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LAND REFORM IN AFRICA: LESSONS FOR SOUTH AFRICA

Customary Land Tenure Reform in Uganda; Lessons for South Africa

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Introduction

Land Reform processes have been on going in several sub-Saharan African Countries. Many of these processes have on the agenda to transform traditional land holding systems to the modern that is easier to market. It can be noted that the most successful land reform processes in Africa will be those that can;

- Recognize and protect control and access to and use of land by the masses,
- recognize how traditional land tenure has evolved over time,
- attempt to guide the tenure evolution by encouraging those changes that are beneficial and prevent those changes that are harmful.[1]

In Uganda land marketability was one of the key driving forces in the land reform process. Chapter 15 of the Constitution of 1995 on Land and Environment and the Land Act 1998 were developed with one of the major objectives being the enhancement of the land market where it did not exist. The following principles were considered;

- *A good Land tenure system should support agricultural development through the function of land market which permits those who have rights in land to voluntarily sell their land and for progressive framers to gain access to land*
- *A good land tenure system should not force people off the land, particularly those who have no other way to earn a reasonable living or to survive. Land tenure system should protect people's rights in land so they are not forced off the land before there are jobs available in the non-agricultural sector of the economy.*
- *A good land tenure system should be uniform throughout the country.*

As seen above the basic underlying principle for the land reform process in Uganda was to create a land market so that land would move from the people without capacity to utilize it to those that have the capacity to put it to maximum usage. With Over 75% of land in Uganda held customarily, it was important to address this system and regulate it with a view to slowly transforming it into modern land tenure. The Land Act if fully implemented will have achieved its purpose with the provision that customary tenure can be converted to freehold land tenure.

This paper gives a brief history of the land tenure systems in Uganda and details the evolvement of the customary land tenure system. It goes ahead to analyze the legal provisions on this tenure and the lessons and challenges. In this analysis it is hoped

[1] Margaret Rugadya, July 2002, Ed Margaret Rugadya and Harriet Busingye "Gender Perspectives in the Land Reform Process in Uganda" Paper on the Land Reform Process in Uganda p. 6

that lessons can be extracted for the ongoing process to legislate for communal land rights in South Africa.

Historical Background

Before the coming into force of the 1995 Constitution of Uganda, customary land holding was not recognized as a legal tenure. Only three land tenure systems existed. These were; leasehold, mailo and freehold. Customary tenants were regarded as tenants at sufferance and could be evicted any time at whim of the state. In 1975 the Land Reform Decree (Decree No. 3 of 1975) was passed and with it came many radical changes;

- All land in Uganda was declared public and vested in Uganda Land Commission.
- No person would hold an interest in Land greater than a lease hold except the Uganda Land Commission (ULC) and accordingly mailo and freehold interests were converted into leases for a period of 99 years with effect from 1st June 1975.
- Consent from ULC was required before one would transfer his leasehold.
- Customary tenants became tenants at sufferance i.e. although they may have come onto land and occupied it lawfully, by this law; their continued stay thereon became unlawful.
- It became unlawful for one to acquire fresh customary tenure without permission from what is termed in the law as the 'prescribed authority'.
- A customary tenant was restricted in transferring his customary interest- could not transfer the interest without notice to the prescribed authority.

The promulgation of the 1995 constitution brought with it very significant changes. The radical title to land was vested in the citizens of Uganda, the Land Reform Decree was abolished and the systems of land tenure that were in existence before independence re-instated. These were stated as customary tenure, mailo tenure, freehold tenure and leasehold tenure.

Mailo Land Tenure: This form of tenure was only peculiar to Buganda. It was created by the 1900 Buganda Agreement between Her Majesty's Government of Great Britain and the Kingdom of Buganda. By this agreement, chunks of land were given to some individuals to own in perpetuity. The royal family of Buganda received 958 sq miles as private Mailo, chiefs and other notables received 8 sq miles each. Local peasants previously on the land were not recognized and became tenants on land and had to pay rent to the Landlord commonly known as "Busulu." The owner of Mailo land was and is entitled to a certificate of title.

Freehold Land Tenure*:* This form of tenure also existed in Uganda especially in the Western part of the Country. This was a system of owning land in Perpetuity and was set up by agreement between the Kingdoms and the British Government. Grants of land in freehold were made by the Crown and later by the Uganda Land Commission. The grantee of land in freehold was and is entitled to a certificate of title. Most of this land was issued to church missionaries and academic Institutions.

Leasehold Land Tenure: *This* is a system of owning land on contract. A grant of land would be made by an owner of freehold or Mailo or by the Crown or Uganda Land Commission to another person for a specified period of time and on certain conditions, which included but limited to payment of rent. The grantee of a lease for a period of 3 years or more would be entitled to a certificate of title.

Customary Land Tenure

Customary tenure is the first tenure category specified in the 1995 Constitution and the 1998 Land Act. It has two broad classifications; Communal customary tenure predominantly in Northern and parts of Eastern Uganda and individual/family/clan customary tenure prevalent in central, Western, parts of the North and south Western Uganda. Before 1995 customary tenure though not legally recognized continued to exist as a system of holding unregistered land by customary rules. Customary tenants could be in occupation of mailo-land, Freehold, Leasehold or Public land. They occupied such land by either growing various crops, exercising customary rights to look after animals thereon or by carrying out any other activity thereon as occupiers of such land. The term "Kibanja" became synonymous with occupants of land under customary tenure.

During this period land, which was not owned either in freehold or by way of mailo, was known as public land. Out of public land leases and freeholds could be granted. Public land was vested in Uganda Land Commission (ULC)

Status of a Customary Tenant.

During this period a customary tenant enjoyed some rights. A customary tenant on public land had to give consent before land, which he was occupying, could be granted either in freehold or leasehold by ULC. He was entitled to compensation before such a leasehold of land occupied by him could be taken and a notice of six months. However, a customary tenant on mailo land did not enjoy equal rights as those enjoyed by a customary tenant on public land. His stay on Mailo land was governed by the Busulu and Envujjo Law of 1928. He was under an obligation to pay Busulu (kind of levy) to the mailo owner before he could enjoy a right to cultivate the land he was occupying. In case such a tenant was involved in the growing of economic crops, he had to pay envujjo (another kind of levy) to the mailo owner. He could not transfer or sublet his Kibanja as a matter of right. However he could only be evicted upon an order of court and for sufficient cause. In this respect he was entitled to compensation for the improvements made on the Kibanja.

The Customary System of land holding in Uganda today

The customary system of land holding by its very nature is a very complex system of land relations. It is not always easy to define its incidents since they vary from community to community. What is important to note however is that rights to control, use and ownership are derived from being a member of a given community and are retained by performance of certain obligations in the community.[2] Customary tenure in

[2] Principles of a National Land Policy framework for Uganda: Prepared for Uganda Land alliance by Prof. H.W. Okoth-Ogendo, Jan, 2002, 23

Uganda has persisted for a long time despite its neglect by the legal regime, this goes to show that there are very important incidents in this type of land holding that cannot be easily dismissed or replaced. The system of land allocation and land transactions is important in determining equity, land administration and dispute resolution mechanisms in the customary tenure. It is therefore important first to establish what rights exist under customary tenure.

Communal Land; this is the kind of land where the household is the primary owner of the land and may include extended members of the family. Communal land in Uganda includes gardens and pastures, grazing areas, burial grounds and hunting areas commonly known as common property regimes. Communal land is especially found in Northern Uganda. The common property regime is especially utilized by the pastoralist communities in Northern Uganda and parts of the cattle corridor in the West. User rights are guaranteed in form of farming and seasonal grazing, access to water, pasture burial grounds, firewood and other community activities. No specific ownership rights of control are conferred on users. Control and ownership are through the family, clan or the community.

Individual/Family or Clan customary tenure: In this kind of land there is also emphasis in use rather than ownership. Male elders are the custodians of customary land in most communities and determine distribution of the land. However the family has more control in the land utilization rather the community and different individuals in the family are allocated land (Allocations are only made to male members of the household with very few exceptions). In many places in Uganda customary land has tended to become more individualized and though not initially acceptable, incidents of sale are very high. In some ethnic groups, before a sale is made clan members and family have to be consulted. However the institution of customary land is weakening in many places and people are poorer therefore sales have increased. These are mostly distress sales.

Legal provisions.

The 1995 Constitution of the Republic of Uganda was the first document to ever recognize customary tenure as a land tenure system. (Article 237 (4) (a). The constitutional provisions were re stated and elaborated upon by the Land Act 16 of 1998. This meant that the majority of Ugandans who leave on customary land were now recognized as landowners. Customary owners are given land rights by the Land Act of 1998 through four principle mechanisms:

i) The radical title: Land in Uganda belongs to the citizens of Uganda and they hold it in accordance with the four land tenure systems i.e. Mailo, freehold, leasehold and customary land. (Article 237 (1) of the Constitution.)

ii) The Land Act grants tenure rights to customary holders of land, who can now process certificates of customary ownership thus gaining immediate titles to the land they occupy. Certificates of this nature can be obtained at three levels: individuals, family or community. The certificate of ownership is primary evidence of customary occupation. It confers upon the holder the right to undertake subject to any restrictions and limitations in it, any

transaction in respect of that land which can include leasing, mortgaging, selling etc. S.9 (1) and (2).

iii) The Act permits holders of land in customary tenure to convert it to freehold tenure (S.10). This can be done with or without the certificate of customary ownership. It has been said that the provision for conversion of customary tenure into freehold means that it will be difficult for people to have confidence to transact in customary tenure. It is seen as backward and a hindrance to development. Its conversion would mean doing away with it.

iv) Perhaps the most important provision for customary land ownership is the provision for communal land ownership through Associations. S.16 of the Land Act prescribes for a communal Land Association; it can be formed by a group of persons with the purpose of communal ownership and management of land. The Association can be asked to set aside land for common use by members of the group, recognize that part or all of the land held, is occupied and used by individuals and families for their own purposes and benefit. Individuals may apply for a certificate of customary ownership for land made available to them by the Association for occupation and use of that individual or household. Areas set aside for common use shall be used and managed through a common land management Scheme. This scheme is set up by the Association and has to be agreed upon by the community on whose behalf land is held by the association. The Common Scheme will go a long way to protect the rights of pastoral communities.

Land administration and Dispute Resolution

The Land Act 1998 recognizes the role of traditional authorities in land administration and dispute resolution by providing that traditional authorities will determine disputes over customary tenure by acting as mediators along side the formal land tribunal system. (S.89) The Land Tribunal can also advise parties to settle their case through mediation to enable the services of traditional authorities to be utilized.

In the Customary system, clan leaders, chiefs and other respected leaders are chosen because of age and experience; they settle disputes and allocate land. However the customary dispute settlement mechanism operates along side modern structures, the local council system which is situated at village, parish, sub-county and District levels. The village local council up to the Sub-county level sits as courts in land matters.

Provisions on equality and non-discrimination

In the administration and dispute settlement on customary land the Land Act provides that for any decision taken in respect of land held under customary tenure, whether by individual or communally, the decision will be in accordance with the custom, traditions and practices of the community… except that a decision which denies women or children or persons with disability access to ownership or use shall be null and void (S.28) of the Land Act and Article 33 of the 1995 Constitution.

Sec. 40 provides for consent by spouses or children in any transaction on land where a family ordinarily resides and derive their sustenance. The provision gives protection to

minor children, dependant children of majority age and spouses. It has been said to be one of the achievements of the Land Act inspite of its many loopholes that make enforceability very difficult.

The Land Act provides in section 23 (2) for purposes of customary land ownership, the family shall be considered as a legal person and shall be represented by the head of the family. This family head in most cases is a man who has been given power by this provision to make all transactions in respect of the family land on behalf of the others. He even has the option to convert land to freehold. This may mean that women and children will still be left out in the ownership and control of property. The law could have provided that all names of the family members are written in any transaction on customary land.

Women in Uganda are most discriminated against in the administration and dispute settlement of customary land. Women are said to be property just like land and therefore cannot own property because "property cannot own property." It is known for example that in respect of traditional authorities over land, there is often inequity in composition of the committee, decisions made do not favor women and children in most cases and tend to exclude the poorest in the community. [3] Age is taken to determine who makes the decisions and women are kept out of ownership, control and decision-making. In legislating for traditional authorities to mediate in land matters, there is a danger that the marginalized groups in the community will continue being marginalized.

In the work of the Alliance on women's rights, it has come out clearly that legislating for women's land rights is not enough to provide for equality and equity. It is important that the elders and other decision makers in the community are sensitized on gender relations before enactment of the law to bring them on board and to make it easier for implementation. It is also important to provide continuous sensitization on the provisions of the law once it has been enacted in a bid to change some of the oppressive cultural attitudes.

Lessons in the Ugandan Legislative Process

It important to note that legislating customary land and modernizing some of its instances is very important especially because people living on this tenure have now got secure rights on land. A certificate of customary ownership once acquired will enable the holder to undertake various land transactions like sell, mortgage or transfer land to a third party. It also creates space for different members of the community to have their rights enforced. Women and children who are the most marginalized group can be able to demand for their rights now. Both the Constitution and the Land Act demand that their rights must be taken care of in any decision being made on customary land.

The role of traditional leaders has been appreciated by law by allowing them to participate in dispute resolution and settlement acting as mediators between persons with disputes over any matter arising out of customary tenure. (S.89 of the Land Act 1998).

[3] Dr. Liz Wily, May 1998: A further note on: Customary Land Tenure and the Land Bill, 9

The Land Act provisions are aimed at bringing land services closer to the poor by introducing several land delivery agencies, which are recognized as well by the Constitution. These include as seen above traditional authorities, mediators, and land committees at parish, sub-county and district levels. Land Registry and land Tribunals have been put at every District, which has not been previously the case.

Key Challenges

Although customary land is a recognized tenure in Uganda, not much in terms of implementation of the provisions in the Land Act has happened to measure whether the provisions are progressive or not. No single certificate of ownership has been issued as yet and the status quo on the ground remains the same. It is hoped that the Land Act will be amended to give powers to local council courts and Land Committees to implement the law at the local level. The key challenges to be dealt with will include the following:

- The Land Act by providing that customary land rights may be registered and certificates of ownership issued and customary tenure converted to freehold tenure fails to appreciate the complexities of the system. Customary tenure may have been legislated but the practices and cultures of people in terms of its administration and management may not change for a long time.
- Incidents of customary tenure have not been properly defined by law and are left to the varying systems of culture to decide on administrative and management issues. Community leaders still determine the procedures and conditions of operation therefore the law does not develop its operations to the level of regulating rights and obligations
- Though the law purports to recognize customary tenure, the Land Act has treated it as a transtionary and secondary tenure that will one day cease to exist after every community or individual has converted their land holding to freehold, this is clear since there is only provision for conversion to freehold and there is no reverse process of transforming freehold into customary tenure.
- The provisions for a certificate of customary ownership are yet to be operationalised four years after the Land Act was enacted, by implication that this very certificate is convertible for a freehold title also shows that it is inferior to a land title and may be treated with contempt by lending institutions. It is hoped that the certificate will allow people at local level to borrow against it from micro credit schemes and other financial institutions, pledge it or even sell their land against it. However it is in dispute whether the customs of the community will allow for the land to be mortgaged or even sold. It is in doubt that customary owners will be able to enjoy these privileges; there will be very few customary land tenure systems that will permit these privileges. It remains to be seen that customary land will meet the challenges of the land market and not be found wanting in many respects.
- Most communities have not yet realized the changes made by law, sensitization on the law has only happened at a very small scale and only opinion leaders

have been sensitized, if the people do not know the changes it is even harder to implement them.

- Customary land remains very difficult to sell or transfer , yet the law seems to indicate a very simple system that will easily be market worthy . The community more or less has to regulate its transfer even where land is used by a known individual. It will be very difficult for specific individuals to approach the communal land association to request for their parcel for individual registration. Research has shown that communal landowners are not willing to let any single individual demarcate their own share of land. This is especially true in Northern Uganda where most land is dry and the pastoral communities have to move around looking for greener pastures. For such a community individualization of land may not be a matter for choice.

- The Land Act provides a complicated and laborious system through which people in a community can become a communal land Association and be able to register their land as communal land, it is also not possible to tell at this time whether the local communities which are mostly illiterate will be in position to go through all the necessary procedures to have their parcels documented and possibly converted to freehold. Experience has shown that the lack of capacity for the poor to process their own documents and their failure to verify their own land rights has led to abuse and fraud to the detriment of the would be beneficiaries.[4] It is also not clear form the law what will happen to the interests of people with secondary rights once, land is alienated and registered in the names of specific individuals or families considered to hold primary interests.

- May poor people in Uganda live on customary land, it may not be possible for many of them to register their customary parcels because of the costs involved, since no registration has taken place one cannot be sure whether the costs will be affordable at the local level. Many may have no choice but to remain on unregistered land.

Lessons for South Africa

In many countries in Africa, customary rights in land have not been seen as important and a move not to legislate has been attempted especially as seen in Uganda, legislation only took place in 1995 even when it happened the law has treated customary tenure as inferior to other tenures by requiring that it may be converted to freehold. Customary tenure is only recognized for purposes of transforming it to other statutory tenure. No substantial proof or evidence exists that shows that agrarian reform requires the transformation of customary tenure. The notion that its transformation will lead to agricultural modernization and therefore development has not been proved in any country in Africa. It is therefore significant that South Africa has taken the important step to legislate for customary rights to land. It is also important that South Africa draws lessons from other Countries that have attempted to legislate for customary rights to

[4] Rose Mwebaza; Integrating Statutory and Customary Tenure systems in Policy and Legislation: The Uganda Case, Workshop on Land Tenure Policy in African Nations Berkkkshire England, Feb, 1999,7

land and be very cautious not to attempt to transform the system of communal or customary land into a more desired modern system.

The first important lesson will be to ask people how customary land should be regulated by law. In Uganda the key question asked was whether customary land should be legalized, details on procedures and regulation were not properly legislated and instead left to the different customary practices. This is now a big challenge for implementers since the incidents of customary land have not been properly described. The Communal Land Rights Bill of South Africa has to clearly state the incidents of the customary land in question and how all the relevant communities will administer it. It is good to note that one of the objectives of the bill is to provide space for '…*the members of the community to choose the appropriate land tenure system, community rules and administrative structures governing their communal land.'*

After the law has been enacted it will be important to sensitize the community on what to do and where to go if in need of legal or administrative services. It is important that the services to be provided in the law are brought to the people themselves and that they are implementable. The Land Act in Uganda has had to be amended to make it operational because the services to be provided cannot be afforded by the state and have to be reduced to manageable levels.

By legislating for customary land holding it is important to recognize the role played by traditional authorities in dispute resolution and land administration, failure to involve them would make it even more difficult for implementation therefore both civil society and government face an uphill task to convert the traditional authorities to be more gender responsive. South Africa will have to be very cautious in making legislation to ensure that the traditional institutions are not given too much power in the administration of communal lands, this may mean that gender equity could be compromised as ownership and control may remain in the hands of the male members of the community.

For purposes of ensuring that both men and women can use, access and control land and have equitable distribution of land resources it is important to stress gender issues in the Communal Land Rights Bill[5] by being very clear to avoid any ambiguity. For example S. 7 (2) of the bill provides for unfair discrimination against anyone … This may not be adequate to protect those marginalized people in the community, the Bill should clearly state that the customary or communal system shall not discriminate against women and children and other marginalized groups identified. Throughout the Bill it should be clear that all members of the community include women and children, given the customary biases towards this category of persons, statements like' ...*all members are afforded a fair opportunity to participate in the decision-making processes of the community*; (S. 32 (3) i) could be interpreted to exclude women, children and other marginalized groups.

[5] Communal Land Rights Bill, 2002 Republic of South Africa (Eighth Draft –23rd July 2002) for Discussion purposes only

By transferring ownership of land from the state to the community, South Africa can draw on the Ugandan example where the Constitution vests all land in Uganda in the Citizens. The implications for such a move will have to be considered; how can the state develop and plan land that is in the hands of these rural communities, will the state have the power to appropriate land for public interest, safety, defence or otherwise? Are there provisions for compensation of the communities involved if such a need arises?

Registration of land parcels is important but it does not have to be titling if the community cannot appreciate it. In Uganda the option of having certificates of customary ownership was made because they were seen to be cheaper and easier to acquire at local level. As to whether they meet the need for which certificates of title are preferred remains to be seen. Therefore South Africa will have to consider a registration system that is affordable or the Government would have to consider subsidizing the process to enable the community to register their parcels of land. It will also be important to note that people can retain unregistered land and still contribute to development, since registration is most of the time done for purposes of acquiring credit, unless people appreciate the reasons for registration it may not make much sense to their daily lives. The bigger challenge concerned with registration will be the identification of parcels and being able to establish whether claims made on specific pieces of land are valid. There may be need for redistribution of the available land to the communities concerned to ensure that all communities get a share.

The Uganda Land Alliance has carried out consultative meetings in the past on what issues to be put into consideration when legislating for customary tenure; some of the findings could be relevant for South Africa;
It is important that the role that customary tenure will play in development be clearly identified. What are the land rights that could be standardized in all the communities? for example that all community members should have equal user and ownership rights. Therefore issues to be addressed in standardizing would include:

- Protection of women and children's rights
- Separation of the common property rights from the family or individual land holding within the community,
- Inheritance rights,
- Whether individuals within the community can have distinct parcels of land with access and control rights,
- Who or what authority structures should be put in place for land administration and management,
- What kind of documentation system should be put in place for registration of all land transactions and whether customary/communal land should be registered according to families, individuals or communities,
- Is it important to regulate for a framework of transition to the modern systems of land tenure without loosing sight of the importance of customary tenure and its unique incidents.

Conclusive Remarks

The fact that customary tenure is grappling for space alongside statutory tenure means that legislators can no longer ignore it. It has persisted through the times and needs to be given the place that is due to it. It is therefore important to note that customary tenure is not a dying tenure that will quickly fade out after legal recognition, that it is backward and hinders modernization is a premise that has to be proved. Countries that have tried to phase it out like Kenya and Malawi by converting it to freehold have not yielded any positive results.[6] The Communal Land Rights Bill of South Africa should therefore aim at strengthening the customary land rights system by articulating its incidents, the rights that accrue to each member of the community and how it can be used to bring about development. It is hoped that the process of legislating for communal land rights will be as involving as possible, the people for which this law is meant to guide should be at the forefront in deciding what the law should contain. Only then will it make sense for implementation.

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[6] Okoth Ogendo, Legislating Land Rights for the Poor. Ibid ,9