

Land Reform in the Shadow of the State

The Implementation of New Land Laws in Sub-Saharan Africa

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Introduction

As the 1990s came to an end, the land reform debates which characterised that decade in sub-Saharan Africa gave way to increased attention to the implementation of the recently acquired land laws. In countries such as Tanzania, Uganda, Namibia, Malawi, Eritrea, Mozambique and South Africa, concern with the purpose and direction of land reform has been succeeded by discussions about the problems associated with implementing new legislation.

References to the problems of implementation abound. A report of the South African Government bemoans the slow rate of implementation of the land reform legislation enacted in that country in recent years (Department of Land Affairs, 1998). In Uganda, the British Department for International Development (DFID) funded an 'Implementation Study Report' in 1999 to analyse the problems of implementing the Land Act, which had recently been passed by parliament after a ten year long process funded and supported, indeed made possible by the expertise of a British draftsman commissioned, in the first place, by DFID (Government of Uganda, 1999). In Tanzania, key advisers in the Ministry of Lands have expressed concern at their lack of capacity to implement the Tanzanian Land Act 1998 and Village Land Act 1998. At two recent workshops organised by DFID, delegates made clear the severe constraints which render the implementation of new land legislation most unlikely.¹ Robin Palmer, Oxfam's Land Policy Adviser for Africa, has pointed out that all actors in the land reform process have been preoccupied with debating and passing new land laws and have, until now, overlooked the problem of implementing them (Palmer, 2000a).

¹ See DFID *Report of a Workshop on Land Rights and Sustainable Development in Sub-Saharan Africa: Lessons and Ways Forward in Land Tenure Policy* Sunningdale, England, 16-19 February 1999; NRI, OSSREA and *DFID Report of a Workshop on Networking on Land Issues in Sub-Saharan Africa*, Addis Ababa, Ethiopia, 24-26th January 2000. Details of both workshops may be found at <http://www.oxfam.org.uk/landrights/resources.htm>.

Recent academic commentary has also touched on the issue of implementation. As Coldham (2000: 76) has written in relation Uganda's 1998 Land Act:

"...it will be essential to train the cadres who will be responsible for implementing the Act. In addition to increasing significantly the number of surveyors, planners and registrars, it will be essential to train the members of all the new administrative bodies...destined to play a central role in the process...the Act's provisions are detailed and sometimes complex and...their effective implementation will require a knowledge of both the general law and customary law. While an extensive recruitment and training exercise will add substantially to the cost, the land reform programme is already controversial and, if it carried out in a way that is insensitive or inept, it will leave behind a legacy of disputes and bitterness."

This paper will use Tanzania, Uganda and South Africa as examples and argue that whilst some barriers to implementation (such as lack of clear policy directives and a shortage of qualified personnel) are easily identified, and therefore receive relatively more attention, there are other factors which might hamper attempts to change land relations. The paper explores lack of political will on the part of government, conflicts at community level and the actions of individual bureaucrats as factors which affect implementation.

African Land Reform: The Background

This section sets out in brief the chronology of the reform processes in Tanzania, Uganda and South Africa in order to show how they have come to reach the point of implementing new land laws.

In April 1999, the Tanzanian *Bunge* (National Assembly) passed two important pieces of legislation, the Land Act and the Village Land Act. One might have assumed that the commencement date of these pieces of legislation - that is, the date on which they are translated into and gazetted in Kiswahili - would mark the end of a long process of land reform which began in 1991. However, it is clear that we are still at an early stage in the story of land reform in Tanzania.

It is instructive to note two important aspects of the new legislation. Firstly, in substantive terms the Acts, along with those of South Africa, Uganda and Eritrea, form part of a corpus of new land legislation emerging in contemporary Africa. Whilst it is not the purpose of this paper to discuss the provisions of the new Acts, they are interesting for the way in which they negotiate the contradictory pressures to liberalise the land market, on one hand, and to ensure security of tenure to peasant farmers, on the other. The second issue of note might be termed methodological. The Land Acts set a new precedent in legal methodology in Tanzania. Running to some two hundred and fifty sections in total, the Acts are detailed and extensive in scope. Those engaged in drafting it explicitly rejected previous approaches to legislation in that country which have favoured broad provisions with fewer rather than more checks and balances. This methodological innovation, and its likely impact on the process of implementation which lies ahead, will be discussed below.

In Uganda, the land reform process began in 1989 when a study, funded by the World Bank and USAID, was carried out by the University of Wisconsin Land Tenure Centre together with the Makerere Institute of Social Research (MISR/University of Wisconsin, 1990). The British Department for International Development (DFID) then financed assistance with the drafting of the Land Bill by Patrick McAuslan, who was the legal draftperson responsible for the Tanzanian Land Acts. DFID also gave support to the Uganda Land Alliance, a coalition of non-governmental organisations which was formed to broaden the debate by lobbying the government on land issues. In the run up to parliament's consideration of the Land Bill, the coalition aimed to publicise its provisions and educate the public as to its likely effects; lobby for the protection of the rights of disadvantage groups; and press for a moratorium on land speculation until an acceptable law was passed (Palmer, 2000b). The resulting legislation is the Land Act 1998. The involvement of DFID is ongoing, however, as attention comes to be paid to the problems of implementation. This led, in 1999 to a 'Land Act Implementation Study'²

South Africa's land reform programme, like much of the recent legislation in force or under construction in that country, faces the difficult task of trying to redress the inequalities and injustices of many years of apartheid. Recognising the extremely skewed nature of land tenure in South Africa in which white South Africans, who make up only 5% of the population, own almost 87% of the land, the Department of Land Affairs White Paper notes a four-fold purpose to land reform. Land reform is to redress the imbalances of apartheid, foster national reconciliation and stability, underpin economic growth and, lastly, improve household welfare and alleviate poverty (Department of Land Affairs, 1997). The land reform programme is ambitious in its conception and contains three related components. These are land redistribution, land restitution and land tenure reform.

The Policy Environment

The environment in which land issues are debated and decided is peopled by non-governmental organisations, foreign donors, politicians and African governments, as well as legal draftpersons. The impetus to set a land reform process in motion came, in the early 1990s, from external pressure by bodies such as the World Bank and from internal ones such as discontent rural constituents. However, a decade later it is clear that many Africa states did not anticipate the direction in which land reform would take them. As Wily has

² Government of Uganda *Report of the Land Act Implementation Study* (Kampala: Ministry of Lands, 1999). For a detailed account of the Land Act Implementation Study, see M. Adams *Official Development Assistance for Land Reform: A Review of Issues and Recent Experiences* Report prepared for Department for International Development (DFID), London, September 1999. Briefly, as part of the on-going Land Tenure Reform Interim Project funded by DFID, the study looked at the institutional, financial and technical need for implementation and assessed the economic, social and environmental implications of the process. The report also contains a plan for implementation over the medium term and aims to secure agreement on this from 'stakeholders' and from the donor community.

pointed out, the intention to reform and the often modest objectives which characterise the beginning of the land reform process are soon displaced by issues which the state had not foreseen. These issues, according to Wily, go beyond property to issues of democratisation and governance:

"Once embarked upon, 'reform' is difficult to halt altogether. Over time - decades - the state tends to be forced toward the surrender of significant elements of authority to more democratic institutions of tenure management and to admit 'popular' demands into the law." (Wily, 2000)

The Tanzanian Government's reactions to the recommendation of the Shivji Commission, such as the refusal to issue a White Paper and the obsessive secrecy surrounding the drafting of the Land Bills, suggest that the land reform debates resulted in Land Bills not because the state was pushing a reform agenda but, instead, in spite of the state. A similar conclusion may be reached in relation to South Africa, given the government's allocation of derisory funds to land reform.

The reaction of politicians and bureaucrats to the new legislation must be borne in mind. As Mandivamba Rukuni, Chair of the Commission of Inquiry into Appropriate Agricultural Land Tenure Systems in Zimbabwe, makes clear, his report met with an equivocal response. The report recommended that some of the central powers allocated to ministers be decentralised. Once this happens, "a lot of permanent secretaries and their directors are going to lose power over budgets and management of staff" (Rukuni, 1999). Rukuni's view is that this will lead to politicians being selective about which elements of the legislation to implement. They will oversee the implementation of these elements, and simply ignore the rest. Instead of a holistic approach to implementation, a piece-meal approach is taken.

Implementors

Those charged with implementing the new land legislation in Africa are a corpus of Ministry of Lands bureaucrats and people working in the machinery of land administration set up by the new legislation. Whilst the bodies to be charged with the administration of land and the settlement of disputes are given different names and will perform slightly different functions in Uganda and Tanzania, a common feature is that they were set up to decentralise land matters and promote local democratic structures. The South African situation is different. The June 1999 election brought to office a new Minister of Lands and Agriculture who shelved the Land Rights Bill. As a result, a new land administration has not yet been put in place. Officials working for provincial governments continue to allocate land under the old Bantu land regulations. The following is a brief outline of the new structures for land administration which will be set up in Uganda and Tanzania.

In Uganda, a vast new land administration will be put in place, with forty-five entirely new District Land Boards and nine thousand parish level Land Committees. At the national level a Land Commission will be in charge of holding and managing government land. At the district level, Land Boards are to be established. These will have various powers and will be responsible, *inter*

alia, for confirming, rejecting or varying the recommendations of Land Committees in relation to certificates of customary ownership, and playing a role in the conversion of customary tenure to freehold tenure. The District Council will also contain a District Land Office which will be constituted by a Physical Planner, a Land Officer, a Valuer, a Surveyor, and a Registrar of Titles. A Land Committee which functions at the parish level is appointed by the District Council. These committees are responsible for the initial consideration of certificates of customary ownership, applications for grants of land in freehold, and applications to convert customary tenure to freehold tenure. As Coldham notes, the "success of the land reform programme will depend in large part on the effective operation of these committees". Finally, each district will have a Land Tribunal with jurisdiction over land disputes.

The Tanzanian legislation, in contrast to the Ugandan, will not set up new management institutions. The Land Act and Village Land Act 1999 name existing and well-established Village Councils as Land Managers. They will be responsible for overseeing community decisions on the designation of land within the village as household, clan, community or other lands. The Village Councils will be responsible for adjudication, as well as for the processes of registration in the Village Land Register. Titling will be carried out by the Commissioner's office and overseen by the Village Council.

The Tanzanian Land Acts are a milestone in legal methodology. Once again, the Acts depart from the methodology recommended by the Shivji Commission. The Commission favoured broad provisions with few checks and balances. McAuslan (1998) has labelled this approach 'naive' given the abuses of power by officials uncovered by the Commission itself, for example during the forced collectivisation programme, Operation Vijiji. It will be interesting to follow the process of implementation of the Land Acts. It remains to be seen whether, as Shivji has argued, they create an overly bureaucratic structure in which there are even more opportunities for the abuse of official power than previously. It has been argued that, by providing for elaborate procedures so that bureaucratic discretion is controlled by law, the legislation will simply lend the exercise of power legality and legitimacy. This is perceived by Shivji as "delegitimis[ing] whatever political and ideological constraints might have existed on power-holders under popular ideologies" (Shivji 1997: 2-3). Wily, in her analysis of the new legislation, hails the Tanzanian example as one which ensures democratisation (Wily, 1998).

The Tanzanian Acts aim at decentralisation of land matters. The extent to which this has been achieved is a matter of some difference of opinion between commentators. For Issa Shivji, the Chairman of the Presidential Commission of Inquiry into Land Matters, power over land matters remains vested in centralised bodies:

"The most striking feature of the two bills is the enormous powers over the ownership, control and management of village land placed in the hands of the Ministry [of Lands], and through the Ministry, the Commissioner. The Commissioner has even greater powers of reserved and general land. The role of more elective bodies, like the village assembly, has been virtually done away with. Village Council manages village land more as an agent of

the Commissioner than as an organ of the village accountable to the Village assembly." (Shivji, 1999)

For Liz Wily, a proponent of the methods adopted, the situation is quite different:

"...it is not true that 'the village councils are agents' of the Commissioner, or that administration of village land will be a 'top-down process which cannot be managed at the village level'. The whole point of the Village Land Act is for devolved land administration by the village...The outstanding difference of the Tanzanian Bills with other new land laws [in Africa] is the vesting of (most) control over land tenure administration at the grassroots in the hands of the 'governments' (village councils) elected by the members of each registered village community." (Wily, 1998)

There are five main reasons why the response to land reform has been muted and progress on implementation slow. Firstly, it may be that unclear policies and procedures exist within the department charged with land matters and that it has failed to win support from other government departments necessary to carry out the land reform programme effectively. Secondly, a lack of staff and trained personnel may hinder progress. Thirdly, there may be a distinct lack of political will to carry out policy changes. Fourthly, conflicts at community level and resistance amongst the 'beneficiaries' of the laws can hold up the process of implementation. Finally, the implementors themselves may hinder progress in a number of ways. These issues may assist in identifying possible barriers to implementation.

The first two factors have been acknowledged by academic commentators and policy-makers in African and elsewhere. Indeed, the existence of unclear policies and the potential problems associated with a lack of personnel have been the main preoccupations of implementation debates to date. Whilst it is important that they are addressed, they are not the only potential pitfalls of implementation.

Lack of political will, community conflicts and the actions of individual implementers are the most important factors which merit attention. Land reform in Africa is often marked by a lack of political will to see the process through to its conclusion. To some extent, the provisions of the land legislation in Tanzania, Uganda and especially South Africa have served an important symbolic function just as a result of reaching the statute books. It may be that there was little actual intention on the part of government actors to ensure compliance. In South Africa, for example, the National Land Committee clearly identifies the key problem as a lack of political will to implement land reform (Pearce and Husy, 1999). The government's equivocal stance on land reform might be gleaned from the lack of resources being channeled towards achieving it. Only 0.03 per cent of the national budget allocation is to land reform. According to Walker (1997), the Department of Land Affairs is having difficulty spending even this small sum because of a severe shortage of staff and a bureaucratic structure which is cumbersome.

Walker (1997) cites conflicts at community level as an obstacle to the implementation of reform. The experiences of setting up Communal Property Associations in South Africa serve as an important illustration. Commentators have described how conflicts at community level, ranging from mild resistance to outright opposition to a scheme, can impede implementation (Mayson, Barry, Cronwright, 1998). Conflicts at "street level", which take the form of mild resistance through to outright obstruction, can impede implementation. At Elandskloof, for example, the implementation of progressive provisions on gender contained in the Communal Property Associations Act has been obstructed (Meer, 1999). These provisions enable communal bodies to hold land as a group and provide for a quota of women to sit on the executive. However, the resistance of traditional leaders and commercial farmers has blocked reform (Jordaan, 1997). Simply by delaying the process of drawing up a list of beneficiaries to participate in the Association, it has been possible to inhibit gender progressive change. As Meer has noted, the Elandskloof example demonstrates the "intensely political nature of implementing land reform...the seemingly technical task of drawing up a beneficiary list was stalled by community conflict". For Meer, despite the gender progressive aims of the Communal Property Associations Act "prevailing community dynamics and values can and will reshape social equity policy goals" (Meer 1999: 82).

Finally, the role of individual implementors is important. The scale of the new or improved land administration machinery envisaged by the Ugandan and Tanzanian legislation is remarkable.

Accommodative Non-State Land Reform

The limited resources available to the state and severe constraints in access to the necessary personnel, information and training needed to carry out a large-scale land reform programme mean that in South Africa, there has been a failure to meet the ambitious programme which the government set itself. The scale of the state's failure to deliver on land redistribution is striking: whereas the post-apartheid government declared a target of a transfer of 30% of agricultural land to black farmers between 1994 and 1999, by 1998 a mere 0.06% of total farmland had in fact been transferred (Department of Land Affairs, 1998).

In recent years, a number of initiatives have taken place which aim to secure some land for farm workers on white owned land, as well as on public or government owned land. The emergence of equity schemes to enable farm employees to secure access to land merits attention because it demonstrates the capacity of private actors to carry out the objectives of government in a more efficient manner than the government - hampered by other considerations - is able to achieve. This formula for land reform is labelled 'accommodative' to suggest that it is a compromise between the parties involved. It satisfies both commercial farmers and their families (who are seeking to maintain ownership of, and majority control over, their farms) and farm workers (for whom, in the absence of large scale state action, equity shares secure access to land, housing and potential future dividends). Moreover, farm equity schemes are

accommodative in the sense that they provide the means for an adaptation of conventional land reform.

Private citizen implementers are those to whom the new law or policy is directed. In the absence of state action to carry out the new policy, private citizens take it into their own hands to bring about change. As such, they may be judged to have conformed with or abided by the goals of the policy of land reform. Private citizen implementers have altered land relations without the interventions of government. Clearly, they have been able to do so by using the procedures set out in government enacted legislation.

The equity sharing model of land reform is by now quite familiar in South Africa. There are fifty such schemes in place at present (Lyne et al, 1998). According to the Government's 'Farm Equity Scheme: Policy and Implementation Guide' (Department of Land Affairs, 1994), under such schemes, both 'land reform beneficiaries' and 'private sector partners' purchase equity in the form of shares in an agricultural enterprise (usually land together with an operating company). Such equity can be purchased directly through a grant or by using the interest received on a debenture issued by the enterprise to the participants. The participants in the scheme receive returns in the form of dividends and capital growth.

The legislation which governs the schemes is section 10(1)(b)(v) of the Provision of Land and Assistance Act No. 126 of 1993 as amended. This allows a beneficiary to acquire an equity share in an agricultural enterprise. Such arrangements were envisaged in the corpus of new land laws in South Africa, and the idea has received support from government. Since Farm Equity Schemes first came into being on the initiative of the private sector in the 1990s, they have received the backing of the Department of Land Affairs (Department of Land Affairs, 1994). The White Paper describes Farm Equity Schemes as partnerships or agreements between the owners of private businesses and those in receipt of a settlement or land acquisition grant. Their objective, according to the document, is to broaden the base of land ownership, increase security of tenure and raise farm income and production.

The most important objectives of the farm equity scheme, as described in the guide, are as follows. It is hoped that the schemes will enable farm workers to obtain part ownership of some land, as well as security of accommodation, job security, and improved wages. It is envisaged that the schemes will enable worker input into farming decisions and profit-sharing (Eckert et al, 1996). From the perspective of the private sector, that is the commercial farmers, the schemes facilitate the recapitalisation of farm operations.

A number of commentators have expressed reservations about farm equity schemes, pointing out that they bring little benefit to farmworkers and are simply a way for commercial farmers to reduce the chances of strike action and to increase capital investment or discharge debts without paying the high costs of commercial borrowing.

Land reform is usually assumed to mean direct state intervention in property relations. However, increasingly in South Africa "non-government interventions will actually constitute the shaping force in the process of land reform" (Hamman, 1995).

Radical Non-State Land Reform

In interviews with commercial farmers in Southern Africa carried out by Johnson (2000), it was suggested by a farmer in KwaZulu-Natal that they were facing a "low intensity farm invasion programme" in the form of farm attacks, illegal grazing, fence stealing, and the deliberate setting of veld fires. A newspaper report confirms that "scores of commercial farmers on KwaZulu-Natal's north coast have abandoned their farms after widespread invasions and crop theft. Nearly 1500 people have illegally occupied farms." (*Business Day*, 6 July 2000)

Kwanalu, the farmers' union, suggests that "farm attacks are an indirect form of land redistribution on the Brazilian model, involving a gradual penetration of private land (and state forests) by land-hungry peasants." Johnson describes research carried out in the province which suggests that "there is a direct correlation between farm attacks and local levels of unemployment" (Johnson 2000: 7). The possibilities of radical non-state land reform should be borne in mind. As recent events in Zimbabwe show, it is tempting for an opportunistic government to politicise land needs for its own ends.

Moyo (2000) drew attention to the radical actions of the landless in Zimbabwe long before the land invasions intensified and began to receive international media coverage. He noted the presence of a "silent class struggle" over land with its invasion by the poor and landless. Moyo's explanation is that this is caused by impatience as the formal, legal mechanisms fail to deliver the land needs of the rural population:

"the majority of rural people who continue to subsist on marginal lands are increasingly exercising their collective powers to resolve the land question on their own, through organised strategies of land occupations, popular protests, renegotiating their electoral votes and other forms of resistance. Recently, illegal squatting or land occupations, albeit of a sporadic nature, have been more influential in keeping the land redistribution issue on the agenda than formal organisations of civil society..." (Moyo, 2000)

Conclusions

How best to carry out the implementation of new land legislation is at present the overriding preoccupation of policy-makers, donors governments and academic commentators. In this paper, I have explored the possibilities and limits of implementation both as state action and as it might be carried out by individuals without the involvement of the state.

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