the Minister to make determinations on a range of issues central to the security of people's land rights are probably unconstitutional, in so far as the Bill of Rights requires the law to define clearly the extent of the land rights to be secured. No clear criteria and factors to guide the Minister's decisions are provided, and few opportunities to either participate in making these crucial decisions or to challenge them are provided in the Bill.
 - The measures in the Bill for achieving gender equality in relation to land rights are weak and unconvincing and are likely to be overridden by the provision that traditional councils dominated by traditional leaders will allocate land, and can do so on the basis of custom. In addition, many of the 'old order rights' which the Bill seeks to secure, such as PTOs, vest exclusively in men, and their upgrading to registered 'new order rights' will be at the expense of the informal use and occupation rights of women.
 - The Minister will make determinations on who has land rights, on what these land rights will be, and on the boundaries of the 'community' that will have ownership of communal land transferred to it, and will be guided by the report of a land rights enquiry. However, the people whose rights are to be decided in this manner have no right to view or challenge the report that the enquirer sends to the Minister, and no opportunity to agree or disagree with a decision to transfer title. The terms of community participation in the land rights enquiry are not made clear. There are no provisions that ensure that people will have a real choice over the nature of their tenure system or the content of their land rights.
 - Communities are required to adopt community rules to govern land use and administration, that will set out who can hold new order rights, but there is no requirement that the community must agree to the content of these rules, and no procedure for adopting these rules is provided. In addition the Minister may impose a standard set of rules on a community (as adapted by the Minister) should a community fail to adopt a set of rules.
 - The constitutional requirement that tenure legislation provide for comparable redress in the event that land rights cannot be secured due to overlapping rights (Section 25(6) of the Bill of Rights) is not met in the Bill, which devotes only two clauses to this issue, and does not define the extent of such redress nor provide any clear basis for doing so. Once again, the Minister has wide discretionary powers, and no guidelines are provided to direct ministerial decisions.
 - Democratic and accountable institutions for land administration are not adequately provided for in the Bill.
 - The Bill undermines the existing property rights of communities who own communal land historically, or through trusts and communal property associations; many of the latter have had their land restored to them through the restitution component of the land reform programme, and many do not support or recognise traditional leaders who were imposed on them in the apartheid era.
 - Despite attempts in the Bill to address the problem of municipal service delivery on communal land transferred from the state into private ownership by communities (for example, Section 37), the problem will remain where undivided blocks of land are transferred, since in South African law ownership of infrastructure (for example, water pipes) and buildings (for example, schools) attaches to the owner of the underlying land.
 - Where land for 'development' by local government is excluded from transfer of title, long delays in compiling a communal general plan will result while detailed and long term land use planning is carried out, far in advance of any development actually taking place, and without clear guidelines from the Integrated Development Plan for the area. In many cases such long term planning will be seen to be inappropriate and untimely and will probably not happen at all.
- In addition to questions of substance, most submissions were highly critical of the non-consultative nature of the process through which the Bill had been developed. The memorandum to the Bill claimed that a total of 50 consultative workshops had been held, together with civil society organisations. These involved 'traditional leaders and their communities, the National House of Traditional Leaders, the Coalition of Traditional



Leaders, Contralesa¹⁴ and the Ingonyama Trust Board. However, NGOs and community representatives were sceptical, said they were unaware of such meetings, and called on government to release details of the dates and location of such meetings. Members of Parliament also requested such information, and on the final day of the portfolio committee's deliberations a large file said to contain the information was given to the chairman of the committee. No summary was provided, the file was not available to the public, and civil society suspicions that these meetings were largely fictitious were not allayed.

Another contentious issue was the financial implications of the new law. The memorandum to the Bill stated that the annual costs of implementation were estimated to be R68 million, but portfolio committee members queried this, and the Director-General of Land Affairs admitted that it was a 'guesstimate' only and that there was no systematic basis for the calculation.

AMENDMENTS, CONTROVERSY AND PASSAGE OF THE ACT

As the final parliamentary session of 2003 came to a close, the portfolio committee deferred further discussion of the Bill until January 2004. The Department of Land Affairs commissioned legal opinions on the constitutionality of the Bill, and officials began to draft a number of amendments. The portfolio committee met in late January to discuss these as well as the financial implications and other unresolved issues (such as the composition of land boards) and eventually approved an amended Bill. This went to the National Assembly in mid-February, in the final two-week session of Parliament before campaigning for the 2004 general election began. The amended Bill was then passed by both the National Assembly and the National Council of Provinces, and at the time of writing¹⁵ is awaiting the signature of the President before it becomes law. Before its final passage through Parliament, the Bill continued to be dogged by controversy and intense behind-the-scenes lobbying, over issues of both substance and procedure.

Amendments sought to address a number of issues. On the question of women's rights, one amendment provides that 'old order rights' are deemed to be held by all spouses in a marriage, not by the husband alone. However, no provision is made for securing the current use and occupation rights of single women (widows or unmarried women), and no requirement that land administration committees allocate land on the same basis as men was inserted. The Women's Legal Centre raised doubts about these amendments, and their attorney Sibongile Ndashe said that one problem was that the status of women married under customary law is still legally in question (*Mail & Guardian*, 30 January 2004).

Other amendments also seek to address potential challenges on constitutional grounds. Rewording of certain sections attempts to create greater certainty that

Section 25(6) of the Bill of Rights (requiring clear definition of the extent and content of 'security of tenure') are being given effect, but may still not be adequate, according to lawyers from the Legal Resources Centre. Amendments were also made in relation to decisions and determinations of the Minister. For example, a land rights enquiry must seek to establish the majority views of a community, and these must inform the making of community rules. However, there is still no requirement that majority consent is necessary for the decision to transfer title, or when a land administration committee is established, or prior to the Minister reserving part of communal land for state use. One amendment states that the Minister may not make a determination on land rights until outstanding disputes have been resolved, but no definition of dispute or clarity on who determines whether or not a dispute exists is provided.

The final version of the law also contains a definition of 'land administration committee' that avoids specifying that it will be a traditional council in all areas where these exist. However, the law still does not specify clearly that an alternative structure (such as an elected committee) may administer communal land, and is open to competing interpretations.

Departmental officials told the portfolio committee that the real costs of implementing the law would probably be seven or eight times higher than the original estimate of R68 million, that is, closer to R500 million, but could still not provide a detailed breakdown of costs. Opposition MPs sharply criticised government for 'such an incredible discrepancy' (*Cape Times*, 27 January 2004).

There was also controversy over whether or not the Bill should have been tagged as a 'Section 76' Bill, thereby requiring to further public hearings by the National Council of the Provinces. The Constitution requires this of laws affecting functional areas of 'concurrent competence' between national and provincial governments, of which traditional leadership is one, but land is not. In the end the Bill was *not* re-tagged and was passed unanimously by both houses of Parliament.¹⁶

Unprecedented public interest in the passage of the Bill saw wide media coverage, editorials calling for it to be scrapped or 'substantially amended',¹⁷ angry articles by gender activists,¹⁸ and a statement by the Commission for Gender Equality that it had 'taken an executive decision to challenge the Bill constitutionally'.¹⁹ It appears likely that constitutional challenges to the law will be also mounted in due course by public interest lawyers acting on behalf of some of the communities that presented submissions to Parliament.

The traditional leader lobby was also outspoken in public – but in support of the new law. Patekile Holomisa, an ANC MP and chair of Contralesa, wrote that:



*the bill confirms the long-standing historical fact that African land belongs to the African communities jointly with their African traditional leaders. The three entities – land, people, traditional leaders – are inextricably bound together.*²⁰

However, a critic of the Bill pointed out that the law could:

*cut the nexus that keeps traditional leaders responsive to their 'subjects' ... control over land administration provides traditional leaders with a guaranteed power and resource base, regardless of whether their 'subjects' support them or not.*²¹

Controversy over the role of traditional leaders in land administration continues to rage.

CONCLUSION

Informing the politics of tenure reform policy are competing understandings of both land rights and of institutional arrangements for land administration. In relation to land rights, one view is that only land titling (that is, private ownership) provides adequate tenure security – but forms of group title must be made available, as well as individual title, given the strong rural demand for a community-based form of tenure. Interest groups in favour of titling include emergent commercial farmers, businessmen, chiefs (on condition that titles are issued to themselves or traditional councils), and occasionally, women (some of whom feel that freehold can best provide land rights free from the constraints of patriarchal traditions). The strongest demand from the ground, however, is for security of rights of families and individuals, within a system that secures access to common property (Claassens 2003). This need not take the form of titling.

Land administration systems that are based on local institutions are viewed as cheap and cost-effective by policy makers, and attractive in the context of dominant neo-liberal doctrines of development. Rural communities also stress the importance of local institutions, but with far more emphasis on the need for them to be accountable and responsive to people's needs.²² Proposals to build on institutional arrangements that already exist make sense to both sides, but community calls for adequate funding and support by government for local institutions stand in stark contrast to the minimalist provisions of the CLRBB.

Most controversial remains the issue of traditional authority and its role in communal tenure regimes. Political deals may have informed the rapid progress of the Communal Land Rights Bill through Parliament, but the long-term prospects for chiefs and headmen are not at all clear. At stake are some of the fundamentals of South Africa's new democracy, as Murray (2004:18) points out:

It may be possible to marry the idealised notions of an older, different democratic order eulogised as an intrinsic part of an original, untainted, form of pre-colonial traditional leadership with the requirements of a modern, democratic state. But such an amalgamation should not be the product of either short-term horse trading or transparently sectional interests for whom tradition is little more than a shield from the demands of democratic accountability. We must guard against the possibility that a new order revelling in its emancipation from (neo) colonial rule will abrogate its responsibility to its citizens in the name of a new Africanisation. The danger is that settlement with the lobby of traditional leaders will be a smokescreen for the failure to implement democracy where it really matters: at grassroots, in the material conditions of the ordinary existence of women and men.

The African experience of tenure reform has largely been one of ineffective law and policy, in which interventions have failed to bridge the gap between *de facto* realities and *de jure* rights, and tension and conflict over competing jurisdictions persist (Berry 1993). This has arisen partly from inadequate funding or weak state capacity, both underpinned by lack of political will, but another reason is the persistent lack of understanding by policy makers and legislators of the realities of African systems of land rights (Okoth-Ogendo 2002). However, although usually ineffective, state interventions are not simply ignored – the confusion that results is often used by elites as an opportunity to feather their own nests (Peters 2002). They are the clear winners, and the losers are usually the poor and desperate. A widening difference between strong rights on paper and weak or non-existent rights in practice then calls into question the meaning of 'democracy' (Mamdani 1996; Cousins 2003).

Property rights and their distribution are a key issue for a new democracy such as South Africa's – but what form should these rights take? It is now widely accepted that freehold title is not a 'magic bullet' for increasing security of tenure in Africa and other developing countries (World Bank 2003). This has resulted in wider acceptance of the core features of communal tenure: rights to land and natural resources are shared and relative, flexible boundaries exist between a variety of social units, and rights are nested within a hierarchy of social and administrative units or levels (Okoth-Ogendo 2002). Emerging policy recommendations call for greater recognition in law of such rights, the strengthening of local institutions for land administration and land management, and support for institutions and procedures for mediation and negotiation, particularly at the local level (IIED 1999).

Translating these general prescriptions into law and policy is far from straightforward. Some suggest codification, others registration either centrally or at the local level, but these can backfire and as an unintended consequence produce increased unpredictability and



institutional incoherence (Lund 1998). Local institutions are vulnerable to the power plays of elites, as well as to a 'politics of exclusion' (Lavigne Delville 1999; Peters 2002) and measures to promote transparency and accountability (that is, democratisation) are required (Ribot 2002).

This means that central government has a key role to play in ensuring accountability, through oversight of local bodies and the application of sanctions (Ribot 2002:18). Some analysts emphasise the key role of ongoing processes of negotiation and conflict resolution for securing land rights, and stress the importance of state support for local institutions to mediate conflicting interests (Berry 1993; Moore 1998). This resonates strongly with the view that democracy in Africa requires a strong and capable state, both willing and able to empower citizens through locally accountable, representative institutions (Luckham 1998). An emancipatory version of democratisation is thus integral to the politics of communal tenure reform, as the South African case demonstrates so clearly.

¹Arguments on these questions are complex and wide-ranging, and at the heart of long-standing debates on the political economy of capitalist development in South Africa. Only a simplified and condensed version can be presented here.

²Thoko Didiza, formerly Deputy Minister.

³The project was organised by the National Land Committee (NLC) and the Programme for Land and Agrarian Studies (PLAAS) at the University of the Western Cape. Partners include NLC affiliates, the Trust for Community Outreach and Education, the Legal Resources Centre, the Transkei Land Service Organisation, the Legal Entity Assessment Project, and others.

⁴Holomisa, P. 2003. Resolving communal land rights a vital link in reform process. *Business Day*, 21 May.

⁵Over 30 administrative steps were required before title could be transferred to a community, requiring a minimum of 12 months (and the likelihood that bureaucratic slippage would result in delays of at least two years).

⁶See requirements to create tenure security in section 25(6) of the Bill of Rights, quoted above.

⁷According to section 25.3 of the Communal Land Rights Bill of 8 October 2003, these had to include allocating new rights to land, registering such rights, maintaining registers and records of rights and transactions, liaising with municipalities, resolving disputes, and other functions.

⁸Section 22.2 of Communal Land Rights Bill of 8 October 2003

⁹Pre-election violence in KwaZulu-Natal had marred both the 1994 and 1999 general elections.

¹⁰The NLC/PLAAS consultation project provided support for community groups and NGOs to prepare their submissions through joint workshops to discuss the Bill and its implications. Different views emerged on some key issues (for example, the role of chiefs), and broad consensus on others; the project did not attempt to resolve differences and the principle that diverse views could be held was accepted by all participants in these workshops.

¹¹The NGO grouping included the South African Council of Churches, the Legal Resources Centre and the Women's Legal Centre, in addition to land activist organisations such as the National Land Committee and many of its affiliates

¹²The Programme for Land and Agrarian Studies (PLAAS) from the University of the Western Cape, and the Centre for Applied Legal Studies (CALS) of the University of Witwatersrand.

¹³Most civil society submissions can be found at www.uwc.ac.za/plaas

¹⁴The Congress of Traditional Leaders of South Africa.

¹⁵In May 2004.

¹⁶The National Assembly and the National Council of Provinces.

¹⁷*Cape Times*. 2004. The wrong direction. 29 January; *This Day*. 2004. Land Bill turns back the clock. 30 January.

¹⁸Govender, P. 2004. Parliament gives rural women a raw deal. *Sunday Times*, 15 February.

¹⁹*Sunday Independent*. 2004. United front to oppose controversial land bill. 29 February.

²⁰Holomisa, P. 2004. Chiefs bill gives pride of place to traditional leaders and customs. *Business Day*, 11 February.

²¹Claassens, A. 2004. Land rights bill gives excessive power to traditional leaders and erodes women's rights. *Cape Times*, 19 February.

²²This was a key issue in community submissions to Parliament.

BIBLIOGRAPHY

Alden Wily, L & Mbaya, S. 2001. *Land, people and forests in eastern and southern Africa at the beginning of the 21st*



- century. Nairobi: Natural Resources International and The World Conservation Union.
- Beinart, W. 1982. *The political economy of Pondoland 1860–1930*. Cambridge: Cambridge University Press.
- Beinart, W & Bundy, C. 1987. *Hidden struggles in rural South Africa: Politics and popular movements in the Transkei and Eastern Cape 1980–1930*. Johannesburg: Ravan.
- Berry, S. 1989. Social institutions and access to resources. *Africa*, 59(1).
- Berry, S. 1993. *No condition is permanent: The social dynamics of agrarian change in sub-Saharan Africa*. Madison: University of Wisconsin Press.
- Bruce, JW. 1993. The variety of reform: A review of the recent experiences with land reform and the reform of tenure, with particular reference to the African experience, in *Institutional issues in natural resource management*, edited by HS Marcussen. Roskilde, Denmark: International Development Studies, Roskilde University.
- Bruce, JW & Migot-Adholla, SE (eds). 1994. *Searching for land tenure security in Africa*. Washington DC: The International Bank for Reconstruction and Development.
- Chaskalson, M. 1987. Rural resistance in the 1940s and 1950s. *Africa Perspectives, New Series*, 5&6:47–59.
- Claassens, A. 2000. South African proposals for tenure reform: The Draft Land Rights Bill, in *Evolving land rights, policy and tenure in Africa*, edited by C Toulmin and J Quan. London: International Institute for Environment and Development/Natural Resources Institute.
- Claassens, A. 2001. *‘It is not easy to challenge a chief’: Lessons from Rakgnadi*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Research report; no. 9.)
- Claassens, A. 2003. *Community views on the Communal Land Rights Bill*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Research report; no. 15.)
- Cousins, B. 1997. How do rights become real? Formal and informal institutions in South Africa’s land reform. *IDS Bulletin*, 28(4):59–68.
- Cousins, B. 1999. *The economic benefits of tenure reform*. Submission to Senior Management meeting, Department of Land Affairs, 11/6/99.
- Cousins, B. 2000. Tenure and common property resources in Africa, in *Evolving land rights, policy and tenure in Africa*, edited by C Toulmin and J Quan. London: International Institute for Environment and Development/Natural Resources Institute.
- Cousins B. 2002. *Controversy and consensus in South Africa’s Land Reform Programme*. Paper presented at World Bank Regional Workshop on Land Issues in Africa and the Middle East, Kampala, 29 April–2 May 2002.
- Cousins, B. 2003. The Zimbabwe crisis in its wider context: The politics of land, democracy and development in southern Africa, in *Unfinished business: Rethinking land, state and citizenship in Zimbabwe*, edited by A Hammar, B Raftopolous and S Jensen. Harare: Weaver Press.
- Cousins, T & Hornby, D. 2002. *Leaping the fissures: Bridging the gap between paper and real practice in setting up common property institutions in land reform in South Africa*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Land reform and agrarian change in southern Africa occasional paper; no. 19.)
- Cross C. 1992. An alternate legality: The property rights question in relation to South Africa land reform. *South African Journal of Human Rights*, 8(3):305–33.
- Cross, C. 1998. Reforming land in South Africa: Who owns the land? in *Proceedings of the International conference on Land Tenure in the Developing World*. Cape Town: University of Cape Town Press.
- Delius, P (with Kingwill, R & Chaskalson, M). 1997. *A historical investigation of underlying rights to land registered as state owned*. Report commissioned by the Tenure Reform Core Group. Pretoria: Department of Land Affairs.
- DLA (Department of Land Affairs). 1997. *White Paper on South African Land Policy*. Pretoria: DLA
- De Swardt, C. 2003. *Unravelling chronic poverty in South Africa: Some food for thought*. Paper presented at the International Conference on Chronic Poverty, Manchester, 7–10 April 2003.
- IIED (International Institute for Environment and Development). 1999. *Land tenure and resource access in west Africa: Issues and opportunities for the next twenty five years*. London: IIED.
- Kepe, T. 2001. *Waking up from the dream: The pitfalls of ‘fast track’ development on the Wild Coast of South Africa*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Research report; no. 8.)
- Kepe, T & Cousins, B. 2002. *Radical land reform is key to sustainable rural development in South Africa*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Policy brief; no. 3.)
- Lahiff, E. 2001. *Land reform in South Africa: Is it meeting the challenge?* Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Policy brief; no. 1.)
- Lavigne Delville, P. 1999. *Harmonising formal law and customary land rights in French-speaking west Africa*. London: International Institute for Environment and Development. (IIED issue paper; no. 86.)
- Levin, R & Mkhabela, S. 1997. The chieftaincy, land allocation and democracy, in *‘No more tears...’ Struggles for land in Mpumalanga, South Africa*. Trenton: Africa World Press.

- Luckham, R. 1998. Are there alternatives to liberal democracy?' in *The democratic developmental state: Politics and institutional design*, edited by Mark Robinson and Gordon White. Oxford: Oxford University Press.
- Lund, C. 1998. *Land, power and politics in Niger. Land struggles and the rural code*. Hamburg: LIT Verlag.
- Makopi, S. 2000. Awards to provide security of tenure and comparable redress, in *At the crossroads: Land and agrarian reform in South Africa into the 21st century*, edited by Ben Cousins. Cape Town/Johannesburg: Programme for Land and Agrarian Studies, University of the Western Cape/National Land Committee:143–50.
- Mamdani, M. 1996. *Citizen and subject: Contemporary Africa and the legacy of late colonialism*. Princeton NJ: Princeton University Press.
- May, J et al. 1998. *Poverty and inequality in South Africa*. Durban: Praxis Publishing.
- Mbeki, G. 1964. *The peasants' revolt*. Harmondsworth: Penguin.
- Meer, S. 1997 (ed). *Women, land and authority: Perspectives from South Africa*. Cape Town: David Philip.
- Moore, SF. 1998. Changing African land tenure: Reflections on the incapacities of the state. *European Journal of Development Research*, 10(2):33–49.
- Morris, M. 1976. The development of capitalism in South African agriculture: Class struggle in the countryside. *Economy and Society*, 5(3).
- Mortimore, M. 1999. *History and evolution of land tenure and administration in west Africa*. London: International Institute for Environment and Development. (IIED issue paper; no. 71.)
- Murray, C. 2004. *South Africa's troubled royalty: traditional leaders after democracy*. Canberra: Federation Press in association with the Centre for International and Public Law, Faculty of Law, Australian National University. (Law and policy paper; no. 23.)
- Ntsebeza, L. 1999. *Land tenure reform, traditional authorities and rural local government in post-apartheid South Africa: Case studies from the Eastern Cape*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Research report; no. 3.)
- Okoth-Ogendo, HWO. 2002. *The tragic African commons: A century of expropriation, suppression and subversion*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Land reform and agrarian change in southern Africa occasional paper; no. 24.)
- Oomen, B. 2000. *Tradition on the move: Chiefs, democracy and change in rural South Africa*. Amsterdam: Netherlands Institute for Southern Africa.
- Peters, P. 1998. The erosion of commons and the emergence of property: problems for social analysis, in *Property in economic context*, edited by RC Hunt and A Gilman. Lanham, New York: Oxford University Press of America. (Monographs in economic anthropology; no. 14.)
- Peters, P. 2002. The limits of negotiability: Security, equity and class formation in Africa's land systems, in *Negotiating property in Africa*, edited by K Juul and C Lund. Portsmouth, NH: Heinemann.
- Quan, J. 2000. Land tenure, economic growth and poverty in sub-Saharan Africa, in *Evolving land rights, policy and tenure in Africa*, edited by C Toulmin and J Quan. London: International Institute for Environment and Development/Natural Resources Institute.
- Ribot, JC. 2002. *African decentralization: Local actors, powers and accountability*. Geneva: United Nations Research Institute for Social Development. (Democracy, governance and human rights programme paper; no. 8.)
- Sansome, B. 1974. Traditional economic systems, in *The Bantu-speaking peoples of southern Africa*, edited by WD Hammond-Tooke. London: Routledge.
- Shackleton, S, Shackleton, C & Cousins, B. 2000. The economic value of land and natural resources to rural livelihoods: Case studies from South Africa, in *At the crossroads: Land and agrarian reform in South Africa into the 21st century*, edited by Ben Cousins. Cape Town/Johannesburg: Programme for Land and Agrarian Studies, University of the Western Cape/National Land Committee:35–67.
- Shipton, P & Goheen, M. 1992. Understanding African landholding: Power, wealth, and meaning. *Africa*, 62(3).
- Sibanda, S. 2000. Proposals for the management of land rights in rural South Africa, in *At the crossroads: Land and agrarian reform in South Africa into the 21st century*, edited by Ben Cousins. Cape Town/Johannesburg: Programme for Land and Agrarian Studies, University of the Western Cape/National Land Committee:306–10.
- TRAC (Transvaal Rural Action Committee). 1992. *Botho Sechabeng. A feeling of community*. Johannesburg: TRAC.
- Turner, S. 1999. *Land rights and land administration in the Herschel and Maluti Districts, Eastern Cape*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Land reform and agrarian change in southern Africa occasional paper; no. 10.)
- Wolpe, H. 1972. Capitalism and cheap labour power in South Africa: From segregation to apartheid. *Economy and Society*, 1(4):425–56.
- World Bank. 2003. *Land policies for growth and poverty reduction*. Washington DC: Oxford University Press and World Bank.



APPENDICES



Lagos Declaration on Land and Resource Rights in Africa

Adopted at the second workshop of the Pan-African Programme on Land and Resource Rights (PAPLRR) on 16 July 2002 in Lagos, Nigeria

For sustainable development in Africa, secure the land and resource rights of the rural poor!

- 1** Recognising that:
 - Most people in Africa still live in rural areas and derive their livelihoods primarily from land and natural resources.
 - Neoliberal development policies and programmes which are promoted by Northern donor countries, agencies, and multilateral institutions and which underpin the New Partnership for African Development (Nepad) do not give adequate recognition to the land and natural resource rights of the rural poor. They are premised on opening up African economies to external investment by multinational corporations, and on securing the property rights of foreign capital.
 - Across the continent, the land and resource rights of the poor are threatened by inappropriate policies and institutions, unequal social, political and economic relations, and the actions of powerful vested interests.
- 2** We, the members of the Pan-African Programme on Land and Resource Rights (PAPLRR), a network of scholars, advocacy groups and practitioners from across the continent, call on all parties at the World Summit on Sustainable Development (WSSD) to acknowledge and confront the problematic situation in respect of land and resources in Africa, and to make this a starting point for sustainable economic development and rural transformation.
- 3** We affirm our belief that rural development in Africa should be based on enhancement of the productive capacities of rural people and the regeneration of local economies. Economic efficiency must be subordinate to, and supportive of, social efficiency. Markets, including land markets, can be promoted if they enhance local productive relations and do not lead to inequitable concentrations of wealth. Securing the land and resource rights of the rural poor is a necessary, if not sufficient, condition for economic renewal.
- 4** Policies, laws and programmes to secure these rights are an urgent necessity across the continent. This must include the recognition of customary norms in tenure relations and their integration into national policy and legal frameworks. Governments must also allocate sufficient resources for effective implementation of these policies and laws.
- 5** Equity must be a fundamental goal of all such policies. They must promote gender, class, race, generational, and ethnic equity as a basis for people-centred sustainable development. In particular, law, policy and practice must secure the rights of women, who are the main users of land in most parts of the continent. Historical injustices must be addressed and land redistribution programmes implemented where needed.
- 6** Processes of rural transformation must be accompanied by the democratisation of institutions that govern land and resources, at all levels of state and society. This will entail both devolution of decision-making authority, and the allocation of adequate resources to decentralised institutions.
- 7** In a globalising world in which the interconnectedness of nations is increasing, the accountability of all actors, including developed countries and development partners, is imperative in the quest for the realisation of meaningful land and resource rights. This must be accompanied by concerted and targeted efforts to build the capacity of African countries to enable them to address the challenges of globalisation, in favour of social equity for the poor. We also call for an end to the hypocrisy of those wealthy nations that require the developing world to liberalise markets, but subsidise their own farmers and industries and protect them from competition from the South.
- 8** We recognise that some international agreements (for example, the Convention on Biological Diversity – CBD) can enhance the rights of local communities to land and resources, while others (for example, the Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS) directly and indirectly encroach on these rights. There is an urgent need to implement and enforce treaties that promote local communities' rights, and mobilise a common African voice against those that endanger these rights.
- 9** The people of Africa are beginning to organise themselves into social movements to resist the negative effects of inappropriate policies, and to develop alternatives. This is to be welcomed as pressure from below, which is essential for democratisation and the adoption of policies to secure the rights and livelihoods of the rural poor. We declare our support for these movements and commit ourselves to working closely with them. We call on progressive government officials, NGOs and researchers to provide them with meaningful material assistance.
- 10** We urge researchers and practitioners to acknowledge that land and resources issues are multi-dimensional and cannot be reduced to a single disciplinary or sector-specific approach. Researchers and practitioners must build strong and equitable partnership among NGOs, civil society and academic institutions.
- 11** The central issue of land and resource rights has been grossly neglected in fora such as the WSSD and initiatives such as Nepad. However, sustainable development in Africa will never be achieved without the securing of these rights in law, and their realisation in practice through concerted efforts at all levels of society.

No development without real rights!

This declaration statement was adopted at the second workshop of the Pan-African Programme on Land and Resource Rights (PAPLRR) held in Lagos, Nigeria from 15–16 July 2002. More than 30 participants represented 17 African countries at the meeting.

For further details, comments or queries please contact Mwanasidi Senushere, PAPLRR Co-ordinator, Programme for Land and Agrarian Studies, University of the Western Cape, Private Bag 817, Bellville 7135, Cape Town, South Africa. E-mail: mwanasid@uwc.ac.za. Fax: +27 21 959 3732.



APPENDIX 2: COMMISSIONED AND CASE STUDY PAPERS FROM THE PAPLRR NETWORK

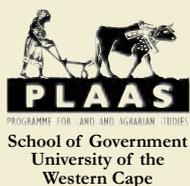
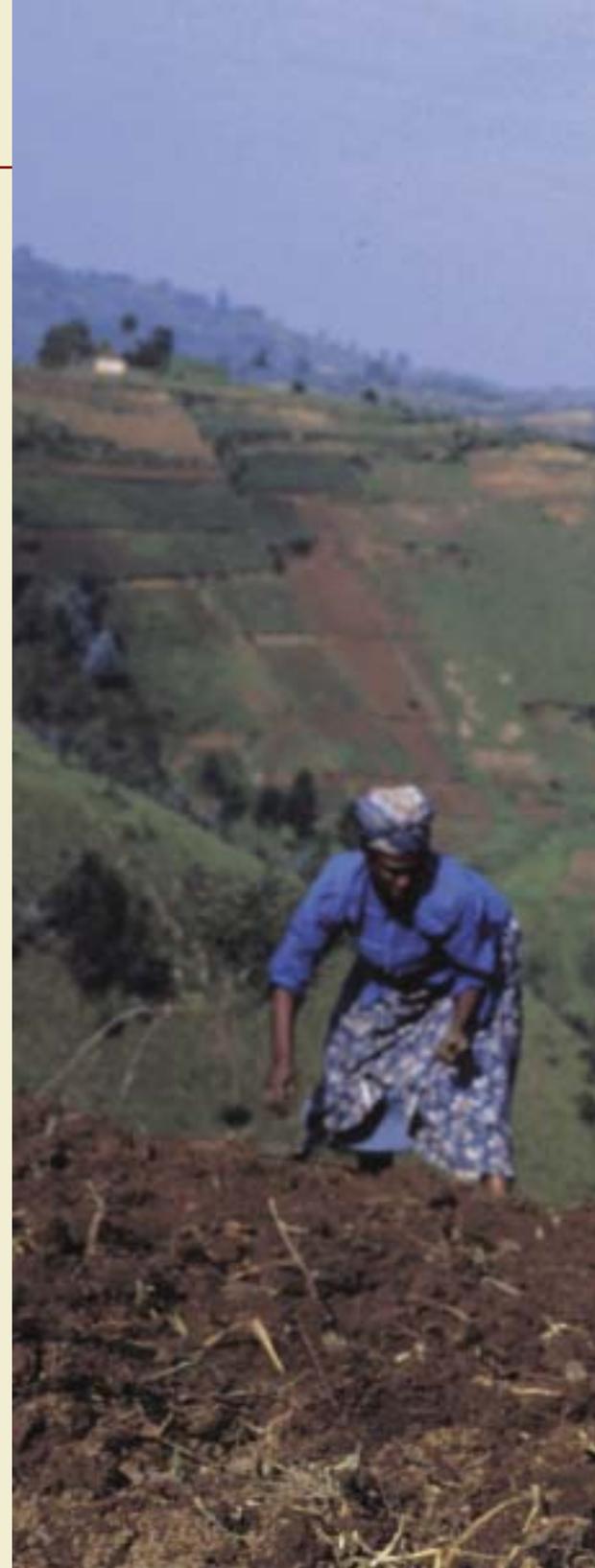
- Alinon, K. 2002. *The Nepad: A new investment chance for Africa? Reflections on current controversial opinions about the initiative*. [www.cbnrm.uwc.ac.za/paplr/docs/NairobiPAPLRRpaper – Kofi.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/NairobiPAPLRRpaper-Kofi.pdf)
- Alinon, K. 2003. *Land issues in the core development agenda: The west African situation*. www.cbnrm.uwc.ac.za/paplr/docs/Cape-Koffi.pdf
- Amadi, A. 2002. *Impact potential of the New Partnership for Africa's Development (Nepad)*. [www.cbnrm.uwc.ac.za/paplr/docs/NairobiPAPLRRNEPADPaper - Ako.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/NairobiPAPLRRNEPADPaper-Ako.pdf)
- Asseta, D. 2002. *Women and land issues in Burkina Faso*. [www.cbnrm.uwc.ac.za/paplr/docs/Diallo Asseta – Cairo Case Study.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/DialloAsseta-CairoCaseStudy.pdf)
- Ayeb, H. 2003. *The Egyptian state under threat of hydraulic crisis and peasant poverty: The risks of a free-market management of water*. www.cbnrm.uwc.ac.za/paplr/docs/CapeTownPAPLRR-HabibsDraftPaper.pdf
- Bazaara, N. 2002. *Politics, legal land reform and resource rights in Uganda*. www.cbnrm.uwc.ac.za/paplr/docs/CairoPAPLRR-Bazaara.pdf
- Cousins, B. 2002. *Reforming communal land tenure in South Africa: Why land titling is not the answer*. [www.cbnrm.uwc.ac.za/paplr/docs/NairobiPAPLRR Paper – Ben.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/NairobiPAPLRRPaper-Ben.pdf)
- Creech, H & Willard T. 2001. *Strategic intentions: Managing knowledge networks for sustainable development*. Published by the International Institute for Sustainable Development. www.iisd.org/publications/publication.asp?pno=306
- Desire, D. 2003. *Legal provisions relating to the management of rural land ownership in the Ivory Coast* www.cbnrm.uwc.ac.za/paplr/docs/PLAAS-CTPAPLRR-DadisPaperEnglish.pdf
- Doyo, G. 2002. *Land tenure and needs for reform in pastoral areas of Kenya*. www.cbnrm.uwc.ac.za/paplr/docs/CairoPAPLRRPr-Godana.pdf
- Fajemirokun, B. 2002. *Land and resource rights: Issues of public participation and access to land in Nigeria* www.cbnrm.uwc.ac.za/paplr/docs/SRCPAPLRR-Bolaspr.pdf
- Greenberg, S. 2002. *Land and resource rights advocacy campaigns in southern Africa*. [www.cbnrm.uwc.ac.za/paplr/docs/PAPLRR Southern Africa land rights paper – Lagos, Greenberg.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/PAPLRRSouthernAfricaLandRightsPaper-LagosGreenberg.pdf)
- Greenberg, S. 2002. *Making rights real: Where to for the South African landless movement after WSSD?* [www.cbnrm.uwc.ac.za/paplr/docs/Nairobi Workshop Paper – Greenberg.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/NairobiWorkshopPaper-Greenberg.pdf)
- Huggins, C. 2003. *Pan-African Programme on Land and Resource Rights (PALRR) networking exchange visit to Tanzania: Trip report*.
- Ismail, AM. 2002. *Tyranny of the law and the retraction of the Egyptian civil society*. [www.cbnrm.uwc.ac.za/paplr/docs/Lagos PAPLRR paper – A. Ishmael Mawla.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/LagosPAPLRRpaper-AIshmaelMawla.pdf)
- Kameri-Mbote, P. 2002. *Wider economic contexts and engagements: International treaties and impacts on land and resource rights*. [www.cbnrm.uwc.ac.za/paplr/docs/PAPLRR Cairo Commissioned Paper – Patricia.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/PAPLRRCairoCommissionedPaper-Patricia.pdf)
- Kameri-Mbote, P. 2003. *Land tenure & conflict in Kenya: Toward innovative conflict prevention and management*. www.cbnrm.uwc.ac.za/paplr/docs/LandTenureConflict-PAPLRRCTK-Mbote.pdf
- Kishk, MA. 2002. *Good governance: A pre-requisite for poverty eradication and sustainable human development*. [www.cbnrm.uwc.ac.za/paplr/docs/Copy of Good Governance.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/CopyofGoodGovernance.pdf)
- Lindquist, EA. 2001. *Discerning policy influence: Framework for a strategic evaluation of IDRC-supported research*. http://web.idrc.ca/uploads/user-S/105223761903-idrc_framework_fin.doc
- Makumbi, I. 2002. *Impact of globalisation on forests in Uganda*. [www.cbnrm.uwc.ac.za/paplr/docs/Nairobi PAPLRR Case Study – Makumbi I.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/NairobiPAPLRRCaseStudy-MakumbiI.pdf)
- Marongwe, N. 2003. *Land and resource rights in southern Africa*. www.cbnrm.uwc.ac.za/paplr/docs/CTPAPLRR-Marongwespaper.pdf
- Mope Simo, J. 2003. *Issues of the sustainable management of protected areas in Cameroon: Case study of land and resource rights in the Campo Ma'an National Park area*. www.cbnrm.uwc.ac.za/paplr/docs/PAPLRRCT-JohnSimo.pdf
- Mpande, R. 2003. *Civil society and Nepad engagement strategies*. www.cbnrm.uwc.ac.za/paplr/docs/CTPAPLRR-Mpande.pdf
- Negrão, J. 2002. *Land in Africa: An indispensable element towards increasing the wealth of the poor*. [www.cbnrm.uwc.ac.za/paplr/docs/Cairo PAPLRR Paper – Jose Negrao – English version.pdf](http://www.cbnrm.uwc.ac.za/paplr/docs/CairoPAPLRRPaper-JoseNegrao-Englishversion.pdf)



- Ng'ong'ola, C. 2002. *Constitutional protection of property and contemporary land problems in southern Africa*. www.cbnrm.uwc.ac.za/paplr/docs/Nairobi%20draft%20Paper%20-%20Ngongola.pdf
- Odhiambo, MO & Kameri-Mbote, P. 2002. *Land & resource tenure policies & laws* www.cbnrm.uwc.ac.za/paplr/docs/Lagos_Odhiambo_Patricia.zip
- Odhiambo, MO. 2002. *Advocating for land policy reforms in Kenya, Uganda and Tanzania: NGO lessons and prospects*. www.cbnrm.uwc.ac.za/paplr/docs/PAPLRR Lagos Paper – M. Odhiambo.pdf
- Omoweh, DA. 2002. *The state, land and resource rights, and the prospects of sustainable economic development in west Africa*. www.cbnrm.uwc.ac.za/paplr/docs/Lagos PAPLRR Paper – D. Omoweh.pdf
- Omoweh, DA. 2003. *The New Partnership for Africa's Development (Nepad): How does it address the land and resource rights of the rural and urban poor?* www.cbnrm.uwc.ac.za/paplr/docs/CTPAPLRR-FinalDraftofNepad.Omoweh.pdf
- Rugadya, M. 2003. *Current status and challenges in the land reform process in Uganda: An NGO perspective*. www.cbnrm.uwc.ac.za/paplr/docs/CTPAPLRR-UgandaLandAllianceRugadyaPaper.pdf
- Saruchera, M. 2002. *Struggles to make rights 'real': 'Hondo Yeminda' in Zimbabwe: The Svosve peasantry land rights assertion, a struggle sacrificed?* www.cbnrm.uwc.ac.za/paplr/docs/Nairobi PAPLRR Paper – Saru.pdf
- Singh, A. 2003. *The future of Indian-owned agricultural land in KwaZulu-Natal, South Africa*. www.cbnrm.uwc.ac.za/paplr/docs/CTPAPLRR-Anandspr.pdf
- Tawfik, R. 2003. *Land and agriculture in Nepal: Implications for north Africa*. www.cbnrm.uwc.ac.za/paplr/docs/CTPAPLRR-Rawiasfinalpr.pdf
- Terranti, S. 2003. *Privatization of agricultural land in Algeria: More than ten years of silent debates*. www.cbnrm.uwc.ac.za/paplr/docs/PLAAS-CTPAPLRR-SalimaPaperEnglish.pdf
- Wanjala, S. 2002. *Land and resource tenure, policies and laws. A perspective from East Africa*. www.cbnrm.uwc.ac.za/paplr/docs/LAND TENURE.pdf
- Werner, W. 2002. *Land and resource rights: Namibia*. www.cbnrm.uwc.ac.za/paplr/docs/PaperCairo-fianloutput.pdf



The Pan-African Programme on Land and Resource Rights (PAPLRR) brings together a core group of African researchers, practitioners and activists to develop common understandings and strategies for securing land and resource rights for the rural poor. The publication of this volume is part of PAPLRR's effort to disseminate a uniquely African voice on matters of land and resource rights. The authors proceed from the understanding that poor Africans are critically dependent on land and other natural resources for survival, but their ability to access these necessities is hampered by inappropriate laws and policies as well as social, political and economic marginalisation. Topics include the historical background and legal framework which applies in various parts of the continent, the impact on land and resources of the New Partnership for Africa's Development (Nepad); the effect of acceding to certain international treaties and agreements; and lessons from experience of social mobilisation that could be applied to enhance the access of Africa's poor to land and resource rights.



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