SETBACKS TO TENURE REFORM IN SOUTH AFRICA

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Tenure security has major implications for livelihoods in the former homelands of South Africa, where about 2.4 million rural households (about 12.7 million people), 32 per cent of the total population, are concentrated in about 13 per cent of the country. While individual ownership (equivalent to freehold in UK) in former 'white' South Africa is fully protected in law and in practice, the communal areas of the former homelands suffer because of inadequate legal protection and administrative support. These areas were intended to serve as reservoirs for cheap migratory labour. People were forcibly moved out of 'white' South Africa to the bantustans without reference to the wishes of the established inhabitants. There is a legacy of severe land pressure and land-related conflict, unsurpassed elsewhere in Africa, which has grown in severity since the disbanding of the apartheid system of land administration.

In the five years of the first democratic government 1994-99, researchers and officials in government and non-governmental agencies were involved in a vigorous process of policy debate with a view to developing the necessary legal and administrative reforms, which would dismantle the apartheid map. During that period, the debate moved from the transfer of land in ownership to tribes to the granting of statutory rights to people using and occupying the land. The tenure reforms envisaged in the White Paper on South African Land Policy 1997 were to have been provided for in the 'Land Rights Bill'. The proposed legislation was developed from numerous commissioned studies, workshops and meetings. The work attracted considerable interest in other countries of the region. International land tenure specialists commented favourably on the innovative nature of the proposed reforms, which sought, among other things, to upgrade 'customary' rights by giving them statutory recognition without changing their essential character. Professor Patrick McAuslan believes that the proposed model is very likely to be adopted elsewhere. Much of the work was contracted under the Land Reform Support Project, jointly funded by DFID, EU and Danida. The Swiss have also provided financial assistance for the work.

The proposed legislation aimed to provide for far-reaching tenure reform in the rural areas of the ex-homelands by repealing the many and complex apartheid laws relating to land administration, by recognising customary tenure systems, and by bringing tenure law into line with the Constitution. The law was expected to confirm the rights of a broad category of rights holders who occupy, use and have access rights to land. It was to have provided for the transfer of property rights from the State to the *de facto* owners and to have devolved land rights management functions to them. Rights were to vest in the people, not in institutions such as traditional authorities or municipalities. The proposed law would have recognised the value of both individual and communal systems and would have allowed for the voluntary registration of individual rights within communal systems. Where rights existed on a group basis, they would have been exercised in

accordance with group rules and the co-owners would have had to choose the structures to manage their land rights. The envisaged law was neutral on the issue of traditional authorities. Where such systems had proved functional and enjoyed popular support, the law would have provided them with legitimacy. Where they were no longer viable or supported, the proposed law would have enabled people to appoint new structures.

Following the elections of June 1999, the draft Land Rights Bill was shelved by the incoming minister, who instructed that new legislation be prepared to transfer state land in the former homelands to tribes. In an attempt to salvage work done on the bill, attempts are being made to disaggregate the draft bill and incorporate the principles in regulations and amendments to tenure laws already on the statute books. The overall effect is expected to be the dilution of the significance of the reforms as originally proposed and a perpetuation of the dual system of land rights inherited from the colonial and apartheid past. It remains to be seen whether the proposed legislation to transfer land tribes will prove viable or whether the draft Land Rights Bill will have to be reactivated. There is little doubt, however, that the cause of tenure reform in South Africa has been severely set back for reasons which have yet to be publicly debated.

The political opposition to tenure reform is, however, predictable. It changes the terms and conditions on which land is held, used and transacted. A tenure reform worthy of the name is sure to be challenged by those with vested interests in maintaining the *status quo.* Opposition stems from traditional leaders reluctant to abide by constitutional principles and from rent-seeking officials who seek to control and profit from land allocation. There are others who feel that priority should be given to capital expenditure on the redistribution of land alienated by European settlers. There is a reluctance to allocate funds to land administration, despite the fact that the Department of Land Affairs budget remains consistently under spent. Currently, in South Africa, government's plans to redistribute freehold land to 'progressive' African farmers are in the ascendance. However, if experience in Zimbabwe and Namibia is any indication, the issue of tenure reform in the communal areas will continue to recur. In South Africa, there is increasing evidence that, contrary to expectations, rights-based policies (i.e. land restitution and land tenure reform) are more likely to receive political support than land redistribution, a purely administrative process. It should not be a case of either one or the other, but of obtaining a better balance between rights-based and administrative processes.