

# **African Experience of Tenure Reform and Cadastres: A Place in the Global Sun?**

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## **ABSTRACT**

Governments in Africa have intervened to change the land tenure system for various reasons. Some of the reforms which took place in colonial times deprived the African populations of their land. At independence, reforms have been initiated to correct these injustices. Apart from such reforms motivated by the need to redress past injustices, there are other reasons for reform. The most common reason is to create a favourable environment for agricultural development and economic activity. This paper discusses some of these reform measures, examining the reasons behind them and suggests the way forward.

**Keywords and phrases:** *Land tenure reform, Africa*

## **Introduction**

Land tenure reform is the programmed intervention by the state designed to change the human-land-human relationships in a society. There are two almost synonymous terms used for such state intervention in land ownership and use, viz., land reform and agrarian reform. Semantically, land reform conveys the impression of any reform in the institutions and procedures associated with access to and control of rights in land, while agrarian reform would suggest that emphasis would be placed on agricultural activities. However, concepts draw their meanings from their origins. Herrera *et al* (1997) suggest that land reform probably originated in the agrarian transformations that began in Denmark in the 1700s. Land reform and agrarian reform therefore tend to be used interchangeably, since land reform generally means “the redistribution of property or rights in land for the benefit of the landless, tenants and farm labourers” (Adams 1995).

Adams (1995) suggests that agrarian reform is “a construct of the Cold War to counter communist land reform,” embracing improvements in both land reform and agricultural organisation:

Its policy prescriptions urged governments to go beyond redistribution: they should also support other rural development measures such as the improvement of farm credit, cooperatives for farm-input supply and marketing, and extension services to facilitate the productive use of the land reallocated.

The African experience of land reform is not always concerned primarily with agricultural production. They are usually concerned with the narrower objectives of “remodelling of tenure rights and the redistribution of land, in directions consistent with the political imperatives underlying the reforms” (Adams 1995).

Land reform programs usually have multiple objectives, and will usually include agricultural productivity. However, the most common land reform objectives in the African experience have been:

- To achieve a more equitable distribution of land resources in a country and redress social injustices of the past (e.g., Zimbabwe and South Africa);
- To streamline the procedures of land allocation, distribution and general management (e.g., Botswana); and
- To facilitate access to land by the government for development projects (e.g., Nigeria).

In addition to land and agrarian reform, there is a third type of tenure reform: cadastral reform.

Cadastral reform is stated as being “concerned with improving the operation, efficiency, effectiveness and performance of the cadastral system in a state or jurisdiction” (Williamson 1990). The two main objectives, among many, are (Ezizbalike and Benwell 1994):

- To make land holdings more secure so that land owners can obtain development funds on the basis of secured land rights, and
- To facilitate the administration of land resources.

In theory, the introduction (or reform) of a cadastral system is not supposed to create new interests in land, nor abolish existing ones. However, Ezizbalike and Benwell (1994) have argued that cadastral reforms always impact on the land tenure system:

... Components in a systemic relationship respond to changes in neighbouring components. The cadastral system is part of the overall land tenure system. ... It therefore affects the administration of, and

transfer of interests in land. It may lead to more secure title or faster land transactions. More secure title and easier transactions may translate into more economic activity on the land. It therefore provides more incentive and opportunities for landowners to invest, with pecuniary advantages. These in turn may translate into income redistribution and changes in power relationships derived from the ownership of land.

This paper examines the experience of Africa in land tenure reforms, without distinguishing between land reform, agrarian reform and cadastral reform. It argues that early reforms in Africa have adopted an approach described in Bruce (1998) as the 'replacement' paradigm. Recently there has been a shift to an 'adaptation' paradigm, due to less than satisfactory results from the replacement reforms. While the shift to the 'adaptation' paradigm is a welcome move, this paper will argue that these reforms have ignored the realities of globalisation of markets and that these have to be address for Africa to have a place in the global sun.

### **Background to Land Reform—Colonial Land Policy**

Colonial land tenure was characterised by various policies. James (1987) characterised the three prevalent policies as dualism, paternalism and transformation.

#### ***Dualism***

The policy of dualism allowed traditional tenure systems to coexist with introduced European tenure concepts. In some jurisdictions, traditional and statutory tenures are compartmentalised and were not allowed to mix. An example of such compartmentalised system was the reservation of the 'white highlands' of Kenya for introduced European tenure rights, while only customary rights could exist in the 'reserves'. In others, they exist side by side and land holdings are converted and reconverted between the two land systems. For example, in Nigeria where alienation land has gained acceptance, land acquired through individual effort could revert back to communal ownership due to traditional inheritance and succession rules which guarantees rights to all members of the deceased's family (though sometimes the result will be a fragmentation, rather than shared interests).

The disadvantages attributed to the policy of dualism are related to the uncertainty of rights in the customary sector and the resultant inability to raise money on the security of their land (James 1987).

On the other hand, it is attributed with the advantage of "possible evolution of a system presumably based on indigenous forms of social and economic organisation. Land reform, it is argued, should avoid any sweeping changes or a total transformation" (James 1987, 9).

### ***Paternalism***

Paternalistic policies regard the 'natives' as incapable of looking after their affairs, as it relates to land matters. Legislation was therefore passed to protect the indigenous population against the "wiles and trickery" of the "non-natives". Such reasoning were used to justify creating 'reserves' where land alienation was forbidden, especially to a non-native. Paternalistic land policies go the further step of the government assuming substantive title to all land, which it holds and manages for the benefit of all members of the society. From this pool of land, it then allocates rights of use and enjoyment to individuals, families and groups. It further stipulates that government must approve any rights created in land by any of the assignees for the rights to be valid.

This system of 'rights of occupancy' was introduced in Northern Nigeria in 1910, and in Tanzania in 1923. The two main objections to this system are its expropriatory nature and "the requirement of the governor's consent by the indigenous people in order to ensure the validity of their land rights"

Colonial administrators however hail the system "as being an effective attempt to protect the land rights of the peasants, and to secure for the community, present and future, the fruits of development" (James 1987, 11).

### ***Transformation***

This policy was first propounded in the report of the East African Royal Commission on Land and Population. Its long-term objective was to introduce a single system of registered holding by substituting traditional titles into fees simple. One of the features of African customary land tenure is the predominance of group interests in land. This presented several problems to administrators. There were strong suggestions, right or wrong, that customary land tenure does not offer landholders enough security and incentive for economic development of the land.

Its implementation involved

... an adjudication process, which determines the existing rights in land and provides for the renunciation by rights holders of their land rights in favour of an individual or few individuals. Then follows consolidation of scattered plots into economically workable units and the demarcation of boundaries. The resultant title is then registered as a fee simple in an official register of titles.

(James 1987, 12-13)

Several advantages are attributed to the transformation policy. These include security of tenure, reduced litigation in land matters and ease of disposition.

The disadvantages attributed to the policy include "a trend towards widespread landlessness of many persons" and a tendency towards fragmentation of holdings due to the persistence of customary rules of inheritance.

One of the effects of consolidation and registration in Kenya, for example, has amounted to a form of expropriation, admittedly of “lesser rights not amounting to ownership,” but nonetheless rights of members of the family “recognised under customary law to use a separate piece of land at their own discretion, such as married sons and widows”...

(Apthorpe 1969, 116)

### **Colonial Land Grabbing**

Another common feature of colonial land management, especially in parts of Eastern and Southern Africa where climatic conditions were more suitable for European settlement, and in the French colonies, was land grabbing. In several African colonies, the colonial administration adopted policies, at various times, that dispossessed the African landowners of much of their land, which were then allocated to immigrants from the colonising countries. This is usually achieved by declaring “unoccupied” land to be Crown or public land, which were then allocated to new settlers in fee simple or freehold tenure.

The Portuguese (since 1856), the Belgians (since 1885/86), and the French (since the turn of the twentieth century) clearly articulated that “occupied lands” were to be governed according to local custom and all other lands were considered to be state property. ... Widespread practices of itinerant farming and transhumant or nomadic herding common throughout West Africa resulted in the vulnerability of local populations to being confronted with state claims of ownership to lands exploited on a periodic basis. ... Applications of such principles as *mise en valeur* and eminent domain, often resulting in the establishment of state-supported and long-term land claims on the part of nonlocal individuals and the accompanying displacement of local populations, is especially striking in the resource-rich regions today defined by the countries of Zaire, Congo, and Gabon.

(Elbow *et al.* 1998, 4)

In Kenya, the rich highlands were at one time reserved for whites only. In Zimbabwe, Moyana (1984) reported that under the administration of the Royal South Africa Company, there was an explicit mandate to secure and prepare land for migration of Europeans into Zimbabwe. The immigrants were settled on Crown lands that had been acquired by moving the original occupiers to “reserves”. The paternalistic argument that the indigenous populations should be protected from the more sophisticated settlers was used to justify these relocations, which are usually to less fertile areas.

Other notable examples of colonial and settler land grabbing include South Africa and Namibia. In South Africa,

Past apartheid policies have resulted in an extremely racially-skewed and inequitable distribution of land, overcrowding and poverty. Until 1991, 80% of the population was prohibited from owning or leasing

land in over 80% of the country. About 3.5 million black South Africans in urban and rural areas lost their land and rights in property through forced removals.

(Adams 1995)

The experience of Namibia was very similar to that of South Africa:

Disposition of the indigenous people of Namibia was a central feature of colonial rule. The ethnic groups inhabiting the central plateau (principally the Herero, Nama, Samara, and San) were forcefully expelled to make way for colonial settlers. At independence, some 45% of the total land area and 74% of the potentially arable land was owned by white commercial farmers who comprised less than 2% of the total population.

(Subramanian 1998)

Given the background outlined above, it is not surprising that many countries embarked on land reform programs at independence. One of the three-pronged responses of the South African land reform agenda is land restitution. Under this response, “cases of forced removals are being dealt with by a Land Claims Court and Commission established under the Restitution of Land Rights Act, 1994, which deals with individual or group land claims which originate since 1913” (Adams 1995). The Namibian Government has expressed “its commitment to redressing the injustices of the past in a spirit of national reconciliation and to promote sustainable economic development” (Namibia: Republic of Namibia 1998). The Agricultural (Commercial) Land Reform Act of 1995 gave the Minister powers to acquire agricultural land

... in order to make such land available for agricultural purposes to Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.

(Namibia: Republic of Namibia 1995)

Independent Kenya did not have to embark on a restitution program as the barriers to descendants of non-Europeans owning land on the White Highlands was removed by an order-in-council in 1960.

### **Reforming for Administrative Convenience**

A common reason for land reform is the need to streamline land administration rules and procedures. Even where there is no politicised land question, by the time of independence, land administration problems usually result from attempts to combine differing land systems. At one level, indigenous land practices were mixed with introduced concepts. Even the protectionist laws under the British systems did not prevent this mixing as land is converted and reconverted between the two systems.

At another level, different indigenous land practices were mixed. Most modern African countries are a collection of several national or tribal groups, sometimes with very divergent customs, including land tenure practices. While these tribes had interacted with each other before the introduction of colonial rule, the impact on each other's customs had been limited (except possibly in cases of conquest). The colonial creation of "countries" out of neighbouring national groups catalysed the interactions. Metropolitan settlements were created to cater for the new administration and "strangers" became neighbours, mixing their customs to create new, more complex customs.

Lack of uniformity in customary law may make the administration of the law, especially by non-African appellate or revisory courts or authorities, more difficult. In other words, the problems of the judicial ascertainment of customary law are greatly increased if there is a multiplicity of different tribal laws existing in a particular territory. ... Multiplicity of tribal laws also renders more problematical the application of the appropriate law in urban areas and other areas with mixed populations. There is the problem of deciding which is the appropriate law to apply in a case where inter-tribal conflicts of law may arise.

(Kanywanyi 1969, 170)

Even though most land in resulting urban areas were held under introduced statutory laws, rather than customary laws, the traditional rules of succession were generally applied on the death of the land owner, thereby bringing various customary land practices to the townships.

Another cause of mixing traditional land system is the forced relocation of indigenous populations to 'reserves' and the imposition of "customary" law on them. This is based on the fallacious assumption that African customary land law is homogenous. The result was new complex customs that borrowed from the customs of the people so relocated.

Mixing of land practices has not been limited to the accident of living with neighbours in urban areas and coercive relocations to reserves. With easy access to transportation, members of rural communities now move around freely, sometimes across the proverbial seven seas and seven landforms. As people travel, they imbibe new ideas, which are brought back to integrate into existing practices at home. These include land tenure ideas, along with ideas about clothing, food and religion, for example. The so-called traditional societies are therefore no longer that "traditional."

Just like "travellers" bring back aspects of foreign cultures when they return home, while they were "abroad", they also influence the cultures of their host communities. In the past, these outsiders stayed for relatively short periods and only needed limited rights in land. Now, these strangers stay longer and therefore have more opportunities to impact on the local customs. With modern statehood, some of them may now be entitled to more permanent land rights.

Mechanisms employed for administrative reforms include the establishment of new administrative structures (e.g., Land Boards in Botswana) and nationalisation of land (e.g., the Nigerian Land Use Decree, 1978).

### **Land for the Government**

Though land reform is supposed to be for the benefit of the population, reform outcomes sometimes benefit the government more than it does the people. This is the case with the land reform introduced by the Nigerian Land Use Decree of 1978. Among the several reasons for promulgating the Land Use Decree (LUD), one that is often omitted in the literature on the LUD is the need to facilitate access to land by the government for development purposes. Prior to the LUD, customary land practices in rural Nigeria was characterised by a mixture of trustee lands in the North and communal and individual holdings in the South. Because of population pressures in the South, land holdings were, and still are, small fragments. During the oil boom in the 1970s, the government was in a hurry to execute several development projects. One of the sources of frustration in those days was dealing with the numerous owners of various rights in land being acquired for such projects.

The LUD vested all lands in the territory of a state in “the Military Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians”(Nigeria: Federal Republic of Nigeria 1979). The law replaced all existing possessory rights in land with rights of occupancy, the statutory and customary rights of occupancy in urban and non urban areas respectively. The statutory right of occupancy is to be granted by the state governor, while the Local Government Council in whose territory the land is situated grants the customary right of occupancy.

The decree empowers the governor to “revoke a right of occupancy for overriding public interest” (s. 28). Though compensation is payable upon such revocation, the decree makes it easier for the government to acquire land for projects, especially since only land that is being used for agriculture, or that has been developed, qualifies to be treated as if a right of occupancy had been granted. However, Knox (1998) points out that the role of state governors as supreme authorities over land allocations has made it difficult for the federal government to acquire land from states, particularly when the offices are occupied by members of different parties. While most land laws have “public interest” provisions, the Nigerian provision stands out in that it has been used extensively, mostly for political purposes.

In Lesotho, the Land Act of 1979 introduced the concepts of Selected Development Areas (SDA) and Selected Agricultural Areas (SAA). This mechanism is to allow the Minister to declare public interest in areas where the government needs land to provide urban services or to improve agricultural production.

### **Economic Development Objectives**

This is the single most cited reason for embarking on land reform programmes. Almost all reform programs include agricultural and general development objectives among the

list of policy objectives to be achieved. Land is an essential economic factor and a form of wealth in all economies.

First, it is the source of food stuff which enables man and other living creatures to survive; second it provides the minerals and other resources from which man may make another factor of production-capital, and other assets of consumption and enjoyment; and third it provides the foundation on which the infrastructure of society is built

(Machyo 1969, 100)

Vogelgesan (1998) states that “in rural areas land performs an economic function. It is the primary production factor, source of employment and repository of personal wealth.” Land reform has therefore been undertaken “to ensure that the Nation’s land resources are as quickly as possible, utilised in the fullest possible manner in the best interest of the people (of Kenya) and the nation’s economy” (Kenya: Ministry of Lands and Settlement 1969).

Access to and allocation of rights in land are key features of all land and agrarian reforms. Reform objectives usually have to balance between equitable distribution and efficient production. The equity considerations stem from the obligation a society has towards its members to provide them with a means of livelihood. Land being the primary source of sustenance, members of a society should be entitled to some of it for their subsistence. The egalitarian principles of many rural African societies dictates that every member be given an equal opportunity to enjoy the fruits of their common resources. The preamble to the Nigerian Land Use Decree of 1978 declares:

And whereas it is also in the public interest that the rights of all Nigerian to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved...

Similar declarations are found in most land laws and policy documents.

However, there is a general acceptance that the nature of the rights a landholder has in land will affect their ability or otherwise to use the land in the most economic manner possible. The duration of the rights will affect the type of investments one would be inclined to make on the land. Also important are succession rules.

While African experience of land reform policy objectives includes economic development, they seem to have opted for caution in favour of the equity considerations. For example, the Presidential Commission on Land Tenure in Botswana stated as follows:

Since the economy of Botswana is still largely agricultural, land is the only resource available to most of its citizens from which to earn a livelihood. Land tenure is thus a matter of grave importance and any change required must be made with care.

“Care” in this context means primarily the close coordination of tenure change with developments in the economy and society generally.

(Botswana: Presidential Commission on Land Tenure 1983, 3)

Obol-Ochola (1969b, 9) warns: “Land reform must necessarily accommodate the existing social, economic and political realities without which the reforms are doomed to failure.” The Botswana Presidential Commission observed that:

In every society new needs arise merging with or replacing old ones. In a developing society new needs often arise rapidly, without affording sufficient time for adjustment of existing concepts and social patterns. ... There are new economic opportunities and needs which require to be accommodated. ... Many of the needs for which the traditional land tenure system catered are still very important to a majority of citizens. On the other hand, new economic opportunities ushered in by economic growth are increasing and it is important that all citizens, wherever they live have access to them.

The challenge for land reform policy formulators is to balance the needs of citizens “with one foot in the traditional sector and the other in the developing cash economy.”

### **On Security of Tenure and Land Titling**

An important consideration in the economic use of land is the security of whatever right one has in land. Place *et al* (1994, 19) define land tenure as follows:

Land tenure security can be defined to exist when an individual perceives that he or she has rights to a piece of land on a continuous basis, free from imposition or interference from outside sources, as well as ability to reap the benefits of labor and capital invested in that land, either in use or upon transfer to another holder.

They explain that there are three aspects of tenure. The robustness or breadth of the right depends on which of the bundle rights the person holds. One of the important characteristics of the institution of property in land is the ability of several rights to co-exist in the same parcel of land simultaneously, vested in different people. Which of all the possible rights in land a person has at any time will also determine the way he or she will use the land. What other rights, apart from the ones already defined are possible and who can create these rights in the future? To feel secure, one needs to know that the rights he or she does not hold are not superior to those that they do hold.

The second aspect of the definition deals with the duration of the right. Place *et al* (1994) explain that this economic dimension requires that the time should be “sufficiently long to enable the holder to recoup with confidence the full income stream generated by the investment.” The third aspect is the assurance that the right will not be interfered with during the duration of the right. The assurance aspect depends on the

legal certainty of the enforcement provisions. If the enforcement arrangements are weak, the holder may not be able to enforce his or her rights against squatters, for example.

It is important to note that tenure security is based on the perception of the holder of the right. It is not based on some absolute measure of security. As such, it is jurisdiction dependent. It is also time dependent. Experience in the pilot schemes in Uganda “seems to indicate that what peasant farmers are more concerned with is not the paper title as such but safety from those who might grab their land” (Machyo 1969, 104). Obol-Ochola (1969a) referred to “security of use” and suggests that “it seems quite sufficient to tell a person that he owns a plot of land subject to certain statutory qualifications...”

Land registration has been used as a means of ensuring security of tenure. We contend that registration *per se* does not produce security. Like other aspects of governance, the registration system can be abused, or as is more commonly the case, neglected and become out of date and ineffectual, especially when the people do not really understand the concepts associated with it. Land registration laws usually go with such concepts as freehold, fee simple and leasehold. These are foreign concepts which rural people cannot relate to. Discussing the possible juridical interests that would be conferred by registering customary rights, Machyo (1969, 38-39) observed as follows:

- i) The fee simple concept is alien and there does not seem to be any convincing reason or a necessity for its adoption.
- ii) The fee simple idea being alien and very few, if any, understand it. This is an undesirable and purposeless creation of disparity between the rights of an owner of land in the “law books” and the actual right as conceived by the owner within his social and cultural context.
- iii) Apart from being alien and unintelligible, the fee simple notion is unrealistic and meaningless if applied to customary holding because any statutory ownership conferred on an existing owner under customary law must, by virtue of social necessity, take into account all customary incidents and encumbrances.
- iv) It is important that in any law reform a meticulous step should be taken to ensure that the content of the particular law reform is generally acceptable and is in harmony with contemporary economic and social values and attitudes and should not ignore the reality of the existing situations.

The Kenyan land titling project has been assessed as successful by some writers (and as a failure by others). Comparing its apparent success with the apparent failure of similar projects in Nyarubanja, Kato (1969, 312) suggested that certain circumstances must exist for such changes in land tenure to succeed.

The way to go about it is to channel and re-channel them to suit the aims and purposes of both the legislator as well as the masses concerned. Secondly, in land reform the people must clearly be shown

the profit of the proposed change. Leaving it to chance is likely to prove an obstacle in implementing legislation. The people are not impressed by reform of which profit is left to chance. Circumstances must be that the people themselves need the change in their tenure or, at least, are prepared to acquiesce in it. Thirdly, reform must be aimed at clear and recognised evil. Fourthly, in the absence of the peoples' consent to reform, then there must be circumstances which allow strict authoritarianism in order to carry it through. There is no half-way between these two alternatives. Furthermore, there must be adequate manpower to implement the reform on land. Without this the law reform measures will always remain book law, unpopular and ineffectual.

He found that in Kikuyuland, Kenya, the Kikuyu who had been agitating against the declaration of their land as Crown Lands while the white settlers got private property, had all along been "individualistic in so far as land ownership was concerned. ... The second factor is that there was excessive soil erosion as well as fragmentation in the reserve, and to prevent these, consolidation was inevitable."

### **On Access to Credit**

One of the most common arguments against customary land tenure, and in favour of individualisation of rights and land titling is to facilitate the ability to secure credit for investment with the land as collateral. The Presidential Commission on Land Tenure, after consulting lending institutions found that there are several constraints to securing credit apart from security of tenure.

The first constraint, with respect to residential properties in rural areas, was that the rural land markets are relatively small. Should the borrower default on the loan, the lending institution has no assurance that it will recover its investment in full and in time. The option of taking a business loan presents another constraint. The applicant must "have a viable business proposition... He must have an idea about how to use the money to make more money, and convince the bank that the idea is sound." And if the loan is for investment in property, then

... the constraint may not be primarily lack of security but lack of credit worthiness. Foreclosure on land security is a last step and one which the lender hopes to avoid. The lender in the first instance relies on the borrower's apparent ability to pay back the loan. The lender examines his savings record, his credit record, if he has any, and attempts to form an estimate of his reliable income flow. If the applicant for the loan cannot satisfy the lender on these points, and many without modern sector employment will be unable to do so, he may not get the loan even if he can offer good security.

(Botswana: Presidential Commission on Land Tenure 1983, 26)

But assuming that the credit can be raised, there is not guarantee that the capital can be invested economically. The operations in rural African farms are too small to realise the enough profit to service the loans. The farmers lack proper management know-how and business practices to manage the funds. Machyo (1969, 104) reports that in Kenya,

... African farmers settled on the former European lands have experienced great difficulties in repaying their loans and some have in fact abandoned the idea of becoming rich over night through inheriting the whiteman's land rights. In Uganda, the Ugandan Commercial Bank as well as the Uganda Development Corporation where schemes of granting loans to "progressive farmers" and small industries have been carried on for some years, have had bitter experience of failure of businesses advanced.

And in Zimbabwe, Takaoma (1999) reported recently that over 80 percent of the 1200 indigenous commercial farmers throughout the country are facing foreclosures from the Agricultural Finance Corporation due to outstanding loans with some of the farms having already been auctioned at far below market prices.

So, even though "the new need is for capital to invest in new opportunities," and, at least in theory, "this may in part be obtained through loans extended against security of the land" (Botswana: Presidential Commission on Land Tenure 1983), land tenure reform alone will not ensure that lending institutions will lend on the security of rural land. The Presidential Commission further notes that "if land is to be good security for a loan, the lender must be able to sell it to recover his loan, in the case of default." But it has been noted that the size of the rural land market is too small. Moreover, most land reform programs place restrictions on sale of land.

### **The Land Market**

A common feature of many African land reform programs is the restriction of the right of alienation of the rights. These provisions appear at odds to one of the main objectives of land reform: to stimulate economic and beneficial use of land. The market is expected to redistribute resources in favour of people who have more private initiative. The market is expected to entrench merit and individual effort as opposed to non-competitive birthright entitlements.

All these expectations may be true and have been observed to occur in other jurisdictions. But they may equally be wrong, and there is another set of very negative possibilities, which have also been observed. So, while a free market is expected to allow people who can afford it to acquire more land and create suitable economies of scale, they also present the possibility of land concentration and landlessness. Creating a landless class will result in social upheavals that will far outweigh the gains of whatever economic progress could have been made by allowing a few individuals to amass land. That is why the (Botswana) Presidential Commission cautioned against the "real possibility that the disadvantages of radical changes in land tenure may far outweigh, at least for the time being, any benefits resulting from such changes." African countries do

not have comprehensive social welfare systems to cater for the disadvantaged citizens. Even if there were social welfare schemes, to create communities of landless welfare dependants would not be considered progress. And so ironically, our independent governments seem to use that the same paternalistic arguments the colonial administration used to restrict sale of land: that the natives were not sophisticated in real estate markets and will lose their lands to the new settlers.

However, there is an important difference. The colonial administration's motive was to create 'reserves' of cheap labour for their farms and estates. The independent governments, on the other hand, are trying to prevent the creation of disenfranchised communities of cheap labour for the landed elite.

Sale of land is not always completely outlawed, but rather controlled by requiring the consent of some designated official. Sometimes the restrictions only apply to alienation to foreigners. There are other more overt reasons for this control than the desire not to create cheap labour, which is never stated as such.

All reforms based on nationalisation require approval for sale of land. For example, the Nigerian Land Use Decree provides in Section 21 that "it shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise howsoever—without the consent of the Military Governor..." Section 22 provides the same restriction for statutory rights of occupancy. This is an obvious consequence of the nationalisation of all land. If all land is now vested in the Governor and citizens only have use rights, then the substantive owner needs to control the alienation of the right. It should be noted that we are not here making any arguments in support or against such provisions, but merely presenting the logic behind them.

Another common form of control is a restriction on sale until the possessor of the land satisfies some development covenants. These provisions follow from the fact that the stated objectives of land reform usually include the encouragement of land development and prevention (or at least, reduction) of land speculation. In more diverse economies, the land market may exist as an end in itself. That is, there are people whose contribution to the economy is just to buy and sell land. They are an important component of the economy.

Most rural African economies are mono economies, concentrating almost entirely on the production of unprocessed agricultural or other land-based resources. Land markets in such economies are small, with few activities. Incessant land sales in such economies can only be fuelled by speculation, with detrimental effects on productivity. The development covenant is therefore used as a mechanism to curtail land hoarding and speculation, and achieve a minimum level of development.

### **Formalisation of Rights**

Like all land systems, African land tenure consists of several rights that can be vested in different people at the same time. These may include rights of access to, or through the

land; withdrawal rights to take resources from the land; management rights to make decisions that affect the land's condition; exclusion rights to determine who may have access, withdrawal and management rights; and disposal rights to dispose of any or all the rights that one has. Structures exist in the community for enforcing one's rights against others, thus making these rights property rights. Such property rights are mostly *de facto*, having been accepted over time, rather than *de jure*—deriving from some legal instrument of the government. These *de facto* rights are normally simple and fluid. The small size of the community units, and the kinship relationship between members of the community make them easy to enforce, as there was little competition. The egalitarianism attributed to these customary tenure systems derives partly from the fluid and unspecified nature of the rights, which provides access to land for younger generations of the community.

Because of the simple nature of the rights, and the high-level of community cohesiveness and co-operation, as opposed to competition, there has not been the need to fully specify these rights. This non-specific state of rights should not be viewed negatively:

... incomplete property rights need not be irrational, paradoxical or imperfect. There are good reasons why property rights are not always perfectly specified or enforced. Most important, it is costly to specify, monitor and enforce them. Goods have many characteristics; to be complete, rights would have to be established and enforced over every valuable characteristic of every good. However, in the real world, it is costly not only to determine which goods are valuable and should be protected, but also to police compliance and punish offenders. Because of these costs, ... property rights are never completely specified and enforced, nor would it be cost-effective to do so.

(Ensminger and Rutten 1993, 89)

However, with globalisation, especially of markets and information, communities that used to be isolated and remote are increasingly being integrated into the global community. Needs that used to be simple are becoming complex and the simple community structures are becoming less able to support the emerging system of rights and rules. At the same time, with the expansion of transport and communication infrastructure, the government is increasing its influence. Central government structures like administrative offices, courts and police are now resorted to for establishing and enforcing property rights. There is therefore a need for these rights and rules to be specified more clearly than was necessary so that “outsiders” with whom we have to deal will know what to expect and what is expected of them. While some of the customary rights and transactions have Western equivalents, many do not. Care should be taken not to omit this latter group of rights and transactions. They should all be identified and formalised.

## **Registration and Information**

Various jurisdictions maintain various registers such as firearms, medical practitioners, surveyors and others. These registers are administrative records concerned with particular aspects of the community. Because of the importance of land in any society and certain characteristics it possesses, the registration of rights in land has required special treatment, different from other administrative records. In any records system, the attributes of interests are determined and recorded against discrete entities. With land, the entities are units of land, which are continuous and contiguous with other units or parcels of interest. Special techniques are therefore required to define and identify the land objects or entities about which data are recorded. These techniques are the domain of land surveying.

The immovability of land gives it certain advantages over other objects of property, resulting in, for instance its use as savings and investment, and as collateral for securing loans. The same immovability presents certain disadvantages. Since a purchaser cannot remove their purchase to a safe place, a fraudulent seller could, for example, try to sell the land parcel again to another unsuspecting buyer. Different land registration systems have therefore been developed mainly to prevent this possibility of fraud in land transactions, with an equally important objective to facilitate them and reduce associated costs.

It has been suggested that the land market is small in rural Africa. The cost of establishing and maintaining a registration system dedicated to land transactions may not be justified. However, with property rights being formalised, and administrative structures established to manage them, including enforcing rules, there is need for an information system to support the administrative tasks.

The information system needed is in the form of a land inventory system that identifies owners of different rights in land, together with other land characteristics needed for planning and administration. Such an inventory does not require expensive cadastral surveying to set up, especially with modern measurement systems, like the global positioning system (GPS). With proper design of the information system, land under different types of tenure can be provided for. Also, the system should make provision a variety of attribute data. And should be capable of being kept in paper medium, if computer resources are not available.

## **Conclusion**

Africa has had a long history of land reforms. And the reforms continuing for various reasons. In some places, to redress injustices of the past. Examples are South Africa, Zimbabwe and Namibia. In others, from a realisation that no state of affairs is perfect and there is always room for improvement. For example, the Botswana land tenure system, which is referred to as a successful example, is about to be reformed again. Tenders have just closed (July 30, 1999) for proposals to undertake an extensive review of the land policy with a view to recommending a new policy. As part of the global community, we are being affected and influenced by events happening elsewhere. The

most important influences are the global market and information technology. There are few communities that are not affected. Even once remote villages now have access to regular information on world events in some form. With such regular contacts, direct or indirect, customs are continuously being modified, including land management and use practices.

Products manufactured in distance places are now available locally. These products are purchased with the earnings from products of the land. These lands are therefore being gradually, but definitely, being drawn into the global market. Global investors may therefore wish to invest “upstream” in the ultimate source of the products they buy and trade, the remote land somewhere in an African village.

Our land policies should therefore be prepared for such outcomes. However it does not mean that we should provide for these investors at the detriment of our people by copying completely their land management practices. Just like with languages and other customs, people who have to interact for mutual benefit, such as trade, may learn each other’s language to facilitate the transactions, and may spend time to find out about dos and don’ts of the other. We accept differences in language and other aspects of culture. Land tenure is no different. As with most things, we should adopt what is good for us, and at a pace that will not cause social upheavals. Also as in other matters, we should make it easy for the “foreigners” in our midst to fit in by being consistent and providing them with relevant information.

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