# THE STRUGGLE OVER
# LAND IN AFRICA
## CONFLICTS, POLITICS & CHANGE

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EDITED BY WARD ANSEEUW & CHRIS ALDEN



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# *Acronyms and abbreviations*

| | |
|---|---|
| AALS | Affirmative Action Loan Scheme (Namibia) |
| Agribank | Agricultural Bank of Namibia |
| ANC | African National Congress (South Africa) |
| APC | Congolese People's Army |
| CBNRM | Community Based Natural Resources Management programme (of the Ministry of Agriculture) (Mozambique) |
| CBTE | community-based tourism enterprise (Namibia) |
| CFJJ | Centre for Juridical and Judicial Training (of the Ministry of Justice) (Mozambique) |
| CLDC | Community Land Development Committee (Tanzania) |
| CLRA | Communal Land Rights Act (South Africa) |
| Codesa | Convention for a Democratic South Africa |
| CTC | CT Consulting |
| DfID | Department for International Development (UK) |
| DLA | Department of Land Affairs (South Africa) |
| DMG | Daureb Mountain Guides (Association) (Namibia) |
| DNFFB | National Directorate for Forests and Wildlife (Mozambique) |
| DRC | Democratic Republic of Congo |
| DUAT | *Direito de Uso e Aproveitamento de Terra* (Land use and benefit right) (Mozambique) |
| EBM | evidence-based medicine |
| EBP | evidence-based policy |
| EPM | Environmental Planning and Management |
| ESAP | economic structural adjustment programme |
| FAO | Food and Agriculture Organization (of the United Nations) |
| FAPC | People's Armed Forces of Congo (*Forces Armées du Peuple Congolais*) |
| FNI | Front for National Integration (DRC) |
| FPDC | People Forces for Democracy in Congo |
| FRPI | Front for the Patriotic Resistance in Ituri (DRC) |
| IDP | internally displaced person |
| IMF | International Monetary Fund |
| LAPC | Land and Agriculture Policy Centre (South Africa) |
| LRAD | Land Redistribution for Agricultural Development (South Africa) |
| MDC | Movement for Democratic Change (Zimbabwe) |
| MET | Ministry of Environment and Tourism (Namibia) |
| MINADER | *Ministério de Agricultura e Desenvolvimento Rural* (Ministry of Agriculture and Rural Development) (Angola) |
| MLHSD | Ministry of Lands and Human Settlement Development (Tanzania) |

| | |
|---|---|
| MONUC | *Mission de l'Organisation des Nations Unies en République démocratique du Congo* (Mission of the United Nations Organisation in the Democratic Republic of Congo) |
| MP | Member of Parliament |
| MPLA | People's Movement for the Liberation of Angola |
| NAFU | National African Farmers' Union (South Africa) |
| NGO | non-governmental organisation |
| NLC | National Land Committee (South Africa) |
| NMC | National Monument Council (Namibia) |
| PTO | Permission to Occupy |
| PUSIC | Party for Unity and Safeguarding of the Integrity of Congo |
| RPF | Rwandan Patriotic Front |
| SADC | Southern African Development Community |
| SAP | structural adjustment programme |
| SLAG | Settlement Land Acquisition Grant (South Africa) |
| SUDP | Strategic Urban Development Plan/Planning |
| Swapo | South West Africa People's Organisation |
| TA | tribal/traditional authority |
| TCOE | Trust for Community Outreach and Education (South Africa) |
| TLGFA | Traditional Leaders and Governance Framework Act (South Africa) |
| UCLAS | University College of Land and Architectural Studies (Tanzania) |
| UDASEDA | Ubungo Darajani Community Development Organisation (Tanzania) |
| UNDP | United Nations Development Programme |
| Unesco | United Nations Educational, Scientific and Cultural Organization |
| Unita | National Union for the Total Independence of Angola |
| UPC | Union of Congolese Patriots |
| WSSD | World Summit on Sustainable Development |
| Zanu-PF | Zimbabwe African National Union (Patriotic Front) |

# *Acknowledgements*

Land issues and conflicts occur all over the African continent, all the time. Stories regarding land mushroom on a continuous basis. Although many of them are not new, they continue to change and are extremely complex and embedded. This leads to difficulties in dealing with them and results in questions around the legitimacy of forms of conflict intervention and prevention, many of which do not take into consideration the major – and thus potentially recurring – causes of conflict. It is on this basis that the conference forming the foundation of this book was organised.

Supported by the French Institute of South Africa (IFAS-Research) – in partnership with the French embassies of Pretoria, Harare, Gaborone, Windhoek and Maputo; the office of the Food and Agriculture Organization of the United Nations in Harare; the French Agricultural Research Centre for International Development (CIRAD); the London School of Economics and Political Science (LSE); and the University of Pretoria (UP) – The Changing Politics of Land: Domestic Policies, Crisis Management and Regional Norms conference gathered in Pretoria on 28 and 29 November 2005. Papers were selected by a scientific review committee composed of members of all funding institutions, and included the main research institutions and organisations specialising in these questions (UP and the University of the Western Cape, both from South Africa; CIRAD; French Research Institute for Development; French National Institute for Agricultural Research; the Institute for Security Studies; the African Institute for Agrarian Studies of Harare; the Legal Assistance Center of Windhoek; Human Rights Watch; etc.). This book is a collection of updated versions of most of the papers presented at the conference.

We would like to convey our gratitude to all the funders, as well as to the many contributors and participants, who made it possible through both the conference and this publication to present the state of knowledge on land issues and conflicts in Africa. They also made it possible to keep alive a necessary debate on land questions in Africa, despite the sensitive context and acute controversies.

# *Foreword*

> Sustainable growth and development in Africa as well the continent's contribution to the world economy in the 21st Century will continue to depend largely on the manner in which land and land-related resources are secured, used and managed. This will require that these issues be addressed through comprehensive people-driven land policies and reforms which confer full political, social, economic and environmental benefits to the majority of the African people.

Thus concludes the historic *Framework and Guidelines on Land Policy in Africa*, adopted by the Heads of State of Africa meeting in Sirte, Libya, in July 2009. The *Framework* was prepared under an initiative led by the African Union and involving most of Africa's prominent land experts, including some of the authors in this book.

*The Struggle over land in Africa* is a timely and important accompaniment to the growing number of continental-level and national policies on land. Questions about rights to land and natural resources are emerging as a central component of policy and decision-making on development, poverty reduction and peace building. However, as the authors of this book clearly demonstrate, getting beyond noble but broad statements of consensus and into concrete questions of how land should be best used, owned and controlled, and by whom, reveals a complex, highly contested and often conflictual terrain.

Land policy in Africa is changing. The market-centred land tenure reforms of the 1980s and 1990s are beginning to lose ground to the more people-centred tenure reforms of the last decade. Land policies and laws in Africa are, in theory, increasingly capable of serving the needs of ordinary land users by accommodating difference, plurality and more decentralised forms of land governance. Concepts of governance are also evolving. Governments are more willing to reach beyond their own corridors to recognise the legitimate roles of civil society and local-level institutions in making decisions on land use and ownership. At the same time, there are an increasing number of voices who believe they have a right to be heard in defining land policy or influencing its implementation, including well-networked civil society organisations, social movements and producer organisations.

Nonetheless, slow shifts towards the democratisation of land governance in Africa are happening within economies and societies characterised by growing gaps between those with the political and economic power to lay claim to land, and those without. With persistent efforts at agrarian reform few and far between, the current trend is towards increasingly polarised patterns of land ownership, and thus

increased potential for conflict. Conflict is both a symptom of persistent inequalities and an opportunity for the powerful to consolidate their holdings of land and valuable resources.

The scramble to lay claim to land, in which 80 per cent of Africa's land users access land through customary mechanisms, is a profoundly unequal one. How can the enclosure of Africa's land become less of a vehicle for concentration of land ownership and more of an opportunity for those that use the land – women, family farmers, pastoralists, first peoples, tenants and the landless – to gain secure land tenure at collective and/or individual levels? Great strides have been made in the last decade in developing innovative methodologies for participatory and low-cost registration of tenure rights. However, as the chapters of this book make clear, even progressive land policies and the availability of necessary tools for pro-poor land registration can become vehicles of the powerful for their own advantage.

One of this book's major contributions is a systematic analysis that looks not just at competition, but also at confrontations, over land. It does so within an analysis of rights and power relations, political and policy frameworks, culture and values. It does not offer simple solutions, emphasising that the volatile dynamics of land conflict do not always conform to the conventions of logic. Ignoring these complexities can lead to well-conceived tenure reforms simply fuelling land-based conflict.

Securing equitable access to and control over land means securing peace. It is also central to enabling women and men to exercise their fundamental economic, social, political and cultural rights, including the universal right to be free from hunger and poverty. This was the rationale for the creation of the International Land Coalition more than a decade ago, and it is the driving force behind many organisations and individuals across the African continent who work on questions of land tenure. The authors and contributors to *The Struggle over land in Africa* present an illuminating set of perspectives and analyses that provide essential pointers to understanding and establishing the conditions that will promote peace and a measure of lasting security in the livelihoods of ordinary women and men across Africa.

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International Land Coalition Secretariat

# *Introduction*
## *The struggle over land in Africa: Conflicts, politics and change*

Ward Anseeuw and Chris Alden



While rarely reaching the proportions experienced in Darfur or Rwanda, conflicts linked to the acquisition and use of land are part and parcel of the African political landscape. The power of the land issue to invoke emotional responses and political action spills over into questions of ownership, usage, development practices, resource management and, ultimately, citizenship and identity politics. The failure of African governments to recognise and resolve lingering disputes emerging from the land question has triggered extended protests and violence, disrupting vital production and in some cases even destabilising once venerated economic and political 'success' stories in Africa. The inability of the international community to develop policies and programmes which effectively integrate these concerns into their development focus inadvertently renders their efforts stillborn.

A brief survey of conflicts in Africa illustrates these profound linkages between land and the onset of violence and political strife. For instance, the civil war that started in 2002 in Côte d'Ivoire, although apparently winding down, reflects dynamics around land and identity. The land issue remains sensitive in this mainly rural country, where about 40 per cent of the population is of foreign descent (mostly Burkinabe but also Malian and Guinean) (Chauveau & Colin 2005: 3). Land debates also mushroomed in Nigeria, where the power of the oil resources has had a disastrous impact on land practices. The dispossession of local tribes in the Niger Delta and Niger River states in pursuit of oil production has led to a rising tide of violence since 1999 (Akpan 2005). In Kenya, extreme inequality and landlessness have unravelled the so-called successes of the post-settler 'Million Acre Scheme', with Kenya's landless now threatening land invasions (Yamano & Deininger 2005). Indeed, Kenya's 2007 post-electoral conflicts are directly linked to the threat of land invasions. In Zimbabwe, another type of land war is ongoing. What was once considered to be a shining example of democratically inspired reconciliation is now characterised as a failing state (Chitiyo 2003). Although the land question has not descended into civil war, Robert Mugabe's fast-tracked land reform programme has decimated agricultural production and forced almost a quarter of Zimbabweans to become dependent on food aid. In neighbouring South Africa, the ANC promises of land reform remain unrealised. The mere 4 per cent of land redistributed since the first democratic elections and, concurrently, the growing inequalities within the society, coupled with the murder of 1 500 white farmers since 1994, all underscore the continuing sensitivity of the land question. Against this volatile backdrop, the

decision to implement expropriation acts in South Africa and in neighbouring Namibia could arguably still trigger Zimbabwe-like situations in these countries (Alden & Anseeuw 2006; Lee 2003). And even in Botswana, land pressures have caused citizens to echo a localised version of the anti-settler discourse circulating in other parts of the southern African region. Given that the country has historically espoused a deliberately non-racial, universalistic form of liberalism, the shift in discourse on land is particularly significant. Other examples are not lacking.

In many cases, such as Côte d'Ivoire, Kenya and South Africa, the movements from war to peace, from segregated development to inclusiveness, from obstruction to democracy, have (initially) resulted in tangible economic and social improvements in the lives of individuals and communities. And yet, for all the successes that can be pointed to, there remain numerous instances where peace retains only a tenuous grip on society or conflict has reasserted itself. A common denominator of those states that have succumbed to political violence is the failure to address the issue of land.

Conflict, and land conflicts in particular, as noted by Chauveau and Mathieu (1998), are seldom analysed or documented. Understanding this volatile dynamic between land, competing usages and the ensuing (and conflicting) claims to control is, however, not straightforward; the causes and developments of land disputes do not necessarily conform to the conventions of logic. In this sense, the absence of any systematic analysis of land conflicts, and the integration of these insights into sound policies and post-conflict reconstruction strategies, potentially contributes to the perpetuation of the conditions which fuel conflict.

But why is land so important? It is a primary and fundamental but also highly symbolic resource for the vast majority of African peoples, representing a key building block for so-called traditionalist societies and economies. Being a valuable and immovable resource of limited quantity, land is not only fundamental to the livelihoods of most Africans, but also represents a precious reservoir of natural resources. Land is a core element in the complex social relations of production and reproduction (Pons-Vignon & Solignac Lecomte 2004). At the same time, ancestral land impacts on people's identity – on the ways they are bound to the land and relate to their natural surroundings, as well as to fundamental feelings of 'connectedness' with the social and cultural environment in its entirety (Nikolova 2007). As economic, symbolic and emotional aspects are at stake, land is often at the source of violence and is also an essential element in peace building, political stabilisation and (socio-economic) reconstruction in post-conflict situations.

This book analyses the role of land as a site and source of conflict, especially with regard to policy development, crisis management and (post-conflict) reconstruction. Its central aim is to gain insight into the nature of policy-making concerning land, not only at national level but also in terms of the broader African state system, and the challenges facing it – in the form of new norms of governance of state and markets. The modalities and the exteriorisation of these conflicts differ from one

case to another and from one area to another. Besides highlighting the diversity and importance of the land conflicts in Africa, the book draws attention to the diverse and often complex root causes of these land questions – a complexity that is often neglected. By adopting a continental perspective, the various chapters analyse land conflicts and their factors and compare responses to internal crises across a range of countries drawn from all regions of Africa. The chapters are updated contributions selected from the international conference The Changing Politics of Land: Domestic Policies, Crisis Management and Regional Norms, held in Pretoria in November 2005, and include authors from the academic, diplomatic, political and civil sectors. The conference, which was subject to a rigorous selection process, emphasised academic excellence without neglecting the necessary debate on land issues despite a context of acute controversies.

Examining land conflicts in Africa is a challenging task, as the contexts in which they take place are continuously changing, so altering the nature of the conflicts themselves. While questions traditionally related to land – such as scarcity of and competition for land, monopolisation of natural resources, and ethnic conflicts – remain important in the present context, new aspects also play a role: ecological aspects, divergent economic interests, minority rights and heterodox land tenures, and urban conflicts. Also, the appearance of new norms becomes evident: environmental and sustainable development criteria, new North–South relationships and power structures, the rise of anti-imperialism and anti-liberalism. This increased complexity implies the need for mobilising and combining an increasing number of approaches and instruments in order to understand the bases of the land questions in Africa. While deploying political economy as its main point of intellectual departure, the book nonetheless presents a multidisciplinary approach to understand the full range of issues around land and conflict, as well as the accompanying implications for policy. By taking cognisance of economic policy, institutional economy, international relations, sociology and anthropology in approaching land, a more constructive and ultimately more viable source for policy appears than is presently the case. The different chapters demonstrate unequivocally that simplistic interventions currently employed by multilateral agencies – based on, as emphasised by Huggins (Chapter 2), the naïve one-dimensional 'black or white' or 'all or nothing' approaches – should be questioned. In fact, in many respects, by ignoring deeper causal factors, much contemporary policy on land and conflict only serves to defer – if not perpetuate – the rationale for the further recurrence of disputes.

The book is divided into six themes in an attempt to group causes and structural factors:

- Ethnic and indigenous land conflicts (Chapters 1 and 2);
- Between 'traditionalism and modernity': Insecurity, privatisation and marginalisation (Chapters 3 and 4);
- Renewed land interests, land use, and conflicts (Chapters 5, 6 and 7);
- State building, politics and land (Chapters 8, 9 and 10);

- Land policy development, planning and (non-)inclusiveness (Chapters 11 and 12);
- Regional scopes of land conflicts and changing norms (Chapters 13 and 14).

This classification facilitates understanding, analysis and the elaboration of precise indicators. However, given the diversity of contexts, the themes should not be interpreted unilaterally, sequentially or hierarchically. Individual factors do not by themselves constitute a necessary or sufficient cause of land conflicts. The conflictual processes articulate themselves according to various sequences, diverse factors and sources of tension. This leads to the questioning of previously recognised rules as legitimate for the rights of land or even of the broader socio-economic and political environment within which land questions are framed. Indeed, as shown in the different chapters, broader dimensions linked to the economic and political environments also have to be taken into account in order to understand the different types of conflicts.

■ ■ ■

As a primary and fundamental but also highly symbolic resource for most African peoples, land holds a unique position within so-called traditionalist societies and economies. Many of the conflicts experienced can therefore be traced back to the pressure on these resources, to the competition to acquire nature and land linked to assets, and to its summary expropriation from the peasantry and the historic owners.

Population growth and environmental stresses exacerbate the perception of land as a dwelling resource, often – and probably too easily – tightening the connections between land pressure and conflict (Chauveau & Mathieu 1998). Indeed, a reason often put forward regarding the origin of land conflicts is the difficult ecological and environmental context of the African countries (Jolly & Boyle Torrey 1993; Lund et al. 2006). The latter cannot be ignored, particularly on the African continent. Africa still hasn't had its demographic transition,[1] leading to high population growth. With African countries' population growth rates at around 2.5 per cent per year (3 per cent at the end of the 1980s), it is estimated that the continent will gain 1 billion inhabitants between 2008 and 2050 (Losch 2008: 48). Africa will by then have to assure acceptable living conditions to 1.7 billion people, 80 per cent of whom are mainly dependent on agriculture and natural resources (Giordano & Losch 2007). Whereas land availability was always one of Africa's assets, it is presently no longer the case for several countries. For example, in the agricultural-based countries of Senegal and Madagascar, farm households occupy on average less than a hectare (Faye et al. 2007).

Although not *un*important, rapid population growth and natural resource depletion cannot be generalised as conditions that automatically cause acts of violence and conflict: 'Increased population densities do not always lead to increased competition for natural resources, and this competition does not necessarily lead to conflicts' (Mathieu et al. 1998: 1). It is not the increased competition as such that leads to conflict but the increased confrontation – facilitated by increased demographic pressure – of

different sets of norms, linked to diverse political and policy frameworks, cultures and values. Socio-economic and political rights and power relations, embedded in the enabling environments of extreme poverty, overlapping rights, and biased power relations – all exacerbated by increased land pressure and competition – thus seem to be more relevant structuring determinants. This goes hand in hand with Africa's accelerated integration into a globalised economy, leading not only to more frequent interactions, but also to increasingly varied interests regarding land.

## *Ethnic and indigenous land conflicts*

Although not new, ethnic and indigenous land conflicts have seen a significant increase in frequency and violence. Indeed, an important aspect linked to the demographic evolution in Africa is the escalation in massive movements of populations, leading to increased contact and confrontation between different cultures, values and norms, sometimes linked to diverse political and policy frameworks (Mathieu et al. 1998). This contact between 'insiders' and 'outsiders', who often know very little about each other and who do not share similar histories, adds to the already devastating impact that European colonialism has had on Africa through the establishment of artificial boundaries, and the bringing together of different ethnic groups within a nation that neither reflects nor has the ability to accommodate or provide for the cultural and ethnic diversity.

Besides many other examples around the continent (e.g. Côte d'Ivoire, Sudan), important ethnic and indigenous land conflicts are reflected in the long-standing territorial land claims in the Mount Elgon region in Kenya, on the border with Uganda. This issue dates back to the colonial period, when land alienation and the creation of African reserves led to discrimination between so-called indigenous communities and migrant communities. From 1991 to 2003, with the aim of creating exclusive ethnic regions, approximately 400 000 migrants were forced by government to return to their 'ancestral land' and became internally displaced. Médard (Chapter 1) shows that even though the focus has shifted from establishing African (versus European or Asian) rights to land to defining separate 'ethnic' rights over land, the issue of suing the British government for compensation has come up as part of ethno-nationalist claims to territory.

As discussed by Huggins in Chapter 2, a similar situation occurs in Rwanda and to a lesser degree in Burundi, which is deeply affected by the Tutsi–Hutu conflicts. The return of hundreds of thousands of refugees, and the related property claims, pose a great challenge. Although many are optimistic about the futures of these countries, problems remain – based not necessarily, according to Huggins, on ethnic constituencies but rather on vicious power struggles within the ruling parties, and numerous small-scale violent incidents related to political intimidation, land grabbing and land disputes. Huggins argues that the most appropriate way forward would be a process of adaptation and a melding of customary and 'modern' systems through participatory mechanisms.

## *Between 'traditionalism and modernity': Insecurity, privatisation and marginalisation*

The melding of customary and modern systems draws attention to the importance of ill-defined land tenure systems as a source of conflict. Indeed, the above-mentioned ethnic and indigenous land conflicts are also linked to unclear rights and boundaries, geographically but also institutionally and legally, regarding lands.

The latter is especially the case with traditional land systems, where uncertainties regarding land and land rights increase when unclear or multiple rights exist in the same geographical area (Odgaard 2005). On the same lands, different actors might have specific rights, possibly for different activities and/or at different times. These complex systems imply sufficient availability of resources but, more importantly, mutual social consensus between the diverse land protagonists, leading to precise arrangements regarding the different rights (Mathieu et al. 1998). The latter implies a set of social relationships – rarely legal – of subordination, dependence and acceptance (Mugangu Matabaro 1997). Uncertainties regarding these relationships increase with unstable and unclear articulation between the main land regulation systems (traditional, market), resulting in these systems being unable to coordinate competition and arbitrate conflictual situations (Mathieu 1996). Competition for land then becomes more conflictual, with tensions appearing at various levels of social organisation: between family members, between villages, between social categories and between ethnic groups (Mathieu et al. 1998). Confusion around institutional regulations either leads to deterioration in the conditions of the weakest or reinforces distrust and resentment, which can feed ethnic conflicts.

In order to clarify rights, as well as to develop African agriculture and promote (urban and rural) investment, the evolution to individual tenure is seen as desirable for modernisation. Individualisation policies are driven by the perceived need to promote access to and control over land (Deininger & Binswanger 1999). It is thought that titling promotes market-driven development by enhancing security of tenure so as to provide sufficient incentives for individuals to improve their land. However, more recently the validity of African customary systems has been acknowledged (Cousins et al. 2006). In addition, according to the 'evolutionary' theory of landholding, individualised rights to land do emerge from customary practices (World Bank 2003). As such, 'property rights are social conventions backed up by the power of the state or the community' (World Bank 2003: 22), allowing for customary systems to provide 'secure, long-term and in most cases inheritable' land rights (World Bank 2003: 53). Recognising these systems, their emergence and evolution, would possibly limit drastic measures and interventions, which are often not adapted or are out of context and can lead to exclusionary and marginalisation effects.

Although clarifying rights is necessary, it is a contested process as it deals with key features of African tenure systems, derived from their social and political embeddedness. Rights (such as land tenure) are thus not defined according to rational criteria but rather in accordance with social needs and interests. Cousins argues in

Chapter 3 that embeddedness within power relations means that the balance of power between different interests in relation to land not only defines rights but can shift over time, as when chiefs and headmen became instruments of indirect rule by the colonial and apartheid states and as a result acquired greater powers over land than they had previously enjoyed. Cousins argues that South Africa's new Communal Land Rights Act (No. 11 of 2004) – which seeks to transfer title of communal land from the state to 'communities' who will be recognised as juristic personalities on registration of a set of community rules – is likely to have profound impacts on African traditional tenure systems while reinforcing the distortions of the colonial period, and could have the unintended effect of undermining rather than securing rural people's land rights. The author emphasises that many of the problems in the Act derive from the paradigm of land titling that has been adopted.

In the Diamaré in Northern Cameroon, on the other hand, the *karal* land, once considered an inalienable resource and heritage, is now subject to a market economy or monetisation due to the overexploitation of cash crops. Because of frequent droughts and a lack of food security in the Diamaré, the demand for and overexploitation of this basic resource has led to its individual appropriation, the monetisation of land, and land transference. Gonné (Chapter 4) shows how this land, which has now become one of the principal means of intra- and extra-familial transfers, causes marginalisation and conflicts. These new perceptions of the land question not only the status of this resource, which in the past was never subject to competition or conflict, but also the rights people hold regarding their land. The situation has encouraged the institutionalisation and distribution of 'undisturbed land rights' papers in the region, giving the farmers and their families a certain land security.



## *Renewed land interests, land use, and conflicts*

Uncertainty of rights, which works against the interests of the original occupants, tends to increase when exogenous changes or interests appear. In such cases, the need to adapt or create specific institutions (often imposed by the state or by the outside technical or financial partner), as well as to redefine the local balances of power (through the external intervention or the institutional reorganisations implied thereby), creates destabilised and uncertain social situations (Mathieu et al. 1998).

Examples are numerous. Competition between different types of farmers to access land or between different land uses for agricultural and non-agricultural production and activities has been a major source of conflict for decades in many countries. Certain 'modern' land uses, such as game farming and ecotourism, combined with new perceptions and principles, often linked to ecological and environmental ethics, have also created competing interests and conflicts. More recently, countries hungry to secure their food and energy supplies – including China, South Korea, Saudi Arabia and South Africa – have been engaged in a scramble to gobble up land all around the world, mainly in Africa (Von Braun & Meinzen-Dick 2009). All these issues, which affect mainly the poor and the insecure, contribute to current conflictual land stakes.

The case of Namibia, discussed by Lapeyre in Chapter 5, is noteworthy as an example of ecotourism. It shows that land acquisition for tourism and leisure activities can lead to tensions, but also that land reform in the form of nature conservancies can perpetuate social exclusion among previously deprived populations and, therefore, is not always an optimal solution. While ecotourism is often presented as an ideal alternative – enabling rural communities to access nature-based (wildlife, etc.) and financial resources through nature tourism – it disguises a lack of transfer of secure rights to local populations, perpetuates the content of land exclusion if not the form, and does not allow them much legal recourse in cases of disputes. Tensions consequently arise over ownership and leasehold rights, leading to conflicts around common resource appropriation and distribution.

Post-war Mozambique, on the other hand – discussed by Tanner in Chapter 6 – is confronted by the challenge of reforming land policy and legislation with an innovative Land Law that protects customary rights, while promoting investment and development. Most rural households have customarily acquired land rights, which are now legally equivalent to an official state land use right. With rights recognised and recorded, communities can now negotiate with investors and the state and secure agreements to promote local development and reduce poverty. Nevertheless, a focus on fast-tracking private sector land applications is resulting in land use concentration that could fuel future conflicts over resource access and use. The progressive mechanism of community consultation is being applied but, according to Tanner, in a way that does not bring real local benefits. Instead, it gives a veneer of respectability to what is more like a European-style enclosure movement, aimed at rationalising land use and placing resources in the hands of a class that sees itself as more capable and better able to use national resources than the peasant farmers, whose rights are legally recognised but still unprotected in practice. The author judges that a historic opportunity is in danger of being lost – the chance to use the Land Law to implement rural transformation with a controlled enclosure process that brings social benefits and generates an equitable and sustainable outcome for all involved.

In the South African case, discussed by Laurent in Chapter 7, the circumstances of small-scale farmers and landless people have gained political legitimacy. Being a source of income and food security for rural households, small-scale farming is viewed as a key element of rural livelihood improvement. However, Laurent notes that in several cases during South Africa's land and agrarian transition, the legitimacy of the demands of potential black small-scale farmers to access land was questioned, not only for its impact on agricultural production but also for ecological reasons. While emphasising that such contradictions may become potential sources of major land crises, the author argues that it is necessary to understand what is really at stake when environmental issues are opposed to agrarian reform and small-scale farming modernisation.

## *State building, politics and land*

The above-mentioned, sometimes rapid and important changes in land use and acquisition, whether linked to violent or non-conflictual situations, often create new land situations without the state or social mechanisms being able to define new norms and policies in a way that is socially acceptable. If, on the one hand, varieties of agrarian reform can lead to changing land and natural resource appropriation patterns (as seen above), it also leads to the recomposition of political and power relations. This will obviously create new stakes, new opportunities (for the more powerful, the new occupants, the richer) and new risks (for the displaced, the weaker).

This brings us to the importance of reconstructing states and societies in the aftermath of colonialism, in post-conflict situations and in changing societies. If the legacy of the past remains important – several decades of colonial rule and occupation, politics, interests, actors and discourses strongly shape land policy in post-colonial, post-conflict, restructuring countries – present dynamics, political intrigues and socio-economic situations (often not independent of the previous influences) are also at stake and determine current situations and policies. Building on the new states' political economy, formal and informal processes, which depict vested interests at work, actors' networks and discourses invoked to legitimise specific views have led to the adoption of new policies during different cycles of policy-making. State building, elite formation, interest conflicts, positions advanced by different interest groups, confront each other and shape some of the means by which policy is formed.

Although the link between land, land policies and state formation is featured around the continent, Angola, South Africa and Namibia reflect exemplary cases. On the one hand, land reform is emerging in these cases from extreme situations – a protracted and brutal war in the case of Angola, and extreme segregation and unequal societies in the cases of South Africa and Namibia. On the other hand, land reform is seen in these cases as an integral part, if not the most essential element, of the social, economic and political reconstruction processes of these post-conflict and post-segregation societies.

Angola is indeed beginning the difficult process of rebuilding the country's shattered physical and social infrastructure, and reintegrating the millions of people who fled their homes. The legislative history of Angola, especially during the last 40 years, has resulted in a succession of injustices against the rights of traditional communities and the sustainability of their economies. It is only now, as peace spreads across the country, that attention is being focused on addressing land-related inequalities that still prevail, and building sustainable livelihoods. The potential for Angola to move from conflict to reconstruction and sustained development is greater than ever before. Clover (Chapter 8) explores the potential fracture points facing the country during its current period of post-conflict normalisation, especially in the light of returnees (refugees and internally displaced peoples); recent land-related conflicts, most notably those experienced by pastoralists in the Gambos region of Huíla

Province; tensions around peri-urban and urban land issues; and the importance of restoring food security and agricultural productivity.

The difficulty of implementing such reforms is detailed by the South African case, where, after 15 years of democratisation, less than 5 per cent (85 per cent less than was initially planned) of the land has been redistributed. To achieve the latter, two different cycles of land policy were implemented since the end of apartheid. According to Hall (Chapter 9), this shift was a significant rupture from the vision evident in the Reconstruction and Development Programme, initially adopted in the newly democratised South Africa and focusing mainly on stabilisation and normalisation through redistribution. The Programme was hailed by some as a viable means of creating a class of black commercial farmers, and for reintroducing considerations of land use that were previously obscured; others criticised it for abandoning the poor and failing to address the conditions that lead to the underutilisation of redistributed land. It was replaced soon after President Mbeki took over from Nelson Mandela by a more growth-orientated approach, emphasising more than ever the 'willing buyer–willing seller' principle. How could a country that at one stage had promoted the nationalisation of land resources support the need for a redistribution based on market principles and respect for property rights? Hall draws attention to the processes through which these policies were defined, and suggests that they can be understood as outcomes of multiple and conflicting interests and, in some important respects, as internally incoherent and contradictory. As such, opportunities for influence differed substantially in the first and second cycles, as new forms of 'participation' were institutionalised and new forms of 'knowledge' were validated. This led to a substantial narrowing of the political space to input into policy in the second cycle. Added to this, the room for manoeuvre for policy was defined elsewhere, notably in the macroeconomic framework adopted in 1996. Through the exploration of questions of the politics, interests, actors and discourses shaping land policy in a country that is still attempting to define its development trajectory, the priorities of state and market advanced by different interest groups reflect some of the means by which certain actors have sought to shape policy.

In Namibia – like South Africa and Zimbabwe, a country characterised by a divide between commercial and communal agriculture due to expropriation of land from indigenous peoples – the instruments adopted in addressing commercial land reform are government purchases of commercial farms for the purpose of resettling landless communities, and an Affirmative Action Loan Scheme for the purchase of commercial farms by previously disadvantaged individuals. After increased criticism of the 'willing buyer–willing seller' principle, in February 2004 the Namibian government announced plans to implement the option of expropriating commercial agricultural land in order to speed up its land reform and resettlement programme. While the process of expropriation is supported by adequate legislation, Odendaal (Chapter 10) judges that the expropriation criteria used by the government to identify suitable land appear to be ill-defined. Against the background of 15 years of land reform in Namibia, the author first provides an analysis of the successes and

failures of land reform in that country, and then considers options through which the shortcomings of the land reform programme could be addressed.

## *Land policy development, planning and (non-)inclusiveness*

In parallel to the state-building processes, the renovation of land policy appears in numerous cases to be a priority on national agendas to relieve the numerous challenges rural Africans face: land conflicts, land insecurity, important demographic pressures, high prevalence of poverty in rural areas, etc. Simultaneously, although at varying paces according to particular situations, African countries have engaged (at times due to external pressure) in institutional reforms, the promotion of the democratisation of the public sphere, administrative decentralisation and new forms of governance that favour, among others, principles of transparency, inclusiveness and responsibility (Anseeuw & Bouquet 2009).

As such, after decades marked by little consultation from states and foreign donors/funders during the definition, development and implementation of policies, these formal processes are now accompanied by increased participation and wider dialogue involving actors from different political segments (NGOs, professional organisations, civil society, private sector, etc.). Such evolutions were observed in different countries regarding the development of the Poverty Reduction Strategy Papers (Sewpaul 2006), agricultural policies (Senegal, Mali and Kenya) (Anseeuw 2009) and land policies (Senegal and South Africa) (Claasens & Cousins 2008; Toulmin 2006).

These emerging processes and actors reflect, in the African context, a certain evolution in terms of participative democracy. However, in both theory and practice, a lack of knowledge and concrete actions to facilitate these processes is often noted. This is linked, on the one hand, to the absence of favourable conditions to facilitate these more inclusive processes of policy development (strong asymmetries among actors, partial negotiations, imposed agendas and sequences, and weak information dissemination before consultations). On the other hand, a lack of concrete knowledge about these new policy development processes and the issues at stake, particularly regarding land policy, is often apparent. In a context marked by the multiplicity of concerned actors, and by an awareness of those on the African continent of the necessity of developing land policies in a more autonomous way, the reality becomes increasingly complex.

The latter is shown by Vircoulon (Chapter 11), who focuses on tribal conflicts in the district of Ituri in the north-eastern part of Democratic Republic of Congo, a territory populated by approximately 10 tribes, two of which have been at war since 1999. This region, where control over land means access to both agriculture and gold, has been confronted by ongoing conflict over land between the Lendus and the Hemas for at least the last century. This social cleavage – made official during colonisation – led to several 'clashes' during the twentieth century, only to be contained by coercion and negotiations. Manipulated by powerful neighbours, this local war reached a scale

not experienced before in recent years and is not about to be solved since, as showed by Vircoulon, the absence of measures to address the land problem in the UN peace agenda in Ituri is obvious. Based on recreating administrative local authorities and demobilising and reintegrating the fighters into civil society, Vircoulon judges that the international community's peacekeeping strategy does not provide any opportunity for addressing the land problem and generalised conflicts.

Contrary to the Ituri case, the description of the Ubungo Darajani case in Dar es Salaam (Chapter 12) details the urban planning process and the roles of different actors in each interface, and explores sustainability indicators in the planning process to gain insights into the nature of policy-making concerning land. Magigi systematically analyses the status of land and changes of tenure and explores the historical transition of urban planning process dynamics in Tanzania. The chapter outlines policy challenges of the new participatory urban planning approach (i.e. land regularisation) in determining future urban land development sustainability and networking success. Equally important, partial decentralisation of urban planning functions and a better understanding of participatory planning, in the sense of identifying the roles of the various actors, are also identified as necessary in ensuring future urban sustainability.

## *Regional scopes of land conflicts and changing norms*

By pitting the ongoing land crises in several African countries against a range of post-liberation norms – such as electoral democracy, human rights and adherence to a market economy – as well as against the sources of legitimacy of present regimes, which are regularly questioned for not delivering the expected results, one can identify an evolution of ideologies – often characterised by state-led versus proactive land reform opposition. The intimate links between the establishment of stable nation states and the concurrent fashioning of liberal constitutional regimes, transitions to democracy and sharing in the socio-economic wealth of these countries, all of which held important implications for attempts to embark on land reform, are part of the reason why ideologies and narratives change (Alden & Anseeuw 2009).

The general failure of the established regimes to provide for people's expectations and the disjuncture between the institutional outcomes of the post-independence African states are reservoirs of potential conflict within new democracies. This applies not only to land reform at national level, but also to the ideologies embraced in the majority of cases – especially the neoliberal approach adopted by many democratic governments. When linked to persisting crises, these developments pose significant challenges to established state and regional norms, which, in addition, are often still derived from the post-colonial and liberation era. As shown by Moyo (Chapter 13) and by Alden and Anseeuw (Chapter 14), the case of Zimbabwe is emblematic; its influence on the regional, even African, level reflects the volatility inherent in the politics of land and, with that, the political structure of post-independence states.

As such, Moyo argues that Zimbabwe's crisis has been characterised in terms of the subjective struggles of its key political and social movements, in the context of current international hegemonic interests and intervention strategies, which generate both the conflict and the 'crisis' discourse, while misunderstanding the historical and material basis which shapes popular social movements. The interconnected complexity of reforms in Zimbabwe since the mid-1990s, focusing on the triple transition of economic policy, land reform policy and political liberalisation/succession, explains the shifting perspectives and engagement strategies since 1998. According to Moyo, the progression from overtly violent conflicts between 1998 and 2004, to new and erratic experimental processes of piecemeal dialogue by opposing domestic forces – supported by key Southern African Development Community forces – has questioned existing paradigms (norms), practices that underlie the 'crisis' and the various confrontational domestic strategies and external interventions. The cascading series of crises in Zimbabwe has also raised questions about state responses aimed at addressing the main contested issues of economic policy, governance politics, human rights and sovereign international relations within the current univocal global order. Zimbabwe has, as such, gradually veered towards normalisation and convergence between the opposed domestic political and civil society gladiators, although an impasse remains with the international community.

The ex-settler states of South Africa and Namibia acted with a curious mix of equivocation, fear and support for the Zimbabwean government's actions. This was despite the expectations of the international community and sectors of civil society within these states for whom the transition to democracy was emblematic of a break with the authoritarian past. Alden and Anseeuw (Chapter 14), by analysing the response of the southern African countries towards Zimbabwe's crisis, and how the latter has affected their own domestic and land policies, show how the Zimbabwean situation is regional in scope, striking a chord across southern Africa precisely because it touches the region's political actors, states and societies in some fundamental areas. The formative nationalism of independent states in southern Africa is inextricably intertwined with notions of identity and citizenship (e.g. who is 'African'?), the sources of legitimacy of post-colonial regimes and the conflict between neoliberalism/bureaucratic autonomy and the imperatives of neo-patrimonialism in constructing state (and regional) policy.



### *Note*

1 Demographic transition is the decrease in time of the mortality rate, followed by a decrease in birth rate. Africa's demographic stabilisation is only expected for 2050 (Losch 2008).

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# ETHNIC AND INDIGENOUS LAND CONFLICTS

# 1 *'Indigenous' land claims in Kenya: A case study of Chebyuk, Mount Elgon District*

Claire Médard

> The thing is now so upside down, because for a Sabaot to tell a Kikuyu 'that you give me land', it is almost taboo. They don't believe that there is justice, just as much as you don't expect a leopard to coexist with a goat; you don't get, expect, any justice from the leopard, because the poor goat will be eaten up, so, that is where the Chebyuk problem is, when you go back just pray for them. (Interview 7)[1]

Several major conflictual episodes over land have been documented in Kenya's history. Land alienation through European settlement in the first half of the twentieth century and the structure of power introduced by the colonial government (centralisation, territorial and administrative control) led to the Mau Mau War (1952–60). Control over land exerted by administrative chiefs[2] in the African reserves and the eviction of 'squatters' from the White Highlands in the Rift Valley Province and from forest reserves resulted in cases of strongly resented landlessness. Since independence (1963), landlessness constitutes one of the state's main official concerns. At the same time, however, the distribution of land for political gain and the mobilisation of communities by promising them land have been major political strategies in Kenya.

Landownership in the White Highlands was partially transferred to Africans after independence, with only marginal measures of broader land redistribution to deter claims coming from squatters. Political patronage through land distribution became widespread. The ruling elite, those close to the first president, Jomo Kenyatta, benefited widely from the Africanisation of landownership. They accumulated wealth and power through land acquisitions. President Moi, Kenyatta's successor in 1978, also viewed land as a basis for power, even though his control over land transfers was less than Kenyatta's. In the face of opposition during the 1990s, the Moi regime promoted the *majimbo* (regionalism) ideology, which led to approximately 400 000 people being displaced from 1991 to 2002, with some of them becoming permanently landless. Land clashes where 'indigenous' communities claimed back 'their' land, as a strategy to regain political clout through support from 'minority' groups, including the president's own Kalenjin community, were instigated. It must be noted that most 'indigenous' land claims were formulated by leaders who happened to be political allies of the Moi regime and, as such, did not constitute a political minority. Therefore, 'indigenous' land claims in Kenya are tainted within this historical context and are viewed as a strategy to reclaim land, gain control over existing settlements and contest established landownership on the basis of ethnicity. When President Kibaki was

elected in December 2002, the new government distanced itself from the *majimbo* ideology. Though several episodes of land clashes have occurred since then, it appears that 'indigenous' land claims have lost state backing.[3]

Landownership and state involvement in defining rights and access to land remain as disputed as ever in Kenya, whether claims are formulated on the basis of ethnicity or on the grounds of landlessness. This chapter focuses on the area of Chebyuk, a well-watered and fertile area located on the southern slopes of Mount Elgon, which epitomises insecurity of land tenure originating both from government and from 'indigenous' claims to land. What might be viewed as poor land administration, inefficiency or political interference in land allocations leading to strong resentment and 'indigenous' strategies to reclaim the land should in fact be described as deliberate political strategies on the part of leaders to accumulate wealth and power through the politics of patronage. 'Indigenous' land claims in Chebyuk, Mount Elgon District, are viewed in a context of deep involvement by government (territorial administration and politicians) in land matters.

Since the forested area of Chebyuk was cleared in the 1970s, it has become an agricultural frontier for migrants, mostly from within the Sabaot community (a group of Kalenjin speakers), which straddles the Uganda–Kenya border. Contrary to a common view, ethnic affiliations fluctuate and vary greatly over time and space. Claiming a distinct ethnic affiliation must be understood within the local and national political arena. Today, on the Kenyan side of Mount Elgon, there are three different ethnic clusters: the Kalenjin, the Luhya and the Teso.[4] Additionally, the Sabaot group can be divided into subgroups such as the Kony, Bok, Bongomek, Sabiny or Sebei and the Ndorobo or Ogiek.[5] Over the years, territorial claims to land have contributed to the growth of ethnicities such as the Sabaot and the Ndorobo. Clearly one can choose to stress one level of ethnic affiliation over another (Kenyan/Ugandan, Kalenjin, Sabaot, Bok/Bongomek/Kony/Sabiny/Ndorobo) according to circumstances, opportunities and strategies (Martin 1992). The unified view of a Sabaot people has been increasingly questioned with conflicts over land in Chebyuk.

The approach taken in this chapter to understanding the conflict at the Chebyuk land settlement is shaped by the works of historians, geographers, anthropologists and political scientists who have endeavoured to analyse the making of state territory within the local arena of power. Many historical studies have demonstrated the radical change that accompanied the introduction of a centralised and administrative form of government during the colonial period (Berman & Lonsdale 1992). Geographers (Maurel 1984; Pourtier 1989) have focused on state territory shaped to exert exclusive control over people and resources. Their work has highlighted a territorial framework of control comprised not only of boundaries (used for the purpose of internal administration in the case of Kenya) but also of forced or induced settlements. The concepts of boundaries and frontiers epitomise conflicting views of territory: a centralised and controlled access to land versus a decentralised and/or unrestricted one (Kopytoff 1987). The changing patterns of boundaries and their enforcement have led us to view them from a different perspective. They are

instrumental in creating opportunities for specific interest groups, demonstrating conflicting territorial strategies even within government. In Kenya, these strategies are strongly related to ethnic claims to land and power as well as to political patronage. Alarmed by the drift towards authoritarian regimes, the works of political scientists have explored the process of power centralisation (Bourmaud 1988), which is closely associated with neo-patrimonial practices, where the separation between private and public spheres is obliterated (Médard 1991). The territory of a neo-patrimonial state is far from being 'legal', even though it can rely on legal instruments. The mix between institutionalised and personalised forms of power has led to paralegal actions, where political barons and territorial administrators are among the key players who abuse legality. In this context, how can land transfers, which are central in the bargaining for power in Kenya, be regulated?

This chapter is comprised of two parts. The first describes land settlement in Chebyuk in relation to territorial constraints, and the second focuses on state involvement in land transfers.



## *Boundaries and frontiers in Mount Elgon*

The area of Mount Elgon is characterised by numerous boundaries that both define and restrain settlements and population movements. The international boundary between Kenya and Uganda cuts across the mountain and its inhabitants. Created for the purpose of administrative convenience, internal boundaries also play an important role at the local level. Some were introduced on the grounds of race or ethnicity, others on the basis of environmental considerations. For example, forest reserves and national parks were established over the years in different locations on both sides of the international boundary. With the exception of the Chepkitale moorlands in Mount Elgon, Kenya, people were, as a rule, excluded from the high altitude ecosystems in East Africa, kept away with the creation of forest reserves and parks. Government views internal boundaries as convenient tools to manage communities. Some were inherited from the colonial era, others introduced or renegotiated in more recent years. For instance, Trans Nzoia District, east of Mount Elgon in Kenya, was reserved for European settlement, while Bungoma District and the recently created Mount Elgon District to the south of Mount Elgon were part of an African reserve. Contrasts in the size of landholdings and population densities between the two areas remain striking, despite the growth of internal migrations and land subdivisions in the former White Highlands. Although racial and ethnic boundaries were questioned at independence, they still play a major role in Kenya's demarcation scheme.

Boundaries are instrumental in creating population reserves on the basis of ethnicity: first as an administrative expediency, then as a strategy by leaders to claim land on the basis of a separate identity. In Mount Elgon, several levels of competing claims to land are found along the Sabaot/Bukusu and the Ndorobo/Sabaot divides. The Sabaot and the Ndorobo both claim an 'indigenous' or 'ancestral' right to land.

Sabaot violence backed by government in the 1990s and targeting the Bukusu led to the creation of Mount Elgon District. Territorial claims of Ndorobo leaders on Chepkitale and Chebyuk were also shaped by the local administrative history, though the government has not consistently supported them.

### *The move from Chepkitale to Chebyuk*

Above the forest reserve, the Chepkitale moorlands were demarcated in 1933 as a native reserve for a community relying on mainly pastoral activities, hunting and gathering. According to the Kenya Land Commission report (Carter 1933: 528):

> …the moorland area of Mount Elgon, comprising some 40,000 acres, should be added to the Kavirondo Native Reserve and set aside for the use of the El Gonyi, who should also be able to find accommodation in other parts of the Kavirondo Native Reserve, or, to the extent that the Uganda Government may be willing to accommodate more El Gonyi in its territory, they should have an option of going there.[6]

From the start, voices in government questioned the reasoning behind the creation of a native reserve above the forest reserve, which allowed people to live isolated in the moorlands. The decision to relocate the inhabitants of Chepkitale further below, in the forest reserve next to the main area of the former native reserve, was the result of a long process that started in 1955 and ended in the early 1970s (Interviews 5 and 15). The resettlement in the lower parts of the forest was encouraged and began before the forest area of Chelebei was officially de-gazetted (*Kenya Gazette* 1974),[7] indicating that, from the start, legal procedures were not followed. The forest area that was finally de-gazetted did not correspond entirely to the area that was being settled, a situation that worsened with time. By the time some encroachments were legalised in 2000 and 2001 (Republic of Kenya 2004), an area three times larger, the area commonly called Chebyuk,[8] had been cleared. All along issues were raised about the legality of the settlement and led to the displacement of 'squatters' on numerous occasions.

Since the introduction of boundaries, their meaning and enforcement have varied. On the Ugandan side of Mount Elgon, for instance, the forest reserve covering the higher reaches of the mountain was upgraded to a national park in 1993; moorland residents were no longer tolerated and were displaced.[9] Likewise, in Kenya, people living in Chepkitale have suffered from territorial measures aimed at displacing them or restricting their movements. In 1968, when the national park was created in the neighbouring Trans Nzoia District,[10] the eastern parts of the moorlands became out of bounds. When the Chebyuk settlement was started, it was considered an 'exchange' (without any legal backing) for the land in Chepkitale and Chepkitale residents were told to vacate the area. In spite of this, they remained until they were chased away by the government in 1979. They managed to return in 1982 until 1988. After being chased away again, they returned once more in 1990 (Interview 18). In 2000, Chepkitale was turned into a game reserve under the County Council.[11]

However, the proper procedures were not followed[12] and the Chepkitale people managed – somehow – to reassert their right to the area, on the basis of its legal status as trust land (as a former native reserve), as opposed to neighbouring government land (forest reserves and national parks).

Keeping people out of forest reserves has been a major policy initiative since their creation. During the colonial days, permits were required to take cattle to salt licks found in caves located in the forest reserve. Today, permits are still required for a number of activities and the Forest Department collects a fee for firewood, cattle grazing, etc. A continuously contentious issue surrounding forest reserves has been cultivation. Large tracts of forests were turned into cultivated land in different parts of Mount Elgon, often at the initiative of the Forest Department under systems called *shamba* cultivation or non-resident cultivation (KFWG 2000). In Chebyuk, as in Kiboroa and Kaberwa (other forest areas around Mount Elgon), people encroached on officially gazetted forest. At times, the Forest Department adopted a strict policy of enforcing territorial boundaries. In other instances, the Forest Department neglected its duties and allowed non-resident cultivation, potentially leading to permanent settlements, with staff sometimes personally benefiting from the arrangement. The opening up of forests for settlement might also be decided at a higher level by central government, as was the case for Chebyuk in the 1970s. During the 1990s, the government was petitioned to enlarge the settlement and adjust the forest boundaries to the settlement; President Moi intervened personally to allow the move, though it was made official much later. Since the change to the Kibaki regime in 2002, illegal squatter settlements in forests – some of them established with the backing of the previous administration – have been eliminated. This effort to enforce boundaries was strongly resented around Mount Elgon, for instance in Chebyuk, Kaberwa and Kiboroa, where more adjustments were made.

Some of the inhabitants of Chebyuk originated from the higher reaches of the mountain (Chepkitale in Kenya, Benet in Uganda) and some from the lower lands of Cheptais, Kapkateny, Kapsokwony and Kaptama in the Mount Elgon District; from Trans Nzoia District to the east; and from Sebei land, Uganda, to the north. The differentiation between lowland and highland people is found in the Mosop/Soy categories used in the Kalenjin languages, which are also referred to in Chebyuk. The name Mosop, or, to be more precise, Mosoobiisyek, is used for the people who originated from Chepkitale. The Soy category is used for all the other Sabaots. Settlers in Chebyuk have kept ties with their former neighbours, friends and family. Patterns of exchanges are somewhat different for the Chepkitale people or Mosop and for the lowland people or Soy. Although they own a plot in Chebyuk, most Chepkitale people still have relatives in the moorlands, the land of milk and honey, where they keep cattle. They take turns rearing animals on the mountain, bringing back honey and making use of bamboo. Before the creation of Chebyuk, in spite of their isolation up in the moorlands, the Chepkitale people exchanged baskets for grains and intermarried with people living below the forest. In recent years they have come to assert a distinct Ndorobo or Ogiek identity, by claiming to 'own' Chepkitale and Chebyuk, the forests

and higher reaches of Mount Elgon. The words 'Ogiek' or 'Ndorobo' are usually reserved in Kenya to describe forest dwellers or hunter-gatherer communities, even though in this case they refer to a pastoral community. Soy settlers, on the other hand, have migrated to Chebyuk from various areas of the lowlands. The largest single group is the Bok, a Sabaot subgroup originating from Cheptais: an area bordering Teso and Bungoma districts. They, too, claim the land in Chebyuk on the basis of their contribution to its clearing and cultivation (Ghezali 2005).

Boundaries enforced during colonisation seem to have encouraged a clear distinction between the people from the moorlands, the Mosop, and the people from the lowlands, the Soy, with the forest reserve lying inbetween. The Kalenjin speakers of Mount Elgon were administered separately in Chepkitale and were kept apart from the main reserve until the creation of Chebyuk. This helps in understanding the roots and the growth of Ndorobo identity in Mount Elgon (Interview 5). Many insist that Sabaot subgroups cut across the lower and higher reaches of the mountain and are strongly related through clan[13] and family ties. When Chebyuk was cleared, the Mosop enlisted help from Soy relatives and friends. The Soy were also able to claim they were related to the Chepkitale people, and they did so in order to get land. Non-Sabaot migrants from more or less distant places (Bukusu, Teso neighbours, Gusii forest clearers and Kikuyu traders and farmers) also found their way to Chebyuk, eager to get access to the land made available through clearing and which they offered to buy.

### *Sabaot and Ndorobo claims to territory*

From the late 1980s onwards, repeated crises over land and territory have occurred in Mount Elgon involving the Sabaot: on the one hand, pitting the Sabaot against the Bukusu and, on the other, splitting the Kalenjin speakers of Mount Elgon into rival subgroups, namely the Ndorobo (or Mosop or Ogiek) and the Soy (or Bok or Sabaot).[14] The creation of Mount Elgon District in 1993 is widely perceived as the introduction of an ethnic reserve for the Sabaot. The meaning and origin of the term 'Sabaot' itself is debated. It is likely that the term was coined recently – possibly by political leaders in 1955 (Interview 13); the word 'Kalenjin' was formed similarly, but earlier on. The present debate regarding the term 'Sabaot' is three-pronged. It questions, first, whether Sabaot is an inclusive term or not (comprising the Bok, Sabiny or Sebei, Kony, Bongomek, Ogiek or Ndorobo); second, whether a different term would serve; and third, whether a single term should be used at all.

The growth of a Sabaot identity in Kenya is linked to territorial claims for land and the search for an administrative status. Over the years community leaders have lobbied the state to form a separate Sabaot unit, to join other Kalenjin units in the Rift Valley Province and to obtain land for agricultural expansion through the conversion of forest land and the acquisition of European land. Nevertheless, the Sabaot District has remained in Western Province, where the Sabaot constitute a minority. The creation of a single administrative location to unite different Sabaot

subgroups (mainly the Bok of the Malakisi Location and the Kony of the Elgon Location) was debated throughout colonisation.

At independence, the question of territorially unifying the Sabaot arose in view of the perceived political domination and land encroachment by the neighbouring Bukusu, affiliated to the Luhya group (Kakai 2000), with whom the Sabaot clashed during the 1960s (in June 1963 and in September 1968).[15] The Sabaot were gathered politically under one constituency before they were granted an administrative status. Created in 1963, the constituency comprised Elgon Location and parts of Malakisi Location. The administrative unification followed: with the introduction of Elgon Division in 1970, which led to the later creation of a sub-district and finally a district. Daniel Moss, the first Sabaot leader elected to Parliament, fought for the idea during his entire political career. He was also instrumental in bargaining for land for the Sabaot with the creation of a Chebyuk settlement scheme within his constituency, under a unified administration from 1971 onwards.

During the 1990s, politically instigated land clashes and the government-supported growth of Sabaot ethno-nationalism led to the exodus of most Bukusu and Teso people from the Mount Elgon area; subsequently, Mount Elgon District was created in 1993. As noted, after the introduction of multiparty politics in Kenya, in order to garner support from minority groups (including President Moi's own Kalenjin people) the regime espoused the *majimbo* ideology, which promoted an exclusive view of ethnicity defined by territory. The unofficial designation of Mount Elgon District as a Sabaot area is aligned with this tradition.[16] Violence against the Bukusu extended to the neighbouring Trans Nzoia District, parts of which were also included in Sabaot territory with the growth of 'indigenous' land claims. During the 1990s, Sabaot leaders took over existing land-buying cooperatives in Trans Nzoia District and Sabaot leaders and their clients privately purchased, individually and collectively, a whole area located in the foothills east of Mount Elgon. The backing of the Moi regime was certainly a prerequisite for such a move. Previously, Kenyatta's regime had resorted, on a much wider scale, to land-buying companies to settle his own clients in the same area and in neighbouring areas of the Rift Valley Province where the former White Highlands are located. Since the politically instigated land clashes of the 1990s, very few non-Sabaots have returned to settle in Mount Elgon District. In terms of integration, the Teso people seem to be more accepted than the Bukusu. A few Bukusu have resorted to walking to Chebyuk on a daily basis to work as farm labourers. Ever since the non-Sabaot were forced to leave Mount Elgon District, the debate over who owns the land has shifted. It is no longer over whether the land is Sabaot land or not, but over the claims emerging from the different ethnic subgroups making up the Sabaot.

The Sabaot claim to territorial existence (through land and administration) downplays growing tensions within the group that emanate from political patronage and other strategies to gain popularity by using ethnic sentiments and, in the case of Mount Elgon, by promoting micro ethnicities. The recent questioning of the name 'Sabaot' brings out rival Bok and Kony interests: the Kony ordinarily insist on their

close ties with the Mosop and some consider the term 'Kony' to be more inclusive than the term 'Sabaot' (Lynch 2006). Since its creation, Elgon constituency has been demographically and politically dominated by the Bok, starting with the first MP, Daniel Moss (1963–78), then the second, Wilberforce Kisiero (1978–92), and the fourth, John Serut (1997–2007). The only Kony leader to be elected was Joseph Kimkung (1992–97) and it took the backing of President Moi. Bok leaders have played an important role formulating Sabaot claims. In a way, due to their political weight as a subgroup, the Bok claim to the area of Chebyuk has received considerable backing, though not openly. With time, the clients of successive MPs were sidelined with the growth of new leaders and privileges within the Bok community itself. Referring to the language of ethnicity spoken locally is misguiding in so far as it obliterates the political game that is being played behind the scenes, and the process of land grabbing that is taking place for the benefit of the wealthier segments of the local and national community.

The conflict over land in Chebyuk has become a threat to Sabaot unity at a time when a Sabaot District has been awarded. Arguments about whether the Mosop from Chepkitale and the Soy from Cheptais, Kapsokwony and Kaptama are the same or a different people have become extremely heated. The Ndorobo's present claim to Chepkitale and Chebyuk is clearly formulated, and is thus a claim that the administration and other settlers have to contend with. Defined as 'indigenous' forest dwellers, they received special consideration in the proposed new Kenyan Constitution (which failed to be adopted during the 2005 referendum). The international reference to aboriginal land rights has lent some credibility to the Chepkitale people's land claim, which has received international backing. They are now in a position to claim they are even more 'indigenous' than the other Sabaot. Whether local territorial land claims are backed by the central government or not is also crucial. Moi supported 'indigenous' land claims when he found an interest in doing so, but did not view internal disputes among the Kalenjin favourably. During the 1990s, he counted on the undivided backing of all the Kalenjin groups and other tribes of the Rift Valley, the 'KAMATUSA' (Kalenjin, Maasai, Turkana, Samburu), introduced at the time as 'indigenous'. The marginal position of the Sabaot within the Kalenjin-speaking communities, both demographically and politically, has led to some resentment. The status of the Ndorobo, as a minority within the Sabaot minority, has led to even more resentment. The Moi government certainly backed the Sabaot claim, which targeted the Bukusu in the 1990s, within the context of the *majimbo* ideology as a strategy to retain power. The status of rival Ndorobo and Bok (or Sabaot) claims to land is not as clear at any given time. Over the years government was made to defend narrow political interests. Political leaders and MPs, who in their own way represented government locally, defended first and foremost their own political interests. They chose to back land claims in the name of *specific* communities for their own benefit.[17] Almost every Sabaot has tried to get land in Chebyuk at one point or another, or at least has a relative who has tried to settle there. This is one of the reasons why all the Sabaot have in some way been drawn into the land wrangles in the area. In this context, the term 'Sabaot' was described as

having been coined for political gain or for the benefit of *land-eaters*. It is important to note that the same has been said about the term 'Kalenjin'.

Kenya has a strong legacy of territorial control, with boundaries acting as constraints to land settlement. Environmental policies in Kenya have relied overwhelmingly on the drawing and enforcement of boundaries. Therefore, unless existing boundaries are questioned and new boundaries introduced, little land is available for new settlements in the highlands. Boundaries establishing land reserves or territorial preserves (forests, parks and ethnic districts) have mostly acted as barriers to land settlement but have also created limited opportunities for certain categories of people.

## *Government involvement in land allocations and transactions*

In the early 1970s the creation of Chebyuk resulted from a deal between President Kenyatta and the local MP Daniel Moss.[18] The area was cleared and settled without government assistance. Decisions about land allocations were handled at the local level with much of the responsibility being handed over to chiefs and to a land committee. This constitutes the first period of Chebyuk's settlement. The second period emerged following complaints of mismanagement in 1989, when the central government decided to cancel the previous allocations and start the exercise afresh, this time intervening directly and reasserting its control over the settlement. During this study, people interviewed insisted that the changes in the management of the scheme at Chebyuk between the first and second periods were radical. Those who felt marginalised during the second period referred to the first Chebyuk as 'community land', while for the second period they viewed Chebyuk as a 'settlement scheme'. Title deeds were not issued to residents during either the first or the second period, despite the initial appointment of a land adjudication committee in March 1973.[19] After 1989, following the decision to reallocate the land, the handing out of letters of allotments was delayed and started only in 2002. Chebyuk's inhabitants may not agree about which community owned the land during the first – or even the second – phase; however, they all seem to lament the poor administration and political interference in the settlement.

### *The 1970s and 1980s 'community land': A decentralised process of land allocation*

Although the process of land allocation in the 1970s and 1980s in Chebyuk is referred to as decentralised, this does not mean that the state was not involved; on the contrary, it was at the heart of the land bargaining. The central government was involved through the local administration, as chiefs and sub-chiefs were approached for land (Interview 1). Apart from the administration, politicians – from councillors to MPs – also took a keen interest in the process of land allocation. Land was given out in an extremely decentralised fashion *in spite* of state involvement. In fact, decentralisation was *facilitated by* state involvement, as land was allocated through political patronage or privilege. Although in Kenya land privatisation and the issuing of title deeds were official policies, these tasks were never finalised in Chebyuk. The

lack of official documents to prove landownership did not prevent land transactions, however. Those who were given land by the government started to hand it over to others: some people 'borrowed, others rented and others bought land' (Interview 5). The status of those staying on the land varied greatly, from the one who was 'given' land by state representatives, to the labourer and the person who rented or 'bought' the land from others. In some cases, forest land was 'sold' directly with the complicity of officials (Interview 16). The centrality of the state as an established structure of power appears clearly through the privatisation of public office and resources and, in this case, through the sale of plots and other land bargains it initiated.

In the early 1970s, when the government made the administrative decision to relocate the inhabitants of Chepkitale to arable land in the forested area of Chebyuk, the list of beneficiaries of the scheme was drafted by the local administration with the help of 'elders' from the community. At the time, the 672 families counted as living in the moorlands took part in the scheme (Interview 5).[20] Several controversies surrounding this scheme continue to fuel debate. The first issue is the number of beneficiaries and the alleged inclusion of non-Chepkitale people on the beneficiary list. The second issue concerns the size of the plots: officials responsible for the scheme claim that each of the 672 families was allocated 20 acres (8 hectares) (Interview 18). However, this is impossible, as the records show that only 3 686 hectares were to be officially allocated at the start of the settlement. The third – and most controversial – issue concerns large-scale land transactions that allegedly took place after the initial land allocations, which saw additional forest land cleared without being officially de-gazetted. The process of land allocation was, in theory, to be handled by a land adjudication committee, which worked hand in hand with the administration and the elected representatives of the area. Under the influence of power brokers, the size of the committee was increased. The original committee was comprised of 11 members who were supposedly chosen from within the Chepkitale community, although at least one member was allegedly a non-Chepkitale person (a relative of a local chief) (Interview 2). The enlarged committee, which took over almost immediately from the first (official) one, comprised chiefs and local politicians and its legitimacy was widely questioned (Interviews 4 and 5).

As one might expect, land was unequally distributed among beneficiaries and additional people were added to the list, including local politicians or their relatives. Officials have since then defended their acquisition of land by claiming that it was given to them by the community as a sign of appreciation (Interview 13). The older men who were in control of the land allocation belonged either to the administration or to the land committee, or were politicians themselves. It has been noted that they belonged mostly to one age group (the *Korongoro*). In some cases, they managed to recreate clan land by grouping people on a clan basis or by allocating land in a given area to their own clan members; the chairman of the land committee is accused of such activities (Interviews 2 and 6). This has led people to believe that certain families or clans controlled land locally. Those who had direct access to land allocations often became the head of large families with many wives (in some

cases, with four to ten wives). Each beneficiary was given a forest plot without any infrastructure and it was up to him to develop it, an impossible task without enlisting the help of others. This resulted in a shortage of labour and land was promised in exchange for work. A system involving the exchange of labour for a small piece of land for one's own cultivation seems to have existed. In the case of large landholdings, several 'guest' families might share the land with their 'host', having helped clear the forest (Interview 17). Some also insist they paid for the land allocated to them by the first beneficiaries of the scheme or by the administration. The decentralised access to land was also characterised by the stretching of boundaries where local arrangements were made with chiefs and sub-chiefs as well as with the forest authorities for cultivation in forest areas. None of this business was conducted legally and was easily revoked when the time came – the land reform of 1989 reversed all previous land allocations and sales.

The system lasted as long as no official change of policy or renewal of leadership occurred, which it did at the turn of the 1980s. Just before, an attempt to proceed with land adjudication led to renewed opportunities for land grabbing (Interview 7). A memorandum from the Ndorobo was forwarded to President Moi in October 1988, which led to investigations and the subsequent removal of administrators and demotion of political leaders.[21] Chief Bomje and MP Wilberforce Kisiero are examples of officials implicated in the investigations. They were accused of giving land to 'outsiders' even though Kisiero denied this. This episode, in which Kisiero lost his post as assistant minister, can be related to politics at the national level and a sudden loss of favour, which explains President Moi's decision to pursue allegations of corruption. It was decided that the whole process of land allocations that had begun in the early 1970s would be cancelled and started anew. By that time, those who had officially been allocated land in the 1970s considered themselves as landowners and behaved accordingly, even though no legal document had been given to the beneficiaries of the scheme. In reality, their right to land originated from the government, but was not legal in the real sense and turned out to be temporary. Those who had not been allocated land by government but who took part in the clearing of the forest genuinely believed that they had acquired land and rights through their hard labour (Ghezali 2005). These were the people whose rights to the land were not recognised during its later reallocation, along with all those who thought they had formally purchased land in the area. In the process the rights of the original beneficiaries of the scheme were also reconsidered.

Within the context of increased competition for land, the label 'outsider' was used to define the local community in both ethnic and political terms. Privileged access to land, which was organised at the political and administrative level, was denounced using the language of ethnicity. With increased competition for land, old ties were questioned even though some residents still remember them.

### *The 1989 reform: Change to the establishment of a 'settlement scheme'*

Since the late 1980s, different segments of the Chebyuk population have petitioned the state in an effort to claim or reclaim land on the basis of community or landlessness. The gap between local aspirations and government decisions has thus widened since then. One of the contentious issues seems to be whether to address land claims at the ethnic community level or not. The Moi regime has given contradictory signals on this matter.

The 1989 reform highlights major misunderstandings between the state and local communities. Through their petition to President Moi, the Ndorobo of Chebyuk tried to reclaim 'community land'. During the 1990s, President Moi encouraged such community-based land claims by listening to them and making pledges, although without much follow-up. In this case, the matter was handed over to the administration and took a new turn. The state's official position emphasised that it was catering to the poor and the landless, not to a certain community. The central government took the matter of land allocations in Chebyuk into its own hands. A new team of administrators was appointed to streamline the exercise. The administration was completely overhauled and people started to refer to Chebyuk as a 'settlement scheme' with the direct involvement of the state in land allocations. The provincial commissioner, Lekoolol, has gone down in Chebyuk's local history as the main architect of the reform, along with the district commissioner, Changole, and the surveyor, Muchumbet (Interview 5). Previous allocations were cancelled and people were 'reshuffled' without taking into account the labour investment in the land. The new land distribution was conducted through a system of 'balloting', which resulted in former allotments and land transactions being cancelled and new ones decided. People were shifted from one place to another, with most of the landowners from the 1970s retaining only five acres, irrespective of the size of their families. A handful of polygamous families – families of local leaders from the 1970s – nevertheless managed to retain more than five acres if all allotments given to wives and sons are tallied; some managed to keep 20 to 50 acres in total. In one or two instances they managed to resist being moved to a new location and remained on their previously allocated land. Newcomers under the scheme were accused of 'land grabbing' and the administration was blamed for allowing this to happen ('Lekoolol disrupted the whole thing, he caused people to fight by bringing people from outside' – Interview 5).

Despite these radical changes in land allocation, the privatisation of land remains incomplete to date, as people still await their title deeds. Ballots were issued in 1991 for plots in Phases I and II (east and south of Chebyuk) (Interview 3) and allotment letters followed in July 2002; however, in some cases the two did not match. The process of allotment stalled after Phases I and II. The area north of Kipsigon, in Chepkurkur, which has become Phase III, was not originally part of the settlement scheme at all. The people who were cultivating the land in the 1970s (both Mosop and Soy and, among the Soy, mostly the Bok) had to leave in 1989 when a reforestation project, financed by Finland (Interview 3), began in the area (Interview 14). Those who were unable to find land to rent elsewhere found themselves in the local town

centres without any land to cultivate. These squatters petitioned the president about this matter in 1991. This time it meant a different section of the Chebyuk community decided to get the president's attention (they did so as squatters, not as members of the Bok community). Moi listened to their complaints and, in addition to telling the provincial commissioner to fire Changole, the district commissioner (Interview 3), he allowed the squatters to return to the land. As a result, there was a rush for the land and many people remained landless in the process, including those who stayed on the land before the reforestation programme began. Unfortunately, it was not unusual during the 1990s for the president to make promises without implementing his decisions legally. In this case, the forest he allowed people to return to was not de-gazetted until 2000, leaving people to grab the land, with some – especially politicians – acting as brokers for others. Those who were actually allowed to return to the land did not get any in the end. Thus, the tension between the people who currently reside on the land, those who were living there before and those who are to be given the land by the government with the implementation of Phase III has increased over time. The Ndorobo claim they were told they would not get any land in Phase III,[22] even though they are supposedly on the lists (Interview 3). They add that the people who managed to settle on the land before the implementation of the land reform have political protection. In 1998, residents sided with John Serut when he became MP. Serut is blamed for delaying the process of land reallocation in Phase III to protect their interests. He finally gave the green light for the reform in 2006, after the referendum on the new Constitution demonstrated that his former allies had voted against him (and against the new Constitution).

In December 1992, houses said to belong to the Ndorobo were burned in Chepkurkur (Phase III). Clashes appeared to have emanated from the contentious Phase III and have occurred repeatedly ever since in the whole area of Chebyuk. While the Ndorobo were targeted in some areas (Chepkurkur in December 1992, Kaimugul in January 2002), the Bok were also attacked in other areas (Phase I and II). Bok settlers stated in 2005 that they were hesitant to take up land close to the forest (Interview 17). Thus, the general feeling of insecurity grew, partly blamed on Ndorobo 'indigenous' claims. In early 2004, 200 houses said to belong to both 'moderate' Bok and Ndorobo were burned down.[23] The anniversary of these clashes was marked in February 2005 by the burning of eight houses.

These more recent events have demonstrated that the Ndorobo or Bok communities are divided from within. 'Moderate' Bok or Ndorobo, who insist they share a common heritage, are facing the violence of radical factions fighting for exclusive ethnic boundaries. Some of the older generation of the 1970s landowners and settlers are bitter and contribute to the growth of ethnic feelings and hatred, while others are left unarmed to face extremism. In some instances, their 'sons' are the ones being accused of resorting to violence. Targeted house burning is used as a technique to chase people away, especially those perceived to be squatters on other people's land. Clashes have escalated with the individualisation of land tenure, where accommodating a friend or relative has become increasingly difficult, former 'guests'

becoming 'squatters' in the process. Mostly, clashes find their roots in the arbitrary and irregular conduct of the Chebyuk land reform, leading to strong feelings of injustice and resentment against government. Similarities in the way ethnic militias and government forces operate are striking: both rely on force and burn houses to chase away 'squatters'. Once more, the antagonism has come to look like the Ndorobo versus the Bok, despite the importance of the politics played behind the scenes where new leaders and new clients threaten an older political order. It is, however, the plight of all the squatters – whether Bok or Ndorobo – that the government is accused of ignoring by entertaining political privilege and violence.

The reform has not put an end to land transactions in Chebyuk, nor has it stopped land grabbing or corruption. Because of uncertainty in land tenure, land in Chebyuk sells for less than land in the neighbouring former native reserve that is accompanied by a title deed (60 000 Kenyan shillings [Ksh][24] or an acre compared to 100 000 Ksh in 2005). Some say allotment letters in Chebyuk were sold; as in the 1970s, chiefs and sub-chiefs are accused of being at the centre of illegal land transactions (Interview 2). Many people are landless – even those who managed to retain their homes no longer own the land surrounding it and are forced to survive by selling their labour, renting a small plot or trading. Often the official owner of the land that their house sits on has ploughed up to the door. Land, like labour, is being sold or leased on the market with earlier arrangements being increasingly marginalised. For instance, the previously noted agreement of work in exchange for land has become rare, although it still occurs. A few permanent workers 'protected' by the people who own a lot of land still benefit from such arrangements.

In 2004, in an effort to put an end to the crisis, the government has come up with a new scheme: the involvement of clan leaders, since clans cut across the divisions of the Sabaot subgroups. Most people insist this is a marginal initiative, as clan leaders do not have much power. Still, these leaders are supposed to know their people and can help the administration know whom they should be dealing with, whether genuinely or not. The administration's aim is to solve some of the issues related to law, order and land by involving these leaders. For instance, clan leaders can try to prevent land transactions at the local pub, ensure consultations with family members, involve more witnesses and inform the chief. New, sometimes young, leaders were chosen by clan members. One of these newly appointed clan leaders commented that the power still lies with the administration, with the chief who is often responsible for corrupt transactions, and that the power of clan leaders has not been sufficiently recognised. The balance of clan leaders' power is also impacted by the fact that some clans are larger and/or more politically influential than others.

At one stage, the 1989 reform was seen as an answer to Ndorobo grievances about their 'community land' progressively disappearing through 'illegal' transactions. The amount of government interference that it involved has been viewed with increasing suspicion. Some of the landowners of the 1970s are now arguing that the 1989 reform has made it much easier for outsiders to 'enter a community land'.

In order to gain access to new land and to resist evictions, the Sabaot relied on a strategy to claim land in several locations. For instance, people who were chased from Kiboroa forest reserve managed to negotiate access to land in Chebyuk. Those who were sent away from Chebyuk tried their luck in Benet, Uganda. Many have tried to get land in the Kitalale settlement scheme, which was opened up in the 1990s by the Moi regime for the benefit of the Sabaot. Kitalale, just like Chebyuk, is a poorly planned settlement scheme designed on government land. Despite shrinking land opportunities, some people have managed to retain plots in different locations. Others have turned into landless squatters locally, in Chebyuk, or refugees in a neighbouring location. In the face of insecurity of tenure and clashes, those who could do so gave up and moved away, looking for a piece of land where they could hold a title. Mobility, once a strategy to gain access to land, has become a response to insecurity of tenure and violence.

## *Conclusion*

At times, the state's determination to make its authority felt on the ground and to enforce territorial control (resettlement, forest boundaries, etc.) is clearly apparent, while at other times it seems reluctant to do so (opening up of forest settlements, delaying the implementation of the resettlement programme). Access to land has been controlled by the central government in Kenya. At the same time, enabling some people to get land has been viewed as a way to gain or retain power and has led to what might be called state-backed land frontiers, such as Chebyuk. Giving out land to clients for settlement and for political gain has proven to be a major strategy of the Kenyatta and Moi regimes and has led to the organisation of land transfers on an ethnic basis. Due to other political considerations, government overlooked the fact that land patronage is somewhat contradictory to the enforcement of environmental policies.

Conflicting idioms, interests and strategies have been observed in Chebyuk: between Chepkitale and non-Chepkitale people, between residents, political leaders and government. Misconceptions about the value of labour and land and about the role of government officials are evident. The state has acted against the space created by social networks, transgressing boundaries and disrespecting official land allocations, while also playing its part in this paralegal territory, often setting unwritten rules. During the Moi regime, selected 'ethnic' claims to territory were backed, including the creation of 'ethnic' districts. Land was then also being sold and bought without title at the instigation of government officials. Not much changed between the 1970s and 1990s in the way state officials acted as intermediaries for land transactions, using their public office for their own private benefit. Their role was crucial because the government was the one allocating land. The role of state officials became even more central due to the lack of legal guaranties concerning landownership. Territorial constraints enforced by the state led to a great deal of insecurity of tenure for the inhabitants of Chebyuk. From this perspective, it seems quite natural for people to want to claim and define their own boundaries. The ethnic boundaries fought for in

Chebyuk precisely match the fullness and exclusiveness of state territory. People who reject the government's interference, widely perceived as arbitrary, have also adopted the state's exclusive territorial idiom and have resorted to violence.

### *Postscript*

This chapter was written before the 2006/07 clashes in Chebyuk and the 2008 post-election violence, which claimed many lives and led, at the peak of the violence, to the exodus of most inhabitants of Chebyuk. In the violent outbreak in Mount Elgon, two rival leaders and former allies, both Bok (the incumbent MP, John Serut, and the aspirant MP, Fred Kapondi, who was elected in December 2007), played a major role. Kapondi gathered support from former clients of Serut who, weakened politically, chose to play the Ndorobo card. Both leaders encouraged the growth of exclusive Bok or Ndorobo ethnicities, though Kapondi insisted that he was fighting for Sabaot land rights. Violence against the Bukusu also reappeared within this context.

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1 The names of people interviewed are not disclosed to maintain confidentiality. Research was conducted within the framework of a research agreement between the Institute of Research for Development (France) and Kenyatta University (Nairobi). In 2005, five MA students took part in the project: Julien Luu Van Dong and Sarah Besnainou from the University of Picardie, Sonia Ghezali from the University of Paris I, Geoffreyson Khamala and Toskin Robin Chepsigor from Kenyatta University. Quotations are based on interviews conducted by the researchers, including biographies collected by Sonia Ghezali and translated by staff at the Bible Translation and Literacy Programme (Kopsiro). Dr Johnson Changeiywo also provided us with documents.

2 In Kenya, chiefs are government representatives and not independent representatives of communities.

3 The chapter was written before the 2006–08 political violence in Mount Elgon and the 2008 post-election violence (see also the postscript).

4 Within each cluster, groupings constitute a lower level of affiliation (for the Kalenjin: Sabaot, Nandi, Kipsigis, Tugen, Keiyo, Marakwet, etc.; for the Luhya: the Bukusu, Maragoli, Tachoni, Marama, Idakho, Isukha, etc.).

5 The local elite considers the term 'Ogiek' more appropriate than the word 'Ndorobo'. It is the word used specifically for Kalenjin-speaking hunter-gatherer communities in Kenya. The use of the word 'Ndorobo', which used to be derogatory, is widespread and accepted in Chebyuk.

6 'Kony' is another transcription of 'El Gonyi', after which Mount Elgon was named. It refers to the Kalenjin speakers of Mount Elgon in general.

7 In January 1974, 3 686 hectares were excised from the forest reserve.

8 Strictly speaking, today Chebyuk is only one of the six locations of the settlement under the Kopsiro division of Mount Elgon District, carved out of the original Chebyuk and Emia Locations.

9 Interestingly, in Uganda the moorlands inhabitants' rights over parts of the lower forest, as compensation for restricted access to the moorlands, have just been reconfirmed in a Mbale High Court ruling: Republic of Uganda, miscellaneous case no.1 of 2004 ('Benet land case'), Consent Judgment signed in October 2005.

10 The process of exclusion of people started in 1948 with the creation of the first nature reserve.

11 An area of 17 200 hectares was gazetted, as per Legal Notice No. 88, 6 June 2000, as Chepkitale Game Reserve.

12 This measure does not follow the procedures laid out in the Environmental Management and Co-ordination Act, 1999 (Kenya Gazette Supplement, Acts, Nairobi, 14 January 2000).

13 Clans are different from other subdivisions – such as Bok, Kony, etc. – mentioned earlier on. Although some clans might be more represented among particular subgroups, clans cut across boundaries.

14 Though they convey separate meanings, the terms 'Ndorobo', 'Mosop' and 'Ogiek', on the one hand, and 'Soy', 'Bok' and 'Sabaot', on the other, are used to describe two rival groups in Chebyuk.

15 Kakamega Record Office HB/27/224. In the Bukusu/Walagu Commission of Inquiry, 21 November 1964, the word 'Walagu' is used. The Walagu are also called the Bok. In a 1968 document from the file, the same are referred to as Sabaot.

16 Mount Elgon District was not legally made into a Sabaot reserve, though its creation was an answer to Sabaot claims.

17 In the case of the Sabaot, as a civil servant iterated, 'You complain as a community but the benefit is individual' (Interview 19).

18 People say Kenyatta gave them the land for settlement (Interview 13).

19 Kakamega Record Office, YP/7/5/99, 27.

20 640 people are listed in a document kept in the archives. Kakamega Record Office, YP/7/5/99, 29.

21 Memorandum to His Excellency, the President of the Republic of Kenya, from the People of Chepkitale in Mount Elgon Division (Ndorobos), 16/10/1988. Private archives, Dr Changeiywo.

22 See www.ogiek.org, accessed on 24 April 2004.

23 See note 22.

24 10 Ksh = 1 Euro.

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# 2 *Shades of grey: Post-conflict land policy reform in the Great Lakes Region*

Chris Huggins

Access to land lies at the heart of social, economic and political life in most of Africa, and thus is part of the dynamics of conflict, peace-building processes and post-conflict reconstruction, particularly for conflicts involving lengthy population displacement.

There has been increasing interest in recent years among both practitioners and academics in the links between land access issues and violent conflicts. This is related to a realisation that complex humanitarian emergencies cannot be addressed without comprehensive engagement with root causes. Non-governmental organisations (NGOs), donors, church groups and other institutions have thus been investing more in research and engagement on inherently 'political', difficult and sensitive issues that were previously off the agenda. These issues include the roots and dynamics of large-scale violent conflict, as well as post-conflict land policy.

There has also been, to some extent, a convergence of views on some key aspects of land policy reform and the identification of 'best practices', with a body of literature emerging on the challenges of post-conflict policy-making on land (FAO 2005; Huggins & Clover 2005; OECD/USAID 2003). African governments, donor agencies and international experts are increasingly in agreement that, first, land policy must be conflict-sensitive in order to avoid legitimising past wrongs or fuelling continued hostilities; second, policies can only be effectively developed and implemented through the involvement of a broad group of actors, including international agencies, rather than just central government; third, a range of technical approaches may be taken to improve land tenure security, with granting of full land title being just one among many other options; fourth, the rights of land users other than the head of household (particularly women and vulnerable children) and of the poor and displaced are often at risk through formalisation and individualisation of land tenure, which requires legal and socio-economic measures to address the problem; fifth, customary tenure systems should not be ignored or 'abolished' (even if this were possible) but can and should be adapted, strengthened and incorporated into formal systems, through codification or other means; and, sixth, some form of administrative decentralisation is necessary in order for land laws to be implemented in locally appropriate ways.[1]

Naturally, however, land policy reform remains controversial and difficult in many countries, particularly after conflict. In addition to the debates over 'technical' aspects, there are wider issues arising from different perceptions of the role of 'development

partners' and civil society groups in supporting and/or influencing policy-making. Most critically, however, countries emerging from conflict are often characterised by divergent views on history, on the legitimacy of governments and opposition groups (which are often linked with, or have emerged from, rebel movements), and on the most appropriate models of governance. In particular, 'successor regimes' recovering from mass violence, such as the post-1994 government of Rwanda, face greater challenges than transitional regimes (Waldorf 2006). In many cases, years of conflict have inculcated an authoritarian and unaccountable institutional culture, unaccustomed to multi-sectoral cooperation and hostile to civil society influence. Furthermore, while outright large-scale violence may have ceased, the country may still be affected by sporadic outbreaks of violence and key actors may remain hostile to each other. All of these challenges affect land access, and are in turn affected by decision-making over land.

The Great Lakes Region of sub-Saharan Africa provides ample evidence of such divergence and controversy. The Democratic Republic of Congo (DRC) has emerged from elections, which were largely hailed as a success; however, a post-election stand-off between the two main political rivals resulted in large-scale destruction in Kinshasa in late March 2007. The east of the country remains volatile, and the former government rebel movements now integrated into the transition process continue to jostle for local advantage. Much of this revolves around the security concerns (and the military, political and economic positioning) of the Kinyarwanda-speaking population in the Kivu Provinces. The Kinyarwanda-speaking population is made up of diverse elements, some of whom have been in Congo for over a hundred years, while others have been there for less than a decade, having emigrated from Rwanda. The political and economic roles of these groups have been politically disputed and manipulated for years and are intimately tied to their control of land, which is in turn dependent to some degree on the local dispensation of politico-military power as a result of the terrible conflicts and massacres experienced since the early 1990s (Huggins & Clover 2005).

Land policy reform and the overhaul of cadastral systems are crucial priorities in the DRC. In July 2003, a conference in Kinshasa brought together land specialists who recommended that, among other things, the status of customary land tenure should be legally clarified; the Supreme Court should make judgments based on jurisprudence and hence achieve uniformity in judgments on land; and political leaders should stop interfering in land issues (Kangulumba 2004). Despite calls for reform, there was understandably little political will among the transitional government to work on this until after elections. Meanwhile, new laws on logging and other industries have been criticised due to lack of consultation and respect for customary access to forests and other lands.

In Burundi, a peace process has produced a successful election. Contrary to the situation in Rwanda, Burundi's political positions are allocated on a quota basis, which has allowed Tutsi politicians to retain some influence despite the overwhelming electoral victory of a former Hutu rebel group.[2] Nevertheless, the composition of all

parties has altered in recent years, with many political figures defecting for strategic political reasons, rather than on the basis of ethnic constituency. To maintain a sense of political balance it appears that the government will avoid making rapid sweeping changes among local administration and other institutions.[3] Many are optimistic for Burundi's future.

Nevertheless, problems remain, including vicious power struggles within the ruling party, and numerous small-scale violent incidents related to political intimidation, theft or land disputes. The return of hundreds of thousands of refugees, and the related property claims, also pose a great challenge to dispute-management systems. While many of the resulting disputes are within families, some, such as claims for compensation for land taken for the construction of camps for internally displaced persons (now almost mono-ethnic semi-permanent settlements), may have ethnic overtones. To address these lingering issues, a draft revised Land Code was prepared by a small group of consultants in collaboration with the relevant ministry during 2004, but it has since been shelved, much to the relief of many civil society groups. Customary aspects are to be 'replaced' with a modern system, through universal land registration; however, land redistribution is not being considered. Instead, it is envisaged that land markets will redress some imbalances. It remains to be seen how soon the new government will embark on another drafting process.

In Rwanda, interpretations of governance regimes vary markedly among observers, as well as among Rwandans themselves. Yet all agree that the so-called multiparty political system is in fact completely dominated by the ruling Rwandan Patriotic Front (RPF), through mechanisms such as the Forum for Political Parties. This Forum ensures that the smaller parties do not stray far from the RPF line, and freedom of the press has been limited through the intimidation of journalists. Some argue that the use of a 'heavy hand' against would-be political opponents is justified by the need for stability in a country that is still recovering from genocide and civil war.

Others argue that the future stability of the country will depend on liberalisation of the political scene, lest the lack of democracy provokes a backlash. The RPF has used a number of tactics, including co-option, infiltration and intimidation, in order to control critical voices and has used legal action against the crime of 'divisionism' to undermine the emergence of any credible opposition (Human Rights Watch 2003). Governance in Rwanda is rarely characterised by open debate. Members of the government as well as civil servants tend to stick closely to the perceived party line, and consultation over decision-making outside of the capital, or with ordinary people, is minimal. If efforts are made to involve local stakeholders in the process, these tend to involve 'sensitisation' meetings – to publicise decisions that have effectively already been taken – that are dominated by speeches by government officials. The system remains highly top-down in nature, as evidenced by the surprise announcement in August 2005 of sweeping administrative reforms: the 106 districts were to be reduced to just 30 and the 12 provinces reduced to four by early 2006. There is ample evidence of the lack of prior consultation even within government, such as certain requests for funding, based on the current administrative system,

sent out to donors just two weeks before the new reforms were announced. This will have impacts on the district land committees that are proposed in the new land law and shows the difficulties of inter-ministerial coordination, a common problem with land policy reform.

Despite the slick policy statements in Kigali, it is at the local level, where the genocide has left a complex legacy, that policies must be implemented. While some of the local authorities are now elected, the influence of the RPF ensures that candidates are essentially 'pre-selected', so that loyalty to the ruling party is guaranteed. The *gacaca* (a popular justice system for the genocide) may also have an influence. Thousands of local leaders have been accused of involvement in the genocide, and the individual decisions about whether each one should be suspended from duty pending trial in *gacaca* may also have been decided by local political loyalties. Some local leaders may then be more 'accountable' to central government or powerful individuals than to the local populace.

## *Conflict and land access in Rwanda*

Rwanda faces a range of challenges: land is increasingly scarce because of rapid population growth; intra-family disputes are common, especially in polygamous households; the formal justice system often lacks the capacity to deal with the high number of land-related court cases; and poor rural landholders, especially women, orphans and other vulnerable groups, are threatened by 'land grabbing', and are plagued by a sheer lack of access to information and justice. While these problems existed prior to 1990, they were certainly exacerbated by the civil war and genocide.

Due to the turbulent history of the country since the 'revolution' of 1959, the majority of Rwandans have, at some point in time, experienced forced displacement, either within the country or to a second – or even third – country. Thousands of Tutsi left the country due to violence and repression from 1959 onwards; through a 1966 presidential decree their land was subsequently allocated to other people.

It was Tutsi living in exile, particularly those in Uganda, who founded the now powerful RPF. The Front came to power militarily in July 1994 – ending the genocide, in the face of international inaction – and has dominated the political scene ever since. The lack of international intervention during the genocide[4] has led to a feeling of profound guilt among many donors, including the British and American governments, who are now the most influential of Rwanda's 'development partners'. This has encouraged the international community to give the government much more 'room to manoeuvre' than would otherwise be the case.

After the RPF victory, hundreds of thousands of 'old case' refugees – mainly Tutsis – returned to the country, which was completely devastated by the horrors of genocide and four years of war. Fearing revenge attacks amid stories (some real and some false) of massacres by the RPF, and ordered to move by the retreating remnants of the interim government which had overseen the genocide, some 2 million Hutu

left Rwanda for the refugee camps of eastern DRC. In light of these events, many of the 'old case' refugees simply occupied the houses and cultivated the fields of those who had fled to Congo. Some of the returnees identified lands that had belonged to their families; others simply chose suitable properties according to their needs. It is estimated that about 600 000 'old case' refugees returned by the late 1990s, although this figure was overestimated by many (including the government) to be between 800 000 and 1 million.[5]

The mainly Hutu exodus in the immediate aftermath of the war and genocide became known as the 'new caseload' when they returned *en masse* in late 1996 and early 1997.[6] Once some of the refugees started to return to Rwanda, 'pull' factors came into play and many families decided to return sooner rather than later, lest they lose their claims to land and property.

These various influxes – complicated by previous displacements during the four years of civil war, and internal migration due to localised land scarcity – resulted in multiple and competing claims of ownership for farmlands, buildings and natural resources, which still persist today. Current estimates are that 80 per cent of all cases coming before a provincial governor relate to land, and that 80 per cent of the complaints received by the human rights department of the Ministry of Justice outside of Kigali are land related. This problem must be viewed within the context of generalised land scarcity: the average landholding at the household level dropped from 2 hectares in 1960, to 1.2 hectares in 1984, to just 0.7 hectares in the early 1990s (Bigagaza et al. 2002; Kairaba 2002). In 2001, almost 60 per cent of households had less than half a hectare.

The Arusha Accords of 1993 guided, to some extent, government's land policy, as did the 1991 Constitution that formed the supreme law of the country. During the Arusha process, which contemplated a negotiated end to the civil war, the parties settled on a clause which 'recommended' that refugees who had been out of the country for more than 10 years and whose land had been occupied by others, 'should not claim their property'.[7] The justification for this was the need for 'social harmony and national reconciliation'. One can contrast this with the Arusha Agreement on Peace and Reconciliation in Burundi in 2000, which included a special committee and protocol for land and property rights issues, and for the revision of the Land Code, in order to address various (unspecified) land management problems.[8] Article IV of the Accords provides that all returning refugees will be able to access their property, including their land, or will instead receive adequate compensation and the Agreement recognises the need for '…compensation for plundered property'.[9]

In the Rwandan case, the return of refugees was handled differently across the country. For example, papers legitimising landownership would be offered in some areas but not others; some communities set up informal 'land commissions' while traditional *gacaca* oversaw land disputes in other places. According to legal scholar Laurel Rose, 'In essence, the law was being interpreted and legal institutions were being re-invented in various ways from community to community on a day-to-day

basis' (Rose 2004: 206). Given the level of tensions and background of denunciations and arrests, one might perhaps question the validity of the word 'community' in such a fractured, post-genocide context.

The clause of the Arusha Agreement regarding the property rights of the 'old caseload', which constitutes a breach of the refugees' fundamental rights to property, was selectively implemented with an influential minority being able to claim their rights unhindered. Members of the repatriate community formed the core of the new post-conflict regime, and continue to wield power today. Those with relatives in the military have said that they were 'guaranteed' their land rights by government officials. In such cases, the principle of land sharing was not followed. In one example from Ruhengeri Province, a family returning from exile in Uganda reclaimed 25 hectares, leaving the occupants with ownership over only one hectare, and renting out some of the land to others (Interviews, Ruhengeri Province, 2005). There are numerous examples of soldiers or politicians simply 'grabbing' land, especially in Kigali and in the east of the country.

The land challenges were exacerbated by constraints to the justice system that persisted throughout the 1990s, including a lack of qualified personnel due to the genocide and population displacements (by early 1995, there were only 200 magistrates in the entire country, compared to 1 100 before the war), and a system clogged with an overwhelming number of genocide cases.

Faced with land scarcity, the government opened up public lands, such as Akagera National Park, for resettlement. In addition, communal areas managed by district authorities, sloping areas on the margins of marshes, and pastures were allocated to the 'old case' refugees across the country. A large number of 'old case' repatriates from Congo were resettled in the Gishwati forest, not just due to lack of alternatives, but also to reduce the potential for the armed Hutu extremists in Congo to infiltrate the forest. Later, perhaps having served their purpose, these repatriates were expelled from the forest on environmental grounds – although the privatisation of the area for commercial ranching by the wealthy does not seem to be any more environmentally friendly.

As can be deduced from the above-mentioned measure, truly 'vacant' land was in very short supply. Therefore, the government decided upon two main mechanisms for addressing the situation. However, as will be seen, neither can be divorced from the political context, and as such were clearly motivated by a number of issues, including security concerns and a desire for increased social control. They are also both characterised by the great leeway given to the local representatives of government in their implementation, and the lack of full development of guidelines, checks and balances.

The first main mechanism for managing land problems, 'land sharing', was pioneered in Kibungo Province but also spread (although to a lesser degree) to other provinces. According to some, the practice originated as a spontaneous sharing between genocide survivors and returning 'old case' refugees, which was then made

obligatory on the directives of the provincial authorities; others have identified the authorities as the authors of the idea. However, exactly how this sharing was to work was not fully elucidated and there was no law supporting the policy.[10] This resulted in a lack of uniform application of 'sharing', with modalities varying from place to place (Gasarasi & Musahara 2004). In a sense, the concept of land sharing was a pragmatic solution to a difficult problem, but predictably, the equity of the exercise depended on the wisdom and the sense of duty of the local authorities managing the process. Many people affirm the continuing widespread dissatisfaction over the way the process was managed. In Kibuye, a recent study found that over half of all land conflicts were due to 'post-sharing grudges' (Gasarasi & Musahara 2004). The Centre for Conflict Management at the National University of Rwanda summarises some of the problems affecting land sharing in some places:

> …problems of land sharing abound…These include corrupt practices of accumulation of land parcels by some local leaders; imposing on people unconsensual criteria of land sharing; acceptance of bribes by local leaders in order to use favouritism in the allocation of land; local leaders' favouritism towards cronies and friends in parcel allocation; arbitrary distribution of land without regard to former occupancy; and unnecessary uprooting of people to distant places by local leaders in the name of land sharing. (Gasarasi & Musahara 2004: 6)

The second major mechanism utilised by the government was to extend an 'emergency' shelter policy of constructing villages, known in Kinyarwanda as *imidugudu*, into a more widespread settlement policy. The idea of imposing grouped settlement dates from the 1970s, but was never successfully applied. The first attempt at its nationwide implementation in 1997 was characterised by a number of major problems. First, many people were unwilling to move, and the local authorities instructed people to destroy their own houses in order to force them to move into the new ones. The central government did not seem concerned which method was employed by the local mayors to implement the policy, as long as targets were met. Second, many people who gave up land for construction of the *imidugudu* have never received compensation. Third, the relocation took many people further from their fields, making cultivation more difficult, especially for women who have particular security concerns; this led to an apparent decline in production. International pressure (and a related lack of donor funds) essentially put a stop to the programme, though some new construction continues. Meanwhile, in many cases there is a slow migration out of the villages and into towns by those who can afford it. The new land law and policy re-emphasise the role of villagisation as the guiding principle for rural settlement. Again, this shows a tendency for the opportunistic utilisation of circumstances – and donor funds – and for the 'black and white' of emergency housing policy to be transformed into the grey area where development, security and land policies meet.

These two mechanisms, among other policies, may be why, when asked who was to blame for causing land conflicts in a nationwide survey, local people answered that

the government was first (29.9 per cent of respondents), the rich were second (14.8 per cent) and local authorities third (13.7 per cent) (Haba & Bizimana 2005).

The general contours of the debate over land in Rwanda – including the historical events and problems outlined above – are well known and acknowledged in some policy processes. However, the extent of the problems, or the emotions they generate, is often hidden or underestimated. For example, in the case of land sharing, the degree of volunteerism is often overestimated. Many of the land-sharing decisions were made in the shadow of the genocide and the arbitrary arrests of tens of thousands of Hutu in the late 1990s. Human rights activists observed that 'for a house, for a field or a tool, people are denounced without evidence' (Sibomana 1999: 11). In other words, negotiation was difficult for those in the weaker position.

Human rights groups have documented numerous examples of local people who are too afraid to stake the claims that they feel entitled to, especially in cases where those involved have military or government connections. Another problem is stigmatisation of certain groups, such as the children of those accused of participation in genocide, or those associated with the counter-insurgency operations in the north-west of the country from 1999 to 2001. Such vulnerable groups need assistance in order to claim land and housing rights from family members, neighbours or strangers who occupy land and property.

Other problems relate to the lack of effective record keeping or the management of existing records. In both Rwanda and Burundi, many people claim to have owned some kind of document of purchase or ownership that was destroyed during conflict. Another example concerns some 'old case' refugees who reportedly benefited from land sharing in one area, sold the land soon after receiving their share, and moved on to make another sharing claim in a different district. The time and money needed to investigate such concerns often puts them beyond the capacity of the justice system. For example, a magistrate in Kibungo Province admitted that he lacked the resources to investigate cases, and generally referred land problems back to the provincial governor, who is a nominated representative of the executive.

## *Implementation of land laws and policies*

Prior to the new law, which came into force in September 2005, the 1976 land law continued to be the *de jure* framework for land acquisition, management and sale. However, as elsewhere on the continent, the law is based on Western norms of registration, and its interaction with a customary system, which continues to dominate more than 90 per cent of the land area, has been highly problematic. There has been a great deal of flexibility in interpretation of the 1976 land law because it is simply not appropriate to the typical rural situation. In many ways, custom has prevailed, but the law has intermingled with and influenced customary practice as well as the pragmatic decisions of local authorities. For example, while a strict interpretation of the law prohibits most land sales, in practice land sales are tolerated.

However, it is generally considered 'illegal' to sell all family land. In practice, local justice systems perceive several 'levels' of legality. There is uncertainty, for example, over whether land that has been purchased (rather than inherited) should be subject to customary practice or to the new legal rules of inheritance (Rose 2004). While the differences in interpretation are an understandable reaction to local needs, it also means that those with more influence may benefit from being able to negotiate the 'grey areas' more easily than the poor and those generally held to have a low social status, including, for example, women separated from their husbands. Women, who now head about 34 per cent of households in the country, have difficulty accessing land because customary systems which guaranteed them temporary access are often unable to function due to land scarcity, and have been undermined by the damage to social cohesion caused by the genocide and war. In order to gain access to land after the war, many women joined agricultural associations, which are able to access land through rental or temporary provisions of land from the government; however, these groups also usually lack long-term tenure security. As has been pointed out, women are not a stagnant 'vulnerable group'; rather, they often employ a variety of innovative means to pursue their land claims (Rose 2004).



## *The policy debate: Civil society and government roles*

The government has 'de-ethnicised', and hence to a certain degree depoliticised, the debate over land and other issues in Rwanda by adopting a Constitution and political culture that does not acknowledge ethnicity. However, this may be counterproductive in the longer term, especially if some issues are seen as 'off-limits' for discussion.

Already, the de-ethnicisation policy has resulted in the further marginalisation of an already marginalised category, the Batwa. This forest-dwelling community was forced out of the forests in recent years, but has hardly benefited from government programmes such as construction of *imidugudu*. Approximately 46 per cent of Batwa are completely landless, while the vast majority of the remainder have only enough land for the construction of a house, leaving no land for cultivation. Nevertheless, the recommendations of Batwa-rights groups for changes to the land law and policy were not heeded. Since mid-2004, the Batwa rights organisation CAURWA (Communauté des Autochtones Rwandais) has been under instructions to cease operations, because its name and objectives are considered to be unconstitutional and 'divisionist'. Despite the objections of the Batwa beneficiaries of the organisation that were presented to government representatives, the organisation remained unable to operate legally until it changed its name, avoiding any reference to indigeneity. The provision in the Constitution for 'historically marginalised communities' – a coded term for the Batwa – does not seem to have improved the socio-economic situation of this community (Huggins 2009).

This approach can be contrasted with that of the government in Burundi, where ethnicity has been accepted as part of the structures and systems for decision-making. In Burundi, other kinds of challenges are likely to be more important, such as empowering the Batwa to claim their land rights through access to education,

information and networks. Illiteracy is a major part of their historic social and political marginalisation.

The roles of civil society in policy-making in Rwanda are mediated through numerous filters and 'gates'. Personal connections and language barriers are sometimes just as significant determinants of influence as ideas, networks or data. Political connections can allow people to speak out but can also put them into direct personal competition with powerful people, therefore becoming counterproductive. One organisation with a large grassroots membership found difficulties in working as part of a civil society network on land, because the former was generally francophone and the latter primarily anglophone. Language proficiency is also a major issue for international organisations, as those who speak only one of the national languages are much less likely to achieve a balanced view. For international personnel, there is an additional challenge in working with translations of Kinyarwanda documents or speeches because the language is characterised by figurative speech and proverbs, making it difficult to capture all innuendos and nuances in translation.



The engagement of civil society in the development of the land policy and law is generally seen as a success story, and indeed it represents perhaps one of the most participatory policy-making processes in recent years, with NGOs participating directly in the parliamentary debates. However, the government ensured that much of the debate was kept within certain boundaries. Those who were particularly critical in the parliamentary debates were targets of government-controlled media, and were publicly branded by politicians as 'troublemakers', a loaded term in the sensitive context of the country. Organisations that were too outspoken were excluded through various means. LIPRODHOR (Ligue Rwandise pour la Promotion et la defense de Droits de l'Homme), the largest and most effective human rights organisation in the country in 2004, was the main, though not the only, victim of a Parliamentary Commission on Genocide Ideology. The Commission's report, based on a highly dubious methodology and with few references to specific sources, recommended the dissolution of a number of organisations accused of spreading ethnic 'divisionism'. Advocacy on land issues, including questioning the legal basis for the land-sharing exercise, was interpreted as a means for spreading 'confusion' and 'conflicts' among rural people (Republic of Rwanda 2004). The Commission considered the discussion of certain legal and policy issues, characterised by an inescapable ethnic dimension, to be the same as perpetuating ethnic divisions. The example of LIPRODHOR, according to some commentators, holds lessons for donors. By supporting one organisation, rather than spreading the investment among many organisations, donors may have created a sense of threat in government and hence made it vulnerable to infiltration and repression. When the government attacked LIPRODHOR, most donors did little to publicly defend the organisation. Although it is still in operation, the organisation's capacity has been severely reduced as a result of these events.

The frequent application of the 'divisionism' charge has ensured that most civil society organisations practise a great deal of self-censorship, often raising certain issues only under condition of anonymity or when outside of the country.

Organisations wanting to conduct research on land have been denied permission, and some civil society meetings have even been prohibited. Most organisations do 'awareness-raising' and few engage in in-depth research or advocacy.

Conversely, in Burundi, civil society initially experienced good access to policy-makers since the beginning of the transitional process (although the draft Land Code was not as openly discussed as other pieces of legislation). However, a local dispute-resolution mechanism demonstrates the often difficult relationship between government and 'non-political' institutions. In Burundi, local disputes of all kinds were traditionally addressed by the *Bashingantahe*, a local council made up of Hutu and Tutsi male elders, chosen for their sense of responsibility for the overall good (Nindorera 2003). However, during the colonial period, the institution was weakened as the authorities appointed individuals and they increasingly lost their virtues of neutrality and independence (Ngorwanubusa 1991). Successive regimes ignored the institution, until late in the 1980s the ruling party UPRONA (Union pour le Progrès National) co-opted many members of the *Bashingantahe* into party structures, thereby further undermining its effectiveness. In 1997, President Buyoya established the National Council of Bashingantahe, which met to discuss issues related to the civil war, the adaptation of democratic institutions, and the rehabilitation of the *Bashingantahe* institution. Unesco held seminars to facilitate the latter. However, the legitimacy of the exercise was apparently undermined because it was established by presidential decree (Van Leeuwen & Haartsen 2005).

Yet the *Bashingantahe* remains important in certain places: research in nine provinces by a local NGO, Ligue ITEKA, indicates that of all post-2000 returnees who have sought assistance in disputes, over half have approached the *Bashingantahe*. However, the latest decentralisation law seems to reduce the official backing for their dispute-resolution role. Instead, a *conseil de colline* (a councillor for each hill) has been established.[11] Given the hostility from many members of the ruling CNDD-FDD (Conseil National pour la Défense de la Démocratie-Forces de Défense de la Démocratie) party, it is also unclear whether this is a reaction related to concerns over democratisation at the local level or to the links between some members of the *Bashingantahe* and UPRONA (Van Leeuwen & Haartsen 2005).

## *Aims and modalities of the Rwandan land policy*

A new land policy was approved by Parliament in early 2004, and a new law came into force in September 2005. A full discussion of either document is not possible here, but readers are directed to other sources (Huggins & Clover 2005). Briefly, and in the words of policy-makers, land reform is envisaged to:

- provide security of land tenure in order to promote investment in land;
- establish appropriate land allocation and land use through national- and local-level land use planning and development;
- avoid land fragmentation through prevention of subdivision of plots of one hectare or smaller, and promote land consolidation in order to enhance optimum production;

- establish mechanisms that facilitate the socio-economic development of the country through the development of land use and development guidelines at national and local levels;
- facilitate reorganisation of urban and rural settlements (*imidugudu*);
- facilitate development of a land market and an appropriate cadastral system;
- establish national, provincial and district land commissions;
- ensure maintenance of marshlands in the state's private domain, and establish clear regulations concerning their sustainable use;
- ensure specialisation of marshland users, and establish appropriate measures which can increase the agricultural yields of marshlands;
- establish a land office in each district with the main role of surveying land parcels and registering land titles, under the supervision of the district land commissions; and
- develop appropriate methods of land protection and conservation, such as terracing on slopes of between 25 per cent and 55 per cent steepness (gradient), and agroforestry to avoid land degradation (Interviews MINITERE personnel).

In addition to the new land law, a separate law on expropriation has been drafted with the aid of foreign consultants; of particular interest is the fact that the new expropriation law will not compensate those who lost land during the creation of the *imidugudu*. Although the first draft included a provision for compensation, the government expressly insisted that it be taken out, claiming that there are no problems – 'people have come to their own local arrangements' (Interviews MINITERE personnel).

The new land law raises numerous questions. The law states that men and women shall have equal rights on landed property, but does not offer guidance on this point, making reference merely to the succession law rather than improving the ability of women to claim land. The details of how existing land rights will be registered are left to later legislation.

According to the policy, a land reserve – to be created in order to provide land for the landless – is destined for the 'old caseload' refugees, rather than for a more comprehensive range of potential beneficiaries, including the many landless Batwa. In a move away from the 'compromise' position of the Arusha Accord article on land claims, the new law states clearly that 'there shall be no extinction of rights of prescription. If a person disappears, although he or she spends a long time, at any time he comes back he can pursue his or her rights in accordance with the family civil code'.[12] This would seem to legalise land claims of 'old caseload' refugees.

Perhaps the most important issue will be the implementation of provisions on villagisation, consolidation, the regulation of land markets, and the need for increased 'specialisation' or 'professionalism' in land use, 'guided' by centrally developed land use plans. The president of the Parliamentary Commission on Land has clearly stated that the government intends to resuscitate the villagisation programme, with the assurance that promises of services (such as access to healthcare, schooling and

electricity) are kept. It remains to be seen whether the government can achieve this without committing significant human rights abuses, when little donor funding is likely to be available for such a programme.

The ability of extended Rwandan families or communities to 'consolidate' land voluntarily, without contributing further to local disputes and injustices, must be realistically assessed. Even before the genocide, a seasoned regional observer and rural development expert stated that 'Rwandan's communes are administrative groupings of nuclear families, devoid of a collective spirit and rife with suspicion' (Pottier 1993: 12). Problem-free consolidation is unlikely.

Another issue is the possible continuation of land sharing. While a 2004 draft of the land law stated that 'the Decree of the Minister in charge of lands will determine the modalities for land partitioning and the time when land partitioning will end', the new law does not include the last phrase, which suggests that further land sharing could take place.[13] Such an action would be extremely unpopular.

The most fundamental issue is the inequality in land use, which is likely to result from further operation of land markets. Inequality is high by African standards: there is a sevenfold difference in land per person between the highest and lowest landholder quartiles (Clay 2005). A few people own large plots of 50 hectares or more. An early draft of the law included a land ceiling of 30 hectares; this was later pushed to 50 hectares and finally the ceiling was dropped altogether.

In Rwanda, even recently, government officials could privately acknowledge that their plan was to put all the land in the hands of a small proportion of the population who they deemed to have the skills, capital and connections necessary to effect a transformation of the rural economy, thus relegating the poor to 'labourer' status on the farms of the rich (Clay 2005). The dangers of such an approach, in a demographically stressed country recovering from conflict, and with few concrete pro-poor measures for off-farm income and urban settlement, are clear (Management Systems International 2002).

## *Conclusion*

This chapter has documented the large gap between theory and practice in Rwanda in order to illustrate some of the post-conflict challenges that face the Great Lakes Region and sub-Saharan Africa in general. Specific problems include overlapping land claims, lack of documentation due to destruction through conflict, low capacity at local levels of government, lack of firm data on population numbers, politicisation of local-level governance, and particular difficulties faced by women and vulnerable children.

The land policy process in Rwanda included some consultation with civil society, but the government saw discussions of particularly sensitive issues as a threat and has hence attempted to put some NGOs out of action. Some aspects of 'best practice' on land policy have been accepted – such as decentralised land commissions – but may

be undermined by other reforms and political pressures. Other key policy dilemmas, for example over land claims of the 'old caseload' refugees and compensation for those affected by villagisation, have not been effectively discussed; rather, they have been haphazardly implemented at local level, resulting in a *fait accompli* which is legalised by the current land law.

Core problems stem from fundamental issues of political governance. The centralised and top-down nature of government means that it is difficult for policy-makers to remain in touch with rural realities, and it is easy for rural people to misunderstand government intentions. Unequal power relations ensure that land-related problems and injustices are not sufficiently debated, and the legacy of conflict and genocide is used to justify government crackdowns on civil society organisations which are in a position to monitor land issues across the country. New land legislation cannot be understood on a purely technical level, but only by appreciation of the politics and power relations in the country. There are many risks involved in the planned transformation of the agricultural sector. These are, however, often glossed over by government. These political constraints also lead to a lack of (relevant) data. Faced with simplified 'black and white' narratives, international organisations engaging with land issues must be prepared to advocate for increased political space for civil society, and to support detailed research in order to have the messier 'grey areas' – where politics and power relations determine implementation of laws – exposed for debate.



***Notes***

1 Few of these problems are unique to post-conflict situations, of course. See for example IIED/NRI/RAS (2004); see also ACTS (2005).

2 In addition, despite attempts to intimidate the media, it also provides reasonable freedom for civil society to operate.

3 The rapid changes made by the democratically elected 1993 regime contributed to tensions which cost the life of its president, assassinated by elements of the military.

4 A French military operation is the exception to this inaction. While assisting some Tutsi, it actually aided many *genocidaires* (those committing the genocide) to escape into neighbouring Zaire (now the DRC).

5 A joint survey by the United Nations Population Fund and the government of Rwanda in 1996 acknowledged that overestimation had occurred. See Human Rights Watch (2001) and Van Hoyweghen's 'The Rwanda Villagisation Programme: Resettlement for Reconstruction?' in Goyvaerts (2000).

6 The Rwandan armed forces had entered the DRC in 1996 in order to dismantle the refugee camps, and these attacks, which resulted in the deaths of tens or even hundreds of thousands of civilians, remain a source of controversy today.

7 This and the next quote are from Article 3 of the Peace Agreement between the Government of the Republic of Rwanda and the Rwandan Patriotic Front, 4 August 1993, Arusha.

8 Arusha Peace and Reconciliation Agreement for Burundi, 28 August 2000.

9 Protocol I, Article 7(25c).

10 Although there is a popular belief that there was a set of written principles to guide the land-sharing process, key government institutions are unable to provide copies, and it seems that they may never have existed in the first place (Interviews MINITERE personnel).

11 Loi No. 1 / 016 du 20 April 2005, *Portant Organisation de l'Administration Communale*, Section 3 article 35.

12 Republic of Rwanda, Organic Law No. 08/2005 of 14/07/2005, Determining the Use and Management of Land in Rwanda. Language not corrected by author.

13 Republic of Rwanda (2005) Art. 87.

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Interviews with local households and civil society organisations, Ruhengeri Province, August 2005




# BETWEEN 'TRADITIONALISM AND MODERNITY':
## INSECURITY, PRIVATIZATION AND MARGINALISATION

# 3 *The politics of communal tenure reform: A South African case study*

Ben Cousins

Property rights and their redistribution are core elements of the South African government's land reform programme; however, what form these rights should take in the former reserves (or 'communal areas'), where they should vest and which local institutions should administer such rights remain controversial issues. Questions of democratic governance arise, given the central role of local bodies in the realisation of formal rights, and the debate over the roles and powers of traditional authorities in local government and land administration continues.

This chapter reviews a history of authoritarian interventions in South Africa's indigenous land tenure regimes and the contemporary legacy of this history. It then describes the key features of African tenure systems, with particular emphasis on their social and political embeddedness and the flexibility and negotiability of boundaries. The chapter then analyses the potential impacts of the Communal Land Rights Act (CLRA) No. 11 of 2004 and argues that the 'land titling' paradigm that informs the legislation is inappropriate and likely to undermine rather than secure the land rights of rural people.



## *Colonial and apartheid land tenure policies*

The conquest and incorporation of African polities in South Africa by the colonial state brought the imposition of new forms of authority, law and economic organisation, as well as the subordination and distortion of indigenous forms of land tenure and governance. Over two centuries whites took possession of the bulk of the land, and state policies attempted to mould African land tenure systems to the needs of the dominant classes. African 'reserves' were created as a way of containing resistance to dispossession, and as reservoirs of cheap labour (Delius et al. 1997).

There were, however, regional variations in policies and their impacts. In the Cape various measures attempted to restructure land tenure and to provide individual titles, for example through the Native Locations and Commonage Act of 1879 and the Glen Grey Act of 1894. In Natal, by contrast, individualisation of land rights was not pursued. Pursuing a policy of indirect rule, the British 'recognised' a version of customary law and provided a central role for chiefs in local administration (Mamdani 1996). In the Transvaal, a relatively weak Boer state together with determined resistance by Africans meant that, for much of the nineteenth century, 'competing systems and conceptions of land rights co-existed in varying degrees of tension and conflict' (Delius et al. 1997: 24). There were debates about establishing reserves for African settlement, but none were designated until after 1881.

The 1913 Land Act was intended to lay the basis for a segregationist social order in the newly established Union of South Africa. The scheduled 'native areas' covered 7 per cent of the land area of the country, although the area occupied by Africans was actually much larger. The 1936 Land and Trust Act added another 6 per cent to the area in which Africans would be allowed land rights, and the South African Native Trust was established. The Act allowed regulations to 'prescribe the conditions on which natives may hire, purchase or occupy land held by the Trust' (Delius et al. 1997: 38). Subsequently, regulations that drastically reduced tenure security were passed. Landholders' rights to transfer or bequeath land were limited, the size of allotments was set, and women's rights severely circumscribed. As Delius et al. (1997: 38) commented, 'access to land depended upon the whims of white officials and strict observation of a host of regulations' and there was a reduction in the scope for flexibility and diversity in landholdings, which had characterised customary systems. Trust land was also used by the state to accommodate the victims of forced removals or farm evictions from the 1950s onwards.

A drive towards uniform approaches and increased levels of state interference was evident in the Native Administration Act of 1927. Africans were to be governed in a distinct domain legitimised by 'custom' and tribal rule, but under strict control from government. The Governor General, as 'supreme chief', could recognise or appoint anyone as a chief or headman and define the boundaries of any tribe or location.

The Bantu Authorities Act of 1951, which involved the imposition of betterment planning[1] and an authoritarian regulation of land rights under so-called Trust tenure, was a key factor in the rural rebellions of the 1950s (Mbeki 1964). It involved the establishment of tribal authorities (TAs), but the version of traditional rule imposed was highly authoritarian, 'stripped of many of the elements of popular representation and accountability, which had existed within pre-colonial political systems and which had to some extent survived within the reserves' (Delius et al. 1997: 39). In the bantustan era large areas of land occupied by Africans, as well as a large number of purchased farms, in the Transvaal in particular, were transferred to the jurisdiction of 'self-governing territories' and many communities were placed under the jurisdiction of government-recognised chiefs and TAs.

Under Proclamation R.188 of 1969, two forms of tenure were recognised – quitrent[2] for surveyed land and Permission to Occupy (PTO) for unsurveyed land. Severe limitations on the content of the rights of holders were laid down: one man one lot; restrictions on plot size; a rigid system of male primogeniture to govern inheritance; and non-recognition of female land rights. Officials were given extensive powers to appropriate land and to cancel quitrent titles and PTOs. Chiefs and headmen undertook the task of allocation, agricultural officers surveyed the boundaries of sites and fields, and magistrates issued the PTOs.

## *The legacy of reform 'from above'*

The legacy of these historical processes includes vulnerabilities, tensions and conflicts over land that derive from a fundamental lack of clarity on the legal status, content and strength of rights in communal areas. An underlying problem is the second-class status of communal land rights in law. Since the advent of colonial rule the underlying historical rights of occupation have never been adequately recognised by the state, and are still not acknowledged by bodies such as provincial departments or local government authorities. Closely linked to the weak legal status of these rights is the overcrowding and forced overlapping of rights on communal land that derives from South Africa's history of conquest, designation of limited areas for occupation by Africans, forced removals and evictions.

A consequence of past policies of indirect rule and ultimate control from government is the erosion or breakdown of mechanisms that kept traditional authorities responsive and accountable to their subjects. One manifestation of this legacy is the corrupt practices of some traditional leaders, the extent of which is not entirely clear, but a number of instances are cited in the literature (Alcock & Hornby 2004; Claassens 2001; Levin & Mkhabela 1997; Ntsebeza 1999; Oomen 2000; Turner 1999; Zulu 1996). This problem is linked to past policies that placed all African communities under the jurisdiction of traditional authorities – whether or not there were any historical ties between the former and the latter – and the (false) assumption by many traditional leaders that this gave them control over the land rights within their jurisdictional boundaries (Claassens 2001).

Community submissions to Parliament in November 2003 referred to three main types of abuse by traditional leaders: (a) they allocate land or make private agreements with outsiders (e.g. operators of ecotourism enterprises) that have the effect of depriving community members of land; (b) they refuse to allow land to be used for development projects led by local government; and (c) they sell plots to outsiders for private gain, these plots often being located on the common property areas of communal land (Claassens 2003).

In many cases tensions and disputes over land rights result from the near collapse of land administration systems. Since in many areas magistrates no longer play a role, PTOs may or may not be issued, the procedures followed may be ad hoc and unclear, and registers are not always kept up to date (Lahiff & Aphane 2000; MacIntosh and Associates 1998; Turner 1999).

Lack of clarity on land rights constrains infrastructure and service provision in rural areas; this is further exacerbated by tensions between local government bodies and traditional authorities over the allocation of land for development projects (e.g. housing, irrigation schemes, business centres, and tourist infrastructure – see Ntsebeza 1999; Peires 2000). In some areas tensions between traditional leaders and civics aligned to the South African National Civics Organisation, which in the 1980s and early 1990s contested the legitimacy of chiefs and headmen, have also negatively affected development planning (Turner 1999).

The gradual decline over several decades of agricultural and natural resource-based livelihoods, with the corollary of an increased dependence on wages, remittances and social grants (May 2000), is another factor impacting on communal land rights. The relative insecurity of urban livelihoods means that many people seek to maintain their rights to land in rural areas, not always in those of their social origins, and have cash available to invest in acquiring land rights. This may be contributing to the increasing incidence of purchase of land rights from either community members or from chiefs and headmen. In some areas, emerging entrepreneurs investing in businesses in communal areas are pushing for the individualisation and privatisation of land rights.

Discrimination against women in the allocation of land and the holding of rights is also a feature of most contemporary communal tenure systems in South Africa (Claassens & Ngubane 2003; Mann 1999; Meer 1997; Walker 2001, 2003). Although some communities have moved in the direction of allocating independent rights for single women, divorcees and widows, many have not, and evictions of vulnerable women still occur. In parts of Limpopo Province, for example, women are particularly vulnerable to accusations of witchcraft, which constitutes grounds for loss of land rights (Lahiff & Aphane 2000). Because of all these problems, some women in communal areas are in favour of individual titles as a way to secure independent land rights (Claassens 2003).

Yet it is important to note that women do not form a homogeneous category, as they have socially differentiated identities and interests (e.g. as wives or relatives of traditional leaders, class status, marital status, political affiliation, etc.). Women with elite identities (e.g. as members of 'royal' families) have often managed to access land more successfully than those who are commoners (Walker 2002). This is the result of the 'socially embedded' nature of land rights.

Walker (2001, 2002) emphasises the historical shifts in the character of women's land rights, and argues that customary systems have undergone change and adaptation throughout the colonial and post-colonial periods. She argues that:

> …in southern Africa, the interpretation of 'customary' law by colonial administrators and magistrates served to strengthen, not weaken, patriarchal controls over women and to freeze a level of subordination to male kin (father, husband, brother-in-law, son) that was unknown in precolonial societies… (Walker 2002: 11)

How widespread are these problems? The evidence suggests that conflicts due to lack of certainty are most often brought to the surface by development planning or investments on communal land, such as Spatial Development Initiatives or ecotourism projects of various kinds (Adams et al. 2000). The majority of occupants of communal land still enjoy *de facto* tenure security, because existing systems, many of them now informal as a result of the breakdown of administrative systems, work reasonably well on a day-to-day basis. But in-migration, overcrowding, informal individualisation, breakdowns in administrative systems, abuses by some traditional leaders, tensions over boundaries and common property resource use, the continued

insecurity of many women, and lack of clarity over the role of traditional authorities and local government bodies mean that these systems are under severe strain.

## *Assessing degrees of continuity and change*

African societies were clearly deeply affected by the transition to colonial rule and the incorporation of local agrarian economies into wider political and economic relations. The segregation and apartheid periods saw communal tenure being manipulated and distorted in the interests of those who exercised political and economic power, but some of the key features of communal tenure proved 'resilient' and have persisted over time.

Both continuity and change are evident in the following (contradictory) processes and adaptations: (a) a greater stress on individual and family rights and decision-making in relation to land; (b) a defensive stress on the group-based nature of land rights; (c) redefinitions of women's land rights as 'secondary' and subordinate to those of husbands and men, rather than deriving from their social status; (d) chiefs and headmen becoming the symbols of resistance to colonial rule and loss of land; (e) chiefs and headmen being used by the state as instruments of indirect rule and as a result acquiring greater powers over land than they had previously enjoyed; and (f) the erosion of mechanisms that constrained the power of traditional leaders and kept them responsive to rights holders, these being replaced by a requirement for 'upward accountability' to the state, creating opportunities for abuse and corruption.

Continuing social change means that people adapt their underlying norms, values and principles in the light of changing circumstances (e.g. informal settlements on communal land); therefore, rights to land remain dynamic and flexible. 'Community members' are increasingly of heterogeneous social origin, and acquisition of rights via birth is only one of several routes to such membership. While the democratisation of the wider political system in South Africa has influenced localised power relations to a degree, as seen through the allocation of land to single women with children in some areas, some groups, including widows and divorcees, remain vulnerable.

Although traditional identities and cultural norms continue to be important in many rural contexts, the meanings of 'tradition' and 'custom' are often contested. Similarly, the land allocation powers of traditional leaders and their practice of selling land to outsiders are sometimes questioned. In addition to intra-community contestation and tensions, there exist tensions between traditional leaders over boundaries. This is a result of apartheid policies that resulted in many groups being placed under chiefs with whom they had no previous connection, leading to conflicts around the legitimacy of the traditional authority itself, as well as the boundaries of 'their' communities. Overcrowding and the forced overlapping of rights exacerbate these tensions, sometimes leading to jurisdictional disputes. Clearly, simplistic notions of homogeneous 'communities', with clearly defined social and territorial boundaries under the accepted authority of traditional leaders, are inappropriate in most communal areas in South Africa.

## *Making sense of continuity and change: Key features of African land tenure*

Many analysts make the point that in many non-Western and pre-capitalist societies, land tenure is more directly and clearly 'embedded' in social relationships than in modern Western systems of individual, private property rights (Hann 1998). Therefore, the concept of property, along with its associated entitlements and obligations, varies across different social and cultural contexts, and concepts of land rights derived from modern Western law may not be appropriate in these contexts.

Berry (1993) suggests that in the pre-colonial period access to land was contingent on membership or status in a descent group or community and/or allegiance to political authorities. Rights allocated within the group varied by status, which could be achieved (through accumulation of cattle, grain and wives) as well as ascribed. For example, rights to labour were obtained through both market and social transactions, such as marriage. Therefore, property in rural Africa has rarely had the exclusive character of Western private property (Peters 1998). Whitehead and Tsikata (2003: 77) suggest that social embeddedness is central to understanding the gendered character of access to land, since men and women have generally had 'differentiated positions within the kinship systems that are the primary organising order for land access'.

Closely linked to social embeddedness, and of central importance, are the power relations and micro-political processes within land tenure regimes. Many analysts show how access to land via social relations and identities strongly underpins an ongoing politics of land. For instance, Berry (1993: 133) argues that despite attempts by governments to clarify and regulate land rights, access to land in rural Africa has continued to hinge on social identity and status, and is thus subject to 'a dynamic of litigation and struggle which both fosters investment in social relations and helps to keep them fluid and negotiable'. Bassett (1993: 20) writes that 'the process of acquiring and defending rights in land is inherently a political process based on power relations among members of the social group', while Watts (1993: 187) discusses how negotiations and contestations over land rights are both rooted in 'multiple and polyvalent social and cultural relations' that are 'regularly fought over'. All these arguments indicate that land rights in Africa are thus also *politically* embedded.

Okoth-Ogendo (1989) provides a persuasive analysis of the nature of property rights in Africa. The core of his argument is that a 'right' signifies a power that society allocates to its members to execute a range of functions in respect of any given subject matter. Where that power amounts to exclusive control, one can talk of 'ownership' of 'private property'. However, it is not essential that power and exclusivity of control coincide in this manner: *access* to this power (i.e. a 'right') and its *control* are distinct, and there are diverse social and cultural rules as well as vocabularies for defining access and control.

In Africa, land rights tend to be attached to membership of some unit of production; are specific to a resource management or production function, or group of functions;

and are tied to, and maintained through, active participation in the processes of production and reproduction at particular levels of social organisation. Control of such access is always attached to 'sovereignty' (in its non-proprietary sense) and vested in the political authority of society expressed at different levels of units of production. Control occurs for the sole purpose of guaranteeing access to power over land for production purposes (Okoth-Ogendo 1989).

In African land tenure regimes access and control do not coincide, and property does not involve the vesting of the full complement of power over land that is possible (private property), and variations in power (rights) derive from social relations, not the market. Rights over land are trans-generational and control is exercised through members of the units of production and is not simply the product of political superordination. Different land uses attract varying degrees of control at different levels of socio-political organisation (e.g. allocation of arable land is often controlled at the family level, while grazing is the concern of a wider segment of society) (Okoth-Ogendo 1989).

Okoth-Ogendo (2002: 2) stresses the resilience and persistence of indigenous norms and structure in the face of colonial and post-colonial policies of 'subversion, expropriation and suppression'. In South Africa, Cross (1992: 314) has described a 'land ethic' in terms similar to Okoth-Ogendo (2002), listing a set of social and legal principles that underlie 'social tenure systems of relative rights' from the pre-colonial through to the contemporary era.

The key features of African tenure regimes can now be identified:

- Land rights are embedded in a range of social relationships and units, including households and kinship networks, and various forms of 'community' membership. The relevant social identities are often multiple and overlapping, and are often 'nested' in character (e.g. individual rights within households, households within kinship networks, kinship networks within local communities, etc.), with men's and women's rights defined in different – often unequal – ways.
- Land rights are inclusive rather than exclusive in character, being shared and relative, but they are also generally secure. They include both strong individual and family rights to residential and arable land as well as guaranteed access to and use of common property resources such as grazing, forests and water. These are the fundamental livelihood resources needed by all members of society, and access to them is guaranteed by the norms and values embodied in the 'land ethic'.
- These rights are derived from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or through transactions of various kinds (including gifts, loans and purchases). They are somewhat similar to citizenship entitlements in modern democracies.
- *Access* to land (through defined rights) is distinct from *control* of land (via systems of authority and administration).

- Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access (e.g. trans-generationally), and resolving disputes over land claims.
- Control is often located within a hierarchy of nested systems of authority, with decision-making powers in relation to many functions located at local levels. A key but variable aspect is the degree of accountability and responsiveness of authority structures to the holders of land rights.
- Social, political and resource use boundaries are usually clear but often flexible and negotiable, and are sometimes the source of tension and conflict.
- Both land rights and authority systems are politically embedded; thus power relations and political processes are often key to determining the distribution of rights and benefits.
- Discourses of 'custom' and 'tradition' are key resources for political actors, including men and women, traditional authorities as well as emerging elites, and the meanings of these terms are often highly contested.
- The balance of power between men and women, competing groups or 'communities', land administering authorities and rights holders, and levels of socio-political authority (e.g. chiefs and headmen) is subject to shifts and changes. This has consequences for the content and strength of rights and the degree of accountability of authority structures to rights holders.

The inherent flexibility and negotiability of land rights in African property systems means that they are capable of dynamic adaptation to changing conditions, but are also susceptible to 'capture' by powerful interest groups (as perhaps all property regimes are, to some degree). This possibility is enhanced where powerful external forces and processes (such as incorporation into larger political structures, commodification of production and capital accumulation) are brought to bear in ways that privilege certain interest groups, and where dynamic processes of adaptation are 'frozen' by state-imposed policies and systems (e.g. through co-opting traditional leaders into the lower rungs of colonial administration).

The model of African land tenure discussed here is presented as a heuristic tool for the analysis of empirical evidence demonstrating both continuity and change in land tenure, and not a normative statement indicating what African land tenure *should* be. Here it is used to assess the likely impact of new laws and policies on such systems.

## *Potential impacts of the Communal Land Rights Act*

The CLRA of 2004 and the Traditional Leaders and Governance Framework Act (TLGFA) No. 41 of 2003 are closely interrelated and should be analysed together (Murray 2004). What are the potential impacts of these two Acts on land rights in communal tenure regimes?

### *Existing rights to occupation and use of land*

The CLRA vests ownership of land in the group (the 'community' that takes transfer from the state). It attempts to create a 'relative balance' of group and individual land rights and obligations by allocating 'new order rights' through the issue of registered Deeds of Communal Land Rights to the holders of 'old order rights'. However, the CLRA does not describe or define the content or legal status of these new order rights. On the one hand it provides for the content of these rights to be defined in community rules; on the other, it allows the minister to determine their 'nature and extent', as well the identity of rights holders (sections 18(3) and 18(4)). As such, subsequent to a determination by the minister, a land administration committee must allocate and register new order land rights, yet the relationship between community rules and a ministerial determination is not specified. Differences between rights to common property resources as well as rights to arable and residential land, and the relationship between them, are not acknowledged.

The CLRA and the TLGFA, taken together, shift the balance of power in communal areas decisively away from individuals and families and towards the group and its authority structures on the one hand, and towards the minister (as advised by officials) on the other. This is at odds with the 'African land ethic' and the norms, values and principles that underlie communal tenure systems (Cross 1992; Okoth-Ogendo 1989). Unless adequate measures are provided to ensure that decision-makers recognise and protect existing rights, and that the rights holders themselves can make key decisions as to whether or not they want to change the contents of these rights or dispose of them, these rights are potentially in jeopardy.

### *Women's rights to land*

Women's land rights were subject to redefinition during the early colonial period, when particular versions of 'custom' were officially recognised and recorded, and in most cases women's rights were subordinated to those of married men. South African land tenure laws and policies further entrenched gender inequality; thus quitrent titles, PTOs and betterment regulations all vested land rights and decision-making power in male household heads, and women's rights to occupy and use land were relegated to 'secondary' status.

Land rights in African tenure systems are socially embedded and are shared and relatively flexible in character. In African societies land was allocated to families, and often women had strong rights within the family. Despite the strengthening of male control over land as a result of the policies and processes described above, the obligation to provide family members with access to a means of livelihood has remained a strongly held value and norm. This means that the composition of households and families needs to be taken into account in defining land rights, and women who are household members but not necessarily spouses must also be considered.

Contemporary evidence suggests that many women in communal areas now suffer from severe tenure insecurity, with female divorcees and widows sometimes arbitrarily evicted by ex-husbands or male relatives. In some areas, unmarried women with children are being allocated land, but in many others they cannot hold land in their own right. Thus, existing definitions of rights are inherently discriminatory and cannot be recognised and confirmed; rather, they must be transformed in accordance with the constitutional principle of gender equality. What does require recognition and confirmation, however, are the rights of women based on their existing occupation and use of land.

Section 18(4) of the CLRA allows the minister to confer a new order right on a woman, even where old order rights, such PTOs, were vested only in men. Section 4(2) deems new order rights to be held jointly by all spouses in a marriage, and these must be registered in all their names. Section 4(3) is of a general nature and states that a woman is entitled to the same tenure rights as a man, and no laws, rules or practices may discriminate on the grounds of gender. These measures, despite their intent to provide for gender equality in land rights, are problematic.

If old order rights are to be vested in spouses only, then this weakens the tenure rights of female household members who occupy and use land, but who are not wives – mothers, adult daughters and divorced and unmarried sisters, for example. There appears to be a strong presumption that a Deed of Communal Land Right is akin to individual ownership, albeit ownership that must be vested in spouses jointly. This is evident in the provision that these Deeds can be converted into freehold ownership if the community approves (section 9 of the CLRA). There is no explicit provision for a Deed of Communal Land Right to be issued to a family. In addition, it is unclear what land rights can be claimed by women who are divorced at the time that a determination is made by the minister, since they will no longer be married and thus cannot be deemed to be the joint holder of an old order right.



### *The decision-making powers of rights holders*

It is argued above that in pre-colonial societies in Africa, the role of authority structures in relation to land was primarily to guarantee rights of access to productive resources, regulate use of common property resources and help resolve disputes. Rights were derived most fundamentally from accepted membership of the group, and were thus akin to 'entitlements of citizenship', rather than being derived from an allocation by a landowning political class. A key issue in this respect is the existence in pre-colonial societies of structural mechanisms to ensure the responsiveness and accountability of authority structures towards rights holders. Through history, this has varied a great deal depending on the balance of political forces.

Under colonial rule, structures of traditional authority were co-opted into the lower rungs of colonial administration. This saw the erosion of the mechanisms which had constrained the power of traditional leaders and held them accountable

to communities. These mechanisms were replaced by a requirement for upward accountability to the state. Accompanying these processes was the emergence of a model of communal tenure premised on 'ownership' of land by chiefs, who acted as 'trustees' for the community and allocated plots to their subjects.

The TLGFA reconstructs TAs yet again by creating traditional councils, which can either be new structures or merely a renaming of the existing TA. The traditional councils, under CLRA, could be awarded unprecedented power over community land. Section 24(1) of the CLRA establishes a land administration committee that 'represents a community owning communal land', and has the powers and duties conferred on it by the CLRA and by the rules of such a community. The list of duties in the CLRA includes the allocation of new order land rights, the establishment and maintenance of registers and of records of rights and transactions, provision of assistance in dispute resolution, and liaison with local government bodies in relation to planning and development. The committee must also 'promote and safeguard the interests of the community and its members in their land' and 'endeavour to promote co-operation among community members' (section 24(3)).

Section 21(2) of the CLRA states that 'If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council,' therefore intertwining the two pieces of legislation. The permissibility implied by the word 'may' enables a traditional council to exercise the powers of a land administration committee, rather than creating a choice for rights holders. No other provision of the Act allows for such a choice, and no procedures for decision-making are set out in this regard. It is also clear that government officials envisage areas under TAs as the 'communities' to which land will be transferred.[3]

TA areas typically have populations of between 10 000 and 20 000 residents, and the chiefs that head them have jurisdiction over a great many wards and villages, under the authority of sub-chiefs, headmen, or sub-headmen. The CLRA thus envisages the adoption of one set of rules, to be administered by one authority structure, for large and often diverse rural populations. This represents a decisive shift from the relative balance of power between different actors and authority structures within communal area tenure systems, in favour of TAs and chiefs and at the expense of both individual rights holders and other levels of authority. It moves the authority for land allocation to the pinnacle of the traditional hierarchy, providing the chieftainship with 'even more powers than it previously enjoyed' (Mulaudzi 2004: 129). The consequences of this shift of power include the potential for severe tensions between TAs/chiefs and other levels of authority, such as headmen and sub-headmen, who currently oversee land transactions at the local level. Shifts in the relative balance of power flowing from the CLRA and the TLGFA are most evident in the lack of choice available to rural residents in respect of the body that will represent their interests as land rights holders. This means that, in effect, power relationships can be seen as being top-down rather than bottom-up in character.

A key issue is the degree of accountability and responsiveness of authority structures. The CLRA does not require land administration committees to consult with the community members they represent. They may, for example, make major decisions on the disposal of land or of the rights to such land without consulting community members. The only requirement in such a case is ratification of a decision by the relevant Land Rights Board (i.e. the only accountability mechanism prescribed is 'upwards', not 'downwards'). In general, the CLRA has little to say about how key decision-making processes (such as the adoption of community rules, the holding of a land rights enquiry, or the election of a land administration committee in those instances where a traditional council does not exist) are to take place, other than the generalised prescriptions in sections 17(1) and (2) which state that rights enquiries must be open and transparent, and that decisions must be informed and democratic.

### *The demarcation of 'community' boundaries*

The CLRA gives effect to a 'transfer of title' approach to tenure reform, but with titles held by groups rather than individuals. The Act makes provision for the minister to determine boundaries on the basis of an official report on the outcomes of a land rights enquiry (sections 17(3) and 18(2)). It is also possible, however, for the minister to determine, on the basis of the report, that communal land transferred to a community must thereafter be subdivided and registered in the name of individuals (section 18(3)). In all cases, transfer of title involves demarcating the boundaries of the 'community' that will become the legal owner of communal land. Surveying of outer as well as internal boundaries – including individual plots, in some cases – will be required to formulate the mandatory 'communal general plan' under CLRA.

Boundary issues in communal systems are complex, however, and implementation of the CLRA and the TLGFA is likely to increase rather than reduce boundary disputes, and thus promote uncertainty rather than certainty. The jurisdictional boundaries of TAs demarcated in the apartheid era are still recognised, and in most communal areas exist back to back with one another; this proximity creates disputes over boundaries between tribes or TAs (Sithole 2004). Contributing to the disputes over boundaries is the nested character of land administration in communal systems, which means that boundaries are inherently variable and flexible, particularly in areas within which community members may use or collect common property resources. Colonial and apartheid legacies also influence the current disputes in communal areas; under policies of forced removals and evictions, as well as the implementation of the bantustan policy, many groups of people were placed under chiefs with whom they had no previous connection. This remains a source of tensions between TAs and such groups, with disputes over both jurisdictional authority and physical boundaries.

Given the near irreversibility of a transfer of title (except by expropriation), boundary demarcations via land rights enquiries, ministerial determinations and surveying will be of great importance to potential title holders, and existing tensions and disputes over the boundaries of TAs will be exacerbated. Boundaries of common property resource areas that are flexibly defined could well become the source of new boundary

disputes, should the prospect of a transfer of title arise. In general, there is a poor fit between the 'transfer of title' paradigm that forms the basis of the CLRA and many of the realities described in the contemporary literature on communal tenure.

## *Conclusion*

Informing the politics of tenure reform policy in South Africa are competing understandings of land rights and land administration. With regard to land rights, one view is that only land titling (i.e. private ownership) provides adequate tenure security. However, forms of group title, *as well as* individual title, must be made available given the strong rural demand for a community-based form of tenure. The strongest demand from the ground, however, is that there should be security of rights for families and individuals within a system that secures access to common property (Claassens 2003).

It is now widely accepted that freehold title is not a 'magic bullet' for increasing security of tenure in Africa and other developing countries (World Bank 2003). Emerging policy recommendations call for greater recognition in law of such rights, the strengthening of local institutions for land administration and land management, and support for institutions and procedures for mediation and negotiation, particularly at the local level. Local institutions are vulnerable to the power plays of elites, and measures to promote transparency and downward accountability (in accordance with the constitutional imperative of democratisation) are integral. This suggests that rights should be vested in individuals rather than in institutions that purport to represent community members (Woodhouse 2003).

This also means that central government has a key role to play in ensuring accountability, through oversight of local bodies and the application of sanctions (Woodhouse 2003: 18). Some analysts emphasise the key role of ongoing processes of negotiation and conflict resolution for securing land rights, and stress the importance of state support for local institutions to mediate conflicting interests (Berry 1993; Moore 1998). This resonates strongly with the view that democracy in Africa requires a strong and capable state, both willing and able to empower citizens through locally accountable, representative institutions (Luckham 1998). An emancipatory version of democratisation is thus integral to the politics of communal tenure reform, both within and outside of South Africa (Cousins 2003).

### *Postscript*

In March 2006, four rural communities challenged the constitutionality of the Communal Land Rights Act of 2004, arguing that it would undermine their right to tenure security as set out in the South African constitution (Claassens & Cousins 2008). On 30 October 2009 Judge AP Ledwaba of the North Gauteng High Court in Pretoria handed down judgment in the CLRA legal challenge. The judge declared that 15 key provisions of the Act, and in particular those providing for the transfer and registration of communal land, the determination of rights by the minister and the establishment and composition of land administration committees, are invalid

and unconstitutional. This renders the Act impossible to implement in its present form. The Constitutional Court is due to review the High Court judgement on 2 and 3 March 2010.

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### *Notes*

1 Betterment was a form of land use planning that involved the relocation of scattered homesteads into closely settled villages, the consolidation of blocks of arable land and the demarcation of grazing camps. This state intervention was fiercely resisted in many areas, and has since formed the basis of land restitution claims in some parts of the country (Minkley & Westaway 2005).

2 Quitrent was originally a form of leasehold through which early European settlers could gain access to land under the control of the colonial state. A watered-down version was offered to Africans in the Cape Colony in the nineteenth century as a way of promoting individualised land rights.

3 Senior government officials have stated that they view the population of areas under the jurisdiction of TAs as the 'communities' that will have land transferred to them through the CLRA (address by Dr Sipho Sibanda of the Department of Land Affairs to the Portfolio Committee on Agriculture and Land Affairs, 26 January 2004).

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# 4 Karal *land: Family cultural patrimony or a commercialised product on the Diamaré Plain?*

Bernard Gonné



Cameroon is located in the Lake Chad Basin. A large part of this region is considered to be an ecologically fragile zone due to frequent droughts. This situation puts pressure on *karal* land (this refers to land consisting of humid soil) in the Far North Province of Cameroon because the soil type in this area supports the cultivation of sorghum during the dry season. This sorghum, called *muskwaari* by peasants, is in high demand in the region, as it is a staple food with a growing market value. Several types of *karal* land exist in the area, the most important being the 'modal *karal*' land as it is the most productive.

This chapter analyses the land tenure problems and the different types of *karal* land rights transfers practised by the farming societies of the Diamaré Plain (Northern Cameroon), both within and between families. The recurrence and intensity of conflict with regard to the *karal* landownership justifies the introduction of a number of post-conflict strategies, including 'undisturbed rights papers'. This chapter describes the role played by these papers in reducing, or even completely resolving, conflict in inter-, intra- and extra-familial land transfers in the region. It also presents the region's peasants' perceptions of land security. The chapter is based on investigations conducted in the region and relevant documentation regarding land tenure problems.

## *Overview of the region*

The Diamaré Plain has a latitude and longitude of 10°30' NS and 15°45' E respectively (Figure 4.1), and is considered by Brabant and Gavaud (1985) to be mid-Sahelo-Sudanian. Annual precipitation varies between 600 and 900 mm, although a rainfall deficiency has been recorded over the past few years. Pieri (1989: 89) considers the Diamaré Plain to be 'an agricultural region very susceptible to drought'. *Karal* land is covered with a heavy soil (of montmorillonite origin) with a high water retention capacity – a positive attribute in an environment submitted regularly to drought. The region covers an area of 350 166 hectares (Brabant & Gavaud 1985) and is exploited by the peasant farmers, particularly for the dry season cultivation of *muskwaari*.

Considering its climatic characteristics, the Diamaré Plain is an ecologically fragile region. The impacts of this ecological fragility are more pronounced and noticeable in rural areas, where a large majority of the population's main economic activities are in the primary sector: agriculture and livestock. The recurrent droughts observed in the region since the early 1980s have caused villagers to place greater value on

**Figure 4.1** *Location of Diamaré Plain, Northern Cameroon*


Source: Based on village investigations, 2003 and 2004

wetlands, such as the *karal* or other rich soils. This is considered a significant source for inter-family conflict (Gonné 2004).

In addition to these fragile environmental conditions, the human element is also an important factor in land conflicts. Rapid population growth – especially in farming areas, where numerous regular migratory movements have been recorded – exposes the region to landownership conflicts and competition for resources, and brings into question the actual ownership of *karal* land in the region. These conflicts and questions are exacerbated by the various landownership transfer mechanisms employed in different communities, such as the Guizigas and Fulbé.

## *The* karal*: Traditional land transfers of inalienable domestic space*

In traditional societies, the *karal* land belonged to the person who first acquired it (generally the head of the household); original owners and their families remained on the land for decades. The head of the household, who is almost always male, is also considered the rightful owner because he was the first to 'use his axe on the

land' (i.e. to work and cultivate the land). According to tradition, after the death of the household head, all of his property (land) is passed on to his male descendants (sons, brothers, paternal nephews).

The Diamaré Plain is a multi-ethnic area populated mainly by the Fulbé, or the *kirdi* who became Fulbé (an essentially Muslim society); they controlled and managed most of the land in the region. From a historic viewpoint, the Fulbé were not the first to occupy this region, but were preceded by other, non-Muslim societies, such as the Guiziga.

### *Traditional non-Muslim societies*

In most traditional farming communities of Northern Cameroon, the first stroke of the axe in a collective plot (land reserves) constitutes official land appropriation. For example, the Guizigas of the Diamaré Plain own all their land in this region according to this heritage right. The traditional landownership transfer in this community is inalienable, meaning land may be appropriated exclusively by acquisition, inheritance or as a gift. In the Guiziga society, it is the youngest son who, on the death of his father, inherits all land cultivated by him (Boulet 1975). He is considered to be the person who must guarantee the ownership of the family's land forever. If he is still very young, the management of the land is either temporarily granted to his mother or to one of his paternal uncles until he is old and mature enough to manage it.

Similarly, in Toupouri villages, traditional land transfers generally only take place after the death of the household head. The deceased's land is effectively passed down a generation, and the son becomes the landowner. The lands may, under two conditions, be managed by the widow of the deceased head of household:

- If the woman wishes to manage the land of her deceased husband, she must not remarry. She must cultivate it so as to be able to feed her minor children.
- If the widow wishes to remarry and continue to manage her deceased husband's lands, the marriage must take place to a male member of the deceased's family (brother, cousin, uncle).

If the widow chooses to remarry outside of the deceased's family, she will automatically lose landownership rights, and a family meeting determines who will manage the family land. An administrator for the property is chosen from among the deceased's brothers. He controls decisions pertaining to the land, together with all members who took part in the family meeting where he was chosen. This management approach has minimised inter-familial conflict for many generations.

### *Muslim societies of Fulbé origin*

Landownership transfer in the Fulbé society is different to that of other ethnic communities. The Fulbé conquest disrupted the above-mentioned rule of the axe; thus in rural areas under Fulbé rule, land has been acquired through conquest

and, therefore, belongs to the *Lamiido* (traditional chief of first degree in Northern Cameroon). He is the owner of all conquered land and concedes its management to certain notables, who are often the chiefs of second or third degree (*Lawan* and *Djaoro*). These chiefs are in charge of distributing the lands between families. A legal tax, called *zakhat*, is collected and given to the *Lamiido*, according to Muslim practice. The *Lamiido* has absolute power over the land that he manages. He may abuse his powers by withdrawing allocated parcels of land and granting them to others. This practice is increasingly observed today in the villages of the region, and is most prevalent in areas where arable land is overexploited and population density is high (Raimond 1999). The practice thus intensifies land tenure problems in the Diamaré Plain.

Land acquired according to the 'axe right' is also transferable to the heirs in Fulbé Muslim societies, but it is not as definitive as in other land systems. Therefore, a parcel of land that has not been cultivated for several years and that has reverted back into free bush can be returned to the collective domain and allocated to someone else who is in a position to farm it. However, uncertainty is caused by this mixing of traditional practices (the 'axe right' in Fulbé society and the absolute power of the *Lamiido* over the land that he manages).



## *Land tenure problems in Diamaré Plain*

Since the mid-1980s the Diamaré Plain, populated by Fulbé, has experienced a land crisis centred on *karal* land. The rapidity of the population growth is often considered the most important contributing factor. It leads to a growing number of young people anxious to escape the domestic tutelage found in their households, and to establish their own agricultural businesses. The main actors in the Diamaré Plain include peasants without land, newcomers (migrants), educated young operators (generally not Muslim), wealthy Muslim owners (often notables or city dwellers who rent the land), and mainly transhumant cattle breeders. There are also city dwellers who own land in the country for their personal use (Seignobos & Teyssier 1998).

The land problems in Diamaré Plain are apparent from a number of indicators, the most important of which remains land conflict (between families, between farmers and breeders, between migrants and indigenous people, between public administrations and customary authorities, etc.). Another (less important) problem is the accelerated introduction of monetisation mechanisms in rural areas. It is the monetisation process that has made land an important asset and has mobilised different types of actors, including peasants, civil servants, pensioners, educated urban citizens, young elites and women. The introduction of numerous actors is the main factor complicating local practices of land management in rural areas. In addition, the valuation of land has increased with the introduction of monetisation, and the introduction of cotton cultivation in the region has led to the occupation of important farming land; peasants have had to adapt and grow more *muskwaari*, giving more value to the *karal* land.

The land tenure problems in the Diamaré have also been aggravated by the return of large numbers of migrants to their own villages. They return for various reasons, such as difficulties integrating into new localities, and insufficient land; but it is also important to note the current trend for the local elite to enter the agricultural field, which encourages their return to the rural areas. They may only acquire land by purchasing it with funds obtained in large or small towns. They purchase the best fertile land, thereby contributing to its overexploitation.

There are several indicators of land overexploitation in the Diamaré Plain. These vary over time and space, with some villages experiencing only one indicator and others being afflicted by many at once. In the majority of the villages investigated, a reduction in, or the complete disappearance of, the fallow period on *karal* land was noted. Another important expression of the saturation is the various means of accessing land. This marks the end of the simple traditional appropriation and acquisition rites, and the beginning of money-based land transactions. It also shows itself through the inability to create new fields, an important indicator of land saturation. This situation increases the partitioning of parcels in the farming area. It also highlights the importance of the fact that the land belongs to the *Lamiido*, whose source of income is essentially from the land's management and exploitation, leading then to land monetisation, partitioning and overexploitation in the region.



## *Monetisation: Means for inter- and extra-family land transfer*

Monetisation is a practice through which arable land is made attainable through monetary exchange. Three essential types exist in the Diamaré Plain: purchasing/selling, renting/letting, and guarantees (or security). It is important to identify when monetisation was first introduced before discussing its role.

### *Monetisation in the 1980s*

It is difficult to determine exactly when the region's land access modes were first disrupted. This rupture corresponded to the introduction of rights which Colin (2004: 8) called the 'right of transfer, in the sense of alienation'. Investigations showed that the introduction of merchant rights transfers on *karal* land dates to the early 1980s. This period corresponds with the period in which people from both the public and private sectors began to rush to buy *karal* land in order to grow *muskwaari*, which had become a staple food with a good market value.

The abrupt entry of this land into the market economy led to the dysfunction of the existing rural systems. Peasant families were especially affected, as they derived their main source of income from the cultivation of their land. The situation intensified from 1985 and was further aggravated by the economic slump that Cameroon experienced in 1987. When these agricultural entrepreneurs, referred to as the 'new rural actors', began to take an interest in the region's land, they contributed significantly to the setting up of the monetary mechanisms for the transfer of land rights (Gonné 2004).

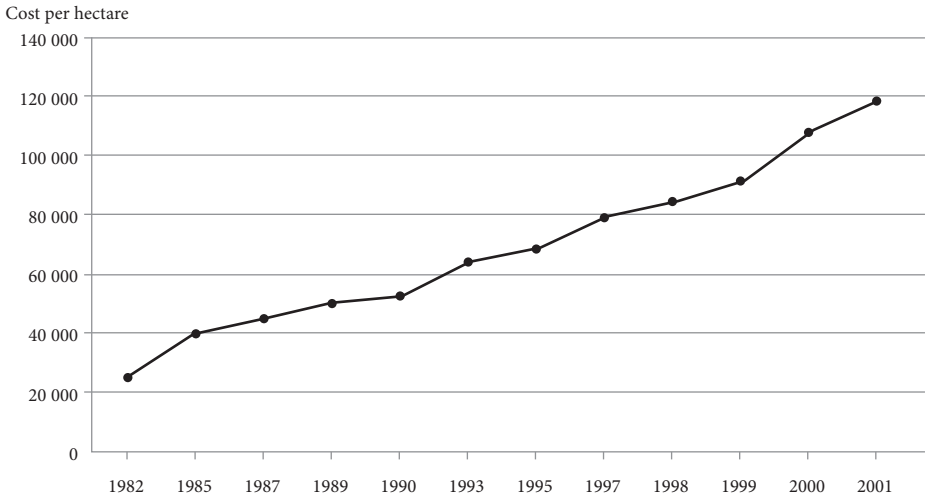
### *Money-based land transfers within and between families*

Land transfers within the family or between families take place in several ways. If the land is not sold to a buyer, it can be given to another family as a gift. Inter- and intra-family land transfers take place in several ways. In cases like this, the appropriation is nearly definitive. This intra-familial transfer right is generally applied in the presence of witnesses who do not belong to either family, and the transfer seldom causes problems for the families involved.

As noted, there are three ways of using money as a means of exchange for land: buying/selling, renting, and guarantees/security. These constitute the main mechanisms for the transfer of landownership within and between families in the region. The buying of a piece of land is the only way to definitely become the owner. Purchase is considered to be the main way of gaining definitive access to land. On the other hand, land can be leased out on a temporary basis (often a year) for cultivation as a source of income. This is done exclusively to generate money.

In the Diamaré Plain, investigations showed that the purchase prices of *karal* lands (a one-quarter hectare is locally referred to as *corde*) grew significantly, especially in the late 1980s and early 1990s (Figure 4.2).

**Figure 4.2** *Annual evolution of the purchase price ($\frac{1}{4}$ ha) in Diamaré Plain*




Sources: Raimond (1999) and village investigations

The monetary value given to arable land acted as a catalyst for family members to calculate the value of land management and ownership. This led to the urban elite (e.g. civil servants, retired persons or those from the commercial sector) initiating processes to appropriate land. The sale of this land by the landowners or their family representatives sometimes took place without consultation with other members of the family. This often resulted in conflicts which became numerous and recurrent,

leading to land insecurity. Seeking a solution to this problem, in 1994 the Diocesan Development Committee of the Archdiocese of Maroua introduced the possession of a document of rights and ownership. Its objective was to secure the land of the regional farmers.

Figure 4.3 illustrates the varied levels of land access, determined by price. The map demonstrates the concentration of expensive land in the *karal* zone of the Far North Province. The further one gets from the highly productive vertisol of the *karal* land, the less expensive land becomes.

Figure 4.3 *Spatial distribution of land in* karal *areas of the Far North Province*


Source: Based on village investigations, 2003 and 2004
Note: CFA franc = Comunaute Financiere Africaine franc

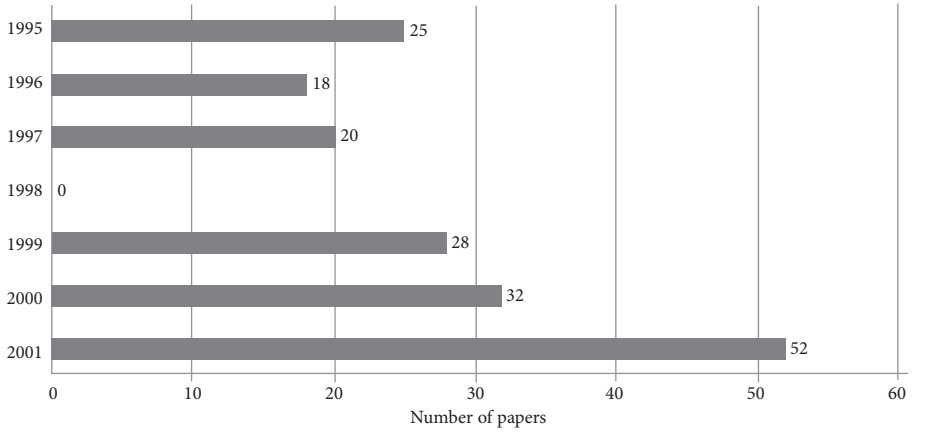
## *Certificates of land rights possession*

Both traditional and monetary means of land transfers were corrupted by the increased demand for land. While the traditional practices of transferring land were jeopardised because witnesses were not present, monetary transactions were also complicated with several people buying the same piece of land, a situation particularly prevalent in the Diamaré Plain's peri-urban areas.

Although the rights acquired traditionally through cultivation should provide farmers with a degree of land security, the system of peasantry under the *Lamiido* often broke this social contract (CDD 2000). Nevertheless, the Cameroonian Land Tenure Act (No. 74/1) established in 1974, which is not effectively applied in the farming zones, recognises the right of landownership of the first owner. It was once a tradition to distribute the lands to peasants, but monetisation changed this – to quote a local saying in this area, 'He who has money, has land'. This is contrary to the tradition that 'the appropriation of land depends on the working strength of the peasant' (Taiwe Paul interview).

The 'law of the axe' cannot be applied in the villages because land management policies have changed with time. For example, the traditional chiefs sometimes sell the same piece of land to several people, making it difficult for them to acquire a legally secure land title. However, possession of a land title is essential if they are to contribute effectively to the sustainable development of their region. Contract papers for possession of land rights were introduced in 1995 in the locality of Salak. Figure 4.4 shows that the number of signed certificates increased considerably between 1995 and 2001.

**Figure 4.4** *Evolution of the number of contract papers in Salak, 1995–2001*




Sources: CDD (2000) and personal investigations in 2002

The papers contain the given and family names of the seller and the purchaser, their official identity (national identity card number, places of origin, etc.), the type of signed certificate (for example, 1.a. for an undetermined period against a gift),

the date, the names and the signatures of the local customary authorities and all the parties (seller, purchaser, neighbours and witnesses, among others). A map of the land parcel is drawn on the reverse side of the contract. Seven of these types of contracts can be signed in the region:

- Traditional landownership certificate acquired for an undetermined period (1.a. for an undetermined period). In general, this covers all areas that do not have land title belonging to the state. In the villages, the customary authorities admit that these laws cannot be applied to the farming areas, because there seems to be an overlap between the customary and the modern land laws. A definitive grant certificate guarantees land security conceded to somebody in exchange for an asset (cattle, ploughs, another field, etc.). This certificate protects the owner in all land conflicts, especially those that emerge after the donor's death.
- Traditional landownership certificate offered for an undetermined period (1.b. for an undetermined period). This second type of traditional landownership certificate essentially gives the owner the same rights as those in certificate 1. However, there are some differences in that the customary land eligible for this certificate is land that is reclaimed, inherited or received as a grant. The rights are secured forever. This certificate contains the signatures and the references of both the former customary owner of the parcel and the new owner, but also – and especially – the signature of the chief of the village.
- Traditional landownership certificate acquired for a given period (2.a. for a given period). This standard third traditional landownership certificate is fundamentally different from the previous two. Here, the customary owner of the parcel puts the traditional landownership certificate at the disposal of a person for a given period, expressed by the number of years from the day of the signature. The signature of the village's chief is also important.
- Traditional landownership certificate offered for a given period (2.b. for a given period). The fourth type of traditional landownership certificate is similar to the previous one. The difference is observed in the gift given by the person who is going to cultivate the parcel. This gift takes various forms, such as beef, goats, ploughing material, millet, etc. The chief's signature is important for this transaction.
- Traditional landownership certificate acquired for as long as one can refund the borrowed product (animal, millet, money) (2.c. for as long as one has a deposited amount). This kind of undisturbed right possession paper is a pledge that acknowledges a debt between two persons. The land can thus be used as a pledge to secure an asset, such as an animal, millet, money, etc. The chief's signature plays an important role.
- Traditional landownership recognition certificate showing ownership rights on the land (3. I have). The sixth paper certifies ownership of land acquired by all types of transaction where the local community members recognise the certificate holder as the owner. It can be obtained from a definitive grant when the customary owner (donor) dies without leaving heirs. These certificates are often signed by descendants of the dead man (his sons).

- Traditional landownership recognition certifies having received this right of ownership from ones parents (3. I have always had it). The last type of certificate confirms right of ownership received from forebears who reclaimed and cultivated the land for many years. The new owner must have the certificate signed by the customary chief of the village in order for his right of ownership to be recognised.

In synthesis, the first and second traditional landownership certificates are signed for the definitive property transfer in a land transaction. The distinction is that the first is given forever in exchange for something (e.g. money, livestock, other land) and the second is a grant with definitive appropriation. On the other hand, the third and fourth traditional landownership certificates are temporary. Their duration is not clear, but comes into effect when signed by both parties and terminates when the asset or its equivalent value is returned, or when the owner wishes to have his field returned. The fifth traditional landownership certificate is a pledge of security against assets such as money, livestock or a house. The length of field exploitation depends on the repayment period for the material that is pledged. The last two certificates are a type of confirmation of landownership for owners who acquired the land by ancestral inheritance or who bought it long ago and their ownership is recognised by all.

Growing land appropriation insecurity in the region began during 2001/02. At the time, more than 50 traditional landownership certificates had been signed exclusively in the locality of Salak and its vicinities. The existence of these signed papers has, according to the farmers, contributed to a reduction in the number of land conflicts in the region. These land security documents have been widely adopted by peasants of other villages, especially in villages where land is scarce and overused. The Toupouri villages are a case in point, where traditional chiefs tend to sign contract ownership transfer papers for payment. This practice reduces the land conflicts in these villages, especially in those where the majority of the population emigrates to the Diamaré Plain and other localities in Bénoué Valley, as this region offers many possibilities to access cultivation land.

At present there is a great deal of interest in these traditional landownership certificates in customary lands, where renting of land is on the increase. Indeed, every year some 'big customary owners' rent the same field to two or three people, leading to protracted discussions over who the rightful owner is. Most often, the weakest withdraw from the discussions and the field is generally given to the most powerful participant. Every year, customary chiefs face such problems that only intensify with the intrusion of new, particularly urban, actors.

The certificates of undisturbed possession rights could potentially play a significant role in the struggle against the deterioration of the environment, through the protection of soils (erosion) on the one hand and improved fertilisation for better outputs on the other. Peasants are unaware of these environmental risks and both their knowledge and the development of sustainable farming are only likely to increase if they have long-term security of tenure.

## *Land security in Diamaré Plain: Peasant perceptions*

Land is the peasants' main source of wealth in the region, is their primary means of production and justifies their existence. However, very few fields have traditional landownership certificates and in the villages, according to custom, the land belongs to the community and is collective. The customary chiefs and the notables are not landowners themselves, but are only guardians on the community's behalf. Whatever is produced there belongs to the person who produced it. The right of every peasant to cultivate land is recognised and it is the chiefs who must secure suitable land for them. However, with the increased demand in urban villages, the laws of the republic are being introduced and so peasants must secure a certificate of undisturbed right possession that guarantees their right to the land.

The different traditional landownership certificates presented above provide peasants with a perception of land tenure security in the region. For them, land tenure security means simply that they have the right to cultivate the land that they occupy. These are the lands that their forebears found and settled, and for which they made many sacrifices. Although the republic's land laws are increasingly present in rural areas, they must accommodate the widespread customary practice, as villagers are now receptive to the establishment of the land title. However, the process of obtaining a certificate from the public authorities is extremely complex, long and expensive; therefore, the peasants hope that the government will introduce a new law that will take into account their needs and demands.

Since the mid-1990s, following the first democratic elections, the peasants have begun engaging with administrators (sub-prefects, prefects, mayors) regarding their land issues without much success. As such, they are increasingly discussing land laws with their *Lamiibe* (traditional chiefs), as well as with other elected personalities (deputies and mayors). Those responsible for land reform have, since the multiparty state elections, promised to facilitate their access to land property titles. Sixteen years later, nothing has changed. The peasants hope that the creation in December 2004 of a Ministry of Property and Land Affairs in Cameroon will facilitate their acquisition of land title deeds with less delay.

## *Conclusion*

*Karal* land in the Diamaré Plain was considered to be an inalienable family property belonging to an entire lineage and could only be inherited from the father by the son or from an uncle by a nephew. But the advent of the market economy in the farming zones has affected the traditional land system. Land in general, and *karal* land in particular, is now subjected to unprecedented monetisation.

With the introduction of a market economy, family members have become interested in settling land rights and in managing the family inheritance. This situation sometimes triggers conflicts within families, which may have extra-familial repercussions. The intensification of land conflict exposed the operators of

*karal* land to insecurity. As a result, the traditional landownership certificates were introduced in the region and constituted an important landmark in the conflict resolution process.

This chapter has indicated the importance of taking into account peasant perceptions of the notion of land security in African countries where legislated texts are difficult to apply in rural areas. National land laws should take into account the viewpoints and the representations that peasants have regarding land tenure. This could result in a proposition within the legal texts that specifically applies to customary rural areas and their land.

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### *Interview*

Taiwe Paul, farmer in South Touloum division, Mayo-Kani Division in the Far North region of Cameroon, 23 March 2003




# RENEWED LAND INTERESTS, LAND USE, AND CONFLICTS

# 5 *The conflicting distribution of tourism revenue as an example of insecure land tenure in Namibian communal lands*

Renaud Lapeyre

Arguably, the extent to which tourism revenues generated in communal lands are redistributed among several actors, namely the state, the private sector and rural communities, is revealing of the current status of land tenure reform in Namibian rural areas.

At independence in 1990, the newly elected Namibian state inherited a highly skewed land distribution: freehold (private ownership) lands comprised 44 per cent of lands, the protected areas 15 per cent, and communal areas, where most people live, only 41 per cent (Fuller 2006: 2), leaving two issues to be dealt with. On the one hand, as the majority of rural inhabitants stayed in a limited and overcrowded portion of arid land, natural resources were depleted, thus threatening environmental sustainability. On the other, this uneven allocation of land and resources commonly led to underdevelopment and poverty among rural communities.

In this context, promoting nature tourism is an effective way to reconcile rural development and sustainability in Namibia. Indeed, due to the very arid climate and low soil fertility, this activity has greater financial returns on investment and better economic value than other land use options, such as agriculture, cattle farming and inland fishing (Barnes 1995; Barnes et al. 2002). In Namibia, tourism is already the fourth largest contributor to the national income, directly contributing an estimated 18 840 jobs (4.7 per cent of total jobs) in 2006 and 3.7 per cent of GDP (WTTC 2006: 12). As such, nature tourism is the fastest-growing subsector within the ever-increasing tourism market.

Nevertheless, multiple actors compete for resources and revenues in communal lands, especially the lucrative tourism assets, and in this competition, appropriating property rights proves crucial. Yet rural communities were disadvantaged from the start because the state and the private sector have forcefully retained most rights over valuable resources in the country. In particular, the colonial state kept full decision-making power over commercial tourism and hunting rights in communal lands and captured most of the revenue from photographic tourism and hunting activities.

In order to redress those past inequalities and improve the economic situation of previously disadvantaged populations, the Namibian state made land redistribution its priority. A National Land Conference was organised in 1992 (Werner 2001) and related discussions were held in Parliament; however, due to financial shortages

and cautious policies, restitution of freehold land and resettlement programmes did not reach their expected scale, and the legislation eventually maintained the status quo in communal lands. In 1990, former indigenous homelands (bantustans) were dismantled and declared state land under custodianship of traditional authorities (TAs). Article 100 of the Namibian Constitution, on the Sovereign Ownership of Natural Resources, states, 'land, water, and natural resources below and above the surface of the land and in continental shelf and within territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.' Thus powers and rights over land and resources in communal areas have in effect remained in public and private hands.

However, recommendations from international institutions, non-governmental organisations (NGOs) and popular pressure have compelled the government to consider policies to decentralise decision-making power and devolve rights in communal lands. In 1996 the Nature Conservation Ordinance Amendment Act (No. 5) was passed to grant partial rights over tourism resources to rural groups registered in conservancies. In 2002 the Communal Land Reform Act (No. 5) further clarified and secured rural inhabitants' rights, including in the tourism industry. As a result, this new legal framework has modified respective powers to allocate and appropriate rights over tourism resources and associated revenues. This is an essential economic change, which this chapter analyses in greater detail.

The purpose of this chapter is thus twofold: first, it analyses the influence of the evolving land legislation on the distribution of the tourism rent between different actors. Second, the chapter emphasises that the land legal framework is still incomplete. As such, conflicts over the appropriation of tourism revenues still remain and could threaten economic as well as environmental sustainability in communal lands.



## *The conceptual framework: Rights over common-pool resources and the nature tourism rent*

Theoretically, nature tourism is defined as a production process that transforms complementary assets (natural capital, infrastructure, human-made capital) into outputs, such as tourism services and packages (Vail & Hultkrantz 2000). In countries like Namibia that are relatively well endowed with natural capital, nature tourism in fact mainly depends on the prevailing background tourism elements: natural and cultural assets that are present in the area (Healy 1994; Jafari 1982). This includes open landscapes, mountains, rivers, fauna, flora and other natural elements that attract visitors to tourism sites. By transforming those production factors, that is, natural resources and ecosystems, into tourism products, actors then generate an economic rent – an economic surplus (Mollard & Pecqueur 2003).

In Namibian communal lands this potential tourism rent proves quite significant. Indeed, these areas present dramatic, open landscapes and contain endemic fauna

(desert-adapted elephant, black rhinoceros) as well as archaeological and cultural sites. As a result, some of the most-visited tourism attractions in Namibia are situated in communal lands: the world-renowned Bushman White Lady painting in the Brandberg Mountain; the Twyfelfontein rock engravings site; the Doros Crater sanctuary; the Himba human settlements, etc. Based on statistics elaborated by the Ministry of Environment and Tourism (MET), as well as Roe et al. (2003), tourism potential in communal areas from 2001 to 2007 has been evaluated (Table 5.1).

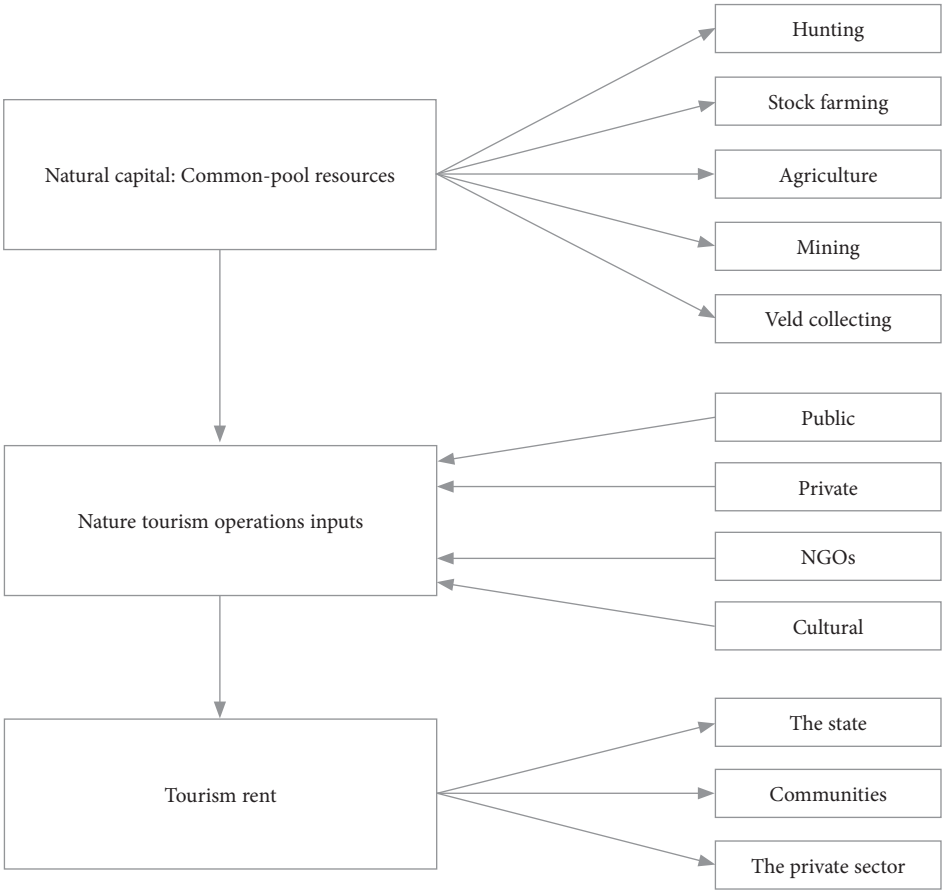
**Table 5.1** *Leisure tourists in Namibia, 2001–07*

| Travellers | 2001 | 2002 | 2003 | 2005 | 2006 | 2007 |
|---|---|---|---|---|---|---|
| A – Total holiday travellers | 322 748 | 430 167 | 299 437 | 321 773 | 405 904 | 474 426 |
| B – Angolan holiday tourists | 91 399 | 127 041 | 40 944 | 43 424 | 101 057 | 123 740 |
| C – Total holiday travellers excl. Angolan holiday travellers (A–B) | 231 349 | 303 126 | 258 493 | 278 349 | 304 847 | 350 686 |
| D – Domestic holiday travellers (11.25% of C) | 29 326 | 38 424 | 32 767 | 35 284 | 38 643 | 44 453 |
| E – Total holiday travellers in Namibia (C+D) | 260 675 | 341 550 | 291 260 | 313 633 | 343 490 | 395 139 |
| Total holiday travellers in communal lands (25% of E) | 65 169 | 85 388 | 72 815 | 78 408 | 85 873 | 98 785 |

Sources: Adapted from Roe et al. (2003) and NTB (2008)

In Namibian communal lands, background tourism elements are nevertheless best characterised as common-pool resources[1] (Briassoulis 2002; Vail & Hultkrantz 2000): on the one hand, it is often very difficult to restrict entry and use by outsiders (resources are open to almost anybody) and, on the other hand, several rival users compete for the same finite resource stock (when one actor extracts one unit of the stock, it reduces potential use by others). Furthermore, natural capital incorporated in tourism remains multifunctional (Vail & Hultkrantz 2000). For instance, landscapes are grazing areas for local farmers and photographic features for tourists; wildlife is an attraction for safari lovers and stands as subsistence meat for local hunters – thus, users compete for different use options from the same resources. Theoretically and practically, there is competition over local natural assets between farmers, hunters, cattle and livestock owners as well as tourism operators who need recreational landscapes. Just as the resource base is limited, so are resource flux and rents. In this context, several groups do indeed compete to capture the tourism rent. Figure 5.1 displays a theoretical representation of this situation of competition over land use and distribution of the tourism rent.

**Figure 5.1** *Rent generation from natural assets, by multiple users and its distribution*




Source: Compiled by author

Rural communities living in communal lands can generate tourism rent, based on their specific local natural assets (Mollard & Pecqueur 2003). Using attractive sites and abundant wildlife on their land, communities can indeed operate tourism activities themselves (tour guiding, camping, crafts, traditional villages, etc.) or work in partnership with other stakeholders in the tourism sector. However, private operators also seek to capture tourism rent. As attractions are mainly situated in communal lands, tourism operators actively try to operate businesses in these areas. As stated by the managing director of private company Wilderness Safaris Namibia, 'most interesting places are in communal lands. Wilderness areas are in communal lands. What we are looking for, when investing, is landscape, wild areas, wildlife, culture' (Dave van Smeerdijk interview). Private operators broadly share this point of view and thus try to get a share of this potential revenue by bringing tourists to and accommodating them in natural and cultural sites in communal areas.

Finally, the central state tries to capture a significant part of the tourism rent. Constitutionally the legitimate owner of resources in communal lands, the state legally controls (whether directly or indirectly) the allocation of rights over land and resources. Imposing taxes, driving and implementing land reform, declaring areas as national parks, national monuments, and public concessions are some of the possible mechanisms in the hand of the government to partially capture rent.

This competition over tourism common-pool resources and the associated rent potentially leads to unsustainable use, rent dissipation and overexploitation (Baland & Platteau 1996).[2] Indeed, users balance the average benefit (the resource stock divided by the numbers of users) with the entry cost, and new users enter the market as long as the average benefits outweigh the entry costs. When the system is in equilibrium, the situation is inefficient as the rent is totally dissipated. Further, the resource system tends to be overexploited and a 'Tragedy of the Commons' situation is plausible (Hardin 1968).

In this context, the allocation and distribution of property rights in communal lands determine the respective opportunities to appropriate resources and capture the tourism rent. According to Bromley (1997: 3, in Vail & Hultkrantz 2000: 224):

> …rights are not relationships between me and an object but rather are relationships between me and others [present or future] with respect to that object…To have a property right…is to have secure control over a future benefit stream. And it is to know that the authority system will come to your defence when that control is threatened.

The definition of legitimate property rights thus allows rent creation and appropriation. It further determines the distribution of the rent among actors and provides a potential solution to the mismanagement of common-pool resources presented above. Theoretically, Demsetz (1967) and others called for private property rights as a first way to avoid rent dissipation. In other words, commons should be divided and enclosed so that each agent is fully responsible and alone bears (internalises) the costs of overuse of the resource base. Private property rights, with universality, exclusion and transferability criteria, result in sustainable use and rent maximisation (Coase 1960). However, common property scholars (Baland & Platteau 1996; Ostrom 1990; Wade 1988) contradict this vision and show that clear rights are not restricted to private property. Ostrom and Schlager (1992) define bundles of rights over resources that clearly provide users with rights and duties over resources, according to their legal status. Such clarification, through common property regimes for example, secures rural inhabitants' rights and provides them with incentives to manage the commons sustainably and to generate rent efficiently.

In this context, land reform should devolve clear rights to local communities in order for them to capture equitable rent from nature tourism activities. Otherwise, multiple land use options will interfere, dissipate the total rent and eventually deplete the natural assets. The Namibian government finally pursued this legal solution in the mid-1990s.

## *Devolution of land rights and redistribution of the nature tourism rent*

### *Land tenure and tourism*

Although Namibia gained independence in 1990, the land situation did not significantly change until 1995. Of course, previous ethnically-based homelands were dismantled and declared state land under the custodianship of traditional leaders; however, farmers' rights over resources were still only temporary and insecure usufruct rights. As a result, the distribution of the tourism rent remained basically unchallenged, in favour of national-level actors (the state and private companies). In this context, in order to redress past inequalities and promote rural development and environmental sustainability, the government actively sought to modify land tenure and rights to resources in communal lands in favour of rural dwellers. Several pieces of legislation were thus passed and implemented.

First, the Policy on Community-Based Tourism Development aims at defining a legal framework for new tourism resources rights (MET 1995). Section 4.2 of the policy seeks to enhance community interests through planning by stipulating:

> …approval of PTO [Permission to Occupy][3] and concessions applications is part of the planning process. All PTO/concession applications for a tourism enterprise must include details of an agreement between the applicant and local community, before it can be approved by the MET… In assessing applications for tourism enterprises, MET will judge them against a range of criteria to include: degree of local participation and benefit in the enterprise…

Section 4.4 further promotes maximum benefits to communities from private sector tourism enterprises on communal land: 'MET…will give incentives for and preference for partnership and or revenue-sharing ventures, e.g. use criteria for judging PTO allocations and tourism concessions.' Finally, section 4.5 enhances rights over tourism resources and officially paves the way to the formal devolution of use rights for tourism to communal farmers. The policy states:

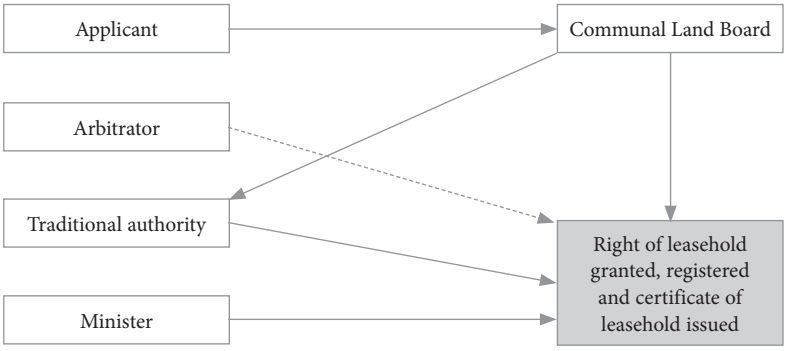
> In order to redress past inequalities, the MET needs to enhance the rights over tourism resources. At present they [communities] have little control over what happens to or on their land…MET sees conservancies[4] as a key tool by which communal residents gain rights over environmental resources, particularly wildlife and hence over tourism assets. Once the conservancy legislation is passed, MET will support communities to establish wildlife conservancies and to establish tourism ventures as appropriate. MET will give recognised conservancies (with a legal Trust Fund or other mechanism for administering and sharing revenues) the concessionary rights for lodge development (which they can utilise themselves or lease to others) within the conservancy boundaries, according to the same principles by which all tourism applications will be

considered, as listed above: i.e. local involvement, environmental impact, conformity with regional and national strategy, etc.

In line with this new devolution vision, the Nature Conservation Amendment Act (No. 5 of 1996) amends the Nature Conservation Ordinance of 1975. In accordance with this Act, rural communities can gain rights over natural assets if they register as conservancies. To be registered, local farmers must set up a community-based organisation, with a membership list, a constitution that defines rules and regulations, an elected management committee and a natural resources zonation and management plan.[5] Moreover, territorial boundaries must be agreed on with neighbouring communities. The Act grants conservancies rights over hunting game and non-consumptive[6] utilisation of game normally associated with tourism. If we refer to the typology of Ostrom and Schlager (1992), local communities gain rights of actions of a *proprietor* status: they control access to tourism resources, they manage those resources through tourism plans and regulations, and they can use them by themselves running a project. Finally, communities can lease their use rights to other operators and formally enter into a contract to develop lodges and other tourism facilities (Jones 2003).

The Communal Land Reform Act of 2002 is another positive step towards land tenure reform in rural areas. Through this Act the Namibian government aims at regulating land use options and clarifying rights of occupation in communal lands; it further decentralises decisions about land allocation to Regional Communal Land Boards. These Boards are now responsible for granting customary rights for residence and farming, as well as rights of leasehold[7] in communal lands. In the latter case, Figure 5.2 schematically displays the legal process when applying for the right. Legally, a right of leasehold is granted for a maximum of 10 years, renewable, and for a maximum area of 50 hectares.[8]

**Figure 5.2** *Application process for a right of leasehold, Namibia*




Source: Legal Assistance Centre (2003)

As a reflection of the changing balance of decision-making powers with regard to land, section 4(f) of the Act stipulates that conservancies' representatives shall legally sit on the Regional Communal Land Boards. As a result, conservancies, on behalf of rural residents, are now able to partially control allocation and distribution of rights over land and resources within their boundaries. In particular, all granting of rights is conditioned to conservancy acceptance and thus to the respect of certain environmental and socio-economic requirements. According to section 31(4):

> …before granting a right of leasehold in terms of subsection (1) in respect of land wholly or partly situated in an area which has been declared a conservancy…a board must have due regard to any management and utilisation plan framed by the conservancy and such a board may not grant the right of leasehold if the purpose for which the land in question is proposed to be used under such right would defeat the objects of such management and utilisation plan.

Overall, legislation passed in 1996 and 2002 has significantly modified opportunities to gain rights over land and resources in communal areas. Allocating rights is monitored at local level and the decision-making process now involves local communities. Thanks to new property rights devolved to them, rural communities are able to generate and appropriate tourism rent from natural assets situated on their land. The result has been a change in the respective economic powers and in the distribution of tourism revenues between the state, the private sector and rural communities.

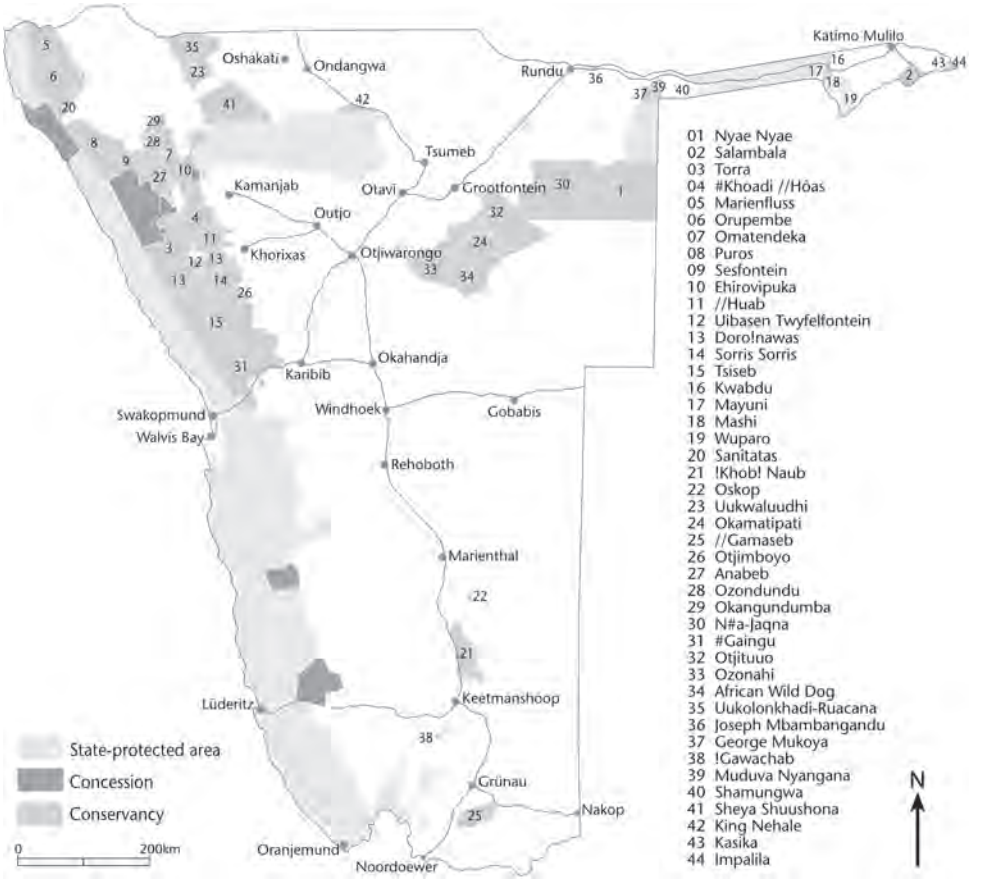


### *Redistribution of the nature tourism rent*

In January 2006, 44 conservancies were officially registered, covering 105 038 km$^2$ and involving around 200 000 rural people[9] (Figure 5.3). Thanks to the legal framework, those registered conservancies are now able to influence the allocation of commercial rights over tourism sites. As such, two possibilities exist for rural communities to generate rent.

First, rural communities can themselves develop and operate tourism activities, labelled as community-based tourism enterprises (CBTEs). In this case, a conservancy legally applies in its name for a commercial use right (right of leasehold) over an attractive tourism site (10–20 hectares) within its boundaries. It then employs local people to run the business and receives revenues and profits from the enterprise. Approximately 35 CBTEs currently operate in Namibian conservancies. Most are campsites catering to individual guests or tourist groups. Other CBTEs include craft centres, guide associations, rest camps, traditional villages and museums. As can be seen in Table 5.2, in 2005 CBTEs and crafts generated N$925 570[10] in the 44 registered conservancies.

**Figure 5.3** *Territorial re-appropriation of natural resources: Communal land conservancies in January 2006*




Source: MET (2006)

**Table 5.2** *Annual revenues in 2005 for 44 conservancies, Namibia*

| Natural resources use option | Total revenue (rent) N$ |
|---|---|
| Campsites/CBTEs | 518 355 |
| Trophy hunting | 2 662 602 |
| Joint venture | 7 602 410 |
| Crafts | 407 215 |

Source: NACSO (2006)

Second, rural communities, via conservancies, can now also negotiate contracts with private sector operators wanting to run commercial tourism activities within conservancy boundaries. Indeed, operators have to apply for a right of leasehold to the Regional Communal Land Board; in practice, however, these Boards often grant rights in the name of the conservancy where the development will take

place. The conservancy then sub-leases[11] this right to the private operator and a benefits-sharing agreement is signed between this private entrepreneur and the local community (represented by the conservancy committee). These joint-venture 'agreements' are reached either by direct negotiation or through a formal tender process monitored by NGOs such as the World Wildlife Fund or the Namibia Community-Based Tourism Association (NACOBTA). After the contract has been signed and the business is operational, the private sector should distribute 4 per cent to 12 per cent of the operation's annual gross turnover to the conservancy community fund. Moreover, provision is made for a minimum annual rental fee and a progressive transfer of building ownership to the community. Finally, a priority to hire local workers is imposed, as well as an obligation to train them into senior management positions. In total, the Acts of 1996 and 2002 have led to a fairer redistribution of tourism rent. Previously, private operators obtained PTOs from elites and local chiefs by bribing them with alcohol and cattle. No secure land rights allowed communities, as landlords, to get a reasonable share from tourism revenues generated on their land (Roe et al. 2001). In 2005 (Table 5.2), however, conservancies earned N$7 602 410 with joint-venture agreements, 307 full-time workers and 58 part-time workers were employed through those private–community partnerships, and some local employees reached senior management positions.

Devolution of rights to resources in communal lands through conservancy policy also played an important role in reshaping relations between the state and local communities. Indeed, certain communities adjacent to protected areas could sign an agreement with the Ministry of Parks and Wildlife after being officially registered as conservancies. Through this, the government aimed at redistributing revenue from parks to neighbouring populations living in communal lands. Co-management institutional arrangements were then set up to manage natural resources in protected areas, especially tourism resources (Birner & Wittmer 2000). In the Caprivi Strip, for example, the MET devolved operational rights over two campsites inside the Bwabwata National Park to two nearby conservancies. Thus the communities now benefit from the area and this helps to balance costs of living with wildlife. Similarly, near Walvis Bay, the Topnaar community, once expropriated and resettled outside the designated protected area, now runs its own campsite in the Namib Naukluft National Park and financially benefits from it.

In short, the new legislation, which forms part of the land reform process since 1992 in Namibia, has redistributed rights over resources among different actors. While the road to come is still long, up to now this has slightly modified the distribution of tourism rent in favour of local communities in communal lands. As a result, this has also partly promoted sustainable rural development, reconciling economic benefits with nature conservation.

However, despite all legislative provisions, the decentralisation and devolution process is still incomplete. Land reform is too slow and central government is reluctant to lose its main prerogatives and rights over natural resources. In this context, legislation remains segmented and actual implementation proves very difficult. This eventually leads to conflicts and unregulated tourism.

## *Insecure land tenure and tourism: Conflicts and unregulated activities*

### *Incomplete devolution of rights and conflicts over land use*

Corbett and Jones (2000) analysed differences between policy intention, legal provision and implementation of policies on the ground in Namibia. They showed that different actors interpret legislation differently, depending on their position in the institutional setting: legal advisors, ministry officers, consultants, NGOs and rural inhabitants all have different interpretations. This creates misunderstandings and leads to incomplete implementation of the legal framework. Table 5.3 demonstrates the disjunctions between policy intervention, the legal provisions and their implementation.

**Table 5.3** *Insecure rights and conflicts, Namibia*

| Policy intention | Legal provision | Implementation |
|---|---|---|
| Conservancies should receive concessionary rights to commercial tourism | Nature Conservation Amendment Act (1996) gives weak tourism rights (gives rights to non-consumptive use of wildlife, which includes for 'recreational' purposes)<br>No relevant tourism legislation | Government officials have renewed expired concessions held by the private sector within registered conservancies |
| Conservancies should be able to enter into joint-venture partnerships and other business arrangements with the private sector | Policy on Promotion of Community-Based Tourism (1995) promotes joint-venture approaches and aims to create a 'supportive and enabling legal framework' | Tendency by government to interpret policy as giving it the right to approve joint-venture agreements |

Source: Corbett & Jones (2000)

These implementation problems have prevented the #Khoadi //Hôas conservancy from acquiring rights over the Hobatere Concession, which lies inside its boundaries (Jones 2003). The area is communal land that was previously designated by the pre-independence Damara ethnic authority for hunting and conservation. At independence, the concession rights were transferred to the central government, as were all bantustans – in accordance with the Namibian Constitution – and became state land. Hence the conservancy has been negotiating fervently for the government to cede its concession right to them, but without success until very recently.[12] Indeed, in 2006 the central government was internally debating and defining its objectives concerning the future of communal land concessions. For example, the Palmwag Concession could revert to the state at the end of the period (in 2010), leaving Wilderness Safaris Namibia, which holds the concession rights and operates in the Palmwag area, facing an insecure situation. In this context of changing land tenure, further investment in tourism is very risky.

Lack of an effective land tenure policy is another main loophole in the regulation of tourism in communal lands in Namibia. The Community Based Natural Resource Management programme is based on sectoral approaches that are implemented by different ministries and departments; however, the legal framework lacks coherence and integration. The land policy is an illustration of this 'sectoral fragmentation' (Jones 2003). Even if the Communal Land Reform Act of 2002 gives power to communal land conservancies to control land allocation within their boundaries (by stating that allocation should not defeat objectives of conservancies' management plans), it does not provide for the possibility of granting group tenure over land. As a result, tenure insecurity and confusion still remain; hence conservancies are unable to legally enforce their zonation plans. For instance, Mosimane (2000) shows that the Torra conservancy does not have any legal backing to exclude outsiders from wildlife and tourism zones, which, in turn, allows outside farmers to come and graze their animals in a zone that has been defined for tourism purposes and has been leased out to a private operator, Wilderness Safaris Namibia. The situation looks like this: the lease contract, signed between the conservancy and Wilderness Safaris for exclusive use and benefits-sharing, stipulates that no farmers are to graze their animals in the zone, as it interferes with photographic activities that focus on wildlife (antelope, desert elephants, rhinos, etc.). However, legislation devolves rights to communities over tourism and wildlife, but not over grazing management; therefore, non-residents can legally use their customary rights (allocated by traditional leaders) to graze their animals in the tourism area. As stated by the concession manager of Wilderness Safaris Namibia in Torra, negotiation is the key element for tourism operators to keep good relations with other land use options (Tina Albl interview). Water and fertile grazing lands are often at the root of conflicts and disputes. As conservancies are not able to solve these questions legally, operators help local farmers with water supply points for their livestock and cattle. However, Mosimane concludes, 'in the absence of formal rules and regulations governing grazing rights and the creation of effective enforcement mechanisms, open access to the conservancy's grazing resources will remain a threat to its long-term viability and tourist potential' (2000: 13).

A further illustration can be found in the case of the Tsiseb conservancy and the Ugab Wilderness Community Campsite development in the Ugab River. Until March 2003, the local community operated the site as a CBTE campsite. From 2003, the site has been leased out to a private individual who operates a lodge and the campsite in this area. However, from the beginning this area has been a bone of contention with the local farmers. According to the Tsiseb conservancy coordinator, 'there was conflict between the farmers and the conservancy as the campsite is located in a good grazing area and the farmers wanted to know what would happen to their livestock' (Eric Xaweb interview). Indeed, while both activities seem mutually exclusive, farmers were still willing to continue farming in the tourism site. As no current legal provision is available to solve such conflicts, fortunately a voluntary agreement was reached through the mediation of local TAs. But without further legislation empowering conservancies, very unclear regulations will continue to result in conflicts for resource rights and could lead to degradation of the tourism commons.

### *Incomplete policy and unregulated tourism*

Since 1990, only draft tourism policies have been released, and they are not accompanied by official agreements or documentation. Thus, tourism regulation lacks a legal framework and conservancies have insecure rights over communal land resources (Table 5.3). Because communal lands are constitutionally common resources to be legally used by all citizens, a conservancy cannot restrict entry or exclude operators or drivers that behave in an environmentally unfriendly manner. Hence, unregulated tourism is, for instance, occurring in the Tsiseb conservancy: around the Brandberg, it is frequently reported by local farmers during the busy season that overland trucks,[13] carrying 15 to 20 tourists, stop and camp anywhere, without permission; similarly, off-road drivers freely track desert elephants in the Ugab River and harass them. Lost revenues for conservancies, as well as the ecological impacts of these activities, particularly on wildlife and soil degradation, are significant. Of course, signboards have been put up to try to restrict off-road driving and wild camping outside designated camps, but as both zonation plans and tourism management plans are only consultative documents, communities have, *de facto*, no legal authority. As a result, sustainability of the tourism commons is threatened and rent could be totally dissipated if this situation of quasi-open access to tourism resources remains.

The role of traditional leaders leads to further confusion in the regulation of tourism activities in communal lands. The Communal Land Reform Act of 2002 devolves powers to allocate customary rights over land to TAs. It also requires that permission from TAs should be obtained before Communal Land Boards grant rights of leasehold. Thus, local TAs play a role in the development of tourism by accepting and recommending projects to the Land Boards. Problems occur, however, when different TAs claim jurisdiction over the same area. The Traditional Authorities Act of 2000 states that TAs must be officially recognised by the central government before responsibilities are transferred to them. Nevertheless, often two or more TAs compete for jurisdiction over the same land, although only one of them is officially recognised. For example, while Chief Elias Thaniseb is the legitimate[14] chief of the Daures Daman Damara community located in the Tsiseb conservancy, the Namibian government did not recognise his jurisdiction and instead recognised the Okombahe TA as the custodian of customary land. This situation eventually led to confusion: the Ugab Campsite,[15] owned by an individual, could easily obtain a right of leasehold through the Okombahe TA, even though the conservancy (and chief Thaniseb) was willing to grant this leasehold only if a benefit-sharing agreement was signed between the community and the individual. In the end, this kind of legal confusion prevents conservancies from having full control over tourism development and revenues within their boundaries. This is even truer when rural communities have to directly share resources with a government body, as discussed below.

### *'Now it's a state-owned project':*[16] *A case of state re-appropriation of tourism resources*

Brandberg Mountain lies in the Tsiseb conservancy and includes numerous Bushman paintings and archaeological remains that attract scientists and tourists from all over the world. Specially protected mountain zebra species and the recently discovered gladiator insect are also of interest to them. The site was proclaimed a national monument in 1951 under South African legislation, which made provision for the National Monument Council (NMC) to become the custodian of the site and the body that manages and preserves it. Act No. 35 of 1979 stipulates:

> …the council may with the approval of the Minister make by-laws regulating the conditions of use by any person of any area of land which has been declared to be a monument and which is under the control of the council; and regulating the conditions for the erection of any building structure on any land declared to be a monument.



After independence, the Namibian government did not revoke this South African colonial law and the NMC thus remained custodian; however, during the period 1990–2004 NMC regulations were not actually enforced at declared national monuments, such as the Brandberg Mountain. Indeed, the sites were now situated in the newly declared communal lands and as the NMC had a shortage of staff (Florence Sibanda interview), the situation was one of *de facto* open access. Rural farmers settled close to the mountain as water was available and livestock and cattle grazed in the monument area. Eventually, the TAs, as recognised custodians of the communal area, along with the local community, decided to take care of the mountain themselves. In 1992 the Daureb Community Tourism Project was created. In 1995 the project became the Daureb Mountain Guides (DMG) Association and in 1997/98 the NACOBTA undertook to support the mountain guides enterprise. Guides followed training courses and the DMG, as a CBTE, received funds from the European Union. The DMG collected fees at the entrance and distributed the income to the guides. From the beginning of the operation (1992), guides felt responsible for tourists' movements and behaviour in the mountain; hence they tried to limit degradation by collecting waste and enforcing the rules. The community, through this community-based association, controlled the common resource. In 2004, 6 000 visitors came to the mountain and the DMG provided revenues for 15 guides, with an average monthly income of N$1 038. An average of six people per guide additionally depended on this source of tourism income.[17]

In 2004 the National Heritage Act (No. 27) was passed and the new NMC of Namibia subsequently appointed more staff members as the government wished to better protect national monuments. The application for Brandberg to be a Unesco World Heritage Site was also in the pipeline, which required that the site be preserved and well managed if the application was to be accepted. In 2003 workshops were held with local communities and the DMG, and in April 2005 control over tourism activities in the Brandberg was transferred back to the state through the NMC.

Hence, the NMC now collects entrance fees for guided tours to the mountain and in this regard it appoints its own two clerks; the guiding operation is then leased out to the DMG, which agreed to operate guided tours on behalf of the NMC. Financially, the first informal agreement (2005) stated that the DMG was to receive 25 per cent of the monthly entrance fees.[18]

Throughout this process, the government, via the NMC, did in fact re-appropriate local resources and expropriated the community's share. Whereas local community members have used resources from the Brandberg to earn income from tourism, these natural assets and revenues are now controlled by a government body. As a result, guides are now getting only a share from entrance fees and most tourism rent is monopolised by the state. Furthermore, the DMG's situation is insecure as the NMC only informally recognises the local guides' association.[19]

This decision by the NMC to take over the management of the Brandberg site eventually led to significant conflicts. Indeed, local guides felt dispossessed of their main source of revenue and thus did not accept this process of re-centralisation. As stated by one guide:

> These people from NMC come to us with contracts, they do not consult us on these contracts, and they want us just to sign the contracts… They want to make things from Windhoek. They do not want to let the communities manage at the local level… (anonymous Twyfelfontein guide interview)

In June 2005, guides decided to create an umbrella body to defend their interests and oppose this unilateral decision. Unfortunately, to date the situation remains one of uncertainty: no formal agreement has been signed yet and cooperation between the NMC and guides is quite weak.

## *Conclusion*

In a post-apartheid era, Namibia faces one of the most uneven income distributions in the world. Local communities, entrepreneurs and the state now compete for scarce and valuable resources. The pre-independence land distribution favoured the public and private sectors in their rent-seeking strategies, and the legacy of colonial and racist policies was thus poverty and conflict over the redistribution of resources.

In order to promote rural development and enhance the livelihoods of 'previously disadvantaged' Namibians, the current land reform reshapes power relations by devolving rights over communal lands to communities, thus granting the latter the authority to control nature tourism and local development. Indeed, the present study shows that the use of natural resources is re-allocated and rent is redistributed between and within groups. However, conflicts remain over land use options in a context of multiple agents and common-pool resource systems. Land reform is incomplete as legislation and policies do not secure the bundles of rights of respective actors, leading to confusion and inefficiencies which threaten natural asset

sustainability. State and private sectors still control the decision-making process and communities have little decision-making power in the internationally driven global tourism supply chain. Often, *de jure* authority devolved to communities over natural resources proves to be only a *de facto* open access regime, thus making communities unable to capture the tourism rent. Moreover, the state is reluctant to decentralise as it will mean loss of revenue and control. Examples even show a process of re-centralisation of some tourism resources and rent.

Finally, the redistribution of rent between different social groups (public sector, private sector, rural communities) does not automatically lead to fair re-allocation within a specific group. Indeed, hierarchy, group heterogeneity and the concentration of power among a few local elites (elite capture) still prevent land reform from meeting its objectives, in particular with regard to poverty alleviation. In this context, new conflicts might be imminent, as the poor still need further devolution of *actual* rights to capture a significant share of tourism revenues.

***Notes***

1 Common-pool resources are also referred to as 'the Commons'.

2 This is the traditional problem related to mismanagement of common-pool resources: non-exclusivity and rivalry lead to rent dissipation.

3 In the system prior to the Communal Land Reform Act (No. 5 of 2002), rights to occupy a site and operate a commercial tourism venture were legally granted for 99 years by the Ministry of Lands in Windhoek.

4 See later for a detailed explanation of conservancies.

5 The zonation plan defines zones where different land use options will be chosen. For instance, there is a wildlife and tourism zone, a grazing zone, a breeding zone, etc. The management plan states who is allowed to access the zones and which exploitation rules should be followed. Following Baland and Platteau (1996), conservancies' resources are thus held under regulated common property regime.

6 The definition of non-consumptive utilisation contained in the Act includes use for 'recreational, educational, cultural, or aesthetic purposes'.

7 A right of leasehold replaces the PTO in the former land system (before 2002). It defines the right to occupy an area and commercially use it (business, tourism operation, etc.).

8 When granting a right of leasehold for a period exceeding 10 years and/or for an area bigger than 50 hectares, a Regional Communal Land Board must get prior written approval from the minister.

9 All of whom are not necessarily registered members. Members are adults over 18 years old who have been living in the conservancy for more than five years. A $N5 fee must also be paid.

10 In 2005, US$1 = approximately N$7.

11 Although no official provision is made for sub-lease in the Communal Land Reform Act.

12 In 2008, the state finally transferred its rights over the Hobatere Concession to the #Khoadi //Hôas conservancy.

13 Former military trucks that are now used to operate low-cost camping tours.

14 This means that local inhabitants recognise him as their traditional chief and thus obey him.

15 This is a different campsite to the Ugab Wilderness Community Campsite that was mentioned earlier. However, it also lies in the Tsiseb conservancy.

16 Interview Adelma/Uises, Tsiseb conservancy vice-chairman.

17 Data collected in May and June 2005.

18 In 2005/06, no formal written contract was signed. In September 2005, the percentage distributed to the DMG grew up to 50 per cent.

19 This means that legally the NMC could unilaterally decide to prohibit some or all of the DMG guides from guiding on the mountain.

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### *Interviews*

Adelma/Uises, Tsiseb conservancy vice-chairman, May 2005, Uis, Erongo Region

Tina Albl, concession manager of Wilderness Safaris Namibia in Torra, 15 April 2005, Windhoek.

Florence Sibanda, scientific officer, National Monument Council of Namibia, June 2005, Windhoek

Dave van Smeerdijk, managing director of Wilderness Safaris Namibia, 3 June 2005, Windhoek

Eric Xaweb, Tsiseb conservancy coordinator, interview in WILD Working Paper Series, 17 March 2003, and interviews in !Gaus and Ugab settlements on 25 May 2005

Anonymous guide at the Twyfelfontein rock engravings site, 17 May 2005, Uis, Erongo Region

# 6 *Land rights and enclosures: Implementing the Mozambican Land Law in practice*

Christopher Tanner



Mozambique has achieved widespread recognition for having what some call the best land law in Africa (DfID 2008). This law emerged after a decisive response by the first democratically elected government to growing post-civil war tensions over land, and an awareness of the need for a modern land policy that would attract and facilitate new investment. An exemplary democratic process involving several public sectors, civil society and experts resulted in the 1997 Land Law, which fully took into account customary land occupation and administration, while including guarantees and mechanisms to promote investment (Tanner 2002). The question now is: has Mozambique been as successful with the challenge of its implementation?

Policy choices in 1995 were restricted by the 1990 Constitution, which maintained the principle of state ownership and did not allow land sales. Yet, like other African countries with similar post-independence histories, free market reforms and the 1992 Peace Accord were already turning land into a valuable asset (Bruce & Tanner 1993; Tanner 1991, 1994, 2002). Refugees and internally displaced people returning to farmland to which they had customary rights found their land occupied by strangers, often in the possession of new documents issued by the state land administration. Government and donors were worried that the existing law did not protect the poor and would not attract investors to a war-ravaged country desperate for new capital.

The need to recognise customary forms of land access and management in the new policy was indicated by the lack of local conflict during the resettlement of millions of 'family sector' farms. It was clear that in spite of years of war and upheaval, these traditional land administrations were in effect *the* land management system of Mozambique, providing a vital zero-cost service to the state (Myers, Eliseu et al. 1993; Myers, West et al. 1993; Tanner 1993).

Farm systems research also showed how local livelihood strategies adapt to local conditions, minimising risk through the use of different resources throughout the year (De Wit et al. 1995, 1996). This suggested a very different view of land rights compared to the official view of the 'family sector' farm on a discrete plot of land that guided post-independence socialist ideas, also evident in other African countries with similar histories (De Wit 1996; Tanner 1991).

Meanwhile, post-independence governments did little to change the colonial land structure recorded in the cadastre. Most colonial plantations simply became state farms and cooperatives. These were later allocated as complete units directly to new

private investors, creating tensions with the original local occupants who still claimed rights over them (Tanner 1993). Smaller colonial units remained as 'properties' on official records, and in recent years have been progressively transferred to private interests. Thus, the colonial map is still largely intact, but with different 'owners'. Meanwhile, local people and farm workers with pre-colonial and other informal rights have occupied many of these areas, resulting in serious conflict when they are given to new private interests (Myers, Eliseu et al. 1993; Myers, West et al. 1993; Tanner 1993).

This mix of surging demand, reasserted local rights and a complex inherited land structure was creating serious problems in 1995. Yet national experts argued that while 'most local farmers resorted to traditional authorities to acquire land' (Carilho 1994: 69), there was a general feeling that existing legislation was adequate and needed only a few adjustments (FAO 1994a, 1994b). A process of 'indigenous modernisation' – 'modernisation from within, based on the Mozambican reality' (FAO 1994a: 15) – was, nevertheless, a major long-term goal. Some also argued that the coexistence of marginalised customary systems and a weak public land administration had created 'a situation of great institutional weakness in relation to natural resources management' (Rodrigues 1994: 158). Therefore, the law was not the problem – effective implementation was needed, and this required stronger public land administration.

These opinions had a familiar ring in 2009, with recent documents saying that the legal framework was sound but needed to be better implemented (Calengo et al. 2007; World Bank 2009). In the mid-1990s, however, when the Inter-ministerial Commission for the Reform of Land Legislation (hereafter the Land Commission) was created, demand for land was already rising exponentially, boosted by the Peace Accord, successful multiparty elections and continuing economic reforms. Economic and political changes were creating a very different policy and legal challenge; therefore the Land Commission initiated a full review of policy and legislation along the 'indigenous modernisation' line.

This chapter argues that the resulting 1997 Land Law has had some success managing the new land challenge in Mozambique. This has been confirmed by many commentators and in a National Commemorative Conference marking 10 years of the Land Law in October 2007 (Calengo et al. 2007; Commemorative Conference 2007). Meanwhile, although the new 2004 Constitution confirms state ownership, political stability created by successful multiparty elections boosts demand for land still further, and local land rights are under immense pressure from both international and national investors. The pressures created by this demand, and a continuing lack of effective implementation by a still unreformed land administration, are resulting in a *de facto* enclosure process that seriously threatens local rights and the equity-enhancing potential of the 1997 legislation.

## *A controlled enclosure movement*

National experts, who recognised the existence and legitimacy of customary land systems in the mid-1990s, also accepted the need for a legal framework in tune with a modern market economy. They agreed that specific articles of the existing Land Law should be changed to allow the transfer of use rights through a market of some sort, and to enable the 50-year state leasehold to be automatically renewed (FAO 1994b).

Because the basic constitutional principle of state ownership could not be changed, the focus was rather on changing the ways in which the state-allocated land use and benefit right (DUAT – *Direito de Uso e Aproveitamento de Terra*) could be used. Old ideas about 'family sector occupation' also had to change, based on evidence from production systems and livelihoods analyses that indicated that customary rights covered far wider areas than previously thought, including common land and areas reserved for family expansion. Public land services also needed to be reformed and upgraded. A case was made, therefore, for a more radical policy review and a new land law which would protect local rights by recognising the legitimacy of customary systems, *and* provide investors with secure long-term rights and some form of marketability in land rights.

The 1995 National Land Policy addresses both issues in its central declaration to:

> [s]afeguard the diverse rights of the Mozambican people over the land and other natural resources, while promoting new investment and the sustainable and equitable use of these resources. (in Serra 2007: 27)

Protection of existing rights and conditions for secure investment were built into the new law, with important implications for the land map of Mozambique. Firstly, customary and formal land administrations were integrated within a single policy and legal framework. Thus, Mozambique is *not* divided into distinct community and commercial areas; rather, different types of occupation and land use coexist, often side by side. Secondly, the policy recognises the legitimacy of extensive customarily acquired land rights, and gives them full legal equivalence to a state-allocated DUAT.[1] These rights can be recorded using a methodology specified in the Land Law Regulations. In terms of legal rights, there is in fact very little 'free' land in Mozambique.

The 1997 Land Law also facilitates equitable and sustainable rural development by allowing negotiated private sector access to customarily acquired land, resulting in agreements benefiting local people. Moreover, individuals with customary rights can also take their land out of customary jurisdiction. The law recognises rights acquired by 'good faith' or squatter occupation, in order to safeguard internally displaced peoples who remained where they were after the war,[2] and to protect the millions who simply occupy land without formal documents (a particularly important provision in the peri-urban and urban contexts).

The law also empowers local people to participate in land and natural resources management, including the allocation of rights to investors, and in conflict resolution. Private investors seeking new DUATs must consult local communities first. Local people can choose to keep their rights, or agree to terms with investors ('partnerships' under the Land Law) for ceding their rights to them. Finally, the new Regulations drew a line under any further attempts to revalidate rights held by former colonial occupants, and required that all new requests for land that were not yet complete should comply with the new law, including the key community consultation provision.

The 1997 Land Law is, therefore, a blueprint for a controlled and equitable process of rural structural transformation. It also promotes a more rational use of land, permitting the transfer of some local rights to new land users, in the hope of providing a more productive future for all. In this sense, Mozambique presently shares the vision of those who proposed the enclosures of eighteenth-century England. To quote one eighteenth-century enclosure Act:

> And whereas the Lands and Grounds…lie inconveniently dispersed, and intermixed with each other, and are in general so disadvantageously circumstanced as to render the Cultivation and Management thereof very difficult and expensive; but if the same…were divided and allocated and enclosed, they would be rendered of much greater Value, and might be much improved…(*sic*) (quoted in Russel 2000: 56)

Similar sentiments are often heard among investors and policy-makers in Maputo who are frustrated by the apparent waste of land in the hands of peasant producers. Yet, while the new law *is* a document advocating change and the development and utilisation of resources, senior commentators also underline the need to protect local rights as the precondition for a process of equitable land rationalisation and rural transformation which brings 'advantages that guarantee the defence of the interests of local communities' (Do Rosario 2005: 177).[3] Achieving this vision of equitable and socially beneficial 'structural transformation' is the greatest challenge of the 1997 Land Law.

## *Land Law implementation*

Proper implementation of the law should result in a *de facto* redrawing of pre- and post-independence land maps, as local people register customarily acquired DUATs and make deals with investors who want their land. Such 'controlled transformation' should begin by recording existing customarily acquired rights on official land maps. A second layer of existing and new 'non-customary' DUATs can be added over these, coexisting within the same overall area. As investors seek land and make agreements with communities, this two-layered base map should change, as areas under community jurisdiction pass to investors under the watchful (and authorising) eye of the state land administration.

### *Recording local rights*

The production systems and livelihoods analysis of land rights translates into customarily acquired DUATs being legally recognised over resources that are not always 'occupied' in the direct sense of presently being worked. These areas can be very large and are included within what the law defines as 'local communities':

> A grouping of families and individuals, living in a circumscribed territorial area at the level of a locality [the lowest official unit of local government in Mozambique] or below, which has as its objective the safeguarding of common interests through the protection of areas of habitation, agricultural areas, whether cultivated or in fallow, forests, sites of socio-cultural importance, grazing lands, water sources and areas for expansion. (Law 19/97, Article 1, Number 1)

The local community itself is a titleholder of a single state DUAT, which is managed according to the principle of 'co-titularity', regulated by the Mozambican Civil Code: when decisions are made affecting the collectively held DUAT, all local community members have an equal say. The law also recognises that customary norms and practices determine individual and family land rights within the community. These lower-level rights are also equivalent to state DUATs, and do not have to be formally registered. Recording the overarching community DUAT on official maps does, however, give them adequate protection and makes the codification of the many customary systems unnecessary. Finally, the unequal treatment of women in some customary contexts is addressed by affirming the primacy of constitutional principles.

In 1998 local communities were officially recognised as being 'open border' systems (Tanner et al. 1998). While the community DUAT is private and exclusive – like any other DUAT – investors can come inside and occupy local land if it is 'free of occupation' or if the community agrees to cede its rights. Although the Cadastral Atlas should by now be amply covered by the contours of local community DUATs, this is not the case for two important reasons. Firstly, the law does not oblige local communities (or their members) to identify and register their rights. Secondly, the public land administration has paid little attention to this aspect of the Land Law.

#### *Registering customarily acquired rights*

The legislators recognised that communities do not have the resources or know-how to comply with a legal obligation to 'register or lose your rights'.[4] Therefore, DUATs acquired by customary or 'good faith'[5] occupation do not have to be registered. Furthermore, the absence of a title document (*titulo*) does not undermine legality of these DUATs, so long as they can be 'proven in terms of the present law'.[6]

However, not being required to register a right does not mean it should not be done. Proof by means specified in the law is an important condition – it is sometimes necessary to prove local rights and show where they exist. Article 15 of the law contains the important provision that proof of a DUAT can include 'evidence

presented by members, men and women, of local communities', a breakthrough in ways to help local people to prove and secure their rights. In addition to this, 'expert opinion and other means permitted by law' are allowed.[7] These 'means' are contained in the Technical Annex to the Regulations: a field-tested participatory methodology – delimitation – that proves the community-held DUAT, and establishes the area over which it extends. The process relies heavily on community-based evidence, and looks at evidence of historical occupation, production and social systems, as well as traditional boundaries (Land Commission 2000a). The resulting 'participatory map' has to be verified by neighbouring communities before being transferred to official maps, at which point a Certificate of Delimitation is issued in the name of the community.

Not having to register these rights also means there is no pressure on public services to record them. Therefore, although these customarily acquired DUATs exist all over Mozambique, very few have been formally mapped and registered. If they had been, the land use and occupation map would show that very large areas are already occupied and have secure community-held title, leaving little – if any – 'free' land. Indeed, in 2005, the then National Director for Land admitted in a national meeting that this is a significant weakness in the public database.[8] More recent data confirm that this is still the case, with up to 292 communities delimited, against a total of well over 20 000 'new' or non-community DUATs registered in official records (personal communication, Simon Norfolk).[9]

*Knowing your rights*

Unregistered community and 'good faith' DUATs may be legally recognised, but are invisible to anyone but local people. Faced by rising demand for land, local people are then exposed to *de facto* expropriation and are not really in a position to negotiate with investors: how can you negotiate over land if it is not clear to whom it belongs? Local communities therefore need to know their rights and why they are important.

To this end, public education has been provided in several ways since the law was approved. Firstly, copies of the Land Law Bill were made available to the public in the national press prior to the debate and passage of the Bill into law by the Assembly of the Republic. All laws must also be gazetted in the *Boletim Oficial* to formally come into effect, and copies are available from the Public Information Bureau and the Official Press (*Imprensa Oficial*). In practice, however, few local people will have been informed in this way.

Secondly, delimitation itself raises local awareness about rights, with significant 'knock-on' effects in terms of local organisation and confidence.[10] The Land Commission and the Food and Agriculture Organization (FAO) of the United Nations also trained over 120 NGO and public sector field staff to use the participatory delimitation methodology.[11] Many of those trained are now in senior posts in NGOs and projects, and continue to advocate for better implementation of

the community aspects of the Land Law. The Land Law, Regulations and Technical Annex have also been translated into six national languages, the only legislation (including the Constitution) to have been translated to this extent.

Thirdly, and most importantly, a National Land Campaign launched by national and international NGOs in 1998 took six basic Land Law messages to the local level:

- consultations (between local communities and would-be investors) are obligatory;
- communities may sign contracts (with investors, the state);
- women have equal rights;
- rights of way must be respected;
- register your rights;
- conflict resolution (Land Campaign 1999).

Following the Land Campaign, several NGO groups have worked hard to keep provincial Land Forums going, especially in Nampula, Manica and Sofala provinces.

Fourthly, specific development projects and programmes have spread awareness through practical applications of the Land Law. For example, the National Directorate for Forests and Wildlife (DNFFB)/FAO Community Based Natural Resources Management (CBNRM) programme of the Ministry of Agriculture has reached over 68 communities since 1996. Community delimitation is integrated with participatory land use planning ahead of community development activities (Durang & Tanner 2004; Enosse et al. 2005). FAO food security programmes, where natural resource access is a key issue, also employ Land Law and delimitation principles to promote equitable and negotiated development predicated on the recognition of local rights (FAO 2008; Norfolk & Tanner 2007).

The cadastral service has trained district administrators and other sector officers, and an English-language version of the Land Law is available on their website.[12] This training focuses more on handling new private sector land requests, however, and community delimitation has not been a high priority (CT Consulting [CTC] 2003). The FAO–Netherlands-supported Paralegal and District Seminar Programme run by the Centre for Juridical and Judicial Training (CFJJ) of the Ministry of Justice is more comprehensive (Serra & Tanner 2008). Between 2006 and 2008, some 252 paralegals (including 65 women) working in communities were trained, not just in the Land Law but in other natural resources and environmental laws; and 157 district officers – administrators, judges, district attorneys, police chiefs and land administrators – have a better understanding of these laws and how to use them to promote equitable, participatory development.

*Progress to date*

While the law does not oblige communities to register their rights, registration is becoming more important, both to secure local resources and as a first step in development initiatives. Yet, apart from 21 Land Commission pilot projects to develop the delimitation methodology, few delimitations have been supported by the public sector. Most of this work is done by NGOs with bilateral support, notably

the British Department for International Development (DfID), the Netherlands and Germany. The latter have supported community delimitation programmes by the national NGO ORAM[13] in Zambezia, Nampula and Sofala provinces respectively. Important work has also been done by smaller local NGOs, such as Kwaedza Simukai and Caritas in Manica, and the Swiss NGO Helvetas and Action Aid in Maputo Province and Gaza. All these NGOs have acquired solid operational and technical capacity over the years, and continue to promote the community aspects of the 1997 law.

The impact of focused donor support is evident in a comprehensive survey carried out for DfID in 2003, which showed that 180 communities had been delimited by June that year (Table 6.1). However, of the 180 delimited communities, just 74 had certificates issued by provincial cadastral services. Reasons for not issuing certificates vary from not having an officially prescribed form, to the presence of private investors and/or conflicts within communities. For example, one certificate that had already been issued was held back by the local administration, which argued that handing it to the community would cause conflict in an area of high investor demand.[14]

Table 6.1 *Community land delimitations under way and completed, Mozambique, June 2003*

| Province | Number of delimitations | Number of certificates issued | Number of titles issued | Number of substantial post delimitation activities |
|---|---|---|---|---|
| Niassa | 5 | 3 | 0 | 1 |
| Cabo Delgado | 11 | 0 | 0 | 0 |
| Nampula | 56 | 19 | 24 | 1 |
| Zambezia | 48 | 28 | 0 | 1 |
| Tete | 2 | 0 | 0 | 0 |
| Manica | 18 | 4 | 0 | 1 |
| Sofala | 17 | 5 | 0 | 1 |
| Inhambane | 5 | 0 | 0 | 0 |
| Gaza | 9 | 8 | – | 1 |
| Maputo | 9 | 7 | – | – |
| Total | 180 | 74 | 24 | 6 |

Source: CTC (2003: 19)

It is not clear how many 'local communities' there are, but the Ministry of State Administration has recorded over 10 000 villages. Usually, a 'local community' includes several villages, so there could be anything between 2 000 and 3 000, all with extensive legally recognised DUATs. Cadastral maps should be full of the outlines of these community DUATs. Where large communities are registered (for example in Niassa Province), they do stand out alongside the private sector DUATs, which – by law – have to be recorded; overall, however, the communities so far recorded do not make a big impact on official maps. In fact, the absence of local rights on these

maps seriously understates the extent of legal land use and occupation, and creates an impression of large 'empty areas' available for investment.

*The public sector response*

The cost of delimiting local rights is often given as a reason why more has not been done. A report for DfID in 2003 estimated that a delimitation costs from US$2 200 to US$8 800, depending upon the terrain and logistical factors – an average figure is around US$6 000. This may seem high, but it is cost-effective if it gives once-off documentary and visible (recorded on a map) security to the hundreds of households who make up a local community, and if compared with the cost of securing a DUAT for an individual investor. For example, it can cost US$400 to survey and provide a title document for a 2- to 10-hectare plot (CTC 2003: 35). For a community of 50 households, this would be US$20 000. Delimitation is a good deal in this context.

The absence of local rights on cadastral maps is then fundamentally the result of weak public sector commitment to community rights registration. Apart from the 21 Land Commission pilot projects, little public funding has been available, and even declined from 2001 to 2003 (Table 6.2). Using the then exchange rate of Meticais (Mts) 20 000/$US suggests that public resources could have funded 10 delimitations in 2001, and only three or four in 2003. This is an extremely low level of funding for a state committed to safeguarding the basic rights of its citizens. In fact, the CBNRM programme, run by the DNFFB and FAO, has probably done more than the state land administrators to provide some level of public support to community aspects of the Land Law, by supporting delimitations to secure the forest and other resources that will subsequently be managed by local people.



**Table 6.2** *Allocation of public sector resources to community land delimitation through PAAO SPGC budgets, Mozambique, 2001–03*

| Province | Resources for community land registration (Mts 1 000) | | | Resources for community consultations (Mts 1 000) | | |
|---|---|---|---|---|---|---|
| | 2001 | 2002 | 2003 | 2001 | 2002 | 2003 |
| Niassa | 142 520 | 28 080 | 116 400 | 0 | 88 000 | 0 |
| Cabo Delgado | 67 920 | 0 | 23 500 | 34 060 | 14 000 | 0 |
| Nampula | 301 040 | 57 600 | 0 | 71 832 | 41 800 | 42 600 |
| Zambezia | 335 080 | 73 800 | 83 260 | 62 000 | 130 500 | 42 720 |
| Tete | 36 432 | 90 000 | 37 260 | 0 | 25 380 | 0 |
| Manica | 27 504 | 22 680 | 83 425 | 79 200 | 37 900 | 81 700 |
| Sofala | 147 488 | 0 | 0 | 26 720 | 0 | 0 |
| Inhambane | 0 | 47 520 | 20 184 | 0 | 176 400 | 0 |
| Gaza | 80 000 | 11 520 | 5 800 | 0 | 0 | 0 |
| Maputo | 10 836 | 118 700 | 42 840 | 7 224 | 0 | 0 |
| Total (1 000 Mts) | 1 148 820 | 449 900 | 412 669 | 281 036 | 513 980 | 167 020 |

Source: CTC (2003: 44), using data from the sector programme PROAGRI
Notes: Annual Action Plan of Operations (PAAO) and Provincial Geography and Cadastre Service (SPGC)

The Technical Annex indicates when delimitations are necessary, with implications for who pays. Priority is given to conflict areas, where the Public Administration 'decides on how the costs are divided', presumably between stakeholders. Next are areas where new projects are proposed (state or private). Here the Annex is clear: 'costs are supported by the investor'.[15] The third situation is when the community requests delimitation. Although nothing is said about costs, it is likely that the community or a supporting NGO would pay.

As already indicated above, NGO programmes are the main source of funding for the majority of community rights work. To quote the CTC (2003: 43) report:

> In practice, it is very rare for delimitation and registration costs to be supported by a new investor or the State. There are no cases yet of the State proposing a delimitation as a first step in a local development process, as specified in the Land Law Regulations. Accordingly, there are no cases where costs have been assumed either by the public sector, or by the investor at the direction of the local administration. All community land delimitation exercises can then be said to be at the request of the community, and costs are transferred to the community or its support NGO. In practically all cases recorded to date, NGOs or similar organisations have covered the costs and carried out the work.

This situation has changed little since 2003, when the CTC report suggested an 'optimistic rate' of some 45 delimitations per year (based on Table 6.1, all delimitations). Assuming a baseline of 180 in 2003, this would give a 2008 total of 405 communities delimited. A recent review of official data suggests a current figure (early 2009) of 298,[16] which is significantly short. In fact, the number of communities delimited has now been accepted by government as a key indicator in the Performance Assessment Framework which informs the government–donor Joint Review process. The *accumulative* target of 242 communities 'delimited and registered' by end-2008 has been met (República de Moçambique 2009: 9), but this is well short of even the 299 that could be expected using the 2003 'with certificates' figure of 74 as baseline. Moreover, certification is still a problem, and other data show the rate of delimitation falling dramatically in the last two years.[17] This is attributed to a regulatory change that imposes conditions on communities that were previously only applicable to investors, and requires that delimitations are approved by the Council of Ministers.[18]

Current agricultural sector programmes[19] appear to allocate even fewer resources to recording the land rights of the majority rural population. Instead, regulatory changes, land use and occupation inventories, and a recent zoning exercise to find land 'available' for large-scale investors (over 10 000 hectares) are restricting community rights. A more narrowly defined interpretation of 'occupation' is emerging, focusing on areas of actual use – existing plots and housing – rather than the extensive Land Law definition of a local community.[20] Therefore, there is an

even greater likelihood that official maps will effectively reduce the legal rights of communities and small farmers, and re-impose the orthodox view of 'family sector' farms that existed before the 1997 law.

*Private sector and other non-customary land rights*

Compared with community-held rights, the treatment of private sector land rights under the 1997 Land Law has been different. Practically all public sector funding in the last two governments has gone to fast-tracking private sector requests for new land rights. In contrast to the 180 community delimitations registered by mid-2003, the CTC reported many thousands of private sector land claims processed by public land services since the Land Law came into effect. The full extent of the differential treatment of 'occupation' DUATs and those held by the private sector is revealed in the recent survey of official records already cited, with more than 20 000 privately held DUATs registered.

Apart from the weak public commitment to delimitation, the major reason for this dramatic imbalance is that, unlike community rights, the registration of new DUATs acquired from the state is legally mandatory. The result is an official land map of Mozambique that presents a seriously one-sided view of where legally attributed and protected rights actually exist, and which gives the impression of vast areas where no rights exist at all. Moreover, even the administration of these formally registered rights is not free of problems, with overlapping rights and poor survey work causing many land conflicts between investors as well as with local communities (Baleira & Tanner 2004).

*Historical land units*

There is another underlying layer of landholdings with roots in the colonial era: the colonial plantations that became state farms after independence, and the thousands of smaller colonial properties that still exist on the cadastral database with their original borders. The establishment of these colonial units always involved the relocation of local people from the best land to marginal areas nearby, where they formed a labour pool for the colonial enterprises (see Negrão 1995).

With the post-independence nationalisation of land, all colonial properties that were not converted into state farms should have disappeared off the map. Instead, they have remained silently in cadastral records, treated by the land administration as discrete (albeit moribund) 'properties', already alienated from community control. Since the mid-1990s they have been the focus of growing private sector interest, and many have been privatised as going concerns. In many cases, however, local communities have already settled on this land, often asserting prior rights that existed before Portuguese occupation. They argue that, under the 1997 Land Law, these areas have reverted to local community 'use and occupation', either by customary practices or 'good faith' occupation.

When an investor wants to take over one of these 'properties', an acute conflict inevitably starts with local residents. The state argues that local residents have no permanent right to be there, having been 'allowed to stay' until a new owner was found. Residents in turn argue that they have been there for years and have *de facto* acquired DUATs either as a community or as individuals. Recent research into natural resource conflicts has revealed many such cases (Afonso et al. 2004; Baleira & Tanner 2004) where local people are in conflict with the new 'owner' of an old colonial property that has been transferred to him or her by the state, without regard for the presence of local communities.[21]

Colonial national parks and official hunting reserves (*coutadas*) also remain 'public domain' areas where, in theory, no one can live, farm or hunt. Again, however, all of these areas have significant resident populations who claim historic rights, and who reoccupied 'their' land during the years of neglect and war. These people end up in conflict with both the state and private firms now securing management contracts for tourism or safari hunting businesses. This issue is even more complex in the new national parks created since independence, where local people claim pre-existing rights. The debate in Mozambique as to whether local rights cease to exist when a new park is declared, or whether they continue subject to park and conservation legislation through negotiated settlements along Makuleke[22] lines, has still to be resolved.

The old colonial land map of Mozambique is therefore still very real. The settlers may be gone, but many old company and other colonial landholdings are either the site of bitter conflict, or are being used without any clear legal basis. Conflict occurs in all these areas where local people have either reasserted old pre-colonial land rights or claim 'good faith' occupancy rights, and then the state suddenly gives the DUAT to a new investor.

*Land concentration*

The final piece in the new Mozambican land map is provided by an assessment of the impact on land distribution of the many thousands of private land applications since economic liberalisation began in the mid-1980s. Official data on land distribution are presented in very simple categories that do not allow in-depth analysis of the evolving land structure of the country. It is, however, possible to interpret some of the available data and draw tentative conclusions about how the rising tide of private land applications is affecting land concentration.

The first example is from Zambezia Province, where the DfID-funded Zambezia Agricultural Development Project team had full access to cadastral records (Norfolk & Soberano 2000). Up to March 2000, 3 259 applications had been made to the provincial cadastral services, covering a total of 3 613 847 hectares. Of these, 1 342 were for residential purposes. The analysis was restricted to 1 678 of the total applications as all applications less than one hectare[23] were excluded on the grounds that they are mostly for urban commercial or residential use and in 33 cases the land use purpose was 'not indicated'. This exercise was repeated for the number of

applications actually approved. The data are presented in three amalgamated bands (Table 6.3).

**Table 6.3** *Land concentration indicated by new land applications up to March 2000, Zambezia Province, Mozambique*

| Size of land | Applications (N = 1 678)[a] | | Approved applications (N = 219)[a] | |
|---|---|---|---|---|
| | Number of applications | Total area applied for (%) | Number approved | Total area approved (%) |
| 1–100 ha | 44 | 0.4 | 59 | 2.8 |
| 100–1 000 | 33 | 5.3 | 30 | 23.5 |
| Over 1 000 ha | 23 | 94.3 | 11 | 73.7 |
| Total[b] | 100 | 100.0 | 100 | 100.0 |

Source: Norfolk & Soberano (2000: 21)
Notes: a. Excludes 251 cases <1 ha
b. Excludes 1 548 cases <1 ha, and 33 cases 'not indicated'

The evidence of a land concentration process in Zambezia is compelling. The most accurate indicator is the area actually approved, but even in this case, just 11 per cent of applicants were allocated nearly 74 per cent of the area approved, while 59 per cent of applicants received just below 3 per cent. The data also reflect the huge scale of some applications. In the Norfolk and Soberano dataset, there are 15 applications for areas of over 50 000 hectares, covering over 1 million hectares (29 per cent of total area applied for).

In Zambezia most of the area requested is for forestry projects (2.2 million hectares or 62 per cent of the total) (Norfolk & Soberano 2000). In fact, a forestry concession holder does not need a DUAT to carry out his or her activities. Forest resources are legally the property of the state and do not 'belong' to the land rights holder; the concession applicant needs to secure a licence to extract timber, and with that they can advance into a given area and start logging. Either way, the net result is usually that the timber company considers the area to be 'theirs', and local interests are largely ignored.

Many such projects conflict badly with the land use practices of local communities with legally recognised but unregistered DUATs over the area. In this context, communities have little power to demand a share of the high returns earned from extracting 'their' timber, in spite of the 1999 Forest and Wildlife Law that demands consultations between the local people and the concession holder before getting a logging licence. In Sofala, years of local-level capacity building by ORAM are changing this, with some communities now able to insist on some form of participation in commercial logging. Having a community-held DUAT recorded and registered also raises the pressure the community is able to apply to the concession holders (Tanner 2004).

Recent research by the CFJJ also provides some insight into land distribution. This research looked at the economic and social impact of community consultations,

discussed in the next section. Data on areas requested by land applicants were also collected, however; through these data it was possible to produce indicative tables of trends in land concentration in some provinces.

Table 6.4 shows the situation in Gaza Province, indicated by a random sample of 41 cases from the files of the Provincial Geography and Cadastre Service. Again, there is a clear trend towards land concentration as a result of new land rights being awarded to private sector applicants. Out of 41 cases, 17 (42 per cent) account for 95 per cent of the area requested. At the bottom of the scale, 13 cases (32 per cent) account for less than 1 per cent of the area applied for. While the data are by no means complete or statistically valid (all land applications would have to be classified, as in the Zambezia study), they do support the general trend observed elsewhere.

**Table 6.4** *Land concentration trends in Gaza Province, Mozambique, 2004–05*

| Area (ha) | Number and (%) of cases | Total area requested | % Total area requested |
|---|---|---|---|
| 0–10 | 8 | 52 | – |
| 10–50 | 4 | 127 | 0.5 |
| 50–100 | 1 | 100 | – |
| 100–500 | 7 | 1 940 | 1.5 |
| 500–1 000 | 4 | 3 504 | 3.0 |
| 1 000–10 000 | 15 | 84 136 | 65.0 |
| > 10 000 | 2 | 39 000 | 30.0 |
| Total [1] | 41 | 128 859 | 100.0 |

Source: Tanner & Baleira (2005) using data from a field survey by João Paulo Azevedo

This view is confirmed in work by Dr José Negrão from Eduardo Mondlane University in Maputo, whose fieldwork in Manica Province revealed clear signs of land concentration through the allocation of large areas to a relatively small number of applicants (Cruzeiro do Sul 2004).[24] Negrão foresaw a serious increase in land conflicts within the next 10 years as a direct result of this process, and estimated that across the country, land concentration resulting from new DUATs was probably benefiting some 60 to 70 families.[25]

These concerns appear to be justified: 2008 saw the high point of new requests for large areas of land by the new biofuel lobby, with figures of up to 12 million hectares requested appearing in the national press and a variety of documents. However, the huge areas legally covered by community-held DUATs could restore some balance to a highly skewed situation. Communities are not single users, however, and assuming an average of 1 000 households in a community of 30 000 hectares delimited would give an area of 30 hectares per 'household-farm'. Based on recent calculations of the area needed by low-technology extensive agriculture, this is not enough land for sustainability, where households might need up to 30 hectares just for their subsistence plots, without taking into account access to forests and other common use areas (Åkesson et al. 2008: 21).

Better and more disaggregated classification of land occupation data will allow a clearer view to emerge, and might even permit a Gini coefficient for land distribution at some point. Given the very large areas legally under community control, it is likely that a Gini coefficient may not show a marked degree of concentration among a small number of land users. However, available data do indicate that with respect to areas being requested – which tend to cover the best or most economically viable land – a process of land concentration involving the wholesale loss of local rights is under way.

*Benefits to local people: Community consultations*

The Land Law was described above as an instrument for promoting rural development through a controlled structural transformation. Customary rights are not frozen when they are legally recognised or even when they are delimited. Instead, by negotiating with investors, local people can trade land for new resources to advance their own development priorities. Using their legally recognised customary rights and community consultations, they can realise at least some of the capital value locked up in their land.

Land concentration is, therefore, not necessarily a bad thing (although the trends advise against complacency). Assuming the process is beneficial, and that consultations bring benefits to local people in exchange for giving up their rights over very large areas, it makes sense to look at the impact of these consultations.

Article 27 of the Land Law Regulations requires the district administrator to issue a statement (*parecer*) about the consultation between a community and the investor. This statement should:

> …refer to the existence or not, in the area requested, of the Land Use and Benefit Right [DUAT] acquired through occupation [customary or 'good faith']. Where other rights do exist over the requested area, the statement will include the terms through which the partnership will be regulated between the titleholders of the DUAT acquired through occupation and the applicant.[26]

The Technical Annex to the Regulations also stipulates that delimitation should be carried out where new projects are proposed, and that the person or entity proposing the new project (state or investor) should pay for it. This makes sense if a core objective of the consultation is to see if local DUATs already exist in the project area and, given the recognition of customary rights, local DUATs are very likely to be present.

The National Land Directorate and the government legal advisor on land argue that Article 27 alone is adequate for protecting local land interests, and is much less costly in terms of both time and money than a full-scale delimitation before the consultation.[27] This is understandable from a public sector with a limited budget, and applying Article 27 does comply with the most essential legal requirements; and to the credit of the land administration, a *consulta* is carried out for practically every

new land application. This has had many positive effects, not least that local people feel their interests are being taken into consideration. Whatever the outcome of the process, this is an important step forward. If local rights – delimited or not – are then ceded to the investor, the important question is whether or not the *consulta* brings benefits to local people that (a) are sufficient to compensate them for the real value of the assets lost, and (b) allow them to move out of the poverty trap they are in.

Recent research by the CFJJ and the FAO Livelihoods Programme looked specifically at these questions and clearly indicates that the answer is a resounding 'no' in both cases (Tanner & Baleira 2005).[28] There are a number of reasons for this:

- Local people are unaware of how to exercise their legal rights: they may be aware of their rights, but when faced with an outsider in the presence of representatives of 'the state' (district administrator), surveyors or even the police, they feel pressured into agreeing. They also have no experience in negotiating.
- Local awareness of the real value of their assets is low: without some kind of land use inventory and support to understand the real value of their assets (often for new uses about which they have no knowledge, such as ecotourism), local people accept absurdly low 'offers' in exchange for agreeing to an application.
- Consultations are poorly carried out, with little real local representation: local leaders do not consult other community members, or documents are signed by whoever is available at the time.
- Most consultations are too short, often lasting no longer than an afternoon visit: the Land Law principle of co-titleholding requires that all community members are consulted, implying time for an internal discussion.
- Not enough meetings are held with local communities: investor projects are new and complex and the community needs at least two meetings to be informed, and to discuss an agreement.
- The best 'development outcome' may not be a community priority: the overriding objective of the investor and public officers is that the community should have 'no objection', as the land applications cannot proceed without their consent. Public officers are also often aware that investors are supported by higher-level political figures.

It is very difficult to give a monetary value to the community–investor agreements that are made during a consultation. In some cases, especially in coastal areas where investors are queuing up to build beach lodges, a form of purchase is occurring that can provide some indication as to how much some communities are getting for these very valuable resources. Land cannot be bought and sold, but fixed assets *on* a piece of land are treated as private property and can be sold to a third party. Having acquired the assets, the third party can then request the transfer of the underlying DUAT into his or her name.

Several cases in prime beach locations in Inhambane Province use standing coconut trees as the basis of the transaction. One 'good practice' consultation based on a price per tree agreed between the investor and the local community resulted in the DUAT titleholders – 69 households – handing over 20 hectares of beachfront land

for US$16 000. The investor also agreed to employ local people and upgrade local infrastructure, which seems to be happening. This is, however, a very small sum to pay for a world-class beach location. In fact, the average price per hectare paid to local people in this beach zone is even less: around US$390, with wide variations depending on the awareness and negotiating skills of local people. Prices charged by developers, who later subdivide such areas for holiday homes, range up to US$200 000 for a 10-hectare plot.[29]

The official position that consultations adequately protect local rights *could* apply if local people are fully aware of their rights and how these relate to the area the investor is requesting, and if they know the real value of the land. However, without a full delimitation or other technical support, they are rarely aware of these aspects, in spite of the hard work of the Land Campaign and others (Baleira & Tanner 2004).

The CFJJ/FAO data also indicate that the majority of consultation agreements between investors and local people are poorly recorded, and do not give enough detail to later verify if investor promises are adhered to. Field visits to these communities confirm that, in reality, very few of these promises are kept, even those that involve little real economic commitment by the investor.

Judges and prosecutors in CFJJ/FAO courses and seminars confirm this lack of compliance with consultation agreements. Yet, to date, no community has taken legal action based on non-compliance, as they view the courts as being part of the same state mechanism that is obliging them to accept the investor and his promises. Moreover, they have no idea how to prepare a case and take it to the public prosecutor or the courts (Afonso et al. 2004; Baleira & Tanner 2004).

## *The positive side of the picture*

It is almost 12 years since the Land Law came into effect and was quickly followed by the regulatory instruments needed for full implementation. Although the picture painted above illustrates many negative aspects, this does not mean that the Law has failed. The development of the Land Law itself was a major achievement, not only because it provided an innovative and workable solution to very complex problems, but also because it was developed through a participatory exercise that included civil society, academics, and all line ministries and sectors with an interest or role in land and resource management. It had, and still has, widespread support across the country, especially among those who promote local, community-based development and who expect the state to respect and protect the basic rights of its citizens (Calengo et al. 2007).

Implementation *has* been patchy, particularly in relation to the treatment of community rights by public administrative agencies. Nevertheless, notable progress has been made:

- there is basic awareness of the legislation among all land users in many areas, and of the rights provided for and protected by the new law;

- a small but important number of communities have had their customarily acquired collective DUAT identified in spatial terms and registered in the Cadastral Atlas;
- in practically all new land requests, private investors *are* consulting communities before occupying land, and are paying some attention to local rights; and
- community consultations in a limited number of important cases *are* beginning to bring benefits to local people, and impact upon poverty and local development.

A type of controlled enclosure process, which has been conducted not just to meet the demands of a small powerful elite, but also to achieve an equitable and sustainable outcome, is being pursued in a small number of cases with some success. There are important pockets around the country where local people are aware of their rights and are increasingly able to use them to generate new resources for local development, through a negotiated process that either cedes or shares their unused land with investors.

NGOs are making a valuable contribution to this process: the Swiss NGO Helvetas has supported delimitations as a starting point for community-based projects since the law was passed in 1997. In two key tourism areas, community-owned lodges are now generating useful revenues, and in one case the community has signed a revenue-sharing contract with a private firm that will upgrade the lodge and manage it together with local people.[30] In Sofala and Nampula provinces, ORAM continues to delimit community rights and build capacity to deal with outsiders. Finally, in Manica, ORAM and Kwaedza Simukai have created community organisations that are increasingly able to negotiate with outsiders and defend their interests (Chidiamassamba 2004; Knight 2002).[31]

There are cases of investors agreeing to land use contracts with local residents, even inside the contentious hunting reserves (Durang & Tanner 2004; FAO 2008; Norfolk & Tanner 2007).[32] Large multinational investors are also concerned about local rights and want to work with local people, although this is not always easy and can sometimes result in tensions. As a report on one large-scale project says, however, 'it is not a question of not doing it [referring to the participatory rights-based approach], it is a question of how to do it' (Åkesson et al. 2008: cover). In other words, difficulties and challenges associated with implementing this approach do *not* justify discarding it.

There are, therefore, many projects that respect the underlying principles of equity promoted by the new laws and that bring benefits to local people. Other programmes with a strong private sector focus also promote equitable development, based on recognition of local rights and the role of local communities, not just as beneficiaries but also as stakeholders in new projects.[33]

Local people who are more aware of how to use their rights are beginning to use the Land Law to access capital locked up in their land. They are increasingly able to use their rights to secure resources for their own agricultural and other initiatives,

and are learning how to negotiate constructive agreements over land access with investors (and the state) that benefit all sides. Both processes can drive a genuine process of local development and poverty reduction, and can influence longer-term policy development in the context of decentralisation and local planning that is being extended across the country.

Moreover, a number of organisations continue to promote the correct application of the new laws. After the Land Campaign of the late 1990s, provincial Land Forums are still active. NGO development projects that need secure land rights to move forward use key mechanisms like delimitation as a starting point, using Land Commission training manuals and acquiring valuable experience that can now feed into discussions of policy and improvements to the legislation.

In the public sector, the national land administration continues to disseminate the Land Law, albeit still with a focus on acquiring new land rights rather than formalising existing ones.[34] The Community Management Programme of the National Directorate of Forestry and Wildlife, and sectors like Environmental Coordination and Rural Development, are also working at the local level to inform people of their rights and to promote activities based on varying degrees of local control over resources (DNPDR 2007). Recent success with having delimited communities included as a Performance Assessment Framework indicator, and growing acceptance of the unequal treatment of customarily acquired rights in the Cadastral Atlas, suggest that more attention may soon be paid to identifying and recording these rights. NGOs and others must ensure that the approaches used result in certificates that are reflective of the true dimensions of these rights, so that communities can negotiate from a position of strength with investors and the state.

The CFJJ/FAO Paralegal and District Seminar Programme has achieved important results in raising awareness among local people of their rights, and promoting a participatory and equitable approach to agrarian transformation. The Programme is now poised to link this process of legal empowerment and negotiated stakeholder participation in local development directly into the national Rural Development Strategy (approved late 2007). The focus will be on how to use rights constructively, and – when necessary – how to access the justice system to defend them. The critical issues of women's rights and HIV/AIDS are also being addressed and included in this training (Seuane 2005).[35]

## *Conclusion*

The discussion has underlined the progressive nature of the 1997 Land Law and its potential for bringing about a controlled structural transformation of the rural economy, without creating social injustice and hardship. Indeed, if used as intended by its architects, the Land Law can facilitate a process of local development in which a kind of equitable enclosure process, linked to agreements between local people and investors, facilitates the release of locked-up capital value of local land rights to local people.

This requires effective implementation of the legislation. A key indicator of this is progress towards identifying and recording customarily acquired rights, and helping local people appreciate the potential of their land and other resources. However, the limited progress that has been made is mainly a result of donor-supported NGOs, and not a reflection of a public commitment to securing local rights as the first step towards a participatory development process. The number of registered 'delimitations' remains very low. Public sector involvement is still minimal, resulting in official records that practically ignore local land rights, in a country where the vast majority of DUATs are acquired through customary systems.

Much of the colonial land map remains in place, including old private properties, plantations-turned-state-farms, national parks and hunting reserves. The failure to remove the old farm properties in particular from cadastral records contradicts the basic philosophical principles of the Land Law, and undermines the rights of local people who have occupied these areas and claim historic or squatters' rights. Conflicts erupt when the state then allocates this land to investors.

Thus, while local DUATs probably exist over most of the country, their lack of visibility means that local land is vulnerable to acquisition by investors and elite groups. In this context, the evidence of land concentration is disconcerting. Legally recognised customarily acquired land use rights cover large parts of the country and a Gini coefficient for land occupation might then suggest that land distribution is still quite evenly balanced or even favours the poor rural majority. Applying the same test to the best land (fertile; close to water, roads and markets; in valuable coastal areas) would, however, suggest that there is a serious trend towards concentration in land use at the expense of local rights.

Community consultation is said in official quarters to be adequate for protecting local rights, and the fact that all new land requests do involve prior consultation with local people is a considerable achievement. Yet, in the face of rising demand for land, communities 'participate' in *consultas* from an essentially defensive position, and most agreements to date scarcely enable them to maintain current living standards, never mind achieve a lift out of poverty. The final outcome – loss of local rights for little or no return – is weighted in favour of the land applicant.

If these trends continue, especially with regard to the best and most viable resources, the end result will be an enclosure movement that only benefits national and international interests, resembling the classic English historical model alluded to by Russel (2000, quoted above). Moreover, the community consultation process in this context merely serves to give these new enclosures a veneer of respectability by demonstrating compliance with the law, and apparently safeguarding local needs and interests.

Nevertheless, there is also much of which Mozambique can be proud. Producing an innovative new Land Law that includes local practices and customs is the first achievement. The mid-1990s consensus on land policy still exists, albeit challenged by a strong private sector that wants to privatise land. Real benefits from a more

controlled enclosure process are possible if people know how to use and defend their rights, and if consultations are properly carried out. Important benchmark cases are proving this in practice, and must be used to inform investors and policy-makers of the real benefits that a more equitable application of the Land Law can bring.

Meanwhile, pressures to change direction are increasing. There have been indications that government is considering a kind of market in land use rights. Indeed, a *de facto* market in land rights already exists and does need to be regulated. How this is done and what the implications are for local people must be fully explored and discussed. Yet, even without full privatisation, there are strong signs that a more conventional form of enclosure movement is under way, in which the progressive aspects of the Land Law, such as negotiating with existing rights holders, are used to provide a veneer of respectability.

The evidence also suggests that a historical Mozambican process is repeating itself: outsiders are occupying the highest-potential local land, leaving local people to survive with fewer and less-robust resources or to work for the new occupants of their land. On what land is left, they resort to deforestation and shorter rotation cycles – all of which bring the environmental impact of this less equitable enclosure process to the fore.

This is not a cry of 'foul play' against investors, whose funds and skills are essential for generating new growth and employment, and reducing poverty. Nor is it a call for investors *not* to occupy local land, and for communities to hold on to their rights at any price. Indeed, most rural communities *want* investors – they know they need the new jobs, the new market opportunities and the economic shift that will result. The real issue advocated in this chapter is the underlying principles of equity, sustainability and partnership that are eloquently put in the original Land Policy declaration. What local people do *not* want is for their land to be 'captured' by a class intent on rapid capital accumulation through an enclosure movement that brings no benefits to local stakeholders who have legally recognised rights, and which cynically uses elements of the new and progressive legislation to provide a veneer of respectability to the outcome.

Land grabbing and concentration are not yet irreversible and large areas are still occupied by local communities who can learn from the growing number of 'best practice' cases. This chapter does, however, present a call for caution. The 1997 Land Law offers huge potential for a genuinely equitable process of rural transformation and local economic diversification – enclosures with a human face – based on rationalisation of land use and the availability of new capital and skills through a collaborative relationship between state, citizens and entrepreneurs. There are clear signs that this potential for good is being wasted and the Mozambican enclosures could produce the same result as their predecessors in Europe – a dispossessed rural majority, and migration to towns. Yet, unlike Europe, this will be in a country that is not about to embark upon a labour-intensive industrial revolution generating thousands of new jobs for dispossessed peasant farmers and their families.

*Notes*

1 Law 19/97, Article 12.

2 Applies to national individuals occupying unclaimed land for 10 years uncontested.

3 Carlos Agostinho do Rosario was Minister of Agriculture in charge of the Land Commission to January 2000, and oversaw the development of the Land Law, Regulations and Technical Annex.

4 Personal notes, FAO and Land Commission files.

5 'Good faith' occupation: uncontested occupancy and use of a piece of land for 10 years or more.

6 Article 13, Line 2 and Article 14, Line 2.

7 Law 19/97, Article 15.

8 Speaking at the National Seminar on Integrating Territorial Planning and Natural Resources Management in the Context of Decentralised Planning, Beira, 31 August–2 September 2005.

9 Based on a recent analysis of official records.

10 This is clear in provinces like Nampula, where NGOs like ORAM say that early delimitation programmes have created demand for registration in neighbouring communities concerned about threats to their land; and in Manica Province, where communities bordering a new biofuel project feel at risk.

11 See the Commission delimitation training manuals and video (Land Commission 2000a, 2000b, 2000c). A second edition of the Manual has been produced by the Centre for Judicial and Judicial Training of the Ministry of Justice for use in paralegal training, and in the multi-donor Community Land Initiative project.

12 See www.dinageca.gov.mz.

13 The Rural Organisation for Mutual Support, ORAM is today the major 'land' NGO in Mozambique.

14 Anecdotal evidence is from a reliable NGO source.

15 Technical Annex, Article 7, Number 4, lines a) and b) respectively.

16 See note 9.

17 Noted by donors in a non-published communication, early 2009, based on independent NGO data. Government has apparently agreed to an annual target of 50 communities delimited as from 2009.

18 Article 35 of the Land Law Regulations was altered in October 2007. See Calengo et al. (2007) for a full account of the legal basis of this change and its possible impact.

19 These are the PROAGRI 2 sector-wide programme and the newer Programme for Food Production.

20 Recent reports from the National Directorate for Land and Forests, and personal communications with National Directorate staff.

21 Part of the FAO programme at the CFJJ.

22 The Makuleke community bordering the northern Kruger Park won back their rights over land inside the park under the RSA land restitution process, and subsequently negotiated with the National Parks Board SANPARKS to still include this land as part of the park in return for economic benefits flowing from eco-tourism within this area.

23 The average residential area applied for was six hectares. This suggests that some are very large and intended for agricultural or other use. Only small residential plots were therefore removed.

24 Also see www.iid.org.mz.

25 Personal communications with Dr Negrão discussing his field research before his untimely death in 2005. José Negrão made a huge contribution to the land and poverty debate in Mozambique, and established a successful master's programme in rural development.

26 Law 19/97, Regulations, Article 27.

27 Personal notes, FAO files; donor meeting, Swedish Embassy, Maputo, 2007.

28 Now also published in Portuguese, Working Paper No. 1 in the series *Sociedade e Justiça* of the CFJJ.

29 Based on conversations with developers, CFJJ/FAO field research, and anecdotal evidence.

30 This is the Covane Community Lodge, Canhane Community in Massingir District. A delimitation and land use plan supported by USAID and FAO preceded the development of this important case study.

31 About Manica, Knight asserts that 'communities reported that after learning about the land law they felt as though their ignorance and isolation has been alleviated and that a door had been opened for them into the greater national legal system. A sub-chief in Pindanyanga [said] that, "This new land law…is good, because it is helping people to know their rights to the land. We knew our rights within our culture, but not under the government's laws" ' (2002: 12).

32 In Coutada 9, safari operators proposed a revenue-sharing agreement with communities in the Coutada, with an internal zoning of the reserve where the investor has an exclusive Ministry of Tourism concession. In 2005, community leaders received US$18 000 from the first year of operation.

33 The African Safari Lodge programme promotes ecotourism operators who make genuine and beneficial agreements with local people, and who implicitly recognise the underlying rights of local people as the original asset holders. With more attention paid to consultation as a negotiation over benefits, future projects can then secure greater benefits for both sides.

34 For example, brochures and posters on the so-called Simplified Procedures for getting a new DUAT.

35 Initial case study research by Sonia Seuane and Megan Rivers-Moore indicates very low awareness among women of their basic constitutional rights, and a failure to use these to defend their land rights when husbands or male household heads die young – see Seuane (2005).

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# 7 *Biodiversity conservation against small-scale farming? Scientific evidences and emergence of new types of land crises*

Catherine E Laurent



Competition between different types of farmers for access to land for agricultural production has been a major source of conflict for decades in many countries. In these situations, small-scale farmers' and landless peoples' struggles have gained increasing political legitimacy compared to large-scale farms. As a source of income and food security for rural households, small-scale farming is viewed as a key element of rural livelihood improvement. But this legitimacy is increasingly being challenged by environmental lobbies. Environmental issues concern all types of farms; however, it is more difficult for small-scale farmers and their organisations to access and assess the scientific knowledge that is brought in the policy debate to support environmentalists' positions when conservation and production objectives seem contradictory. Hence, new elements have to be considered to analyse the changing power relations that structure land issues.

Some countries, such as South Africa, are emblematic of this general trend. In several cases during South Africa's transition in the 1990s, the legitimacy of the demands of potential black small-scale farmers for land was questioned. A first argument stated that replacing too many of the existing large-scale white farms with new non-skilled black farmers would threaten national production capacities. This debate was considered in many policy and scientific papers. The technical efficiency of small-scale farmers is a controversial, but old, issue. But the legitimacy of potential black small-scale farmers' demands is also challenged for ecological reasons, based on statements that insist on the negative impact of farm activities on biodiversity conservation. For instance, the re-establishment of black farmers on formerly extensive rangelands or in 'nature areas' is presented as a threat to biodiversity. However, from a scientific point of view, some ecological studies show that adequate farming practices can contribute to biodiversity conservation (Diaz et al. 2005). It thus appears necessary to understand what is really at stake when scientific arguments are put forward to oppose environmental issues to agrarian reform and agricultural development.

The aim of this chapter is to contribute to this analysis. It is based on African case studies. However, this new kind of situation, where farmers are confronted with ecological requirements and the strengthening of alliances between ecological lobbyists and large landowners, is a potential source of major land crises for the near future, not only in Africa but also in other regions of the world.

This chapter demonstrates that growing environmental concerns, such as the maintenance of biodiversity, tend to partially shift issues of land conflict by emphasising the long-term sustainability of natural resources. This goal requires the mobilisation of scientific knowledge, which the various protagonists do not all possess to the same degree. Hence, the role of this knowledge in political decision-making is changing, as the increasing use of the concept of 'evidence-based policy' attests. It thus seems relevant to identify the main lines of critical analysis of this new role of scientific knowledge in decisions on land policies. This reflection is particularly necessary insofar as convergent observations show that the focus on scientific arguments often seems to be a pseudo-rationalisation of policies used to reinforce the status quo, rather than a real attempt to reshape society–environment relations.

## *Small-scale farmers, land use and biodiversity conservation*

The agriculture/environment interface is a growing source of problems, due not only to the frequently denounced negative effects of agriculture on the environment, but also to the increasing constraints that environmental conservation places on small-scale farmers and collective rangeland management. Different forms of land access regulation are expressions of the power relations unique to each society. History is filled with different 'solutions' to struggles for access to land. Assertion of the most violent submissive relationships resulted in large-scale despoilment (enclosures in England, appropriation of 'native' land during the colonisation process, etc.). Landless peasants, small farmers and farmers in colonised countries have always been the losers in this eternal tendency of dominant groups to seize land for their own use. The many resulting conflicts have, in some instances, led to more balanced power relations and consequently to the redistribution of access to land (via different forms of land reform) as well as to guaranteed ownership and use rights. The question of ownership rights is thus considered to be a key element in the regulation of land-related conflicts and is at the core of the main international organisations' recommendations on land policy (Deininger 2003).

But the upsurge of environmental concerns such as the conservation of biodiversity tends to radically change this logic by putting forward new imperatives. These considerably weaken the potential regulatory function of adjusting the balance of ownership to solve land-related conflicts.

It would be easy to believe that biodiversity conservation and poverty reduction are convergent objectives. This is the argument in many voluntarist discourses on the subject (IUCN 2002). It is also suggested in national documents (e.g. DEAT 1997) and by international organisations (e.g. UN 2005) that both objectives be stated together, without considering their possible contradictions. But this is not always a win–win situation.

The legitimacy of certain rural households' demands for land to begin farming, or even to continue farming on land that they already own, may be challenged in certain areas when agriculture is considered to have only negative effects on

natural resources. Even when the objectives of agricultural production and those of environmental protection can be reconciled, farmers in areas subject to protective measures have to comply with set specifications that reduce their autonomy, irrespective of their rights to the land. In addition, biodiversity conservation involves processes that transcend the spatial limits of farms (migration of certain species such as birds, etc.) as well as their time horizon (necessity to take into account the long-term effects of practices far beyond the life cycle of farm households). The issues to which the question of biodiversity conservation relates concern society as a whole (or are at least conceived as such) and not only the protagonists directly involved in land issues; in addition, mastering these issues requires knowledge that is developed in a particular sphere (the research world) and is not readily accessible to the majority of farmers concerned.

For instance, based on their observations of the South African land reform process, Kepe et al. (2005) show the conflicts that arise between conservation and production objectives when poor households want to retrieve the land taken from them and classified as protected natural areas under apartheid. In this study (Khanyano people/Mkanbati nature reserve), it appears that not only is the rangeland unlikely to be restored to poor households, but that the extension of the protected area will possibly further limit their access to natural resources and reduce the surface area of grazing land available to them. These findings corroborate observations in other countries, which show that, in many cases, local populations bear the brunt of the costs of biodiversity conservation (e.g. Brockington 2002).

In a recent review of the subject for the journal *Science*, Adams et al. (2004) note many authors' scepticism as to the possibility of combining poverty reduction and biodiversity conservation efforts, expressed by the term 'pro-poor conservation'. They cite a number of studies, all of which conclude that the creation of protected areas often has a negative impact on poverty. These authors thus propose a typology of the different situations of articulation between poverty reduction and biodiversity conservation that helps to explain why these relations may not always be viewed as a win–win situation. Where biodiversity conservation is at stake, farmers can be excluded from dialogue when they are located beyond the geographical limits of the conservation area. In this case, they may obtain specific benefits or suffer new constraints resulting from their proximity to these areas. Alternatively, in some places farmers are included in resource conservation schemes when environmental policy designers accept the idea that human agricultural activity may contribute positively to biodiversity conservation. But even in this case, farmers are more often the targets of prescriptions that they must comply with than real partners in decision-making. This unequal balance of power between farmers and other actors in negotiations on biodiversity and land use is often described. But it is not a mere continuation of age-old relations of domination where poor rural households have tenuous rights to their land and virtually no right to a say in the matter.

From this point of view, the South African examples are interesting. If we observe this inequality in the balance of power (e.g. Kepe et al. 2005), it is difficult to imagine

that it is a lack of politically legitimate land claims that places black rural households at a disadvantage in the debate. Despite all the obstacles, the South African land reform programme enjoys virtually unchallenged political legitimacy. We may therefore wonder whether a part of the difficulties they encounter in defending their vision of their future does not stem from incapacity to challenge the requirements of environmental protection – requirements presented as unquestionable statements, which are not open to debate.

Presently, rural households are not in a position to present scientific arguments on the appropriateness of the conservation measures proposed, nor are they able to offer alternative scenarios. The mobilisation of ecological knowledge in policy debates is new; as such, unions, civics and other political institutions have not yet fully analysed and made visible its social implications, as they did for some economic theories (e.g. regarding market regulation). Such knowledge is often considered as 'neutral', leading to some 'naturalisation' of ecological questions that are constructed by dominant stakeholders. Nevertheless, the way in which these measures are designed and the knowledge on which they are based can be questioned. Is it relevant that so little debate exists on the way in which knowledge is selected and mobilised to design environmental and land policies?

## *Evidence-based frameworks for policies?*

The increasing mobilisation of arguments presented as 'scientifically validated' has opened a new research field concerning the content of that 'evidence', the way that policy-makers mobilise it, and the transformation of power struggles induced by land use conflicts. A growing number of documents on the analysis of land and environmental policies propose the adoption of evidence-based frameworks adapted from the field of health (Baranyi et al. 2004; Pullin et al. 2004).

Indeed, this discussion, which is strongly related to the question of appropriate use of scientific knowledge in practice, is partially based on the reflection and teachings of the evidence-based medicine (EBM) movement that has developed in the health sector since the 1990s. As such, the founding document of EBM (EBM-WG 1992) announced the advent of a new scientific paradigm. In fact, it was essentially a plea for medical practices wherein clinicians make 'conscientious, explicit and judicious use of current best evidence' for decisions on patient care (Sackett et al. 1996: 71). As many authors have subsequently noted, one cannot but agree with this objective of making the best possible use of available scientific knowledge for therapeutic decisions. Based primarily on this argument, the notion of EBM was transposed to decision-making in other areas, and the concept of evidence-based policy (EBP) was born.

At first, the idea of making the best possible use of available scientific knowledge may seem trivial. Yet surveys undertaken at the time of EBM's emergence showed that many medical doctors were unfamiliar with recent scientific data in their field and based their practice on routines, some of which were outdated. Therefore, the EBM movement has endeavoured to facilitate doctors' access to scientific data through the

compilation of easily accessible databases. It also offers incentives to perform and to disseminate various types of meta-knowledge (knowledge about the knowledge), such as quantitative meta-analyses, systematic reviews, and assessment of the level of proof provided by diverse observations. The aim is to ensure the accessibility of scientifically valid knowledge during doctors' initial – and ongoing – training, as well as in their day-to-day practice.

If we agree that science proposes not *one definitive truth*, but knowledge that evolves over time, we cannot but subscribe to this type of approach. With regards to land use, we may also question whether the prescriptions regarding biodiversity conservation, which now confront rural households, are indeed based on systematic and regularly updated reviews of the scientific literature.

Several studies with this objective reveal that this is not the case; rather, research indicates that the decisions taken and the practices implemented are generally based not on a review of existing scientific literature but on existing routines, without any attempt to identify alternative plans of action. The findings of Pullin et al. (2004: 247), who analysed 38 management plans of organisations involved in biological conservation in the UK, show that these plans:

> …highlight a reliance on tradition as an indicator and guide to future management. In 66% of plans alternative actions did not appear to have been considered and in only 16% of plans were alternative actions discussed. In only 8% of the plans was any attempt to review the literature apparent and in no plan was it evident that the review had been extensive.

A review by Homewood (2004) on how biodiversity conservation policies in African rangelands affect development and welfare as well as environmental issues leads to similar statements. First, she stresses evidence in the scientific literature of the key role of buffer-zone habitation of rangelands for maintaining the biodiversity of protected areas. But she observes that this evidence has little impact on policy decisions and concludes that:

> [g]overnment and donors need to find better ways of taking note of what research reveals about the way policy is operating, and of incorporating those insights into practice. Government policy documents, and popular assumptions as to the impact of local land use in sub-Saharan rangelands, have not kept pace with the data documenting environmental processes and outcome. National governments and also the international environmental lobby are resistant to those data, to the alternative models of underlying processes and to the alternative approaches they suggest. (Homewood 2004: 139)

In South Africa, a study of the White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity shows that, while negative impacts of agriculture on biodiversity are heavily documented, almost nothing is reported regarding the positive roles that agriculture can play in biodiversity conservation. Once again, this suggests that not all of the available scientific literature was used.

On the whole, the analysis of the literature shows that few decision-makers who deal with environmental problems systematically analyse scientific publications, even though they use arguments based on 'scientific knowledge'.

On the other hand, one must recognise that it is very difficult for any stakeholder (including policy-makers) to make their way in the maze of existing publications and to get a clear picture of all alternatives suggested by existing theories. Adequate meta-knowledge, such as updated systematic reviews made with explicit methodologies, showing the blind spots of the various approaches, is missing (Laurent et al. 2009).

A highly positive feature of evidence-based approaches is that they lead to explicit questions on the way that the knowledge underlying prescriptions is collected and selected. But apart from that, there are problems in the 'evidence' of 'evidence-based' frameworks. Feinstein and Horwitz (1997) have noted and analysed it for medicine. It seems that the same applies to EBP.

## *Problems of 'evidence' in EBPs*

There are several problems with the 'evidence' aspect of EBPs. These problems emerge from the way evidence is constituted during scientific work, from the situations it is based on, and from the theories from which evidence stems. EBP is also a problem when knowledge, which is or is supposed to be scientific, is used as an authoritative argument to impose decisions that serve the interests of a particular group.

### *Scientific theories are changing and controversial*

We know that in all of the sciences various paradigms coexist; these paradigms approach reality from different angles and, at some point in time, may be contradictory in their initial postulates. This concerns the 'hard' sciences like physics as well as the natural sciences and the social sciences (Andler et al. 2002; Cartwright 1999). Moreover, scientific knowledge evolves and it is precisely the aim of a scientific approach to produce knowledge which is, if not 'true', then at least less false than preceding knowledge.

The rational use of scientific knowledge to solve a practical problem thus implies the mobilisation of the most recent scientific knowledge and the analysis of changes induced by scientific progress. Yet in many cases obsolete or doubtful theories are used to justify environmental protection measures, without any explanation of related controversies or their implications for action.

Many examples illustrate this argument. The most famous concerns the 'Tragedy of the Commons' (Hardin 1968), a theory that was subsequently recognised by its own author as being misleading (Hardin 1998). In the first paper, Hardin used communal grazing land as a key example. He proposed a theoretical model which showed that since each individual livestock keeper was selfish, norm-free and aimed to maximise short-term results from rangelands, the cumulative impact of rangeland users would ineluctably lead to the destruction of common resources.

But the reality is quite different and this model has been heavily contested since then. As Ostrom et al. noted in their review, 'although tragedies have undoubtedly occurred, it is also obvious that for thousands of years people have self-organized to manage common pool resources, and users often do devise long-term sustainable institutions for governing these resources' (1999: 278). Thus, 'management' is the key issue. Hardin (1998: 682) himself, commenting 30 years later on his 1968 paper and on the critiques he received, admitted that 'repeatedly I found fault with my own conclusions…the weightiest mistake…was the omission of the modifying adjective "unmanaged"…', adding that, for him, it was 'with an unmanaged commons [that] ruin is inevitable'. Notwithstanding this admission, a large number of scientific publications note that Hardin's 1968 theoretical model is still used to justify the privatisation of collective rangelands in many situations. This was the case again recently in South Africa (Allsopp et al. 2007; Rohde et al. 1999), despite agreement on the model's shortcomings by the entire scientific community and even by the author himself.

Other examples of the coexistence of different theoretical standpoints could be mentioned, each of them calling for specific (and different) management measures:

- equilibrium ecological models that see alternative vegetation states as results of degradation from people and livestock versus disequilibrium models that suggest that ecosystem dynamics are driven by unpredictable and extreme fluctuations in biophysical factors (Ellis & Swift 1988; Vetter 2005); and
- rational choice theories of collective action in economics that postulate that a society is a set of selfish individuals versus historic institutionalist approaches which show the various levels of economic and social regulation.

The problem is that these controversies may be well known by some scientists but are rarely given enough attention by policy-makers. Consequently, policy-makers do not use scientific knowledge to feed alternative development scenarios. One of the main criticisms levelled at policy-makers who deny agriculture the possibility of playing a positive part in biodiversity preservation is that they select knowledge which serves their own aims *despite evidence to the contrary*, instead of submitting the range of alternatives to debate.

### *The problem of putting EBP into practice*

Public action cannot have strictly scientific bases even if it updates its scientific sources. Scientific knowledge is always the result of a methodological simplification and can provide only incomplete views of reality. Consequently, a policy always has a strong peculiarity compared to the explanatory field of a given theory. There is no functional continuity between scientific theory and political decision-making, irrespective of the hegemonic intentions of any theory (e.g. the imperialism of some theories in economics or ecology). The logic underlying political and scientific discourses is of a radically different nature (Weber 1919): no matter how sophisticated, a scientific model cannot take into account the infinite elements that produce a real event; it can only *aid* political decision-making.

Rational use of knowledge as a decision-making aid, therefore, implies taking account of the necessarily incomplete and heterogeneous character of available scientific knowledge when addressing a practical problem. It also implies that political decisions, including those at a very local level, necessarily consider a set of complex elements and conflicts of interest. This is a point that certain theoretical approaches of EBP readily acknowledge (Davies & Nutley 2001; Gray 2001). On the other hand, findings show that in daily practices of negotiating land conflicts, the use of 'scientific evidence' is often a way of reinforcing existing power relations, rather than serving as a tool for explaining the ecological dimension of alternative development choices (Homewood 2004; Kepe et al. 2005).

In itself the phenomenon explained above is not new. For many years, trade unions, political parties and various associations have constructed social critiques of economists' approaches in order to enhance arguments based on economic results in political debate. What *is* new is the sudden appearance of arguments based on ecological theories without an existing social counterargument in land conflicts. Thus, these arguments tend to dominate without the various stakeholders in the political debate having an overview of what is at stake when one theoretical standpoint is favoured over another.

### *The problems with statistical data*

Recognising the difference between political decision-making and scientific theory amounts to agreeing that policy-making requires different kinds of data. But the debate on EBP becomes confusing when political decision-makers consider widely diverse types of information as 'evidence'.

In their analysis of the UK government Cabinet Office's EBP 1999 agenda, Davies and Nutley (2001) remark that what is considered in this agenda as 'evidence' is extraordinarily broad and eclectic. The list of 'evidence' in this document includes '[e]xpert knowledge; published research; existing statistics; stakeholder consultation; previous policy evaluation; the internet; outcomes from consultations; costing of policy options; output from economic and statistical modelling' (Strategic Policy Making Team 1999, cited by Davies & Nutley 2001: 87). Such a list changes the nature of the EBP decision-making framework and of projects precisely aimed at distinguishing scientifically *validated* knowledge from ideas that may contain expert knowledge or opinions. It nevertheless clearly highlights the function of legitimisation of the notion of 'evidence' in policy-making.

In this list of information that policy-makers use as evidence, statistics represent a particularly sensitive point: an intermediate category between scientific knowledge and political management tools. The way in which statistics are constructed and used can be examined in light of criticism of EBM procedures. This criticism emphasises the fact that 'evidence' is the result of investigations undertaken in a singular context, and that we need to measure the limits of their use by taking into

account the scope of their validity and the conventional rules (methods, etc.) that supported their construction.

Consider the example of South African statistical data for examining the role that they can play in the political regulation of relations between objectives of agricultural production and those of biodiversity protection. This example is interesting because it is both explicit and official that '[t]hrough the National Statistic System, Stats SA aims to promote evidence-based-policy-making, monitoring and evaluation in Government by establishing quality standards for official statistics…' (National Treasury 2003: 269). Moreover, we know that it is customary for statisticians to list the conventions guiding their work (conventions for the definitions of the categories chosen, conventions for collecting and processing data) (Desrosière 2002). A series of interviews with Statistics South Africa statisticians showed that they readily agree with the provision of this information, whether it consists of published documents or informal data, to assist in understanding how the basic definitions and samples were negotiated between the stakeholders. How can available statistics help to build reliable evidence on existing or possible relations between agriculture and biodiversity conservation?



An examination of the statistical conventions and available data shows that it is impossible in South Africa to use statistics to grasp possible relations between the agricultural activity of black households on rangelands and biodiversity. Agriculture is understood primarily as an economic sector that supplies goods for the market, and not as a sector of activity through which a large proportion of the population is in direct contact with the land. Consequently, the Agricultural Census is focused only on large-scale farms (so-called commercial farms with an annual turnover in excess of R300 000). These farms, considered as part of the scope of 'economic' statistics, are carefully recorded (there were less than 60 000 in the last census) and a profusion of data concerning them is available. In contrast, smaller farms (the number of which is uncertain: somewhere between 0.8 and 2.5 million) are considered to fall into 'social' statistics. They are the subject of highly simplified surveys that provide no indication of their agricultural practices or the performance of these practices. A specific survey ('2000 survey of large- and small-scale agriculture') was undertaken once, but its interpretation was complicated by the selected sampling procedures (Stats SA 2002).

Hence, no global data source is available to account for the farm activity (livestock keeping or crops) of black households in private rangelands, in the commons or in small intensive farming, despite the fact that their role in biodiversity management seems essential. In areas of high priority for the objectives of biodiversity conservation, scientists are virtually without any statistics on the economy or the structures of the farms concerned. Consequently, they lack the traditional tools of generalisation for case studies. Thus, even if some case studies show that the impact of small farmers on biodiversity may be positive under certain conditions, there are no data for testing the validity of these results in other situations and/or at a regional level. This observation

made in a country benefiting from a strong statistical apparatus is consistent with a more general statement made by Carpenter et al. (2006) for the millennium ecosystem assessment: there is a tremendous lack of knowledge and data linking social and ecological processes at a scale that is relevant for policy-making. Therefore, it may be understandable that policy-makers develop a particular 'preference' for measures based on zoning that recommend unhitching agriculture from conservation. Once established, the management of these zones requires no statistical data of a different nature to that which is available. The vicious circle is completed.

## *Conclusion*

This incursion into the fields of EBP reveals its usefulness as a guideline for analysing the way in which scientific knowledge is mobilised in land and conservation policies, what knowledge is actually available, how it is used to improve the technical content of environmental policies, but also how it can be selectively chosen to strengthen the power positions of some stakeholders.

The reasons why such an approach is getting more and more attention cannot be ignored: the status of knowledge in policy decisions is changing, and a better understanding of the new function given to scientific evidence in policy decisions involving land issues is crucial. Part of the answer to the uncertainty raised by sustainable development issues is sought in research outcomes. Scientific knowledge is increasingly used to justify certain views of relations between human societies and uses of natural resources. Yet we observe that often decision-makers fail to perform the scientific inquiry that would allow them to make better use of all available scientific knowledge. Sometimes theories that are questionable or even universally known to be false ('Tragedy of the Commons' is the example offered) are mobilised to justify certain measures. Most often, known scientific theories offer the possibility of conceiving alternative measures to those proposed, but such scenarios have not been fully formulated.

Several causes contribute to an explanation. First, adequate knowledge is missing. Decisions regarding agri-environmental issues involve social, biotechnical and ecological processes but there is a lack of such interdisciplinary knowledge at scales that are relevant for policy-makers. In addition, the available disciplinary knowledge is difficult to use. There is a lack of meta-knowledge that would allow policy-makers and other stakeholders to get a clear picture of the existing theories, the scenarios they suggest, their limits, and the possibilities they open.

That is why it seems necessary to develop interdisciplinary approaches that link the social sciences with the natural sciences at a scale that is relevant for policy-makers, but also to produce and make available for all stakeholders more meta-knowledge of the current scientific knowledge on the interaction between agriculture and biodiversity conservation. At the moment, the various actors have very asymmetrical positions. Dominant stakeholders can more easily mobilise experts to build such meta-knowledge, and even produce ad hoc knowledge (for

instance, biodiversity inventory) to support their positions. Therefore, in many cases the use of scientific data to justify biodiversity conservation measures seems to be a pseudo-rationalisation of policies that serve to strengthen the existing balance of power, rather than making a real attempt to reshape society–environment relations by making the best possible use of available knowledge.

These old concerns must be considered with a renewed interest because the current period is characterised by two major changes:

- the increasing pressure on limited resources will result in an upsurge of technical sub-measures in land regulation, giving more importance to this issue of validated knowledge; and
- while a social criticism of economics and other social sciences was built over the last century by various stakeholders (unions, political parties, etc.), the mobilisation of ecological knowledge in policy debates is new. It does not benefit from the same social criticism and is often considered as 'neutral', leading to some 'naturalisation' of ecological questions that are built by dominant stakeholders.

Hence, the challenge for researchers has several dimensions: to provide a better analysis of the social and ecological implications of various forms of association of agricultural production and environmental protection objectives, to recall the interests and limitations of any available scientific knowledge and the subsequent importance of the political negotiation process, but also to give all stakeholders access to the available scientific knowledge through the development of adequate meta-knowledge that will allow them to fully assess the limitations of the outcomes of different theories and the interests of the development scenarios they suggest.



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# STATE BUILDING, POLITICS AND LAND

# 8 *The role of land as a site and source of conflict in Angola*

Jenny Clover



The signing of the Luena Memorandum of Understanding peace accord in April 2002 between the rebel National Union for the Total Independence of Angola (Unita) and the government of Angola brought to an end 27 years of civil war. As was expected, despite the end of a crisis of violent conflict, the transition to a situation in which most of the population is stabilised is taking much longer. More than six years after the Luena accord the benefits of peace have not fully relieved the daily struggle faced by most Angolans; there are vast economic and social rights problems still to be addressed. Indeed, it is difficult to determine what might qualify as 'normality' in Angola. The situation since the end of the war in 2002 certainly has held a greater promise of lasting peace than any other period since the beginning of the independence struggle in 1961. Hence the importance of laying down the foundations for broad-based recovery and peace building, to realise the link between security and development.

Basic indicators of development in Angola consistently have been among the lowest in the world, the direct result of two related factors: the prolonged armed conflict and long-term underinvestment in basic social services. The country was ranked 157th of the 179 countries listed on the United Nations Development Programme (UNDP) Human Development Index (UNDP 2006). The Index indicated that the average life expectancy at birth is 40.7 years, less than 50 per cent of the population has access to basic health services and 47 per cent has no access to clean drinking water. Years of war have increased inequality in income and assets. The government's *Estrategia de Combate a Pobreza* (Poverty Reduction Strategy Paper) states that 68 per cent of Angolans live below the poverty level, 28 per cent of whom are classified as living in extreme poverty. The International Monetary Fund (IMF) estimates that some 70 per cent of the population lives under conditions of 'absolute poverty' (IMF 2006). The high incidence and intensity of poverty also reflect the failure of the formal economy to generate livelihoods for the majority of people. Households diversify their incomes with a mix of formal and informal employment, or rely entirely on informal work or commerce.

## *Post-conflict recovery and peace building*

As countries enter the transition from war to peace, it is important to move beyond saving lives to saving livelihoods, building resilience and addressing vulnerability. At the same time, efforts on all fronts must help transform a fragile process into

a sustainable, durable peace in which the causes of conflict are diminished and incentives for peace are strengthened.

Promoting peace and unity entails respecting and integrating all groups constituting the society – and this calls for ensuring guarantees and safeguards to protect the interests of the marginalised; otherwise groups that are discriminated against would be justified in seeking their own self-determined equity.

> [I]f post-conflict reconstruction merely consists of re-creating what existed prior to the state's collapse, this may ultimately lead to the very same result: another failure. Therefore, post-conflict state-building should aim, first and foremost, at building a new, different state…Otherwise, the unity of the state may be restored at the expense of justice, and may not foster peace in the long run. (Rogier 2004: 54)

As the renowned conflict analyst Mark Duffield states, 'Similar processes operate in both peace and conflict; consequently war economies may be a different expression of what constitutes normality in peacetime economies, and war and peace represent different degrees of each other rather than absolute or contrasting stages' (in Luckham et al. 2001: 3). Both war and political violence affect the allocation of power and resources, which in turn negatively impacts on poverty and inequity. So, while peace may hold, when inequity is embedded in social relations and the political and conflictual significance of distributional problems is not addressed, what may follow is the transformation of violence into still pervasive but different forms, including localised rural conflicts and widespread urban violence (Cramer 2001). This view is shared by others, who argue against conflating violence and insecurity: non-violent conflict may be as important as violent strife in undermining livelihoods and social and economic sustainability (Liotta 2005; Peluso & Watts 2001). Thus, a more inclusive concept of violence and non-violence is taken, in which understanding security calls for a focus on both direct and immediate threats and the insidious and creeping vulnerabilities that underpin environmental conflict (Liotta 2005). Land conflicts do not generally find expression as violent, physical conflicts; rather, most arise from land issues between communities and investors, the elite, or government officials, and are experienced as the loss of home, livelihoods and productivity. And because long-term vulnerabilities are contentious, they often fall victim to the 'do nothing' response and receive the least attention from policy-makers.

### *The challenges of post-conflict normalisation*

Angola now faces the monumental challenges of post-conflict normalisation, the achievement of which must rest on a foundation of restoring trust within society. Poverty reduction is an integral part of rebuilding trust, and development projects in turn are more likely to bolster peace in areas endowed with high levels of 'social capital'. For peace and stability to prevail, the needs arising from underdevelopment and huge inequalities must be addressed during this (re)construction phase.

Angola has a Human Development Index (HDI) of 0.484, which gives the country a rank of 157 out of 179 countries; on the Human Poverty Index (HPI-I) 2006 for developing countries it ranks 119 out of 135 countries, and with a 46.7 per cent probability of not surviving past the age of 40 it ranks 131 of 135 countries (UNDP 2008). In the rural areas of Angola, which suffered enormous hardships as a result of the civil conflict, the challenges are far from over; indeed, they are just beginning. The agricultural sector accounts for only 8.2 per cent of Angola's gross domestic product (FAO/WFP 2006), but it is a fundamental economic activity in a country with a large rural population and a small industrial sector (excluding oil). Some 85 per cent of the rural population live off subsistence agriculture, which in the absence of safety nets is an important key to poverty alleviation and food security. With a mere 3 per cent of 8 million hectares of arable land estimated to be under cultivation, however, the country can only produce a small amount of its total food needs. Angola has shifted from being a net exporter to a country heavily dependent on the large-scale importation of food (commercial imports of wheat and rice) and on international food aid – a direct result of the protracted war. Many ordinary Angolans have begun to see the NGOs and their donor patrons rather than the state as the main provider of basic social services, humanitarian relief and resources for rehabilitation. For several years, the World Food Programme (WFP) delivered food to an average of 1 million people each month; after 2004, humanitarian aid from NGOs and international donors declined and the WFP now no longer has a programme in Angola.

Perceptions that good land is widely available are false. In many areas land is of poor quality and unworkably remote or fragmented. Even in the Central Highlands where soil fertility was once high, fertilisers are needed to compensate for the marked degradation of soils, as is the case in most areas. In other regions of less fertile soil, larger areas of land are needed in order to guarantee subsistence. Many regions are also remote from markets and services. Logistical constraints, the lack of rural markets or sufficient inputs, and the inaccessibility of some areas continue to constrain food production. The revival of agricultural activities is also severely affected by the large number of landmines that litter the countryside, affecting access and undercutting food production as vast stretches of land are not yet safe for cultivation. In 2006 the UNDP estimated that there were 2 million unexploded munitions; however, international NGOs conducting landmine clearance operations in the country estimated the number of landmines at 500 000 to 1 million (US Dept of State 2007).

### *The significant role of land for recovery and peace building*

Land issues play a fundamental role in post-war reconciliation and economic rehabilitation, and necessitate a land policy that deals with wealth creation and poverty alleviation simultaneously. Such a policy must also provide a sound basis for secure property rights for investment and the generation of economic opportunities while also ensuring that the benefits of such growth are distributed equitably within society; by extension, it must ensure that access to and tenure of land, as the basis

for improved livelihoods and food security, be distributed equitably. In post-conflict settings, a scramble to access the assets necessary to (re-)establish livelihoods for large numbers of people, as well as the pursuit of land access by large-scale commercial interests who capitalise on a fluid land tenure situation in the acquisition of resources, may occur. During war, land is worth little in commercial terms, but in a more stable environment, as experienced in Angola since 2002, the appropriation and regularisation of natural resources in strategic areas becomes of fundamental concern. In many cases there are multiple actors seeking access to and use over the same land and natural resources. Receiving rural communities and returnees may come into competition. There is a high demand for fertile land in areas with access to services and markets, evidenced by increasing competition between peasant and commercial interests (Nielsen 2007). In the urban areas, the 'rising prices of land values represent an important source of wealth – individual, collective, private and public…It is a source of income and a versatile component in survival strategies' (Development Workshop 2002: 4).

This poses a challenge to the broad-based, pro-poor development so crucial to ensuring a sustainable peace. Governance of the tenure regime, access to land, security of tenure and equitable distribution of landholdings provide the building blocks for sustainable security. In post-conflict situations, they are also more fluid and open than at any other time and carry the seeds to reduce or generate conflict and social disruptions, as well as the potential to support or threaten sustainable livelihoods.

The issue of land policy in post-conflict environments has received very little attention from researchers, governments or peace-building and development agencies, despite it playing a fundamental role, both in recovering from conflict and in preventing further conflict. Land lies at the heart of social, economic and political life in most of Africa: over and above basic shelter and security, it plays an extremely important role in development. In fact, land policies should reflect the importance of well-thought-out economic and development considerations and should act as catalysts for social and economic change (AU/ECA/ADB 2006; Hanlon 2002; Peters 2004).

An examination of past and current land issues and their relation to poverty in post-conflict Angola, and the contribution that Angola's recent land legislation could make, may enable us to identify possible threats to human security from the standpoint of social equity, environmental sustainability, economic efficiency and political stability.

## *Angola's history of land legislation and land conflicts*

The disruption of land occupation in Angola has been very severe. Since before independence, distribution and ownership of land and the income it generates have been a source of conflict as well as a cause of huge inequalities among the population. As Pacheco (personal communcation)[1] states, 'the legislative history of Angola,

especially during the last 40 years, has resulted in a succession of injustices against the rights of traditional communities and the sustainability of their economies.'

Portuguese colonisation was based on the principle of 'administrative differentiation' between Angolans, divided into categories of *indigena*,[2] *assimilado*,[3] people of mixed race (*mestiço*s)[4] and, at the top of the hierarchy, white Portuguese. Such racially based discrimination meant that the government gave European settlers concessions of 'unoccupied' land, as well as seeds, tools and slaves. Not only were such privileges denied to whoever did not have Portuguese citizenship, but almost every aspect of their lives was regulated in a specific way (personal communcation Pacheco).[5] This discrimination gave indigenous Angolans, who were not Portuguese citizens, the right to use – but not to own – communal or individual land. Colonial authorities justified the duality of the law as defending colonial rights and interests and at the same time respecting the uses and customs of the indigenous people; however, this justification also contradicted the proclaimed intention of conceding Portuguese citizenship to all Angolans without distinction – provided they 'assimilated'. Foreign commercial farmers violated this right by frequently alienating Angolans from their land, such as in the Gambos of southern Angola (Alberto 1998). Increasingly, political and administrative measures were directed at the submission of Angolans to Portuguese sovereignty and their integration into the monetary economy and the colonial market (Pacheco 2000). In his review of Portuguese legislation between 1880 and 1920, Pacheco (2000: 9) observes: 'The most conspicuous of these measures concerned the payment of taxes, compulsory cultures and different modalities of forced labour. Conflicts between indigenous communities and Portuguese administration appear from that period on, due to abusive occupation of lands by merchants or colonial enterprises…'[6]

The immigration of Portuguese citizens increased in the 1950s, as did the expropriation of land, which served to drive the establishment of farms and plantations in order to grow cash crops for export. This was matched by an ever-growing contempt for the rights and interests of the indigenous populations. By 1960 the Angolan economy had been completely transformed, boasting a successful commercial agricultural sector (as well as a promising mineral and petroleum production enterprise and an incipient manufacturing industry) that continued to grow in strength. The start of the 1960s marked a watershed period prompted by UN criticism of forced labour, coupled with racial discrimination as enshrined in the indigenous statutes. In 1961, with the changes in African societies and the beginning of the liberation struggle, the Portuguese were obliged to approve a new land tenure law. Although the new law retained a differentiated system, it would protect the rights of the rural population, but it was never implemented in practice. Legislative and administrative weaknesses, coupled with the fact that few Africans were in a position to meet the formal registration requirements for the granting of concession titles, meant that the majority of Africans could not take advantage of titles in the third-class areas. In effect, Europeans on the whole maintained their *fazendas* (commercial farms) as *de facto* freehold, rather than as *de jure* freehold.

In 1973 a new land law declared that all lands that were not privately owned or in the public dominion were available for concession, except for those areas under customary tenure.

The period of transition following independence from November 1975 was particularly chaotic for the commercial agricultural sector as almost all the country's skilled humanpower fled Angola, abandoning thousands of *fazendas* and small businesses, including the entire rural trading system. In terms of the Constitutional Law introduced by the post-independence People's Movement for the Liberation of Angola (MPLA) government (Article 11), all natural resources became the property of the state; that is, the state became the owner of lands that were not definitively privately owned and the state as owner could now transmit to others the right of land use. Peasants were able to recover most of their land so there appeared no obvious need for land reform (Pacheco 2000). However, part of the reason that no specific land laws were drafted may lie in the perception that tenure was not an issue, because so much land was seen to be available: 'Communities effectively ceased to lack lands, and land problems apparently ceased to exist' (personal communication Pacheco).[7]

Under a centrally planned economy, state control extended over virtually all economic sectors during the 1980s, but towards the end of this period commitment to a Marxist-Leninist economic policy began to waver and a number of economic reform programmes were introduced, sometimes falteringly. This resulted in important changes in the overall situation. What is evident, in fact, is that economic failure had undermined the legitimacy of the socialist state, leading over time to *de facto* liberalisation and privatisation, with elites linked to the state and the military finding liberalisation an increasingly profitable interest (Addison 2001).

The subsequent transformation of economic policy and change in governance in the early 1990s brought about a radical change of the situation as the country transitioned from a single-party system to a multiparty democracy and adopted a market economy. The economic model required a land market and a legislative framework appropriate for the development of a private sector able to attract foreign investment in commercial farming and cattle breeding. In fact, the cultural and legal dichotomy that existed in the colonial period continued in terms of property. It was during the 1990s, which were characterised by legal ambiguity, that the series of so-called privatisations set the precedent for 'land grabs' in post-independence Angola (*WMRC Daily* 12 August 2004).[8] Landownership became concentrated largely in the hands of the political elite, members of the armed forces and businessmen, while there was a marked erosion of ordinary people's rights that further increased their marginalisation (Pacheco 2000). Although in theory land remained state property, the highly controversial process of privatisation of the previously large state sector that was carried out during this period (and in a poorly conceived and disorganised way) made it possible for the powerful politico-military elite to use their positions to obtain concessions for newly divested state farms, as well as potentially lucrative property and land in rural and urban areas (Bledsoe & Pinto 2002; *Reuters AlertNet* 1 January 2001[9]).

On 28 August 1992, 17 years after independence, Angola adopted its first Land Law.[10] Part of a raft of legislation passed in the few months before elections, it was approved in the absence of any public debate and by a legislature that still had no recognised mandate. This lack of consultation reflected the authoritarianism inherent in a history of both colonialism and the centralisation of political and economic power of the one-party state. Urban land issues were almost completely ignored, despite the fact that since the 1950s migration to the cities had been a common phenomenon (Jenkins & Smith 2003). In effect, implementation of the Land Law reflected neither liberalisation nor security of tenure for smallholders. New forms of 'state' patronage – or crony capitalism – emerged as a few wealthy individuals gained control over vast natural resources. Policy and practice served to recreate the pre-independence structure, with politicians largely assuming the role of the colonisers. The dualistic character of Angolan society continued, with differentiated treatment of so-called *indígena* (the peasant farmers) and the *assimilado* (the ruling class). In the absence of formal institutions, disconnected practices continued in rural areas. Although *sobas* (traditional authorities) were given consideration, this occurred outside of any legal or institutional framework. The de-legitimising of the role of the *sobas*, which began during the colonial period, was continued. Government policy was to give priority to the new commercial farmers rather than to small-scale peasant farmers, although it is investment in the latter that has the potential to raise production, alleviate poverty and reduce household food insecurity rather than the low-wage employment provided by the *fazendas*. It has been argued that for the government it was a priority to gain and maintain control over natural resources that would finance its development activities (Groppo 2001).

## *The new Land Law of 2004 (Lei de Terras 09/04)*

The 1990s marked a period in which the cleavage between legality and legitimacy (the social acceptance of the laws) began to grow (Groppo et al. 2003). Sensitive to these cleavages, and also to the growing number of land conflicts that had occurred over the previous 10 years, the government was increasingly aware that the existing 1992 Land Law was deficient in many ways, and not generally well known to either the public or farmers. In 1999 the National Directorate of Territorial Planning, the department responsible for issuing titles, appointed the UN's Food and Agriculture Organization (FAO) to work in partnership with MINADER (*Ministério de Agricultura e Desenvolvimento Rural* – the Ministry of Agriculture and Rural Development) to recommend revisions to Law 21-C/92. Their mandate was to interpret the 'spirit of the law', with the specific intention of recognising the customary rights of communities, defined more broadly than just their 'cultivated lands' (Groppo 2001). On-the-job training was provided in methodology, the results were widely publicised, and a public meeting was held in September 2000. (It remains questionable, however, whether those most affected – the rural and poorest sections of the population – knew about these processes.) This initiative

resulted in the first titles being granted to communities in March 2001, in a way that recognised land defined in social terms rather than in narrow topographical terms. However, immediately after the first title was granted, President José Eduardo Dos Santos appointed his own advisor to prepare a new draft Land Law, parallel to the MINADER process of redrafting the Land Law. This was a highly secretive process (Palmer 2003). The result of this was a draft that was not entirely approved by the government, but pushed through party channels by Dos Santos for approval. In many ways this draft was considered to be inferior to the very law that it was supposed to improve on, and it failed to take account of the FAO/MINADER process.

In December 2001, an ad hoc Inter-ministerial Land Commission (*Comissão Inter-Minsterial para a Revisão da Lei de Terras*) was formed to combine the two drafts. Approval by the provincial governors and top MPLA structures resulted in the draft Land Law and draft Territorial Planning Law being introduced in July 2002. At central government level, the discussion on the Land Law was led by the Minister of Agriculture and there was no clear institution at central government level that could take responsibility for urban land issues (Jenkins & Smith 2003). This draft emerged amid strong rumours and suspicion that in the immediate post-war phase there was a sense of urgency on the part of government that stemmed from the need of elites, on both sides, to regularise the land grabs that had been taking place in some areas during the war (Palmer 2003).

Commenting on the draft, Palmer (2006) noted three key elements:

- the need for relevant civil society and donor actors to seek out allies in different levels of government who share some of their concerns;
- the need for rural communities to assert their 'customary' land rights as communities and to have those rights affirmed by government; and
- the need for concerned actors to support communities to assert these rights and for those actors to build alliances at different levels.

The government set a six-month period for public consultation on the content and effect of the draft. In spite of civil society weakness, there was increasing mobilisation around the land issue and the period was in fact extended as the issue became increasingly politicised. The campaign 'Towards a fairer Land Law' (*Por uma Justa Lei de Terras*) of the nationally based Land Network (*Rede Terra*) (established in August 2002) and the Huíla Provincial Land Forum (*Forum Terra*) appealed for continued discussion, and succeeded in pressurising the government into allowing an indefinite period of public consultation. In December 2003 the Cabinet Council approved revisions to the draft Land Law (*AllAfrica* 13 December 2003[11]) that contained several improvements, as called for by *Rede Terra* and other supporters, such as recognition and partial protection of the traditional collective rights of rural communities.

On 10 August 2004 the Land Law was approved by the National Assembly during an extraordinary session (*APA* August 2004[12]; DfID 2004), but was not signed into law. During the discussion by the specialised commission, MPs pointed out the

lack of guarantees for the rural population as well as the need to clarify issues of original ownership of land, to define ownership of natural resources existing on land owned privately, and to review the lands confiscation and nationalisation acts of the national citizens (*APA* 5 August 2004[13]). On 18 December 2004, the Land Law was finally passed into law and promulgated in the state Gazette (*APA* December 2004[14]). The Land Law became effective in February 2005.

The Land Law did not define or regulate relations among all concerned sectors, including state administration and local powers. However, soon after President Dos Santos announced the formation of two presidential commissions to review Angola's economic and urban planning legal and regulatory regimes (LiquidAfrica 2005). One technical commission was established to review all existing economic legislation and draft all necessary enabling regulations to implement them effectively. The objective of the second commission was to review existing urban planning practices in order to alleviate urban crowding and the oversubscribed municipal services in Luanda and many other provincial capitals. This commission was responsible for reviewing urban planning, management and development policies as well as all regulations affecting housing credits, with the goal of defining new population settlement and construction criteria for new suburbs and cities. In August 2006 the legal Regulations of Land Use, which established the principles of the juridical regime defined in the Land Law, were approved by the Council of Ministers (Amnesty International 2007). Yet, by early 2008, they had not yet been gazetted. There continues, consequently, to be considerable confusion about what constitutes a legal title capable of standing up in a court of law. The implications are most severely felt in the urban areas where formal written legal title has become of critical importance as private investment increases and demand for scarce (and prime) well-located land from private investors grows (DW & CEHS 2005).



### *The process of approval: Successes and concerns*

Debate and consultation involving all categories of stakeholders – government and non-governmental institutions, central and local institutions, communities and private sector organisations – is critical to the process leading to the approval of a land policy and a new land law. The government has failed to introduce a land policy on which the law can be based (Palmer 2003). Furthermore, although for the first time in Angola's history a law was open for public debate (and for this the government should be commended, as well as NGOs and the media for raising public awareness), the Land Law was to a large degree developed by foreign consultants.

An important factor is that most Angolans are illiterate and poor, and have little or no knowledge of the law and their legal rights to property. They stand little chance of successfully confronting powerful public representatives. It was, therefore, critical that the process be characterised by an open and democratic approach that was negotiated and not imposed. Furthermore, it was critical that the methods of consultation should have included translation into the vernacular, an analysis of

the history of ownership, recognition of cultural links and population movements, as well as the promotion of strong community empowerment and ownership of the process (as opposed to NGOs facilitating the whole process).

Although the consultation process resulted in the Land Law going through several revisions, the process was such that it was more a question of government imposing its ideas than a process of genuine consultation or of absorbing the suggestions from civil society and NGOs. The Land Law was rushed through Parliament, out of session, and the process of approval and implementation is said to have been imposed, not negotiated. The level of debate in Parliament was not characterised by an open and democratic approach, with voting along party lines indicating little engagement with the subject matter. MPLA members voted in a solid block in support of the adoption of the Land Law, while the opposition either voted against or abstained (Cain 2005).

## *Rebuilding a peaceful Angola: Rising expectations*

The end of the war has brought a rapid change in circumstances and high expectations, as there is a greater appreciation of the true economic potential of land. With this have come two sources of land conflicts, both related to the powerlessness of the rural and urban poor: a wave of land grabs and enclosures by powerful people of high-quality land held by rural communities with good access to water, and evictions of the urban poor. There is little to indicate that the Land Law is contributing to improving livelihoods, enabling reduction of vulnerability or reducing the incidence of conflicts. It is increasingly questionable whether the Land Law will contribute positively to broad-based recovery by addressing the country's urgent needs and the expectations of civil society, or whether instability could be triggered if these expectations are not met. Alternatively, there is the risk that it will compound and/or complicate current land issues, possibly triggering conflict by aggravating old, underlying structural tensions. This highlights the need to identify the sources of potential grievances, the conditions that could shape their emergence, the character and levels of conflict, the intentions of the legislation, as well as who decides upon and who benefits from the legislative changes.

### *Land conflicts emerging from the resettlement of IDPs and refugees*

Violent and protracted conflicts, such as those Angola has faced in varying intensity for over 27 years, have severe consequences in terms of wartime dislocation and destruction. The successful resettlement and reintegration of uprooted populations in the rural areas since 2002 has been a critical component of rebuilding a peaceful society. While this has not always occurred without localised tensions, the prevailing evidence indicates that land conflicts between families have generally not been a problem in the post-war period, as customary ownership of land is a deeply embedded reality and widely acknowledged (Norfolk et al. 2004). Resolution is usually sought with the help of the *sobas*, and if they cannot help then the local administrator is

consulted. Solutions to conflicts usually involve the further subdivision of land between family members (Development Workshop 2004). There have, nevertheless, been conflicts and tensions between different groups and individuals over land that has commercial value.[15] Access to land and secure tenure are essential to effective peace building and post-conflict reconstruction, as the social reintegration of communities depends to a great degree on their ability to resolve land conflicts and to assimilate internally displaced persons (IDPs), ex-combatants and refugees without prejudicing their own livelihoods. As there was little surplus land upon which to settle any significant number of IDPs, resettlements were imposed and in some cases the newly displaced peasants were settled on lands that belonged to pastoralist communities. It has been claimed that powerful landowners in various parts of the country have influenced the location of some camps for displaced people (*deslocados*), to provide pools of cheap labour for their farms.[16]

Returning IDPs and refugees wishing to settle in those areas that are more accessible have found that these are the location of many large farms or plantations that have their origins in land concessions given to European farmers during the colonial era (Development Workshop 2004). This has raised the potential for competing claims for land restitution from returning IDPs and refugees, as well as those who acquired lands under previous regimes and those who lost them. In other areas peasant farmers sought to return to their land at exactly the same time that land was under greater pressure than ever before from commercial interests.

### *Urban and peri-urban land tenure tensions*

Irregular development in urban and peri-urban land is widespread and unquantified, as it is linked to the increasingly active market in urban and peri-urban residential properties. Pressure on the outskirts of the principal urban centres has often resulted in land conflicts as landownership became private, but without titles: people have papers showing they bought the land, but no title deed (Amnesty International 2007; DW & CEHS 2005). Under the Constitution the land belongs to the state, but people have surface rights. In the major cities, especially around the capital, Luanda, many families who fled fighting in the countryside ended up occupying or buying land on the informal market from people who usually did not have the corresponding legal title. In peacetime, this is now prime property for commercial interests and the poor run the risk of being turned out of their homes as businesses clamour to snap up city-centre and suburban real estate (*IrinNews* 27 November 2003[17]). Today, rates of urbanisation exceed 60 per cent and the peri-urban community is the largest and fastest-growing sector of the population.[18] Many of these people have purchased plots of land (in good faith) through informal markets. They have taken occupation without having a title deed, although not illegally in terms of the protection offered under the civil code. Allan Cain, the director of Development Workshop, an NGO concerned with urban development, highlights a critical concern that the new Land Law 'risks annulling all these informal occupations and making all of those people who occupy land informally, illegal. These rights need to be articulated and

regulated, and rules need to be set up. Regularising land rights will unblock a lot of people's own capital for improving their housing conditions' (Cain interview 2005).

On the outskirts of Luanda cases were still being reported in 2009 of communities being forcibly removed (in contravention of the government's norms for IDPs) to make way for new developments, and promises of new housing as compensations are failing to materialise (Amnesty International 2007; *Mail & Guardian* 11–17 September 2009[19]). The potential for conflict is compounded because, so far, the government has failed to make land officially available on the commercial market, except for middle- and upper-class housing or new commercial developments. Land is not demarcated for the growth or development of *musseques* (zones of self-built houses) and expansion and removals are disorganised. Hence, people are increasingly 'squatting' in areas that are devoid of any services, further aggravating levels of poverty (Cain interview 2005).

A November 2003 report by Amnesty International, entitled 'Mass forced evictions in Luanda – a call for human rights-based housing policy', called for a moratorium on forced evictions, claiming that over 5 000 people had been forcibly removed from their homes in three mass evictions between 2001 and 2003.[20] The report raises the concern that the 'system for registering land and housing almost collapsed during the war and was unable to cope with the expansion of households in Luanda'.[21] Again in September 2004, over 1 100 people were evicted from 340 houses in Cambamba and Banga Ué in south Luanda without prior consultation. A civil construction firm and a military construction brigade demolished the houses, while guarded by about 50 heavily armed police. Most of those evicted remained in the area without shelter (Amnesty International 2005). Evictions continued – some violently – during 2005 and 2006 without prior consultation, without due legal process (Amnesty International 2007), and without effort to provide compensation or adequate alternative housing. Most evictions took place to make way for the upmarket Nova Vida residential development. Human Rights Watch and SOS Habitat claim that between 2002 and 2006 the state had concluded at least 18 mass evictions that involved violence and excessive use of force (*Mail & Guardian* 11–17 September 2009[22]). Over the years these evictions have targeted the poorest families, hundreds remain without shelter or compensation, and most remain vulnerable to further forced evictions as they continue not to have security of tenure. The effect has been to drive people deeper into poverty. As appositely stated by Melville in *WMRC Daily* of 12 August 2004[23]:

> …if those who benefit from the legislation are the already well-connected, whose principle motivation for exercising their property rights is speculative, then the economic growth driven by the development of private land-ownership will be diverted away from those most in need and most capable of delivering results…The privatisation of government-owned real estates also provides a further opportunity for the well-connected to acquire private property rights at nominal cost, to force

> up rents and to force out residents who were occupying rooms and apartments beyond the scrutiny of the wartime state.

These sentiments were echoed again recently by Araújo (2008): 'The rights and aspirations of all of society are being extinguished in order to build the property base and illicit wealth of the "land lords"…[t]o the detriment of all (but a few)…', made possible by a strategy that 'separates the poor and the elite', especially in Luanda's many mixed-class areas (*Mail & Guardian* 11–17 September 2009[24]). Evidence of this was seen in the 2009 removals on the Ilha de Luanda, the prime strip of land separating Luanda's harbour from the ocean.

### *Rebuilding rural livelihoods and agriculture*

Land grabs first began in the late 1990s when a few wealthy individuals gained control over vast natural resources. In most cases these areas do not have clear boundaries, and it is in the process of defining clear boundaries that the problems start. This was seen in the fertile Kwanza Sul Province near Luanda and in the relatively peaceful south-west, where there is a proliferation of ranches and commercial farms. Thousands of hectares of land, once solely the territory of pastoral people and their cattle, were fenced in, becoming the private property of wealthy new landowners, including government officials. Traditional cattle raisers require more land to sustain increased numbers of cattle, but the carrying capacity of the land has been reduced as the total number of cattle has increased significantly over the years. As commercial cattle ranchers encroached upon the lands of traditional cattle raisers, cattle corridors were closed. Pastoral leaders claimed the land had been taken illegally and their traditions and customs, passed down over centuries, as well as their livelihoods, were under threat.

Lack of adequate protection for the property rights of traditional pastoral communities has continued. In April 2004 the Agricultural Department confirmed that a private farm could expand beyond its concession of 5 000 hectares to an area of approximately 20 000 hectares. This does not have direct effects on indigenous communities, but it does create the possibility of reduced access to land in the future as large-scale farming expands throughout the interior.[25] There is a well-founded belief that sometimes land is contested superficially for agricultural use, while the claimants' real interests lie in its potential for mineral exploitation – such as diamonds, asphalt, gold or manganese. An example of this occurred during an FAO programme carried out in Northern Huíla in 2003, where a land claim for 5 000 hectares presented by a member of the military elite was successfully contested by the community on the basis that he was not from the area. The piece of land in question had in fact been mined for gold during colonial times, and it is suspected that this is what triggered his interest in this particular land.

The re-allocation of pre-colonial land concessions that began in the 1990s has continued, and has become a source of renewed dispute between new concession

holders and local populations. It raises questions about who is receiving the major land concessions and for what. Many have been awarded to government elites, while traditional community populations have been removed from these concessions, the process tending to 'award concessions to a relative few who have access to the laws, rules, and mechanisms, as well as access to credit' (Bledsoe & Pinto 2002: ii). It is no surprise then that elite interests and political factors feature prominently in areas where there are acute land conflicts between private and community interests. It is these same elite groups and individuals who are reluctant to even lease the land to displaced or other poor people in case of future ownership claims. As more land becomes available for farming and as its commercial value and potential are realised, there are signs that wealthy, politically connected elites – groups and individuals – are staking claims to tracts of land. Huambo and Bié provinces have seen a revival of claims for old *fazendas*, purchased at 'knock down prices', with local populations being pushed onto poorer land or reduced to being only employees.

## *Making sense of Angola's land legislation*

An overview of land conflicts in Angola reveals clearly that there is no single land issue but different combinations of stressors that are interacting, and there are also both indirect and direct drivers of conflict (Clover 2007). What is evident is that land is an asset of substantial value and control over this resource is often central to national and local political power (Clover 2007). In the rural areas it is not a matter of land scarcity, with conflicts predominating in resource-rich areas. Rather, the primary scarcity is a capacity to make the most of productive land because of lack of inputs and resources and this is because *the real scarcity is a politically and economically induced one*. Urban conflicts have occurred over land located in prime positions, resulting in the expulsion of the poor and marginalised from the city to areas outside the reach of basic government services and gainful employment. In other words, conflict is less likely to be generated by resource poverty and bankruptcy than by resource value and wealth, and more extensive and destructive violence is likely when the resources are either in great abundance or have great economic or strategic value.

### *The central role of interest groups and politics*

Angola is a highly unequal society in which discrimination has been rampant in many spheres of social, political and economic life. This is evident in its long history of cynical, corrupt, highly centralised and top-down governance and callous indifference to the poor. The persisting cleavages, which are regional rather than ethnic, are rooted in the stratified concept of society imposed by the Portuguese, who remained for the most part in the coastal areas (Clover 2007). It is evident that the patronage network permeates the political system and there are commercial alliances between the state and private actors that benefit the influential elite and cost the poor dearly. It is by exploring who the elite are that the 'convergences of culture, power and

political economy with the historical geography of material practice' become evident (Peluso & Watts 2001: 25). Despite being extremely rich in resources, Angola's huge oil – and to a lesser extent diamond – wealth has contributed to problems which are inhibiting broad-based economic development.

The historical and current patterns of entitlement to land and other natural resources, as well as access to the political regimes and institutions that determine these, are indicative of the central role of politics and interest groups. These entrenched patterns of power continue to influence how entitlements to resources are distributed. The government has shown little interest in rural populations; rather, the urban-industrial interests of the elite, most of whom are the former *assimilado* (many of whom are *mestiço*), dominate policy decisions to the exclusion of any concerns for the people of the interior,[26] in particular for those of the Ovimbundu, the *componese* (peasants). This reflects a (persistent) social and economic cleavage that has deep historical roots.

### *Economic priorities*

Establishing food security is important: it is the principal means for stabilising the population and a vital step in moving from humanitarian relief towards broad-based development. Certainly agriculture and land tenure are prerequisites not only for immediate recovery, but also for obtaining the longer-term benefits of diversification. This, however, necessitates a thorough and early reconsideration of policies, a key component of which is property rights. If the rights of the poor are not strengthened, they will continue to lose out to the wealthy and powerful through land grabs, and will fail to recover the natural capital they lost in wartime.

There is a great need to promote and attract new investment that will generate growth in the agricultural sector so that Angola can rebuild its market-oriented production system. However, this process constitutes both an opportunity and a challenge to ensure that it is not used as a guise for increasing and unscrupulous land grabbing and speculation. If the law satisfies only agro-industrial needs (which in all likelihood will justify the concessions already given to favoured people) and does not ensure the protection of rural community interests, such as water rights, a new social conflict could emerge. Agricultural rehabilitation, although generally considered politically neutral, can easily take on political dimensions, in which case rehabilitation is clearly not enough. It has been suggested that the seeds of the next conflict lie in precisely this outcome.

Land activists maintain that the new law gives greater priority to the economic, rather than the social, value of land. Communities see land as representing not only their guarantee of survival, but also their culture and heritage, as 'social representations of land and land tenure systems give structure to the relation between man, land and agricultural production'.[27] There is a growing belief that the government is unable or unwilling to reconcile such a vision with its own approach, which is informed by

a technocratic and purely economic view, and excludes the social and rights-based community value system, thereby failing to respect traditional law.

The government must develop an equitable and consistent land use policy, balanced between agri-business and smallholders. At the same time, policy with respect to agriculture should not see the agrarian economy split into two, namely modern and traditional, but rather see these components as complementary and engaged in a dynamic interaction based on partnership and shared resource use. The issue is particularly important in ensuring stability of the process of re-entry and reintegration of IDPs. While land per se does not ensure the means of making a living, it is a safety net that should not be threatened. Policy needs to promote both equity and productivity, identifying how these can complement each other.

### *Governmentality: The forms of access to and control over resources*

Governmentality is about the disciplining of forms of life, the modes of enforcement. Angola inherited limited experience of governance and public infrastructure at the time of independence, and the human and physical capital that did exist was decimated by war (Clover 2007). The institutions to administer or allocate land to the rapidly growing population need to be reinforced as there is considerable concern regarding the capacity of Angolan state structures – juridical, regulatory, fiscal, cadastral – to fulfil the devolved responsibilities that are envisaged by the new Land Law or to resolve land disputes.

### *Policy*

One of the key ways of determining how entitlements to resources are distributed is through policy and the legislative mechanisms in place. Clarity of law depends on clarity of policy, but to date there are no formal, written land policies that describe or guide the priorities to be promoted through land use, tenure or transactions, nor is there an implementation framework. This leads to concerns about the capacity of the state structures to perform the devolved responsibilities envisaged by the Land Law (Clover 2007).

A fundamental issue is the need to integrate land policy into a development strategy that is part of a wider social and economic development vision. In the absence of a formal land policy that guides the creation and implementation of priorities to be promoted through land use, tenure or transactions, there is uncertainty over a possible conflict of interests as regards intent: social equity and the preservation of traditional ways, or economic development. There is also the need for coherence among a range of related laws, for example those related to land, natural resource management, water, forests and fisheries.

### *The legislation*

The August 2006 Regulations that specify the institutional set-up for the formalisation of land rights, setting out guidelines defining different forms of land occupation (including commercial use, traditional communal use, leasing and private homes) and by-laws of the new legislation, were approved after having been only cursorily discussed but they are not yet promulgated (World Bank 2006). *Regulamentos* are extremely important in Portuguese law-making (personal communication Rimli). As such, this begs the question whether there is mal-intent behind the delays. The judicial and constitutional basis for agricultural land management is very confusing, disorganised and outdated. New large-estate landowners have increasingly occupied land without considering ancestral occupation rights of local populations.

The Land Law does not adequately address the reality of the majority (80–90 per cent) of Angola's poor who occupy land informally and have no title, and restricts the rights of citizens rather than reinforcing or extending them. Voices of dissent continue to make known their concerns over the government's apparent unwillingness to ensure implementation of the Land Law in a way that guarantees and increases poor people's security. Other government actions seem more deliberate in their intent, such as the Land Law's provision for increased government powers and the enabling of legal expropriation of land for private utility motives, not only in respect of public utility interests. Conflicts may well continue as government grants new and renewed concessions of colonial parcels, or as landowners or concession holders from the past (especially post-1991) reappear and reassert their rights. Urgent calls have been made to halt the ongoing unaccountable and opaque concession process, which tends to award concessions to the relatively few people who have access to the laws, rules and mechanisms, as well as access to credit (Bledsoe & Pinto 2002). The practice of making large land concessions to a privileged few has made it possible for the former communist ruling class to continue in its elitist role. With regard to the issue of state land, the law needs to provide a definition of the nature of state land titles, and clarify state rights to land and natural resources. There also needs to be an inventory of all natural resources in the country, systems and training set up for administrative matters such as participatory methodologies and geographical information systems, as well as monitoring and evaluation. The law circuitously permits the mere classification of land as being within or needing to be within the public domain, to be a sufficient declaration that the land is needed for a public benefit.

Concerns have been raised by land activists with regard to the plethora of reasons presented for the expropriation of land, in the absence of an expropriations law (Bledsoe 2004). There are numerous questions about who is receiving the major land concessions and for what purpose. This also raises the question of whether the new law is deliberately failing to be definite – is there a covert intention to leave the bureaucrat with greater discretionary powers that will serve to ensure unhampered vested interests? Under the new law, government tools for expropriating land are, in fact, greatly increased. There is also no principled way for determining

just compensation because there is no land market and there is no land valuation function or expertise. In effect, this is tantamount to a reduction of rights. However, the government has promised that these concerns have been heeded and will be detailed in the by-laws that have yet to be developed. Development Workshop is playing an active role in discussing the importance of consultation and the establishment of clear rules for expropriations and compensation with government (personal communication Allan Cain).

Not only is the country struggling to rebuild its legal and administrative framework, but there is also a concern that the requirement of only three years (itself a concession by government, which previously stipulated one year) for people to apply for the regularisation of their right to the land they are occupying cannot easily be met (personal communication Allan Cain).[28] 'Lack of accessibility is one of the most serious impediments in Angola's justice system, which is out of reach to an estimated 80% of Angolans' (UN Human Rights, cited in Parsons 2005: 55). In the virtual absence of a functioning provincial justice system, communities have little recourse to the courts.

Access to information is still limited, and many people still have no formal identification documents (a *cedula* – birth/civil registration), either because they were never issued in the first place, they lost their papers in the upheaval of war, or they have been living in areas controlled by Unita and which were inaccessible to state employees. Others have been refugees in neighbouring states.[29] The vast majority of people do not have the necessary papers providing legal ownership of property. Therefore, while the new law seems to make it easier for the relatively well-off to secure urban housing property rights, it increases the vulnerability of disadvantaged communities, as it does little to address the issue of land held informally. Vulnerability is based not only on poverty but also on powerlessness. The risk then is that informal landholders will be illegal occupants of the land they live on. The government needs to establish a process for extending formal land rights at no cost to those occupying irregular urban and peri-urban lands.

Women's rights and other gender-related issues also need to be addressed in all discussions on land policy. Women are particularly vulnerable because of the massive displacements that have resulted in a disproportionately large number of female-headed households. Women, who are essentially temporary custodians of land passing from father to male heir, are without land rights as customary rights leave land in the control of men. Upon divorce, separation or death, a woman faces the risk that her husband's family may take everything of value (including land) from the widow. Women also have the least social power and no effective decision-making powers, as evidenced by recent reports that women and female-headed household returnees are being disadvantaged by being allocated lesser quantities of land than men. The introduction of formal legal rules, through land reform, titling and registration, cannot afford to fail in recognising the rights of women.

It is important to recognise as well as value the role of customary systems and those who manage them, without institutionalising them or removing their

inherent flexibility and legitimacy in the eyes of the local people. The very real possibility of an active and informal land market within and between traditional communities cannot be overlooked. If formal laws are not correlated with customary and traditional realities, there is the risk that these will be ignored by traditional communities. However, while the only real communal lands in Angola exist in areas of low demographic pressure (primarily in the eastern and south-eastern half of the country), there is an important caveat to be added here: a caution against reinvesting power in local traditional leaders, who have shown little support for women's rights.

### *Administration*

Securing land rights requires not only a legal framework but also an effective and efficient administrative and juridical infrastructure if the rules are to translate into action and be enforced. When land lacks adequate legal or institutional protections, it 'quickly becomes a valuable and symbolically powerful commodity easily subjected to manipulation and abuse' (USAID 2005: 3). Property rights in land need to be administered and enforced by institutions that have both legal backing and social legitimacy, and that are accessible and accountable to the local population (Deininger et al. 2003); institutions of justice must be accessible to ordinary people and not reserved for an influential minority. It is, therefore, critical that the gap between legality and legitimacy be overcome; this duality has been a major source of friction in many African countries because neither adequate resources nor legal backing for administration systems that enjoy social legitimacy has always been forthcoming (Cotula et al. 2006). Such is the case in Angola, where government's weak implementation capacity, overlapping or competing jurisdiction of other policies and laws, and the absence of conflict management structures all contribute to conflicts around access to landownership and perpetuate inequitable power and property relationships. The capacity of state structures to perform the devolved responsibilities that are envisaged by the new Land Law, and to fulfil their judicial as well as administrative responsibilities at all levels of government in order to resolve the huge number of land disputes, is questionable. Angola inherited limited experience of governance and public infrastructure at the time of independence, and the human and physical capital that did exist were decimated by war. The mandates of certain ministries overlap, and there have also been tense and poorly defined relationships between provincial and central high-level institutions. Angola now needs to develop a transparent, functioning, efficient and effective land administration system that also integrates the reality of customary land management systems into formal national legislative and administrative frameworks.

The *cadastro* (legal land registry) has not been updated since 1975 and negotiations for the granting of land have not always been conducted in an appropriately formal and objective manner. As already noted, the chaotic administrative history has made it possible for elites to take advantage of local communities. A user-friendly dispute resolution system is needed, for without negotiations it is more likely that tensions

could develop into open conflict. Negotiation and consultation processes are also needed to harmonise formal local government and customary practices. Because questions of land reoccupation are best handled by local land management structures with little intervention from the state, decentralisation is critical as it mitigates the development of inter-institutional confusion (national level versus provincial level) and other problems that could lead to conflict. Consensual agreements can be reached if the appropriate guiding framework and adequately trained facilitators are in place.

Outside of Luanda, central government is represented through provincial delegations, but their institutional weakness leads to the continued centralisation of functions in central government (Jenkins & Smith 2003). In Angola, most legislation emanates from the Executive, not from Parliament, and there is a 'tendency toward even tighter presidential control and a tendency to restrict rights' (Skaar & Van Dunem 2006: 7). The dynamic – and often tense and poorly defined – relationship between provincial and central-level institutions is an important contextual feature of the land question in Angola (Groppo 2001; Quadros 2001; Skaar & Van Dunem 2006). There are also concerns of insufficient funding and capacity at the provincial and municipal levels to perform the devolved responsibilities required for implementing the Land Law.

## *Conclusion*

The potential for Angola to move from conflict to reconstruction and then sustained development is greater than ever before. Nevertheless, there remains a risk that the country will be condemned to further decades of poor governance and localised violence if the challenges of broad-based development are not addressed. As the Commission on Human Security states:

> Cease-fire agreements and peace settlements mark the end of violent conflict, but they do not ensure peace and human security…[the] chance that renewed violent conflict will erupt…is even higher when control over natural resources is at stake. (CHS 2003: 57)

In the end, human security depends on the interweaving of various dimensions: during periods of reconstruction, the focus has to be on addressing poverty while engaging in economic policy reform. Issues of reform and reconstruction cannot be compartmentalised into separate strategies developed under different ministries. If recovery is not broad-based, it can increase inequality by allowing an elite to strengthen its position while poor communities stagnate.

Many elements coalesce in Angola to marginalise and disempower huge sections of the society, creating deep structural inequality and massive poverty. The war may have ended, but there is considerable risk that the great promises brought about by the peace in Angola could be frustrated, especially if partnered with the rapid changes in social mobility, which may result in a breakdown in social consensus and open the door for possible conflicts. Inequality is a hugely important factor in the prolonged

history of violent conflict in Angola, but this is only recognised if conceived from the outset in these political terms, where the 'economic' is intimately related to the social and political. Economic inequality, in turn, exists by virtue of the social and political forces that give rise to it, just as material forces shape the social and political (Cramer 2001). Angola's resource environment, in which oil and minerals are so central, is constituted by, and constitutes, the political economy of access to and control over resources. The small elite in government with control over these resources has no will to ensure broad-based development, choosing instead to focus on their own urban-industrial interests. It is in exploring who the stakeholders are – who benefits, who decides, who will be affected by what trade-offs – and what hidden agendas there may be that the real intent of the Land Law becomes apparent.

While structural conditions do not in themselves imply that conflict is inevitable, cleavages in the social system can lead to violence if, over and above these structural inequalities, events occur that provoke, accelerate or create instability. In such situations, any meaningful empowerment of one group of people is likely to be perceived as being at the expense of others. Certainly the likelihood of more conflicts over land in peri-urban areas can be expected in the future unless occupancy rights are secure (DW & CEHS 2005). With the FAO, the World Bank and other agencies now committed to the concept of community tenure, it seems likely that more and more communities will strive for land rights (see World Bank 2003). This can be seen to be of particular relevance when noting that land tenure is not only a development issue, but also a rights-based issue – that is, rights to land are not just a source of economic production; they are also a basis for social relationships and cultural values as well as a source of prestige and often power (FAO 2002). Although mobilisation of the disaffected is as yet at an early stage, outbreaks of violence in the peri-urban areas have occurred, as dissent from NGOs and civil society towards the forced evictions in Luanda grows. Hindering NGOs' and civil society's abilities to bring about substantive change is the climate of prohibition and control in which they operate, and which has worsened over the past two years with the closing down of the political space in which they operate and decreasing international donor support (APPG 2006; DfID 2005).

However, by shifting the terrain away from a conventional understanding of conflict to a more encompassing, inclusive sense of violence and non-violence that includes 'the destruction of home and humanity, of hope and future, of valued traditions and the integrity of community' (Nordstrom 1997, in Peluso & Watts 2001: 29), the outward manifestations of insecurity, which may not be the threats of violent conflict but social disruptions and day-to-day insecurities that are experienced as insidious 'creeping vulnerabilities' (Liotta 2005), become apparent. These 'non-traditional' security issues are as important as the more obvious 'threats', but because they are usually not clearly identifiable, are often linked to complex interdependence among related issues and are marked by unpredictability, they do not always suggest an adequate or appropriate response. Furthermore, in the face of a strong and consistent regime, which in Angola's case is highly centralised and top-down, local-level

violence and inequities go unnoticed and are politically sustainable, independent of their impacts on various groups. Local-level conflicts are easily camouflaged by government and leaders are able to justify overriding the interests of the poor in the interests of growth. It is, therefore, more likely that these will be contained. Such outcomes will be determined by, inter alia, the potential for political groups to mobilise on behalf of the marginalised, especially when they have external support. For land-related grievances to feed and support violence on any significant scale and in a sustainable manner, there must be organised, channelled and financial support from the outside (Daudelin 2004).

The future for the poor in Angola is not promising as long as entrenched patterns of power are maintained (and strengthened), with the political elite continuing to dominate contestations for entitlements and control over land resources. What is significant here is the wealth and patronage networks of the small elite, built on the specific resource environment of oil and diamonds, which enables them to act with impunity to ensure that patterns and regimes of accumulation are not only maintained but strengthened.

In addition, there are the complexities that characterise the post-conflict environment. Balancing equity and growth is particularly difficult because of factors such as the rush to spend significant resources in a short period of time, often at the cost of prudent administrative procedures. There are also pressures for economic investment and government reconstruction programmes, especially in the urban areas. Then there is the focus of investment in public works and construction (the sector most prone to high-level extortion and bribery), and the absence of transparency and accountability that characterises post-war environments (Galtung 2003). With peace, large amounts of fungible money have been pumped into Angola by the donor community and transnational capital seeking new investment opportunities, and in so doing massive opportunities for embezzlement and theft have been created. As Araújo (2008: 3) notes, 'The international community has become an accomplice rather than run the risk of losing business opportunities.'

There is little to indicate that the incipient 'threats' to the peace and security of the majority will be addressed in a country that is characterised by a 'negative peace'[30] and a very weak government that has control over all resources and no will to change. The cost will be growing inequity, deepening poverty and creeping vulnerability for the most disadvantaged communities in both urban and rural areas. This is as a result of the dilution of the country's ability to use its land resources in support of broad-based economic development and subsequently a sustainable and enduring peace (Nielsen 2007). Ultimately, a world in which all that matters is profit, in which there is separate development for separate economies, is harsher and more dangerous for all.

### *Notes*

1 See Pacheco, 'Land and agriculture in Angola', unpublished.

2 *Indigena(s)*: An African or *mestiço* without *assimilado* status, that is, uncivilised. Before the abolition of the status (and the distinction between it and that of *assimilado*), roughly 99 per cent of all Africans were *indígenas* (US Library of Congress n.d.).

3 *Assimilado(s)* refers to those Africans and *mestiço*s considered by the colonial authorities to have met certain formal standards indicating that they had successfully absorbed (assimilated) the Portuguese language and culture. Individuals legally assigned the status of *assimilado* assumed (in principle) the privileges and obligations of Portuguese citizens and escaped the burdens, e.g. that of forced labour imposed on most Africans (*indígenas*). The status of *assimilado* and its legal implications were formally abolished in 1961 (US Library of Congress n.d.).

4 *Mestiço(s)* was the term used in a social context for the offspring of a mulatto and a white – mixed white and African ancestry. Several varieties, depending on the nature and degree of mixture, were recognised. Before 1961, most *mestiços* had the status of *assimilado.* Most *mestiços* were urban dwellers and had learned to speak Portuguese either as a household language or in school (US Library of Congress n.d.).

5 See note 1.

6 Explore Binswanger-Mkhize and Deininger (2007) for more on this.

7 See note 1.

8 Melville C, 'Angolan Assembly passes new Land Law'.

9 Shaxson N, 'Land squabbles add to problems of Angola's war displaced'. See also note 8.

10 Law 21-C/92: The law of concession, or so-called Land Law (*Lei de Licenciamento da Titularidade do Uso e Aproveitamento da Terra para Fins Agrícolas*).

11 'Special report on land rights'.

12 'Angola: Parliament approves lands, oil sector bills'.

13 'Rural communities' economic emancipation plan announced'.

14 'Land law proclaimed today'.

15 There were some 4 million IDPs at the time. By October 2005, over 90 000 displaced people were still unable to return to their homes (Norwegian Refugee Council 2005).

16 See note 9.

17 'Angola: Special report on land rights'.

18 According to Allan Cain, Development Workshop, the peri-urban community comprises some 80 per cent of the urban population.

19 N Tolsi, 'They came like animals'.

20 As evidenced by evictions in Boavista (July 2001), Soba Kapassa (December 2002), Benfica (March 2003) and Viana (between September 2004 and May 2006) – see J Pearce in *The Guardian*, 18 August 2001, 'Poor Angolans lose bay views to rich'.

21 See www.IRINnews.org/Report.aspx?ReportId=47268, accessed on 17 January 2004.

22 See www.mg.co.za

23 'Government to examine land ownership in Angola'.

24 See www.mg.co.za

25 *Jornal Apostolado*, 26 April 2004. Available from www.apostolado.info, accessed on 1 May 2004.

26 Angola has a narrow low-lying coastal plain that rises abruptly to a vast interior highland plateau – the 'interior'. It is a 'coast-hugging' nation, the ruling MPLA's economic interests are more urban-industrial, with control of ports and coastlines and other trading routes to the outside playing a critical role. *These conflict with the agricultural interests of the groups in the interior* (Kyle 2003).

27 See note 1.

28 The draft Land Law had indicated a period of only one year, but in response to pressure groups for a five-year period, and an acknowledgement of poor implementation capacity, the government made a compromise in agreeing to extend the period to three years.

29 The Ministry of Justice started a nationwide free civil registration campaign in April 2005, but it has faced serious logistical constraints.

30 Negative peace is when there is peace in the absence of war, but opponents do not feel secure. Security is not so much dependent upon the preservation of negative peace as on the building of peace in a constructive way. The key elements of positive peace are peaceful settlement of disputes; international cooperation in solving problems of an economic, social, cultural or humanitarian character; and promotion of respect for human rights. Positive peace is also called associative peace; it establishes open lines of communication (see www.rimun.nl/).



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# 9 *Two cycles of land policy in South Africa: Tracing the contours*

Ruth Hall

> Where a policy may fail in practice, it may succeed as composition and code. (Apthorpe 1997: 45)

The policy sciences have attempted to theorise and systematise both the making of policy and its analysis (Lasswell 1951) and have applied the principles of neoclassical economics, specifically those of rational and self-interested actors, to a policy environment. However, they have failed to generate predictive models (Fischer 1998). Instead, critics of the neoclassical approach have proposed the compilation of an anthropology of policy, dealing with the specific and contingent nature of a configuration of interests, actors and discourses that may come together in the contested and changeable – even 'messy' – process of policy-making (Lindblom 1959; Shore & Wright 1997). Land redistribution in South Africa presents an interesting case study of this approach, since (a) the stakes were so high and polarisation so substantial, (b) so much expertise was brought to bear in policy-making, and (c) the policy is so widely considered to have failed in achieving its objectives.

The official programme of land reform in South Africa has pursued multiple objectives, some of which are in conflict with one another. At the heart of the programme there is tension between the objectives of 'equity' and 'efficiency'. The former aims to bring about changes in social, economic and political relations, at the level of individuals, households and communities, and races, while the latter aims to improve overall output and factor productivity in agriculture. This chapter explores the interests, actors and discourses that shaped land policy in South Africa in the post-apartheid era. It describes two distinct cycles of land redistribution policy-making. The chapter looks at the notions of state and market advanced by different interest groups, and identifies some of the means by which they have sought to shape policy.

There is widespread agreement on the need for land distribution based on the extent to which there is inequality in access to land, and the history of land dispossession and political contest over landownership. There is also widespread agreement that the current situation is politically and economically untenable. By 1994, landownership was dominated by approximately 60 000 white farming units, most of which were operated commercially, though many were heavily indebted and reliant on subsidies and bail-outs. Over the next decade, during which the process of land redistribution began and the economic pressures of liberalisation began to take their toll, landholding became more concentrated and, by 2005, this number had declined to 45 000. While official agricultural data refer to only these areas of the former

'white' South Africa, there are an estimated 1.3 million black smallholder farmers in the former bantustans (NDA 2006: 6).

The first land redistribution programme of the new democratic government was articulated in 1997 in the White Paper on South African Land Policy. It advocated a market-assisted programme based on the distribution of land purchase grants set at a standard level of initially R15 000 (later increased to R16 000) to eligible households – those with a monthly income below R1 500 (DLA 1997: 43–44). By 1999, the programme was brought to a halt and, after a lengthy drafting process, a new policy entitled the Land Redistribution for Agricultural Development (LRAD) programme was launched in 2001. The new policy represented a significant departure from the vision evident in the Reconstruction and Development Programme (ANC 1994). It has been hailed by some as a viable means of creating a class of black commercial farmers, and for reintroducing considerations of land use that were previously obscured; others have criticised it for abandoning the poor and failing to address the conditions that led to underutilisation of redistributed land.

This chapter briefly describes the two cycles of policy-making and then reflects on four contours of the unfolding politics of land, noting how people have spoken about land reform and in what ways and to what ends they have influenced policy. These contours are, firstly, the debate on what land reform is for; secondly, who benefits; thirdly, the roles of state and market; and fourthly, how people have participated in policy-making.

## *The first cycle of policy-making: 1990–97*

The first phase of policy-making on land redistribution can be considered to have started in 1990, with the removal of the ban on the African National Congress (ANC). Policies were developed and elaborated through multi-stakeholder talks and policy research in the busy period leading up to and immediately following the first democratic elections in 1994, culminating in the adoption of the White Paper in 1997. Proposals for land reform in this period were highly disparate, and yet were brought together into a unified policy through years of negotiation. This might imply that compromises were made on all sides and the best combination of possible options was adopted. However, it is evident from a detailed analysis of the proposals that the demands of landless groups and non-governmental organisation (NGO) proposals were sidelined, and that the overarching framework of the World Bank proposals, modified to accommodate the ANC's imperative towards an explicitly pro-poor policy, was adopted. A sizeable core group of local 'experts' emerged during these policy negotiations. Their ideas were formed through academic study and through links with rural resistance, but they transitioned into a discourse of state planning. Although this period of policy-making involved a very open process, with those opposed to the direction the policy was taking able to reiterate their positions repeatedly, it was to little effect.

The early 1990s saw the rapid retreat of the Left in their ambitions to nationalise land and key industries, particularly the mines. This was because political liberalisation in South Africa coincided with the global demise of communist regimes and the emergence of the Washington Consensus that located economic deregulation at the core of political liberalisation. Even before 1990, the ANC's *Constitutional Guidelines for a Democratic South Africa* had focused more moderately on removing racial barriers on access to land, favouring an 'affirmative action' process of land reforms (ANC 1989).

The ANC's Land Commission, when it returned from exile, was led by a small group of thinkers for whom the agrarian question was of central importance to the future of the country. They found allies among leftist academics, who considered a class analysis of land relations to be central to land policy, and also among NGOs that had emerged during the late 1970s and early 1980s in support of resistance to forced removals. Their umbrella organisation, the National Committee Against Removals, was soon converted into an organisation with its own staff, offices and programmes, known as the National Land Committee (NLC).

A series of conferences and workshops in the early 1990s cemented cooperative relations among policy actors. These included a workshop held in Grabouw just a month after the unbanning of the ANC in March 1990, which was dominated by white academics, social scientists and agricultural economists. A workshop held in Broederstroom later that year brought NGOs and local academics together with the ANC Land Commission activists, many of whom had met each other previously at a major conference in Wageningen in the Netherlands in November 1989. Although some ANC thinkers no longer advocated nationalisation, the NGOs were still firm proponents and there were few other proposals on the table.

In 1991, NGO and ANC solidarity was galvanised by their joint rejection of the National Party's pre-emptive reforms contained in the Abolition of Racially Based Land Measures Act (No. 108 of 1991), which repealed a panoply of racialised land legislation, and its White Paper on Land Reform. The latter established a limited programme of land claims on state land and a grant-supported land purchase programme for emerging black farmers, subject to strict land use controls. The NLC argued that the National Party's arguments about economic rationality, sustainable land use practices and agricultural carrying capacity were merely a means to prevent the poor gaining access to land (DRLA 1993). As Crush and Jeeves (1993: 355) noted, 'the mass democratic movement, the alternative media, and the scholarly community united to condemn these measures as incapable of righting past injustices and overcoming the agrarian crisis'.

However, it was the negotiation of the Interim Constitution at the Convention for a Democratic South Africa (Codesa) that marked the beginning of a rift between the ANC and NGOs. As part of its Back to the Land Campaign in June 1993, the NLC supported a protest march of 500 rural community representatives to the World Trade Centre, the site of Codesa negotiations. They demanded the removal of the property

rights clause in the draft Interim Constitution and the confirmation of a right to restitution, threatening land occupations if their demands were not met. A few months later, at the Community Land Conference (CLC 1994) held in February 1994, more than 700 representatives of 357 landless black rural communities from around the country drew up a Land Charter setting out their demands (NLC 1994).

During this period the World Bank played a dual role, giving policy advice to the ANC and also attempting to recruit South Africa as an attractive new client. Between 1992 and 1994, its mission to South Africa engaged with the ANC, hosted a conference in Swaziland, brokered funding for the establishment of the Land and Agriculture Policy Centre (LAPC), oversaw a major programme of policy research and developed a set of Options for Land Reform and Rural Restructuring, which were presented and debated at the LAPC's Land Redistribution Options Conference in 1993 (LAPC 1994; World Bank 1993, 1994). It also promoted a market-based model of land reform, pointing to Zimbabwe as evidence of the model's merits, and argued that potential farmers should purchase land using their own resources and loans, and that where the market price of land far exceeded its productive value, the state should provide vouchers or subsidies (World Bank 1993). The World Bank proposals assumed that beneficiaries would use land acquired under the restitution and redistribution programmes for agricultural cultivation and livestock husbandry, exploiting inverse economies of scale and South Africa's comparative advantage in labour-intensive production (Binswanger & Deininger 1993; Christiansen 1992; World Bank 1994).



After the elections in 1994, Derek Hanekom was appointed Minister of Land Affairs in charge of the Department of Land Affairs (DLA). He inherited an apartheid bureaucracy from the former Department of Regional and Land Affairs, which he infused with new managers from ANC and NGO backgrounds to drive the policy process. By 1995, they had produced Draft Land Policy Principles, which were debated at the National Conference on Land Policy, a major gathering of 1 200 delegates in August to September of that year in Kempton Park. The proceedings of that event noted:

> For the first time in the history of South Africa, people from all sectors of South African society jointly deliberated the way forward in planning and implementing land reform. Of particular importance is the great number of rural people who were assisted by the Department of Land Affairs to attend the conference – more than 400 in all…The policy which will flow from the consultative process has been immensely enriched by people's contributions, and will illustrate a clear example of the practical benefits of democracy. (DLA 1995: 4)

The NGOs and the rural lobby rejected the market-based philosophy underpinning the proposed policy. Objections that were raised included the fact that landowners would not be compelled to sell, the proposed grants were too small and potential beneficiaries would be unable to make a financial contribution towards the purchase

of land, and that giving grants to households would not secure women's rights. Also published in 1995 were the NLC's *Land Reform Policy Proposals*, which reiterated their position adopted at the Community Land Conference, notably the rejection of the overarching market-led framework and opposition to the inclusion of a clause in the final Constitution to protect property rights (the clause was being debated in the Constitutional Assembly at the time). The NLC proposed instead a proactive and targeted approach to acquiring and transferring land, including through leasing state land and promoting the transfer of privately owned land through land taxes, subdivision and expropriation (NLC 1995). The objections and alternatives put forward by community representatives were almost entirely ignored. Years later, some of these communities would call into question the benefits of democracy.

Responses to the policy proposals of the 1996 Green Paper on South African Land Policy, elicited through workshops held in all provinces as well as through written submissions, revealed the different ways in which actors viewed the policy objectives. The representatives of commercial farmers and financial institutions approved of the market-based approach. Others, including rural communities and NGOs, rejected the market-based programme, providing suggestions as to how it might be modified. They expressed concern about reliance on 'willing sellers' and called for more state intervention to make land available through, for instance, the selective expropriation of underutilised land, and the introduction of measures to alter the functioning of land markets by imposing land taxes and placing ceilings on ownership of landholdings (DLA 1997).

The Settlement Land Acquisition Grant (SLAG) proposed in the Green Paper was confirmed in the White Paper as the key policy instrument for redistribution. Provision of small sums of R16 000 per household led applicants to pool their grants and purchase land jointly. This resulted in often unwieldy attempts at collective production on former commercial farms by groups who had little prior connection with one another, in what was termed a 'rent-a-crowd' syndrome (May & Roberts 2000).

By 1999, less than 1 per cent of agricultural land had been redistributed through all the available instruments of land reform combined and government had found that each project required vastly more time and resources to implement than was originally anticipated – with the cost of implementation usually exceeding the capital cost of land purchase (DLA 2000). Substantial concessions had been made by, and within, the ANC: from nationalisation to no nationalisation; and from a principled position that there should be no property clause in the Constitution to conceding to the inclusion of such a clause in 1993 and again, though less restrictively phrased, in the final Constitution. By the end of this cycle of policy, the legal, policy and institutional apparatus for land reform was firmly in place, forming a framework for the redistribution of land through transfer of ownership, usually to groups. A sharp distinction was drawn between land restitution and land redistribution. A programme of restitution was to encompass the demand for historical redress and make concessions to demands for land on the basis of culture, history, identity and

meaning. Redistribution, instead, would be informed by a historical imperative to redress the skewed ownership of land, but would need to be justified on economic grounds. Already, tensions between 'rights' and 'development' were evident.

## *The second cycle of policy-making: 1998–2004*

Despite the widespread view that the shift in land policy that occurred in this second cycle represented the individual visions of 'Hanekom versus Didiza', the timing of the new policy thinking suggests otherwise. The policy was already under review as early as 1998 and alternatives were being debated within government, starting with internal discussion documents and commissioned policy papers. Before the end of 1998, the DLA was considering moving away from group-based projects and expanding its programme to support individual black farmers so that they could enter commercial agriculture. After the appointment of Thoko Didiza as the new minister in July 1999, this rethink of policy took a new turn: a moratorium on further SLAG projects was put in place, pending the outcome of a ministerial review, and in February 2000 the minister announced a new direction for land policy. She attributed the need for a new policy to 'the failure of the land redistribution programme to make any significant contribution to black market-orientated agriculture' (MALA 2000b: 11), and identified the market-led approach as the source of existing problems:

> The placing of responsibility on market forces, as [the] core redistributive factor has not produced the desired effect and impact. This has limited the level of choice, suitability and quality of land parcels acquired for the beneficiaries of [the] land reform program. (MALA 2000a: 9)

The new direction was at once more radical and more conservative. More state intervention would be needed and the benefits would be directed towards a new target group. The new policy, the minister suggested, would have a strong preference for market-based agriculture, rather than market-based land acquisition.

> A new supply led system will be piloted with a more proactive approach to managing the allocation of land…Grants will only be available to those with a clear commitment to creating commercially viable and sustainable farming enterprises and every grant will need to be matched by a significant own resources contribution in terms of capital and loan finance. (MALA 2000b: 11)

The proposed new redistribution policy went through a series of revisions. First, the minister proposed that the one-size-fits-all approach be replaced with three redistribution 'windows', ranging from small to medium and large 'emergent farmers', with the level of state support dependent on the total project cost (MALA 2000b). Second, a joint task team of the two departments proposed two sub-programmes: a Food Safety Net Programme for the poor to engage in food production for their own consumption and a Commercial Farmer Programme to provide larger grants, leveraged with loan finance or own contributions, for emerging farmers aiming to

enter into commercial production. By May 2000, these had been combined into one integrated programme known as the Integrated Programme for Land Redistribution and Agricultural Development (IPLRAD), later shortened to LRAD, and officially launched in August 2001.

The policy process was driven by a joint task team of officials from the departments of Agriculture and Land Affairs, but the draft eventually forwarded to the minister's meeting with provincial ministers, where it was approved, was the draft presented by the Department of Agriculture, which it had developed in collaboration with agricultural economists from the World Bank and the University of Pretoria (Van Zyl et al. 1996). It proposed a sliding scale of grants ranging from R20 000 to R100 000 to be disbursed to individual applicants aiming to become farmers on any scale, and proposed removing the income ceiling, which previously had reserved land grants for the poor. Effectively, the bottom end of the scale was not very different from SLAG, while the top end approximated to the minister's proposal, the World Bank's original model from the early 1990s, and even the National Party's own reforms that had been so wholeheartedly rejected. By combining these in one, opposition to the new policy was partly defused by this compromise.

Two main public events were held to consult stakeholders on this new direction of policy. The two departments held a small consultative workshop where representatives from the Land Bank, private financial institutions and some NGOs met at the Agricultural Research Council in Pretoria in April 2000. By this time, parallel policy drafts had been written by senior officials in the two departments and a dispute arose at the workshop as to which draft should be presented. The draft eventually presented was that proposed by the national Department of Agriculture. Later that year, in December 2000, the minister hosted an *indaba*, an elaborate event attended by a few hundred delegates, at Caesar's Palace in Johannesburg. Landless people protested outside the venue and displayed their displeasure at slow delivery, as well as at the new policy, under the slogan 'No land, no hope, no vote'.

After 10 years of land reform, just over 3 per cent of agricultural land had been redistributed and, for the first time, budgets emerged as a key constraint (Hall 2004). Clearly, delivery had picked up in the second five years. Whether this was due to the revised policy is a moot point. The larger grants certainly assisted the DLA to spend its funds at a pace it had been unable to do before. The changed grant structure introduced under LRAD increased the resources available to applicants and reduced the extent of the 'rent-a-crowd' syndrome. This was partly offset by the significant rise in land prices across large sections of the country as grants had not been adjusted for inflation and therefore had, in real terms, declined.

The irony of the new policy was that most of its successes were not due to an improved grant structure – its salient difference from the previous programme – but rather to the buy-in from stakeholders, particularly agribusiness, individual commercial farmers and their organisations, and private financial institutions. The discourse of commercial farmers invoked in policy brought new partners on board and mitigated the pressure

on officials. Delivery also relied more on outsourcing planning and implementation to service providers. LRAD, however, retained some of the underlying problems evident in the previous programme. Specifically, it did not resolve the conundrums and contradictions of the three core elements of the programme: the provision of relatively small grants to people to purchase land, no provision for inflation to cope with the rising prices of land, and the insistence that land should be bought by individuals and not groups of people who could pool their resources. The continuing absence of a strategy to subdivide land aggravated this problem, as properties offered for sale had to be bought in their entirety, at market prices.

## *Contour I: Economic justifications of political objectives*

A central undercurrent in policy debates has been disagreement on the fundamental question of the purpose of land reform. The World Bank summed this up in 1993 as a tension 'between the desire to address welfare objectives through the redistribution of land and the need to promote the productive use of agricultural land' (World Bank 1993: 34). It is telling that these objectives were arranged hierarchically: while equity was desirable, economic considerations were essential. Land policy, therefore, was considered an adjunct to agricultural policy. The purpose of state support for land transactions, in the Bank's view, was to facilitate the transfer of land from less to more efficient producers. The Bank provided a much-needed economic rationale for a political project of land reform by popularising its argument that there exists an inverse relationship between sizes of landholdings and productivity – that small farms are, all other things being equal, more efficient than large farms. Despite scepticism as to its empirical validity – arguably, all other things were *not* equal in South African agriculture – this rationale was used to underpin the notion of creating a new class of smallholders during the first years of land reform.

The ANC, too, has been torn over how its political and economic interests could be reconciled through land reform. Although the policies of the ANC Land Commission had been institutionally entrenched in the ANC's Department of Economic Planning from 1993, land remained an outlier in economic planning. Despite attempts to implement the wider visions of the ANC's Land Manifesto and the Reconstruction and Development Programme, land-based rural livelihoods had not featured strongly in economic policy, either in the pre-elections Macro Economic Research Group process of 1993 or in later policy, notably the Growth, Employment and Redistribution strategy of 1996 (Department of Finance 1996; MERG 1993). Instead, agricultural policy was located within the economic cluster of government, while land policy was located in the social cluster.

The existing landowning establishment seized the notion of productivity and employed this to draw into question the extent to which land reform might, or could, negatively impact on overall production output and agricultural exports. It is ironic that this farming sector, once heavily subsidised itself, should caution against restructuring on the grounds that free market economics would promote economic

stability, and for retaining agricultural land in production. The organisation representing white commercial farmers and agricultural commodity sector organisations, previously the South African Agricultural Union and now renamed AgriSA, noted in its policy on land reform:

> AgriSA supports land reform in principle…We do however feel strongly that agricultural land should as far as possible be retained for agricultural use and production. We are not in favour of residential type developments on farmland. Agricultural land should be farmed in an economically viable and environmentally sustainable manner. (AgriSA 2000)

As in the Philippines (Reidinger 1995), as land reform became institutionally entrenched, criticism from the landed classes was increasingly couched in terms of opposition to the mechanisms employed rather than the principle.

The provision of land to the poor without any strategy to deracialise commercial farming was viewed with suspicion by some as an idealistic 'white liberal' vision of a return to an African peasantry, rather than an opportunity for black South Africans to accumulate wealth. The hostility between government and civil society on the purpose and intended target group for LRAD was inflected with racial tensions. LRAD was developed largely in response to the frustrations experienced by black farmers and bureaucrats with the white senior management of the DLA, who they maintained were only concerned with mitigating black poverty and not committed to the redistribution of land in order to provide opportunities for black farmers to accumulate wealth. As policy actors branded each other rural romanticists on the one hand and neoliberal elitist sell-outs on the other, tensions around the purpose of land and who should benefit became infused with racial tensions, both within government and in relations between the state and civil society – tensions that, at times, spilled over into the media.



## *Contour II: Defining the subject of policy*

The central organising policy concepts in the first phase were 'households' and 'communities'. These entities were presumed to be relatively cohesive and it was assumed that there would be cooperation in the pursuance of common interests. As noted in the White Paper, 'communities are expected to pool their resources to negotiate, buy and jointly hold land under a formal title deed' (DLA 1997: 15). For NGOs that worked with communities united in their determination to get back their land, the focus on groups was considered to be a strength of the policy. White farmers, on the other hand, consistently objected to group-based land reform. The World Bank regarded it as a necessary evil to enable land to be transferred with minimal transaction costs. The reluctance to subdivide agricultural land into small portions, and the enduring attachment to the idea of 'economic units' expressed by much of the agricultural establishment both in government and the private sector, explains why a policy framework initially aimed at individual smallholder farmers ended up promoting group landownership.

In contrast to the emphasis placed on 'households' and 'communities' during the first phase, most policy discourses in the past few years have been based on the assumption that the beneficiaries are self-activating, rational agents, acting either individually or in small groups or as companies. LRAD placed onerous expectations on these 'willing buyers', who were expected to

> select the chosen amount of the grant, engage a design agent if required, identify available land, enter into a contingent contract with the seller, apply for a normal bank loan through standard banking procedures, if necessary, engage a transfer agent, prepare a farm plan, submit all documentation to the local agricultural officer for an opinion, assemble the completed proposal package, and submit it to the provincial grant committee. (MALA 2001: 10)

The buyer envisaged in the policy is an educated, technically proficient, resourced and creditworthy individual – an entrepreneur. While theoretically extending eligibility to the majority of South Africans, the policy is in fact restrictive, as very few such buyers exist among the rural poor in South Africa.

The critique of LRAD as an abandonment of the poor also stems from two specific provisions in the policy. The first required that applicants hold an agricultural diploma or should be able to demonstrate that they had experience commensurate with this level of education and training. This requirement was quickly discarded, perhaps not least because there would be few such candidates and the policy would be politically untenable if it reserved resources for such a privileged few. The second was the requirement that applicants each provide their 'own contribution' of at least R5 000. This requirement was also discarded, as it would put the programme beyond the reach of the vast majority of the rural population. As NGOs pointed out, this amount was well in excess of the total annual income of many families already on farms as workers, and would exclude most of the rural poor (Nkuzi Development Association 2000; NLC 2000).

Even though the 'anti-poor' provisions were removed, and the language of policy was amended to include mention of 'the rural poor who want to farm on any scale', the critique remained (MALA 2001: 1, 3). The removal of the income ceiling meant that now the poor, the not-so-poor and the well-off would have to compete for limited resources. Without ring-fenced budgets, the better-off would stand to leverage the lion's share of funds, accessing the largest grants. Although the language and provisions of LRAD were adjusted to accommodate the flurry of critique that its publication prompted, there has been great continuity in the thinking underpinning LRAD and an exaggerated representation of how different its mechanisms are from its predecessor, SLAG.

The first policy aimed to assist 'the poor, labour tenants, farm workers, women, as well as emergent farmers' and appeal to a range of clients, 'from the poorest, especially female-headed, single parent families to emergent black entrepreneurs' (DLA 1997: 15). These long lists that incorporated race, class and gender, but

sidestepped the issue of prioritisation, were replaced under LRAD by 'marginalised groups' to be prioritised, namely women, farm workers, youth and the disabled. This policy clarity was undermined by the broad categories identified, and the absence of any specific mechanism to give them priority among the pool of applicants.

The discourse on land reform in South Africa has been marked by the absence of the term 'peasant', which was considered to be not only derogatory but also, in the modernist vision, a relic of a previous mode of production, of backwardness and of the failure of black agriculture in the bantustans. Many of the features of the type of production envisaged were precisely 'peasant': small petty commodity producers, engaged in production for their own consumption as well as for marketing. Policy has also been ambivalent and inconsistent on the issue of full-time farming. In LRAD, the calculation of applicants' labour was calculated as an equivalent of full-time employment, indicating an underlying assumption that beneficiaries would farm on a full-time basis. Yet, much of the policy rhetoric on multiple livelihoods has conceded that it is not feasible to expect the poor to rely wholly on agricultural production. The multiple livelihoods already pursued by rural households, relying on remittances from urban wages of migrant household members, as well as old-age pensions and food production and, sometimes, cash income from agriculture, confirm that agriculture can be one important dimension of a diversified livelihood strategy, but that few can risk putting all their eggs in this unpredictable basket. And this does not apply only to the poor; LRAD beneficiaries farming commercially typically draw on resources from informal and/or small urban businesses – typically taxi businesses, spaza shops and shebeens – to invest in agriculture.

## *Contour III: Debating state and market*

Underlying the disputes about what was at the heart of the failures in the first policy cycle ('the market', grant size and structure, inadequate funding, failure of state to facilitate effectively, or landowners manipulating the process to their benefit) was a divergence in how policy actors saw the world, how they believed policy should set about changing it, and to what ends. In particular, the debate was structured by opposing views about the relative roles of state and market. Disputes revolved around whether obstacles were due to reliance on the market itself or merely 'market failures', which could be remedied. Recognition of 'market imperfections' has led to the moderation of the World Bank's policy positions over time (World Bank 2003). The discourse of 'distortions' also led the Bank and others to advocate a number of measures to tweak markets, including land taxes and in some instances a ceiling on landholdings, though they cautioned that this should not be set at too high a level.

AgriSA became increasingly well disposed to a moderate land reform policy as occupations proceeded in Zimbabwe. From its hostility towards land reform during the 1990s (SAAU 1996), by late 2000 it welcomed LRAD as a means of supporting black commercial farmers, urging the state to dispose of its own land to 'emerging commercial farmers' while pursuing market-based reforms when it came to privately owned land. However, it cautioned, 'we are not…in favour of farmers profiting from

land reform and getting more for their land than what it is worth. We are not in favour of non-market mechanisms for land reform' (AgriSA 2000).

While AgriSA manipulated its definition of the 'market', NGOs, labour unions and landless people's organisations rejected the market-based policy in its entirety. The NGOs took an *a priori* position that property rights are a social relation and, as Fortin (2005) points out, promoting markets in these rights is likely to reinforce rather than remedy inequalities. Market-based land reform has elicited both principled and pragmatic objections. Principled objections have been made to the iniquity of white farmers reaping the benefits of subsidies by selling their improved properties at market value, and to the notion of 'buying back' land that was stolen. Even by 1993, the NLC saw the policy focus on market mechanisms, on production and on 'economic rationality' as politically motivated attempts to prevent far-reaching reforms and repeatedly emphasised the need to refocus, 'to continually bring debates back to the question of justice' – and thus to the realm of law and the state (NLC 1993).

The introduction of the idea of a 'demand-led' process was a key turning point in the state-versus-market debate. While the term had broad appeal, actors' conceptions differed as to whether they saw the state or the market being responsive to demands, and how this would work. The ANC's original use of the term indicated that the state would be responsive to people's demands for land and that the state would address these through a 'demand led process of land acquisition and allocation' (ANC 1992). NGOs, too, insisted that land reform should be participatory and that the state should not engage in top-down planning, but respond to the people's demands. The World Bank, its thinking rooted in the discipline of agricultural economics, adopted but reinterpreted the notion of the 'demand-led' process: the expression of demand in the land market would precipitate supply, although the inadequacy of would-be beneficiaries' purchasing power would require that their resources be augmented with state grants to enable them to become effective players in the land market (World Bank 1994). By 2000, the NLC, now disaffected with the idea, noted that a ' "demand driven" [process] will privilege the rich and educated, who may have necessary networks, resources and knowledge. These elites will hold obvious relative advantage over the poor in accessing the programme' (NLC 2000: 4).

Very little attention has been paid to the ways in which markets actually work: the extent to which they are segmented and socially embedded, and the ways in which the state can harness existing opportunities to acquire land at reasonable cost to meet identified needs by seizing opportunities for redistribution that arise in the market or proactively engaging in negotiations with landowners (Lahiff 2007). Instead, most policy debate has relied on preconceived notions of markets as being either colour-blind and efficiency maximising, or as presenting insurmountable hurdles for both would-be beneficiaries and the state. In particular, few have come to grips with the ways in which land reform in South Africa is both market (or landowner) dependent and bureaucratically mediated and constrained, thus combining some of the worst features of both state-driven and market-based land reforms.

## *Contour IV: Institutionalising participation*

The ANC's consultations in the 1990 to 1994 period focused on 'communities' and individuals who were considered to have relevant expertise. NGOs played an important intermediary role in these consultations with rural communities. Their role was of less importance after 1994 as the ANC, now in power, was keen to establish broadly representative forums and shifted its focus to 'stakeholder groups'. Participation was characterised by consultation through a series of multi-stakeholder workshops and conferences, and through commissioned research, most of which was organised, not directly by government, but indirectly through the LAPC. The consultation process in the lead-up to the finalisation of the White Paper was characterised by large workshops held in rural communities as well as national workshops and conferences at which a broad range of interest groups were represented. Through these events, key role-players among the different interest groups – including white farmers representing AgriSA and its affiliates, commodity sector organisations, community leaders, NGO activists, land lawyers and researchers – came to know one another and were frequently able to develop friendly relations at a personal level, even though the hostility evident in their debating positions persisted.

The single greatest achievement of the rural communities and NGO movement was the enshrining of restitution as a pillar of the Constitution, to be governed by its own legislation and implemented by dedicated institutions. Sometimes, 'doing' achieved more than 'talking'. Innovations by the Surplus People Project in collaboration with municipalities in the Northern Cape led to an alternative model of land redistribution being incorporated into policy in 1996, namely the provision of municipal commonage as a public resource, to be made available to poor and disadvantaged livestock owners. By 2004, nearly half of all land transferred through redistribution was commonage land.

As the market-based redistribution policy was implemented and relations between the state and rural NGOs deteriorated, the central position occupied by NGOs in the early years was also eroded and the legitimacy of NGOs being regarded as the spokespeople for the rural poor was questioned by government; once the ANC was elected, the nature and credibility of claims to representation by NGOs were less clear. Those who had had easy access into policy-making forums, at a time when the line between state and non-state had been substantially blurred, were increasingly excluded from policy-making. Increasingly present were consultants, often former NGO staff or former civil servants, and some university-based academics, notably agricultural economists.

Outside of the DLA, policy-making and agenda setting also occurred in the Presidential Working Group on Agriculture, formed by Thabo Mbeki to bring together AgriSA and the National African Farmers' Union (NAFU), representing both black commercial and 'emerging' farmers. In 2001, the Working Group drew up the *Strategic Plan for South African Agriculture* to guide their future partnership and

to inform government policy, and located its aim to 'deracialise land and enterprise ownership' within a strategy to promote growth, competitiveness and investor confidence in the commercial farming sector (NDA 2001). The same actors drove the process of defining a black economic empowerment code for the agricultural sector that prioritised redistribution through shareholding rather than land reform (NDA 2004). By casting the issue as one of agriculture rather than land rights, those with existing interests in the commercial sector were able to create a framework for land reform policy. Since then, relations between the two have become closer and NAFU and AgriSA have even discussed the possibility of merging, though this is not imminent.

While relations between government and white and black farmers were being consolidated and institutionalised in an emerging alliance focused on the *Strategic Plan*, NGOs responded to the closing of political space available to them by turning their attention away from the state towards their constituency, in support of emerging social movements representing the landless and rural poor. Internal debates in the sector focused on the dangers of NGOs speaking on behalf of landless people. The NGO sector was split on the extent to which it should continue implementing a policy framework, to which it was opposed, or whether its main focus should be to support the social movements. With support from key NGOs, the Landless People's Movement was launched at the UN's World Conference Against Racism in 2001 and has repeatedly rejected the policy framework and threatened, but not carried out, land occupations. With the support of the NLC network, it also hosted a 'Week of the Landless' during the World Summit on Sustainable Development in 2002, bringing together a few thousand rural and urban people from all provinces.

In a similar move, the Trust for Community Outreach and Education (TCOE) and its network of rural NGOs held a Tribunal on Landlessness in Port Elizabeth in December 2003. By adopting the format of the Truth and Reconciliation Commission, and having 'commissioners' to hear testimony from the landless, expert witnesses to contextualise this and representatives of government and the private sector as respondents, the TCOE employed a powerful format iconic of the post-apartheid era. Faced with the testimony, Glen Thomas, then the deputy director general of DLA, conceded that land reform was indeed not on track and that the constraints included the 'willing buyer–willing seller' model, and the limitations of the property clause (TCOE 2004).

Forms of participation in policy-making on land reform thus changed and became institutionalised over time. At first, the NGOs were strongly integrated into ANC processes, and had privileged access to policy-making processes, together with other 'experts' from the World Bank and South African universities. When the World Bank advisors left in 1994, the main forms of engagement were more bilateral, between the state and farmers, and between the state and NGOs, serving as mediators of some community representation. During the second cycle, policy actors participated in major national events, although the big conferences were held less frequently. Inbetween, participation took the form of consultancies and tenders in which

reference groups or task teams, as well as individuals, were invited to participate. In addition, substantial portions of policy reviews and even policy development, specifically on LRAD, were outsourced.

## *Conclusion*

The language of policy continues to perform the political function of reconciling irreconcilable politics and policy objectives in pursuit of legitimising the policy as a framework for debate. In the case of land redistribution, while failing to redistribute large amounts of land or bring about some of the economic benefits for which it aimed, policy did succeed in its wider political function of defining the terms of debate. The success of actors in establishing the language, if not the provisions, of policy is a sign of the success of the policy process in creating a 'discourse coalition'. With this shared language, policy actors waged rhetorical warfare, and among the casualties have been the much-abused and manipulated concepts of 'the market', 'demand' and 'community'.

This chapter interrogated two prevalent ideas. The first is the notion that the development of policies is a linear and rational process. This narrative shows the messiness and contingency of how policies are defined and the uneasy truces between competing interests that lead to internal ambiguity, tension and even contradiction within policy. The second is the view that the shift to the LRAD programme in 2001 marked a fundamental change in land reform. While its underlying ideology and its aims were markedly different from the preceding pro-poor programme, the similarities in the problems besetting the two appear to outweigh their differences. Now it is not only the poor but also the not-so-poor and the well-off who can credibly complain that land reform is not working for them. While the first policy cycle embraced much more explicitly a language of radical restructuring and transformation of class relations, it lacked any real provisions to realise this vision. Its successor, LRAD, initially set out an entirely different vision of deracialising the existing commercial farming sector, through the settlement of a new black capitalist farming class, but retreated from this position to one which was agnostic on who should benefit. The moderated discourse, which again reverted to an unspecified embracing of competing ideas of 'the poor' and 'emerging farmers', is evidence of the ongoing purchase of the idea of pro-poor development within South Africa. It is difficult, if not impossible, to defend a policy that directs resources to those who are financially better-off.

There remains disagreement about whether the vision changed, or whether the policy change was merely a shift in the methods through which the vision could be pursued. Of course, by arguing that the vision is unchanged, one denies that policies have changed – only mechanisms. Both the advocates and critics of the policy shift described here have enormously exaggerated the extent of change from SLAG to LRAD. Factors other than the grant design were significant in expediting delivery over time, including the delegation of powers to approve grants from the Minister of

Land Affairs to her provincial directors. There is also little recognition that LRAD, in the design of the grant leveraged by own capital and loans by emerging farmers, marked a return to aspects of earlier proposals of the World Bank and the widely rejected reforms proposed by the National Party in 1993 (DRLA 1993).

The World Bank considered land only as a productive asset, and that land reform would be used for agricultural purposes; that is, land policy was an adjunct to agricultural policy. For many South Africans, particularly the NGOs, it was the other way around. The World Bank's presumption of the efficiency of small-scale production (Binswanger & Deininger 1993) was an *a priori* position. Despite its ideological appeal, the debate on whether small-scale agriculture could work in South Africa was not settled. In the first phase, the policy emphasis on small-scale farming and land for the poor was the product of the equity and justice imperatives of the local actors coinciding (albeit not neatly) with the World Bank's inverse size–productivity relationship. This allowed the ANC to reconcile its need to address poverty and inequality with its interest in pursuing economic growth and limiting its future commitments.

It is ironic that the land policy for a new South Africa was so substantially shaped by white male agricultural economists, many of them foreign. Unlike in many other countries in sub-Saharan Africa, South Africa's policy advice from the World Bank has not been tied to funds, in the form of conditions set in structural adjustment programmes or poverty reduction strategy papers. To understand its influence, one must look to the dynamics of the policy-making process itself, the alliances that were formed in this period and the ways in which a language and set of concepts to frame policy were adopted and normalised. The view that the World Bank dictated the terms of policy misses the degree to which its attempts to 'set the agenda' coincided with domestic interests to frame land redistribution in terms acceptable to the landowning establishment and to the new incumbent government's priority to stabilise the rural areas and secure investor confidence in the economy, while at the same time addressing poverty and the demand for land redistribution.



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# 10 *A legal analysis of the Namibian commercial agricultural land reform process*

Willem Adriaan Odendaal



## *Background: Land use and farming practices in Namibia*

Namibia and most former white-ruled colonies of southern Africa share a common history of expropriation of land from indigenous peoples. This has resulted in an agricultural dualism, with black subsistence agriculture on the one hand, and white commercial farming on the other. Furthermore, their post-colonial constitutional and legal frameworks[1] have shaped their ability to address the skewed land distribution patterns, the notable recent exception being the 'fast-tracked' land reform programme of Zimbabwe.

Namibia, with a geographical land area of 824 295 kilometres and an estimated population of 1 805 227 is southern Africa's most sparsely populated and arid country.[2] On average, this means about two persons per square kilometre. Namibia therefore presents a hopeful possibility for an orderly land reform process, in contrast to many other African countries. The trade-off is that Namibia's land is very dry, as it is situated between two deserts: the Namib Desert to the west and the Kalahari Desert, which borders its eastern and southern neighbours, Botswana and South Africa. Therefore, Namibia's land is only suitable for a few kinds of agriculture.

Namibia's low and unreliable rainfall pattern limits its potential as a commercial, self-sufficient and reliable agricultural crop producer. Presently, Namibia can only meet 20 per cent of its horticultural demand, requiring the remaining 80 per cent to be imported (IDC 2004: iv). Because of the unpredictability of rainfall patterns and the vulnerability this creates in crop farming, the largest part of Namibian agricultural land is used by both commercial and communal farmers for livestock farming, with natural vegetation used for grazing.

Namibia's commercial farms are large and mainly orientated towards red meat production for local and export markets. Beef is the agricultural sector's main export product, but the worldwide overproduction of cattle and the increased degradation of grazing lands threaten Namibia's commercial farming sector. In recent years, commercial livestock farmers have moved increasingly towards mixed game/livestock farming and many have embarked upon wildlife-based tourism enterprises. This trend in stock diversification has helped to maintain biodiversity and creates a valuable buffer against the effects of drought.

Extended periods of drought impact heavily on the tenuous food security and livelihoods of Namibia's rural poor. Communal farmers are highly dependent on

rain-fed crops (most often millet) and livestock. They receive little income from their work, as most of their production is self-consumed. Agricultural incomes are also limited by a lack of access to benefits such as improved farming techniques, technology, formal credit facilities and regulated markets.

Thus, there are several issues to consider when analysing the logic and potential of the land reform process. Not only should a land reform programme be an investment against historical wrongs, in Namibia's case the legacy of colonialism and apartheid, but it must also carefully consider the agricultural potential and the environmental realities of Namibia's land.

## *The commercial land reform process in Namibia since independence*

When Namibia gained its independence in 1990, it inherited two agricultural subsectors from the colonial era, communal and commercial agriculture. These parallel agricultural systems not only divided Namibia almost equally in terms of land utilisation, but also reflect the racial division in the country at the time of independence. The majority of white Namibians and a small but growing black middle class enjoy one of the world's highest standards of living, while the majority of black Namibians live in abject poverty, making Namibia one of the most unequal societies in the world. It has been argued that this inequality is rooted in the fact that the majority of Namibia's black population lacks secure tenure to land.[3]

However, with independence, Namibia also inherited some myths about the commercial agricultural sector, which are now the source of very deep misunderstandings about agriculture and about land. The central myth is that successful commercial farming in Namibia is associated with wealth. It is easy to see how this myth came into being. Before independence, most white commercial farmers were provided with subsidies in the form of concessionary finance, direct subsidies and veterinary services (Werner 2001). Subsidies, in other words, contributed to raising agricultural income for mainly white commercial farmers during the pre-independence period. The present reality of sometimes unproductive and bankrupt white farmers makes no sense at all to poor black communal farmers. Thus, while the political and social reality is that land reform is necessary, this goal needs to be separated from the idea that farming is a source of great wealth.

Post-independence commercial agriculture in Namibia underwent a number of changes. First, a combination of reduced subsidisation to established farmers and sporadic droughts during the 1990s had a negative impact on commercial agriculture. Second, after independence the government was forced to address the inequitable access to commercial landownership; to this end, a Land Conference was held in Windhoek in 1991. During the Land Conference a policy was adopted stating that past wrongs would not be rectified by the seizure of land from European descendants who had acquired land under successive German or South African colonial powers. Instead, the new government adopted a policy aimed at redressing Namibia's history

of skewed landownership through a process of national reconciliation and within the constitutional provisions of Article 16 (Harring & Odendaal 2002). The Article 16 provisions of the 1990 Constitution of the Republic of Namibia state:

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

The 1991 Land Conference presented a platform from which the land reform programme, policies and legislation were to be developed. It took the government nearly five years to pass its first major piece of legislation on land reform, the Agricultural (Commercial) Land Reform Act (No. 6 of 1995). This delay was possibly a result of the Namibian government's lack of experience in dealing with land reform, from planning and legislation to management.

The Agricultural (Commercial) Land Reform Act (No. 6 of 1995) contains a number of provisions to ensure that the market performs as expected. These provisions include:

- a requirement that any commercial farm that is offered for sale should first be offered to the government for the purposes of resettlement (Part III of the Act);
- a provision restricting ownership of multiple landholdings by a single individual (Part VIII);
- a provision restricting ownership of commercial farmland by non-Namibians (Part VI).

However, in some government and public circles the 'willing buyer–willing seller' principle has been singled out as the root cause for the slow acquisition of commercial land for resettlement purposes.[4] As a result, the Namibian government announced plans in February 2004 to implement an expropriation option for commercial agricultural land to speed up its efforts to buy more land for its Resettlement Programme.

On the one hand, the government blamed commercial farmers for the slow pace of land reform, arguing that they only offer to sell small, uneconomical plots for resettlement under the 'willing buyer–willing seller' option. In his farewell speech as Minister of Lands and Resettlement, Namibia's President Pohamba stated '…those who have land to sell [should sell] a little land to the Government at fair prices so that we [the government] have land to give to the landless people…' in order to avoid a situation where '…Namibia could be made ungovernable if the "have-nots"

patience with the current slow process of land reform runs out' (*The Namibian* 22 March 2005).[5] This belief reflects a view of recent African history, particularly the failure of land reform in Zimbabwe. On the other hand, it has been argued that much more land was available for purchase than the government could buy. The Institute for Public Policy Research, an independent research organisation in Namibia, has pointed out that the slow process of land reform should be attributed to 'leaden-footed bureaucracy, rather than commercial farmers dragging their heels' (De Villiers 2003: 38). For example, the Institute found that of 142 farms that were offered for sale to the government in 1999, only four were acquired, while in 2000 only 15 of 125 farms were acquired for resettlement purposes (De Villiers 2003: 38). Thus, instead of overspending its budget for purchasing farms, it appears that the Ministry has been underspending. It is also possible that most farms that have been waivered by the Ministry have been made available to emerging black farmers to buy under the Affirmative Action Loan Scheme (AALS); hence, by the beginning of 2005 approximately 612 farms had been bought by emerging black commercial farmers, either through the AALS financed by the government or through private banks (information from Ministry of Agriculture, Water and Forestry in 2005).

In addition to the announcement by government that expropriation would run concurrently with the 'willing buyer–willing seller' policy, 2004 also saw the completion of the valuation process of commercial agricultural land – an important step towards the implementation of the first commercial agricultural land tax in Namibia, which was implemented during the 2004/05 financial year. Land tax is progressive, meaning that the percentage of tax payable increases with the number of farms owned by an individual. The desired outcome of imposing such a progressive tax on every additional farming unit is twofold: firstly, it aims to persuade individuals to give up some of their land units because they cannot afford to pay the tax, and secondly, it creates revenue to buy more commercial agricultural land for the Resettlement Programme.

## *The two land reform programmes: The Resettlement Programme and the AALS*

After independence, the Namibian government embarked upon two parallel land reform programmes, namely, the Resettlement Programme and the AALS. The Resettlement Programme is run by the Ministry of Lands and Resettlement in order to resettle poor and landless Namibians on state-acquired commercial farmland. The aim of the Resettlement Programme is 'to make settlers[6] self-reliant, either in terms of food production or self-employment and income generating skills' (MLRR 2001: 2). The AALS is implemented by the Agricultural Bank of Namibia (Agribank), primarily to assist strong communal farmers to acquire commercial farms through subsidised interest rates and loan guarantees by the state. Following is an overview and evaluation of the two programmes.

### *The Resettlement Programme*

Among the most important objectives of the Resettlement Programme are to redress past imbalances in the distribution of natural resources, particularly land; to give an opportunity to the target groups (i.e. poor and landless Namibians) to produce their own food with a view to attaining self-sufficiency; and to bring smallholder farmers into the mainstream economy by producing for the open market.

According to the Ministry of Lands and Resettlement, approximately 243 000 poor and landless Namibians are in need of resettlement. In March 2004, the Ministry considered plans to expropriate 9 million hectares of commercial agricultural land to resettle 230 000 applicants in the next five years (Government of Namibia 2004). However, resettlement statistics obtained from the Ministry in February 2005 show that only 1 526 families had been resettled on 142 commercial farms, comprising some 843 789 hectares at a total cost of N$127 836 132. On average, this means that approximately 610 persons were resettled per year on commercial agricultural land over the last 15 years. If the total costs of buying 142 farms are divided by the total number of people who have been resettled since independence, then the average cost it takes to resettle one person amounts to approximately N$14 000. This amount excludes food rations, housing and technical services that the Ministry provides for resettlement beneficiaries. Judging by the number of people who have been resettled over the last 15 years, it is clear that to resettle 230 000 people over the next five years is not only economically unrealistic, but also logistically impossible.

The National Resettlement Policy stipulates that beneficiaries be self-reliant and self-sufficient by the fourth year (MLRR 2001). However, virtually all resettlement projects older than four years still depend heavily on government support for things like food, drought aid and technical assistance and, as a result, have not achieved self-sufficiency (Odendaal 2005). A major shortcoming of these resettlement projects seems to be a lack of management capacity, a crucial element in achieving self-sufficiency. Moreover, it appears that beneficiaries are not encouraged to participate in the decision-making processes of their respective projects. In most instances, resettlement beneficiaries seem to wait for the Ministry to make decisions for them. On most projects, beneficiaries complain that the Ministry seldom visits the projects and, as a result, they are not always aware of the beneficiaries' needs and concerns. In addition, a lack of basic agricultural skills among beneficiaries results in sporadic and low incomes and continued reliance on government. In other words, providing specific agricultural training and skills to resettlement beneficiaries is important in making resettlement projects self-sufficient, as this would lead not only to more skilful farming methods, but also to more frequent and higher incomes.

The lack of tenure security for resettlement beneficiaries remains a contentious topic in the Resettlement Programme. The Resettlement Policy stipulates that land acquired for resettlement purposes will be provided to beneficiaries on leasehold of 99 years. This will be arranged so that beneficiaries can use the lease agreement as

collateral to get a loan from lending institutions for agricultural production purposes (MLRR 2001). However, the Agribank is cautious with regard to granting loans to resettlement beneficiaries because to date not a single resettlement beneficiary has received a leasehold agreement from the government; therefore, beneficiaries have no legal ownership interest in their land. Agribank is not clear about what procedures to follow should such a resettlement farmer default in repayment. The repossession of land, should a resettlement farmer default on his or her mortgage bond, would surely defeat the aims of resettlement. At the same time, denying resettlement farmers commercial credit may undermine their ability to farm successfully.

### *Affirmative Action Loan Scheme*

As noted earlier, approximately 612 farms have been bought by emerging black commercial farmers through the AALS – nearly four times the number of farms that the Ministry has acquired for its Resettlement Programme. Despite this impressive exchange of landownership from mainly white to black hands, the AALS has not been without its controversies. In March 2004 it was reported that at least 199 of 544 AALS farmers, approximately 37 per cent, have defaulted on their payments (*The Namibian* 21 September 2004[7]); as a result, in December 2004 the government suspended its 35 per cent guarantee on AALS loans. This means that prospective farmers now have to pay 10 per cent of the purchase price before they can qualify for the AALS.

Later, in January 2005, the Agribank put a moratorium on the AALS, arguing that farm prices had gone out of control, mainly because buyers had access to large loans and were buying farms at inflated prices. In some cases, farms had less production value than quoted when loans were applied for, while in other cases the valuation was based on full production. In this regard, some of the AALS farmers are currently underutilising their farms, in that they have fewer cattle on the farm than the number the farm could carry as a result of the inaccurate valuation. This appears to have had a negative knock-on effect on the AALS, as full-scale production is a crucial factor in being able to pay back AALS loans.

Currently, AALS loans are available for periods of 25 years. Years one to three are interest-free for full-time farmers, while over the remaining 22 years the capital amount is to be repaid at an escalating rate, starting with 2 per cent and reaching 14 per cent after the tenth year in the case of full-time farmers. Farmers have several complaints regarding the AALS, which they claim lead to the difficulties in repayment. A major issue surrounds interest rates, which farmers claim are too high, and the grace period of one to three years, which is too short. Part-time farmers with a gross annual income of N$300 000 to N$400 000 start with an interest rate of more than 12 per cent during the first three years, increasing to 14 per cent during the fourth year and continuing until the loan is fully repaid. The end result for many AALS farmers is that in trying to make ends meet, they must sell off their cattle herd, which in turn has negative effects on farming profitably and paying off mortgages.

This is a cyclical problem, where the immediate action to stay afloat impairs the ability for long-term financial planning and success. These decisions demonstrate the complications caused by the Agribank not requiring that prospective farmers be equipped with the much-needed practical and financial information to assist them in the transition from communal farmer to commercial farmer.

In recent years, to assist with this difficult transition, some established farmers have offered training to emerging farmers (mostly AALS) under the Emerging Commercial Farmers Support Programme on issues such as livestock breeding, selection, animal husbandry, infrastructure maintenance, sustainable rangeland management, the sustainable management and protection of wildlife and, most importantly, financial management. Such technical support would have to continue over the long term in order for the Programme to achieve its desired results; however, its future is precarious as it depends on European donor funding.

## *Land expropriation: Constitutional issues*



The right to own property in Namibia is protected by Article 16(1) of the Namibian Constitution. However, ownership of property is not absolute and is limited by Article 16(2) of the Constitution, which provides for the expropriation of private property 'in the public interest' upon payment of 'just compensation'. Despite the fact that Article 16(2) sanctions the expropriation of private property, this action remains a drastic intrusion on the rights of individuals. When constitutional rights are limited or infringed upon, strong legislative provisions must be introduced to provide guidelines and remedies for such infringements or limitations. With this in mind, two concerns emanate from the Agricultural (Commercial) Land Reform Act.

Firstly, in terms of section 20 of the Act, once the minister has decided to expropriate property there are no provisions in the Act to protect a landowner against a *mala fide* decision, apart from challenging the decision to expropriate under administrative law and in the High Court. It might, therefore, be appropriate to give the Lands Tribunal[8] the powers to administratively review the decision of the minister when an owner has grounds to produce such an application. Such a procedure might help to speed up the process of land reform and be less expensive than bringing review applications before the High Court. Article 18 of the Constitution provides that

> [a]dministrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Secondly, the minister has the discretion to nominate all five members of the Tribunal to be appointed by the National Assembly, with the provision that members must have such backgrounds as required in terms of section 63(2)(a)–(c) of the Act. The National Assembly may reject a particular nominee of the minister, but

there is no requirement that persons to be nominated must be independent and impartial. In particular instances, one or all of the members of the Tribunal might have a direct or indirect interest in a subject matter before it, which may put in question the Tribunal's constitutionally required independence and impartiality. The appointment procedures of the Lands Tribunal might be in conflict with provisions of Article 12(1)(a) of the Constitution, which provides that 'all persons are entitled to a fair and public hearing by an independent Court or Tribunal established by law'.

This means that the persons appointed to the Tribunal, their manner of recruitment and ultimate appointment, their security of tenure, and the grounds and manner of removal from the Tribunal would have to demonstrate that the Tribunal is ultimately complying with the Constitution. This is a fine balance, as the state will always be an interested party in the nature of land reform and especially in contentious issues such as expropriation, as it would be one of the parties to the process. Therefore, if a public servant is nominated and appointed to the Tribunal, the independence and impartiality of the Tribunal will be open for a constitutional challenge.

However, to date, the Land Tribunal has never been used for the purposes for which it was established under the Act; thus its independence and impartially have not yet been challenged (Conradie interview). The fact that the Tribunal has never been used to deal with land disputes undermines the government's claim that farms are too expensive to purchase for land reform purposes, as it has never tried to rectify the situation through the mechanisms created by Parliament to address such issues.

## *'Justly compensated' expropriation in the 'public interest'*

According to Article 16(2) of the Constitution, expropriation of land in Namibia must be both 'in the public interest' and accompanied by 'just compensation'. These provisions are slightly developed in the Agricultural (Commercial) Land Reform Amendment Act (No. 14 of 2003), in sections 14 and 25 respectively. However, these sections do not provide clear guidelines or criteria to prevent wide and conflictual interpretations of what 'in the public interest' and 'just compensation' concretely entail.

The 2003 amended version of the Agricultural (Commercial) Land Reform Act touches on expropriation that is in the public interest by stating:

> Subject to subsection (2), the Minister may, out of moneys appropriated by Parliament for the purpose, acquire *in the public interest*, in accordance with the provisions of this Act, 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 and practices.

While the notion of the public interest is clearly detectable in this section, a clear definition and accompanying criteria for its interpretation are visibly missing. Interestingly, section 14(2) of the amended Act (2003) is vaguer and invites more interpretation than the same section in the principle Act (1995), which provides some guidelines regarding the type of agricultural land the minister may acquire for the purposes of land reform, including:

- any agricultural land offered for sale to the minister in terms of section 17(4), whether or not the offer is subsequently withdrawn;
- any agricultural land which has been acquired by a foreign national, or by a nominee owner on behalf of or in the interest of a foreign national; or
- any agricultural land which the minister considers to be appropriate for the purposes contemplated in that subsection.

It is interesting to observe that the Amendment Act of 2003 has amended the principal Act of 1995 insofar as the latter specifically provided for the 'expropriation of under-utilised and excessive land'. The amended Act now has a much broader application; it provides that '…*any* agricultural land which the Minister considers to be appropriate for the purposes contemplated in that subsection' is eligible to be earmarked for expropriation. This broader application opens the door for debates and conflicts regarding the public interest and the application of this legislation to implement land reform. For example, expropriation of land for land reform purposes could be interpreted as being in the public interest; however, disputes may arise as to whether the expropriation of a *particular* piece of land is in the public interest. Likewise, it does not define what conditions are considered as being *contrary* to the public interest. For example, although poor labour relations on farms are not official grounds for expropriation, it appears that the government has targeted such farms for expropriation. Therefore, expropriation in the public interest – if not well defined – has the potential to be a punitive measure for problematic landowners. This, in addition to being arbitrary grounds for expropriation, could be considered unconstitutional, mixing the need to protect workers with the need for land reform, and could potentially lead to unequal treatment of landowners (Treeger 2004).

With the changes made in the amended Act, the minister is awarded considerable powers under this amendment to designate, under the umbrella of land reform, any type of commercial agricultural land eligible for expropriation, and to claim that it favours the public interest. In essence, the lack of specifics regarding the type of land to be targeted for expropriation means that anyone's property – whether the individual is black or white, Namibian or foreigner, absentee landlord or not – can be earmarked. According to a former Minister of Lands and Resettlement, even a productive farm could be expropriated if the government feels that 'it can be used better' (*The Namibian* 4 March 2004[9]).

Nevertheless, the Constitution prevents the government from acting arbitrarily when expropriating property. Usually, expropriation is regarded as a restriction on the constitutionally guaranteed right to own property and should only be legitimate

if there is strict compliance with legal requirements and procedures as determined by an Act of Parliament. As mentioned, Article 16 of the Constitution (right to property) provides that all persons have the right to acquire property in any part of Namibia, and its infringement may only be justified under Article 22 (limitation upon fundamental rights and freedoms) of the Constitution. Article 22 can only apply in circumstances where the limitation on fundamental rights and freedoms is of general application, for example the limitation is not aimed at a particular person. Expropriation should, therefore, always be foreseeable, non-discriminatory and based on reason or principle. In this regard, factors such as current and future land use patterns, the real and potential benefit of such land to the public, the financial costs to the state of expropriating land, the environmental condition of the land, and the availability of other land for the same or similar purpose should be considered when making decisions to expropriate land.

To ensure that consideration is given to the above-mentioned factors impacting on expropriation and just compensation, a set list of criteria and clear definitions should be developed to govern their implementation. These items should be contained in government's policy documents. The government is bound to follow the guidelines of its policies when making decisions, unless there is a justifiable reason or ground to deviate from it by virtue of Article 18 of the Constitution. The flexibility of a government policy (as opposed to an Act of Parliament) will allow the government, without great expense, to amend or adapt the policy as circumstances require. For the sake of clarity and certainty, it might be appropriate to make a provision in the Agricultural (Commercial) Land Reform Act to direct the government to consider the provisions of the relevant government policies. Developing these criteria would also shield the government from the criticism that it now faces regarding explanations and justifications for expropriating particular land.



## *Will expropriation speed up the land reform process?*

There is little evidence to suggest that the Ministry of Lands and Resettlement is purchasing farms for resettlement based on any kind of plan. Isolated farms are acquired when they are offered for sale, but only if they are 'suitable' for resettlement, given unknown criteria. Yet, since 2003, the government has increased its land acquisition budget to N$50 million to speed up the process by buying more farms – this after the previous budget of N$20 million was underspent.

While the budget for acquisitions was increased, the government failed to similarly increase the capacity of its technical services. For example, the Ministry of Lands and Resettlement has a shortage of land evaluators, who, as a result, are unable to effectively do their work. This incapacity results in too few or non-viable farms being purchased for resettlement. With an increased budget, as well as an option of choosing between either the 'willing buyer–willing seller' principle or expropriation – making more work for evaluators, as more land will be available for processing – it is likely that the Ministry's capacity to run an effective resettlement programme will be even

further stretched. Thus, it is not only a question of available land being constricted by the 'willing buyer–willing seller' approach that slowed the pace of Namibia's land reform. Rather, a plethora of factors relating to land and its availability, but in particular to capacities, set the pace of land reform. Therefore, against this evidence, it is doubtful whether expropriation is the missing factor which, once added, will speed up the land reform process in Namibia.

## *Recommendations*

Although much of this chapter attempts to provide a legal analysis of land expropriation in the Namibian land reform context, there can be no question that land expropriation, as a key element of the land reform programme, is ultimately a political issue. And as a political question, land expropriation should also be a critical element of the government's policy on poverty alleviation. Viewed against this statement, this section of the chapter proposes a number of recommendations aimed at increasing the speed and transparency of, and restoring confidence in, the Namibian land reform process.

### *Providing clear criteria for expropriation of land*

Expropriation is an appropriate, necessary and legal part of Namibia's land reform process. At the same time, it is a difficult legal process that requires great care and transparency. Changes are needed in the 1995 Agricultural (Commercial) Land Reform Act to provide for, at least, the following:

- a transparent process of selection of farms for expropriation;
- a transparent process of allocating land to beneficiaries;
- a simplified land acquisition process.

### *Providing a comprehensive land reform plan*

Closely related to the preceding recommendation is the development of a comprehensive land reform plan against which clear criteria for expropriation of land can be measured. This is necessary because disputes may arise as to whether the expropriation of a particular piece of land is in the public interest. In this regard, various factors, as noted earlier, should be considered when making decisions to expropriate land: current and future land use patterns, the real and potential benefit of such land to the public, the state's financial costs of expropriating land, the environmental condition of the land, and the availability of other land for the same or similar purpose. Evidently, numerous factors should be considered when land is targeted for expropriation; therefore, it is recommended that land expropriation be dealt with in accordance with a set criteria list, which ideally would be contained in government policy documents.

### *Skills transfer and capacity building*

Most resettlement beneficiaries lack the management skills to become effective farmers overnight. In this regard, current commercial farmers could be the primary source of skills transfer to resettlement farmers. Joint ventures and shared ownership models between commercial farmers and resettlement beneficiaries should be encouraged as an appropriate land reform strategy, with the possibility of transferring land from white commercial farmers to emerging black farmers without compromising the important contribution of commercial farming to Namibia's economy. In pursuit of such a strategy, funds for settlement should be made available to resettlement beneficiaries in the form of a land acquisition grant, provided that they can prove a partnership with a skilled commercial farmer, while the AALS should be extended to successful resettlement farmers, on the condition of compulsory training.

### *Increasing tenure security for resettlement beneficiaries*

Tenure security for resettlement beneficiaries remains a contentious topic in the Resettlement Programme. The lack of tenure security not only has a negative effect on the livelihoods of resettlement beneficiaries, but also on the maintenance of and investment in valuable state-owned infrastructure. The government should investigate how to improve property rights in resettlement areas to facilitate access to credit. The idea behind creating full rights to use land (instead of creating full ownership of the land) is a way of trying to make leaseholds tradeable so as to be used as collateral security to help resettlement communities. A possible solution to avoid default payments is to use the Land Acquisition and Development Fund (provided for in the 1995 Act) to cover a farmer's loan default.

### *Restructuring Namibia's agricultural policy*

The challenges of land reform and resettlement are reflective of the problems facing Namibian agriculture as a whole. The Namibian government should focus on a clear agricultural development policy that includes restructuring the existing commercial agricultural sector, improving agriculture on the communal lands through capital and skills investment, as well as a bold and creative policy of land reform and land resettlement in both commercial and communal areas. This policy will be expensive and will involve a substantial governmental subsidy. Thus, it is not just land reform policy that is expensive – all agricultural policy is.

## *Conclusion*

Given Namibia's pre-independence history of unequal land distribution based on racial and ethnic lines, land reform is not only desirable from a social and political point of view, but is crucial in ensuring long-term peace and economic prosperity. It is nevertheless evident that after nearly 15 years, the Resettlement Programme has

so far failed in its objectives of empowering Namibia's poor and landless to become self-reliant in terms of food production, employment or income-generating skills. Resettling people does not only involve buying or expropriating land from the 'haves' in order to give more land to the 'have-nots'. In reality, successful resettlement involves a complex human process requiring careful social and economic planning, supported by an unambiguous land reform legislative and policy framework. On the other hand, there is sufficient evidence to believe that the AALS could become an effective land reform programme, but only if the current setbacks can be overcome. There is no reason why the current generation of emerging black farmers should not become successful commercial farmers; however, in order for this to happen, there must be a continued, combined and coordinated effort between the government, the commercial farming sector and the donor community to support emerging farmers. These efforts are complemented by the fact that there is enough goodwill among most white established farmers to share their wealth of farming knowledge and experience with emerging farmers as well as resettlement beneficiaries.

Finally, the speed of land reform depends on an increased pace of expropriation as well as the 'willing buyer–willing seller' principle. In turn, an increased pace of these two principles depends to a great extent on public confidence that land reform is being successfully implemented at grassroots level, that is, that small black-owned farms are being created successfully.



***Notes***

1 That is the 'willing buyer–willing seller' and expropriation concepts being inseparably linked to the 'just compensation' and 'public interest' provisions in both Namibian and South African constitutions and land legislation.

2 2001 population estimates obtained from the Central Statistics Office in Windhoek.

3 Statement by the Right Honourable Theo-Ben Gurirab, MP, Prime Minister of the Republic of Namibia, on the acceleration of land reform in the Republic of Namibia, Windhoek, 25 February 2005.

4 See note 3.

5 'Pohamba warns of "revolution" over land reform'.

6 In all its publications, the Ministry of Lands and Resettlement refers to persons living on resettlement projects as either 'settlers' or 'beneficiaries'. There is a historically negative and even offensive connotation to the term 'settler', which is associated with Namibia's colonial history and refers to white settler farmers. 'Settler', for all its historical baggage, at least has the virtue of equating black settlers with white settlers, evoking a common process that has public recognition. However, the term 'beneficiary' is equally open to criticism because it evokes a 'gift' from a welfare state. Being referred to as a 'beneficiary' means that one is receiving something without making a contribution to one's own welfare. In other words, people living on resettlement projects are dependent on benefits received from the government. Thus, both of these terms have unfortunate connotations that undermine the resettlement process, and evoke either racism or paternalism (Harring & Odendaal 2002).

7 'Resettled farmers left in the lurch'.

8 The Act provides for a Lands Tribunal with a wide range of legal powers to administer the Act.

9 Christoff Maletsky, 'We take any farm we need: Govt'.

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### *Interview*

Dirk Conradie, Chairperson of the Lands Tribunal, 8 June 2005


# LAND POLICY DEVELOPMENT, PLANNING AND (NON-)INCLUSIVENESS

# 11 *The Ituri paradox: When armed groups have a land policy and peacemakers do not*

Thierry Vircoulon



The Democratic Republic of Congo (DRC) has experienced several wars since the end of the Mobutu dispensation. One of them took place in the north-eastern region of the country, in the district of Ituri. Ituri is in the DRC's Eastern Province, bordering both Sudan and Uganda. Approximately 10 tribes, representing a population of about 4 million, populate Ituri. Two of these tribes have been clashing for a century, but from 1999 to 2003 Ituri was characterised by continuous violent confrontations between the Lendus and the Hemas. Regarded by the locals as an 'ethnic war', it was sparked by a conflict over land and resulted in about 50 000 deaths and the displacement of about 500 000 people.

There has been ongoing conflict over land between the Lendus and the Hemas for at least the last century. National and local history produced a social cleavage that is the background to the 1999 to 2003 'ethnic war'. In the Ituri region, control over land means access to both agriculture and gold. Since independence in 1960, the Hemas have dominated local administration, trade and landownership, while the Lendus, who claim to be the first people of Ituri, have provided the workforce for the Hema farms. This social cleavage led to several 'clashes' during the twentieth century that were contained by coercion and negotiations. But in 1999, when Lendu peasants were expelled illegally from 'their' land by Hema landowners, tribal war broke out. Manipulated by powerful neighbours, this local war reached an unprecedented scale in the province, with the creation and institutionalisation of armed groups by the two tribes leading to many massacres. After the signing of the national peace agreement in 2002, it was believed that this local conflict, located at the periphery of the country, had the potential to destabilise the political transition, leading to a European Union military mission (operation Artemis from June to September 2003) and then the deployment of a United Nations peacekeeping brigade (MONUC).[1]

The event that began this four-year conflict was insignificant in itself. In June 1999 in the Djugu sub-district,[2] a Hema farmer decided to evict his Lendu tenants. This was a common practice throughout the whole district, used by the Hema farmers to extend their properties at the expense of the Lendus. In retaliation, one of the Lendu tenants killed a group of Hemas going to a wedding, further escalating tension between the Hema farmers and the Lendu tenants. During 1999 this tension erupted into violent clashes, which spread to the whole sub-district and, at the beginning of 2000, to Irumu and other parts of the Ituri district, resulting in the displacement of all segments of the population. There was a linear relationship between this local clash in the Djugu sub-district and the ethnic war. The four years of bloodshed

stemmed from this long-term conflict over land between these two tribes, who represent the two main ethnic groups in Ituri and together make up 40 per cent of the population.

The conflict patterns are quite similar to those of other ongoing land conflicts in the Great Lakes region. According to the accounts of local inhabitants,[3] the Hemas, who are pastoralists, came to the district from the east in the seventeenth or eighteenth century while the Lendus, who are agriculturalists, are regarded as its earliest occupants. For several centuries, the two tribes had a peaceful but unequal relationship. Having no chiefs and no cattle, the Lendus were subjugated by the Hemas, but the relationships remained friendly: the two tribes exchanged their products, traded peacefully and mixed to the point that some Lendus became pastoralists and some Hemas became agriculturalists. According to the local oral history, the first clash occurred in 1911, when some rebellious Lendu peasants killed the Hema chief, Bomere. The colonial authorities reacted to the ethnic fighting by separating the Hema and Lendu communities in some areas and giving them their 'own' territories (locally called *collectivités*). Nevertheless, except in the Irumu sub-district, the two tribes have remained geographically intertwined. The colonial authorities also favoured the Hemas, who received education and secured jobs in the local administration, while the Lendus stayed away from the colonial administration. The imbalances inherited from the Belgian era were not addressed by the post-colonial authorities, who, on the contrary, exacerbated them through the *zairianisation* policy. In the early seventies, the Congolese government confiscated the properties owned by whites in order to boost development and economic independence. In most cases, the Hemas managed to take advantage of the *zairianisation* by registering as the new owners of the farms (also called *concessions*), thanks to their good education and their close relationship with the authorities (in 1969, President Mobutu Sese Seko appointed a Hema as Minister of Agriculture). This unequal process in the Africanisation of landownership led to the emergence of a rural capitalism and the creation of a Hema farming elite, whose names are well known in Ituri (namely the Savvo, Ugwaro, Lotsove, Kodjo and Singa families). The Lendus became tenants on Hema farms and land use between the pastoralists and agriculturalists sometimes became cause for conflict, with several inter-communal clashes occurring in post-colonial times (1969, 1971, 1981 and 1992). The Congolese authorities dealt with these clashes by using both negotiation and coercion. In 1992, some Lendu cattle raiders were trapped in the Moyo Mountain caves by the Congolese army and killed. During most of President Mobutu's 32-year reign, the government sided with the Hema elite, and this favouritism fuelled Lendu resentment.

In 1999, these clashes turned into a full-scale war due to the absence of a violence regulator: the role played by the Belgian colonisers and, later, the national government led by President Mobutu. The end of the Mobutu dispensation, however, resulted in the disappearance of the central and provincial authorities as violence regulators. This, in turn, led to a vacuum of power and a devastating war in the DRC. From 1996 to 2002, the central government in Kinshasa exercised little authority in the eastern

part of the country and local political parties, traditional leaders and warlords competed to become the real rulers in the Kivus, Maniema and the Eastern Province. This internal conflict, coupled with the direct military interventions of neighbouring countries and the absence of a stable political authority, led to a full-scale ethnic war. As demonstrated in Vlassenroot and Raeymaekers (2004), the intense struggle for access to land was integrated into the broader eastern DRC conflict dynamics and Ituri became 'a war within the war' (Sematumba 2003). In the political confusion that characterised this part of the country from 1998 to 2002,[4] each armed Iturian group allied itself to one or several of the regional powers (Ugandans, Rwandans, MLC, RCD/ML, RCD-K/ML,[5] etc.). The Ituri war looked like a confused war of proxies because of numerous reversals of alliances.[6] But, once again, land was the reason for the interconnection between the local and regional conflict dynamics. Indeed, the Hema landowners rented some of the Ugandan troops to secure their properties against Lendu attacks (Perrot 1999). Locally, seven militias were set up (Table 11.1): five were based in the Ituri community (UPC, PUSIC, FNI, FRPI, FPDC), and two were not (the FAPC, which controlled the Aru sub-district, and the APC, a military force dominated by a 'foreign' tribe from North Kivu, the Nande).[7]

**Table 11.1** *Militias operating in Ituri, DRC, 2003/04*

| Name | Characteristics |
|---|---|
| UPC (Union of Congolese Patriots) | Northern Hemas militia |
| PUSIC (Party for Unity and Safeguarding of the Integrity of Congo) | Southern Hemas militia |
| FNI (Front for National Integration) | Northern Lendus militia |
| FRPI (Front for the Patriotic Resistance in Ituri) | Southern Lendus militia |
| FAPC (People's Armed Forces of Congo) | Militia based in the Aru territory, composed of multi-ethnic bandits |
| APC (Congolese People's Army) | Military branch of the RCD/ML |
| FPDC (People Forces for Democracy in Congo) | Alur militia |

Source: Compiled by the author

## *A village war*

In Ituri, as in the rest of the DRC, land means access to at least two kinds of resources: agriculture and minerals (mainly gold). Therefore, all the militias had a vested interest in land in the sense that controlling land access in certain areas meant controlling the mines.[8] The land strategy referred to in this chapter, however, is not only about mineral resources. In line with Paul Collier's views on civil wars (Collier & Bannon 2003), some militias were only interested in controlling the mining areas while others – the community-based ones – were interested not only in the income generated by artisanal mining, but also in agricultural land. In this respect, there is a difference between a territorial strategy (controlling a territory for military and financial reasons) and a land strategy (controlling a territory for securing land

access). Some militias simply had a territorial strategy, while the community-based militias had both territorial and land strategies.

In the rural Ituri district, the war that started as a series of village attacks in 1999 culminated in 2003 with fighting for the main town, Bunia. From March to June, control of the city was disputed between armed Lendu and Hema groups, each prone to carrying out ethnic cleansing. During the present research, a survey of village attacks was undertaken, in order to understand their motivations. Some villages were clearly 'strategic' in the military or financial sense, as in the cases of Mongbwalu, Djalassiga, Mabanga and Komanda. In 2002, the Lendu militia (FNI) conquered Mongbwalu, but three militias (the FNI, UPC and FAPC) attacked the area again in mid-2003 because it has the main gold mine in the district. Located in the Djugu sub-district, Djalassiga is a small village rich in gold resources, and between June and July 2004 the FAPC and the FNI fought each other to take control of it. Mabanga is another small village built close to a gold mine over which the UPC and the FNI fought for control in 2002. Komanda is not located in a gold-producing area, but it is a commercial crossroads: a market village controlling the only roads to North Kivu and Kisangani, the capital of the Eastern Province.[9] Given its strategic importance, the UPC and the Lendu militias fought repeatedly for Komanda (in 2002 this village was conquered by a different militia 14 times before being eventually occupied by the South Lendus).

Some other villages, however, were of no military or financial importance and could not be regarded as strategic targets in the sense described above. Nevertheless, they were raided, burnt down or re-appropriated. Therefore, these attacks seemed like mere acts of ethnic hatred or blind rage, providing the Western media with sufficient material to confirm the 'barbarians cliché'. The best local example of this was the attack on Nyakunde in a Bira *collectivité* of the Irumu sub-district. Nyakunde was a significant village hosting the biggest clinic of the district, run by foreign priests. The Lendus attacked it several times in 2001 and eventually took it over on 5 September 2002. Occupying the village, they killed all the non-Lendu patients in the clinic, threatened the white staff with death and burnt down the clinic. Nyakunde is a very potent symbol of the war in Ituri. When the Red Cross arrived, it counted hundreds of dead bodies. Bogoro, a village also located in the Irumu sub-district, experienced a similar fate: occupied by Hemas, it was attacked three times by the Lendu militias whose obvious aim was to force out the Hemas. In 2002, the Hemas forced the Lendus out of Loga, a village built on a hilltop in the Djugu sub-district, and the Hemas settled in Songolo (2002), Lipri (2003), Bambu (2003), Kobu (2003) and Drodro (2003), which were also raided without any 'strategic' reason.

These village attacks may look like acts of blind rage to an external observer. However, from the field testimonies recorded in these areas, the local villagers all made sense of the attacks in the same way. These villages were all sites of land disputes, most of them dating from colonial or pre-colonial times. In Loga and Bogoro, the elders of the victorious group (Hema and Lendu respectively) explained to me that they fought for the land because it was well irrigated, located on a hilltop and easier to

cultivate than their own. Consequently, when they felt powerful enough to oust the rival tribe they did so, often with the logistical or direct support of an external force: the Ugandan army sided with the Hemas and the APC sided with the Lendus. The testimonies were all very similar: land control was a driving force for the militia fighters, at least for those coming from an Ituri tribe. The community-based militias focused not only on the mining areas but also on agricultural land. They were interested in the richest plots of land in terms of agriculture. Therefore, this series of village attacks was a series of violent expropriations: war was expropriation by other means. For example, since the expulsion of the Hemas from Komanda, the Lendus and other returnees have settled down on properties previously owned by the Hemas and now under the authority of the *chef de collectivité*, who is in charge of allocating plots of land.[10]

It would be wrong to assume that illegal land occupation is the result of waves of outward and inward migration caused by the violence. Of course, returnees need land to settle on, but they settle in safe areas – territories conquered by their own tribe. Each tribe is applying the rule 'the winner takes all', with the result that the ethnic war has resulted in significant land redistribution: the victorious tribe occupies the loser's land or, in other cases, just prevents the losing tribe from returning to its land. In contested areas, to which displaced people started returning in 2004, attacks or harassment often occurred just before the planting season, making it impossible for them to make a living through agriculture, thus discouraging their return.[11] For the tribes, the post-conflict phase is dominated by the necessity to consolidate their hold on conquered land. As a result, mechanisms need to be found to address tensions arising from the return of those forced into exile. In Bunia, the repatriation of displaced people to the Djugu sub-district took a year and it is still unclear if all returned to their villages. In Ituri, like in many other parts of eastern Congo, the post-conflict land context is characterised by illegal resettlements that create a breeding ground for resentment and future retaliation by newly dispossessed groups.

'Land issue? Not in the mandate…' (Interview UN political officers). When the UN peacemakers arrived in mid-2003 they did not have a land strategy, despite the fact that the land dispute was at the centre of the conflict. In fact, the UN Mission in Ituri stayed away from the issue of enduring land disputes as much as possible and stated repeatedly that it was the responsibility of the Congolese authorities.

From the beginning, the UN's strategic analysis of the Ituri situation underestimated the land problem. In the various UN General Secretary reports to the Security Council, the land conflict is mentioned only from an anecdotal viewpoint (UN 2004, 2005). There is no in-depth analysis of the land problem in Ituri (no detailed information about the unequal land ownership, the size of Lendu and Hema properties and the local land rights history). In fact, since the start of the DRC conflicts, the UN analysis has not adequately taken into account the grassroots problems in Congo. It has focused instead on detecting and denouncing the foreign military interference in eastern Congo (from Uganda and Rwanda) and the business/military networks that are plundering the natural resources (such as coltan, diamonds, gold and cassiterite

[UN 2001]). Unfortunately, this conflict analysis underestimated the local causes of war. The global picture presented by the UN pays little attention to the domestic problem of land either in the Kivus or in the Ituri region (generally speaking, inter-Congolese fighting attracts less of MONUC's attention than rumours of foreign infiltrations in the Congolese territory).[12] The UN strategic analysis is very close to Paul Collier's views on civil wars: foreign interference and local warlordism are motivated by greed. In the UN reports, 'regional greed' is thought to be the root cause of the war and the local disputes between tribes or various social groups are regarded as minor problems (UN 2001, 2004, 2005). Paradoxically, the UN and the Western NGOs focus on regional competition for natural resources and not on intra-national competition for natural resources. Consequently, the indigenous land disputes in Ituri attracted far less interest from Western analysts than the failed prospective attempts of the oil company Heritage in Lake Albert (Johnson 2003). This analytical perspective explains why the peace strategy devised by the UN staff in Ituri not only neglected the land problem but simply ignored it.[13]

Devised without much planning due to time constraints, the peace strategy for Ituri consisted of three stages: restoring law and order in Bunia, helping the interim local administration to impose its authority in the district, and forcing the militias to surrender their weapons. After the European Union military operation in 2003, MONUC's job was to first stabilise the district (militarily) and then disarm the armed groups. This strategy quickly proved to be incomplete and it was adapted according to the local situation. For instance, a justice component was added through European funding in order to deal with the militia. Although completed on a piecemeal basis, this strategy never included the land issue, which was left to the Congolese local administration to be solved. Like effective municipal organisation, infrastructure development and curbing of illegal taxation by armed groups, it was one of the many problems that the Congolese administration was supposed to solve. Local empowerment would have been a good idea if this interim administration had the required authority and enforcement power in the district. Despite the local administration only having a limited kind of moral authority, it was made official in late 2004, when the government appointed Petronille Vaweka as district commissioner. Both its capacity and its legitimacy were limited but, due to the charismatic and persuasive district commissioner, the interim administration was able to organise meetings between tribal representatives, enabling discussion about the humanitarian problem of the displaced. These meetings were the beginning of an intertribal dialogue, but they were unable to solve the land issues. Each time land issues were raised, all the tribal leaders stated their ancient and legitimate land rights and the discussions came to a dead end.

In light of the above discussions, one question needs to be asked: why did the UN peace strategy neglect land issues and leave it to the ineffective local authority? Two reasons can explain this attitude. The first requires a look at the mandate and the second requires a look at the UN mission sociology.

## *The mandate logic*

The reason why land issues were not taken into consideration in the UN peace agenda lies in the mandate. The UN Mission's mandate is defined by Security Council Resolution 1291 for the Mission in Congo. The mandate to keep, build or enforce peace or a ceasefire implies certain diplomatic, political and military actions, but it rarely implies social and economic actions. In the DRC, the UN's focus has thus been on security and elections. This does not mean that the UN does not recognise the importance of the social and economic problems in the war zones in which they operate but, unlike military and political issues, these are regarded as long-term issues that can only be solved in a peaceful country. However, in war zones, these long-term issues usually have short-term negative consequences on peace efforts. Therefore, even if these social and economic issues fall outside their mandate, the UN missions are forced to deal with them in one way or another. At the grassroots level, the UN missions now have funds for quick-impact projects that can provide jobs for the locals and improve their economic situation for a short period of time. At the macro level, the United Nations Development Programme, the International Monetary Fund, the World Bank and the European Union have post-conflict funds in order to tackle the most pressing problems (basic infrastructure, currency stabilisation, and so on). Therefore, the 'official doctrine' is that the UN peacekeeping efforts must be completed by various international financial organisations in order to transform short-term peacekeeping into long-term peace building (Interview UN officials).

Two other factors have contributed to limiting the scope of the UN mandate, thus excluding social and economic matters. The first factor is state sovereignty. UN interventions throughout the world occur in very different political contexts, but in each case they must be reconciled with the international law principle of state sovereignty. In addition, the weaker a state, the more it fights to restrict the scope of UN intervention. The second factor is the 'ownership concept' that has recently been transposed from development theory to peacekeeping. When applied to peacekeeping, the ownership concept means that the local political forces must appropriate the peace process. Behind ownership lies the basic idea that the UN is there to help people who want peace, but it will not impose peace on them. Local ownership of the peace process also calls for a restriction on UN intervention powers and places more responsibilities on local authorities (Vircoulon 2005).

The result of these constraints is that social and economic problems are *de jure* out of the UN mandate and *de facto* beyond its reach. The land problem therefore falls into a void and the postponement of its resolution results in an indefinite future in Ituri.[14]

## *The peacekeepers: Caught between blindness and cautiousness*

The professional profile and the composition of the UN staff can explain a certain 'sociological blindness' to the land issue. Political officers in charge of conflict analysis in a UN mission are usually military personnel and diplomats by training. It is very

rare to find sociologists or economists in the political affairs unit of a UN peace mission. It is also rare to find someone who has a good knowledge of the area. The Department of Peace-Keeping Operations of the UN is not known for investing in developing an understanding of the local political context of its various peacekeeping interventions.[15] As a result, the understanding of local societies is usually very poor among UN staff, which in turn impacts on the way they interpret the conflict and the way they act or, in some instances, overreact. This lack of understanding, together with the fact that peacekeepers often do not speak the local language, results in UN staff often looking lost in a foreign and complex environment (Pouligny 2004).

This sociological blindness is exacerbated when the locals hide or minimise their real conflict motives. This was very common in Ituri, where tribal representatives used to court the UN Mission in order to get material benefits (money, jobs, and humanitarian assistance) and to blur and influence its judgement when tribal violence occurred. In Ituri, it was very difficult for the UN staff to know who was responsible for the village attacks because of various biased narratives coming from different tribal sources. This is common behaviour throughout the world, where the different fighting groups try to pressurise, court or mislead the local UN representatives. In Cambodia, Haiti and San Salvador, some local communities tried to manipulate UN forces and even caused clashes in order to attract the UN Mission's attention or to encourage it to take their side (Pouligny 2004). In most cases, the locals have a vested interest in keeping UN staff out of the real politics of the area and in blinding them to the real stakes of the local political game. For them, it is the best way to preserve their interests from foreigners, whose aims are not very clear and whose actions can dramatically change local political imbalances. Many peace missions have shown that trust between the locals and the UN is not immediate and can only be built gradually.

But, even when the land issue is visible, as in Ituri, addressing land-related claims is regarded not only as falling outside the mandate of the UN, but also as impossible for UN staff to sort out. The paradox is that, among the UN personnel, the land issues are viewed as central to sustainable peace, but too sensitive and practically impossible to tackle. In the past, interventions aimed at agricultural development have inadvertently exacerbated land-related conflict, as in the case of the *Bureau du Projet Ituri* – a development project funded by foreign donors that sought to improve pastoral production and was therefore mainly beneficial to the Hemas. The initiative was regarded with distrust by the Lendus, and furthered their belief that 'donors are biased because they are in Hemas' hands' (Interview Lendu leader). Cautious as a result of these previous experiences, peacekeepers do not want to have the responsibility of sorting out land issues, when the locals are supposed to have the necessary knowledge (albeit not the necessary impartiality and legitimacy). But, contrary to a popular view among UN staff, 'voluntarily excluding' the land issue in the peace strategy (or subcontracting it to a local authority without enforcement power) is not a sign of cautiousness: tenure insecurity and illegal landownership can only fuel the conflict. Furthermore, despite the UN's supposed neutrality, peace

efforts do have an impact on land issues at the grassroots level. In Ituri, like in many other places in the DRC, the policy of the humanitarian arm of the UN was to encourage and facilitate the return of internally displaced persons (IDPs). It is not clear if this policy regards the previous occupants as legitimate ones or if it does not care about the legitimacy issue, but the return of IDPs is done without properly assessing the risks in terms of conflict dynamics and the impact on settlement patterns. Therefore, avoiding the land issue is a problem-avoidance strategy that demonstrates short-sightedness rather than a cautionary policy. Needless to say, in this respect Ituri is far from being pacified: in October 2005 a violent land dispute in the Adjuango village of the Aru sub-district resulted in 200 people having their huts burnt down and being forced to leave the area.

## *Conclusion*

Clearly, MONUC cannot resolve the land issues in Ituri and eastern Congo. The DRC is full of land conflicts between so-called local and non-local tribes, *originaires* and *non-originaires* (Lagrange 2005; Mwaka Bwenge 2003). The legacy of Mobutu's rule, this cleavage between *originaires* and *non-originaires*, is a general Congolese problem that affects and infects every province (Kivus, Katanga, Kasai and Eastern Province) – especially the mining areas. There is no quick fix for it, but it does not mean nothing can be done: it is just another challenge of peace implementation (Malan & Porto 2003).

However, when doing their jobs in rural societies, peacekeepers should always be aware of the land politics in every conflict situation. The land issue is one of many pressing problems affecting war-torn areas. Like law, order and security sector reform, it should be prioritised by peacekeepers because, despite fast urbanisation, Africa is still a rural continent and the African war systems will have land-related aspects for a long time (Huggins & Clover 2005). Therefore, the local politics of land should be investigated so that, at the very least, peace and humanitarian interventions do not further foster conflict, and the right way can be found to support local peace efforts dealing with land issues. This is what is missing in Ituri: despite awareness that securing land tenure means securing peace, the peacekeeping forces ignore it.

***Notes***

1 *Mission de l'Organisation des Nations Unies en République démocratique du Congo* (Mission of the United Nations Organisation in the Democratic Republic of Congo).

2 The Ituri district is subdivided into five territories: Djugu, Mahagi, Irumu, Mambasa and Aru.

3 During my eight months in Ituri, I collected and compared historical narratives from a number of different tribes including the Hemas, Lendus, Biras, Leses, Nyalis and Alurs. Even if the land history is modified and mythologised, the historical narratives all presented a similar land story except for some details.

4 From 1999, the dominant political force in the region, the RCD, kept splitting and gave birth to three competing political parties.

5 MLC: *Mouvement de libération du Congo* (Movement for the Liberation of Congo); RCD-ML: *Rassemblement congolais pour la démocratie/mouvement de libération* (Congolese rally for Democracy-Liberation Movement); RCD-K/ML: *Rassemblement congolais pour la démocratie Kisangani/mouvement de libération*.

6 For instance, the Ugandan People Defence Forces supported the UPC but shifted to supporting the FNI in 2003.

7 UPC: Union of Congolese Patriots; PUSIC: Party for Unity and Safeguarding of the Integrity of Congo; FNI: Front for National Integration; FRPI: Front for the Patriotic Resistance in Ituri; FPDC: People Forces for Democracy in Congo; FAPC: People's Armed Forces of Congo; APC: Congolese People's Army.

8 For more information about illegal mining activities in Ituri, see Human Rights Watch (2005).

9 It must be kept in mind that, in the DRC, the combination of markets and roads means access to revenue through taxation.

10 The big Hema landowner of Komanda, Mugisa Seba, fled to Uganda.

11 In Fataki in 2004, for instance, Hema returnees working in their fields were kidnapped and released several days later.

12 For instance, the news that some Lord's Resistance Army elements crossed the Congolese border in September triggered a quick UN deployment, unlike news of intra-Congolese violence in northern Katanga.

13 The UN analysts are not the only ones to underestimate the land issues, despite being aware of them. The International Crisis Group (ICG) reports have done exactly the same thing: they also focus on the peace process spoilers and the hesitations and contradictions of the international players involved in the DRC conflict. It is striking that the recommendations regularly made by the ICG to the UN Security Council, the UN Development Programme and the Congolese transitional government never concern land issues. Good examples of this are the ICG Africa Reports (see ICG 2003, 2004).

14 It must be pointed out that not all the UN missions are without economic and social responsibilities. When the UN is directly administering a territory like Cambodia or Kosovo, it has a broad legislative mandate. In this context, it can be in charge of the land issue. For example, the UN Mission in Kosovo established a Housing and Property Directorate Claims Commission and, in Cambodia, when local justice was not able to fix land disputes, the UN Mission intervened.

15 There are, however, a few counter-examples: an anthropologist and a sociologist were integrated into the advising team to the chief of the UN Mission in Mozambique, and a team of Somali specialists advised the UN people in charge of running the UN operation in that country.

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Interview with Lendu leader, Bunia, 2003

# 12 *Understanding urban planning approaches in Tanzania: A historical transition analysis for urban sustainability*

Wakuru Magigi



Land regularisation, as a participatory urban planning approach, has been one of the landmark transitions providing for the inclusion of stakeholders in land development and management policy reforms in Tanzania. It has also enhanced the standard of the urban built environment and security of tenure in informal settlements. Exploring the approach followed in Tanzania gives insight into the nature of land policy-making and implementation challenges. This insight can in turn be used to inform and ensure sound urban planning approaches and land policy, thereby encouraging effective urban land governance (Kombe & Kreibich 2000). The nature of the land regularisation processes described in this chapter[1] supports the implementation of Agenda 21, which was developed at the Earth Summit (1992) as a blueprint to aid countries around the world to implement sustainable land development (Clarke 1994). Agenda 21 recognises that most fundamental environmental challenges have their roots in local activities and therefore encourages local governments to promote sustainable environmental, economic and social activities by translating the principles of sustainable development into strategies that are meaningful to local communities (i.e. grassroots actors). Adopting participatory urban planning approaches therefore appears to be a rational way to encourage local communities to link with other interested development partners in urban land development, building their local capacity for change, equal rights and empowerment in sustainable land development.

Urban planning approaches are processes involving the organisation of various development partners who either benefit from or are affected by the spatial and land use dimensions of urban development, and who guide and manage the process, the aim of which is to increase a city's competitive advantage, productivity and safety. Historical transition, in this context, can be perceived as a process of adapting planning approaches to fit community needs and city investment aspirations, based on changing planning circumstances resulting from changes in socio-economic settings and government institutional changes. Urban sustainability is widely defined (Seymoar 2008; Seymoar & McRae 2009). In this context, urban planning is a continuous, flexible process based on meeting community needs and is developed with legal backing. An understanding of linkages between urban planning approaches and urban sustainability in Tanzania is important as this will help other similar countries to implement urban planning that will stimulate economic growth and reduce poverty in poor urban neighbourhoods (i.e. informal settlements).

During the 1950s, when community development was promoted in developing countries, including Tanzania, it was primarily rural in orientation – emphasising service provision administered through community development programmes in order to encourage cash crop production and other economic activities that were regarded as being necessary for economic growth (Pretty & Frank 2000). The British colonial administration, the United Nations and a few independent so-called third world countries were the primary promoters of these initiatives. In the late 1960s, however, more radical approaches to community works became influential. Instead of attempting to help deprived communities to improve their social and environmental circumstances, the new community work activities urged people to take direct political action to demand change and improvement (Midgley et al. 1986). However, this 1960s, top-down approach failed to achieve its urban management objectives (Amos 1986; Mattingly 1996). Then, in the 1980s, there was a shift from a paternalistic social welfare model of community development (top-down approach), to a development (bottom-up) approach in most developing countries.

In sub-Saharan Africa, including Zambia, Zimbabwe, Botswana and Namibia, a top-down planning approach, using mainly a master-plan approach, was common practice. The legislation and policies that were put in place were guided by colonial interests, which focused mainly on economic growth to the benefit of colonial power and little on building the nation at large. Kironde (1994) observed that the models of economic growth that were put in place after independence continued to be based on this Western legacy. In the mid-1980s, the introduction of the structural adjustment programme, trade liberalisation, a free market economy, decentralisation and globalisation called for more participatory approaches, which encouraged community involvement in managing urban land development in third world countries (Mabogunje 1992). Encouraging community involvement resulted in an observed strengthening in urban planning and therefore land sustainability in developing countries, including Tanzania in particular (Armstrong 1987).

Social capital theory was used to determine and establish indicators for urban land sustainability within participatory planning approaches, as it was felt that it would greatly contribute to the explanations and subsequent understanding of the decisions and actions of different actors, policy interventions and the interaction of various actors affecting the land regularisation process. Social capital theory could also be used to explain why, despite varying social, economic and cultural differences, the local community in Ubungo Darajani came together to jointly tackle their problems and meet their objectives. Other scholars have also shown that social capital builds local knowledge and enhances a local community's civic capacity (Jacobs 1961; Putnam 1993). Griffith (1995) observed significant associations and social interactions in building trust and cooperation, common societal rules, norms and sanctions, reciprocity and exchanges, and relationships for community involvement success. Ubungo Darajani is a unique case in local urban planning in Tanzania, as landholders, relying on their own resources with no external financial support, have been able to initiate and accomplish a wide range of processes, ranging from

planning and land surveying to the mobilisation of funds for land registration, in order to gain formal land property rights.

## *The Ubungo Darajani urban settlement study area*

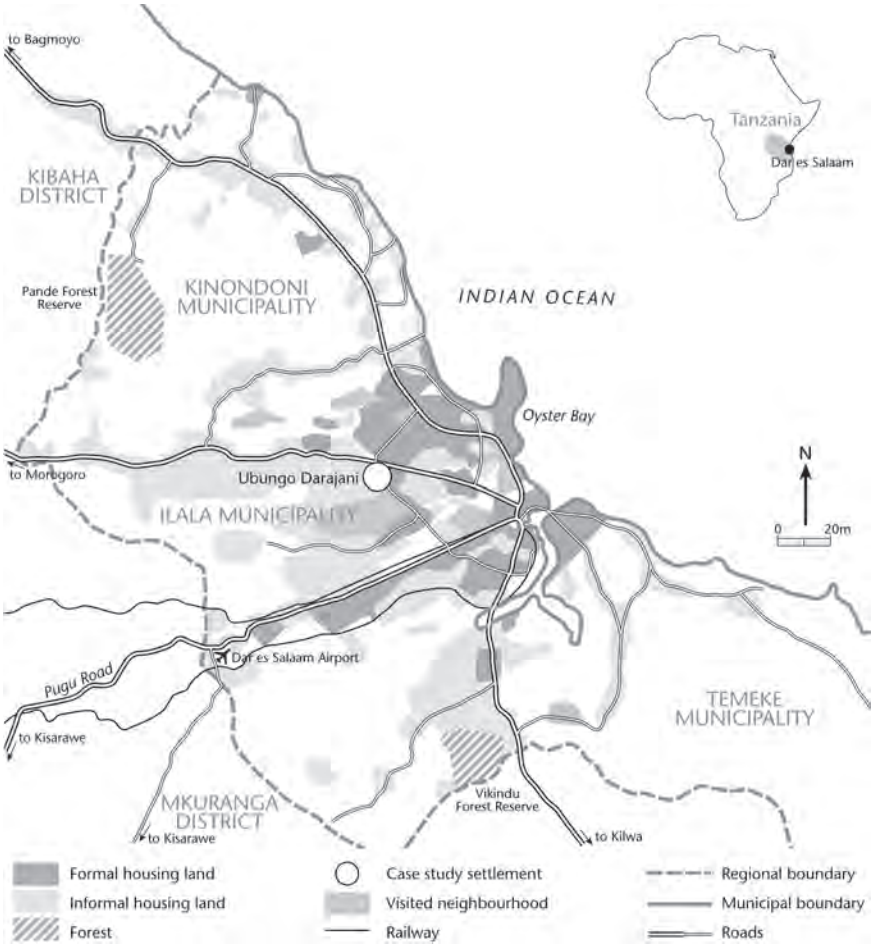
The Ubungo Darajani urban settlement was retained for the study for several reasons. Firstly, it had been involved in land development activities since 1997. Secondly, the community members had developed strategies to subsidise those who could not raise sufficient funds to contribute to the financing of the process. Thirdly, residents were able to demonstrate how they have managed to develop and sustain trust among themselves, and promote healthy relationships and connectedness. They also have made use of oportunities offered by policy changes to develop more secure land tenure. Fourthly, adequate data were available and the settlement was manageable for the project in terms of both area and population size. Lastly, the settlement had a high growth potential in terms of housing development, in order to illustrate the linkages between urbanisation and urban governance.

Ubungo Darajani is one of the unplanned settlements in Dar es Salaam (Figure 12.1). As a low-lying area, it regularly experiences flooding. It is located nine kilometres from the city centre and covers 26 hectares. The settlement has a total of 849 households and 4 245 people, of whom 2 420 are women (URT 2002: Figure 12.1). Of the 849 households, 269 are landholders and 580 are tenants.

The population of the Ubungo Darajani settlement is comprised of people from various tribal backgrounds with diverse social, cultural, economic and ethnic beliefs. These include, among others, the Chagga, Waarusha, Matumbi, Zaramo, Kurya and the Jita. These diverse groups have joined forces in their involvement in development activities and are working collaboratively in their efforts at financial mobilisation and timely information flows to residents and other interested partners. The presence of religious groups and female credit associations (*upatu*) has also constituted an important source for implementing local development activities, including land regularisation.

The major economic and income-generating activities carried out in the settlement include gardening; business, including shopkeeping, garages, hotels and restaurants; petty trading; and animal and poultry farming along the Kibangu River. Other off-farm activities include carpentry and the sale of processed building wood. The study revealed that 60 per cent of landholders were employed in the informal sector and 40 per cent in the formal sector, demonstrating an increasing urban investment in the informal settlements.

**Figure 12.1** *Formal and informal neighbourhoods in Dar es Salaam city*




Source: Kyessi (2002)

## *The transition of urban planning processes and policy interventions*

The master-planning approach was adopted by the British administration, which ruled Tanzania from 1918 to 1960. This approach to urban planning formed the basis for the Town and Country Planning Ordinance (CAP 378) of 1956, revised in 1961. Practical experience has shown that the master-plan approach is top-down and cannot be adapted to accommodate investment aspirations. It is therefore essentially a blueprint and no more. The approach is based on a zoning regulation approach that inadequately allows for local community involvement in planning, implementation and management. As such, it is a single-entity activity, that is, a government-centred approach which excludes other stakeholders. Based on the Ordinance, both general planning and detailed general planning schemes are prepared using the same procedure.

Following is a summarised version of the formal process, based on the Ordinance: the planning authority (i.e. ministry, city authority, municipal authority, town council) passes a resolution of intention to prepare the detail for the planning scheme. The planning authority convenes a meeting of potentially affected landholders and serves six months' notice to the landowners concerning its intentions to prepare the details of the planned scheme, thus allowing them time to prepare their own scheme and submit it to the preparatory authority. If the meeting results in a resolution to endorse the proposal, the planning authority adopts the proposal prepared by landholders, either with or without modification. Within six months of the schemes' preparation, the preparatory authority must deposit a detailed plan of the scheme in the affected area and then conduct public hearings in the planning area. The planning authority must take the input provided in the public hearings and alter or modify the scheme accordingly. Submission of the detailed planning scheme to the urban planning committee for approval is compulsory, particularly after the incorporation of comments by technical experts. The final detailed plan must then be presented to the landholders for acceptance. The local authority then submits the detailed planning scheme to the ministry responsible for planning for approval. This must be done within four months of the date that the local community is served notice of the scheme. The minister furnishes an estimate of the costs of compensation by consulting the area's planning committee and, lastly, the planned scheme is approved by the minister responsible for planning.

The formal urban process explained above appears to take a minimum of one year from land use planning initiation to approval. One may wonder how long it takes to expedite other land regularisation processes, including cadastral survey and land registration, in rapidly developing cities like Dar es Salaam and others in sub-Saharan Africa. This is a dilemma which seems to limit the effectiveness of policy implementation and the sustainability of urban planning approaches in Tanzania and other developing countries, and is therefore a disincentive to ensuring urban sustainability.



## *Involvement of local community*

According to section 24 (subsections (i) and (ii)) of the Town and Country Planning Ordinance, provision is made for local community involvement. The Ordinance ensures, inter alia, local community involvement by consulting landowners through general meetings; providing opportunities for objections to the land use planning scheme to be lodged; granting leave to appeal against administrative decisions; participatory discussions; and ensuring user access to complete and valid information on the prepared detailed scheme through legal deposit and publication in a gazette and in one newspaper distributed throughout the country. Effective land management is limited by inadequate public awareness of land policy regarding land use planning and the processes through which it is scrutinised. Failure to distribute approved plans at the local level also limits the sustainability of urban planning.[2]

Section 35 of the Ordinance requires that developers within a planning area obtain planning consent which, in accordance with section 36, shall be issued by the Area

Planning Committee or local authority. Sections 37 and 38 require that planning consent must be based on a schedule in the course of preparation, or conform with a scheme when in force, as the case may be.

The growing urban population with limited planned and serviced land that has emerged since independence in Tanzania in 1961 has led to escalating housing densification. This has resulted, inter alia, in health threats, environmental consequences and increased unplanned informal sector activities. As noted, efforts by the government to deal with the situation include the adaptation of land policies to use a planning approach, slum clearance through demolition in the 1960s, the introduction of sites and services in the 1970s, and recognition of unplanned settlement in the early 1980s. Encouragement of a homeownership policy and the upgrading of informal settlements accompanied the latter.

In the 1990s, the introduction of bottom-up approaches called for grassroots participation in planning. This was enhanced by the adaptation of the Sustainable Cities Programme using Environmental Planning and Management (EPM) approaches, including Strategic Urban Development Planning (SUDP) (Majani 2000). The latter entailed preparing a City Development Planning Framework through public participation. This was a shift from a blueprint planning approach to a more participatory and transparent process in which affected stakeholders and beneficiaries shared information to determine the fate of city growth and land development in Tanzania.



## *The master-planning approach in Ubungo Darajani*

The master-planning approach was used to prepare the 1979 Dar es Salaam master plan. Ubungo Darajani, according to the plan, was zoned as hazardous land with a provision that it could be an industrial zone in the future. This was done despite the extensive mushrooming of private housing developments that began in the area during the 1960s; thus, it should be noted that the preparation of the plan adopted a top-down approach, without taking into account landholders' inputs. Because the 1979 proposal for Ubungo Darajani was not implemented at the time, most landholders were not even aware of the plan's existence and many continued to subdivide their land for sale.[3] This non-inclusiveness can be attributed to the government's ineffective dissemination of approved plans at the local level – a crucial element in ensuring urban sustainability in urban planning processes. The plan was finally enacted in 1990, when the government declared that it wanted to acquire Ubungo Darajani for industrial development.

## *Adaptation of EPM approach in the city*

Recognition of these unplanned settlements led to the preparation of detailed land use plans for upgrading services, prepared mostly without the land development stakeholders' involvement (i.e. local communities and utility agencies). The situation resulted in increased challenges in settlement development, including fragmentation

of urban land development planning, squatting, housing density and the haphazard allocation of utility facilities in Dar es Salaam.

The government, in redressing the above challenges, adopted a participatory planning approach, namely EPM, so that all land development stakeholders were involved in the land development process. The main processes involved in the EPM approach used in the Sustainable Dar es Salaam Project included sensitisation and identification of stakeholders, situation analysis, preparation of the city profile, and conducting consultative meetings. Other processes included prioritisation of issues and projects, formation of working groups, interventions, implementation of demonstration projects, funding, and preparation of an SUDP.

The key elements that distinguish the master-planning approach and the EPM approach include stakeholders' involvement, sector inclusion, capacity-building needs, issue prioritisation and the implementation of interventions. These elements foster community networking and partnerships in issue identification and implementation. They also build trust, thereby increasing the effectiveness of urban planning implementation and networking.



## *Adaptation of land regularisation: A case-specific participatory planning approach*

EPM is a process that needs to be strengthened with the backing of policy and legislation. Adopting land regularisation to enable the urban poor to secure tenure is a direct result of EPM processes that took in place in Dar es Salaam in 1992, and which were since also implemented in 10 other cities in Tanzania.[4] Land regularisation fosters implementation of EPM outputs in the country, including settlement upgrading and securing tenure.

The new land regularisation process introduced in the Land Act of 1999 strengthened the implementation of EPM. The major conditions necessary for a settlement to qualify for the implementation of a land regularisation plan include: the area should be substantially built up; a significant number of landholders in the area should lack apparent lawful title to their use and occupation of land; land should be occupied under customary rights; and the area should be ripe for development, that is, declared suitable by the responsible authority. Other conditions include that landholders should have lived in the area for a substantial period of time, a considerable number of residents should have invested in their houses, and a substantial number of people and community organisations within the area must want to participate in the regularisation scheme.

The following is a summary of the steps that should be followed in the preparation and implementation of a land regularisation scheme, according to sections 56 to 60 of the 1999 Land Act. The minister may of his or her own accord, or as a result of a request from the urban authority or village council concerned, either direct the commissioner to consider or appoint someone to prepare a land regularisation scheme and submit it to the Minister for Land. The Minister for Land will then pass

a resolution to declare a scheme of regularisation at the request of an urban authority or a village council within an urban or peri-urban area. The urban authority or village council is given the opportunity to convene one or more meetings in the area to explain to residents the nature and purpose of the procedures to be followed in the declaration and implementation of the scheme, and to listen to and take into account residents' views. The appointed authority submits reports to the minister, who may declare a regularisation scheme. If declared, a draft scheme of regularisation is prepared. A summary of the scheme must be published in at least one Kiswahili-language newspaper distributed in the proposed regularisation area. Public hearings explaining the contents of the scheme must be held and the views of stakeholders obtained and noted. The Act gives local authorities the opportunity to consider the draft scheme and to send comments to the Commissioner for Lands.

In the process, the Commissioner for Lands serves a notice on every person occupying land affected or likely to be affected by any part of the draft scheme. In this respect, the commissioner takes into consideration the views of the public, the local authority for the area, adjacent peri-urban areas, or any other persons who have submitted an opinion on the draft scheme. Should the commissioner consider it necessary or desirable to do so, the draft is revised and resubmitted to the minister. Fourteen days notice is given of any public meeting to be held to discuss matters connected with the scheme and of the date by which written or other submissions or representations must be made. The minister may, after considering the draft scheme submitted by the Commissioner for Lands, either approve the scheme and declare it ready for regularisation by order published in the gazette; refer the scheme back to the commissioner for further work in accordance with the minister's instructions; or reject the scheme altogether.



## *Community-led land regularisation processes and roles of actors*

### *Local community involvement initiatives in initial stage*

The Ubungo Darajani community embarked on a land regularisation process in order to improve infrastructure facilities and services, prevent haphazard housing development and encroachment on roads, and improve their security of land tenure. Improving security of tenure was their top priority. The initial land regularisation process in this settlement took two years. It involved establishing contacts with the local authority and consultations with various institutions to obtain support. The involvement of a retired civil servant in the initial stage catalysed the process. Some landholders started surveying their plots, but stopped due to the prohibitive costs; others were swindled by unregistered surveyors. These factors created solidarity among the inhabitants of the settlement because they faced a common problem.

During this initial stage, 14 general meetings were held during which mechanisms for participatory decision-making were established. These included the appointment of Ten Cell leaders. During this period the University College of Land and Architectural Studies (UCLAS) was engaged as the consultant to elaborate on the

regularisation process and provide legal guidance. Respondents argued in initial meetings that the process of regularisation was too bureaucratic, and they therefore sought the aid of UCLAS.

### *Land use planning phase*

In late 1998 the Ubungo Darajani Community Development Organisation (UDASEDA) initiated the project. However, UDASEDA leaders, in consultation with UCLAS, prepared the layout plan which was used for subsequent activities, including surveying.

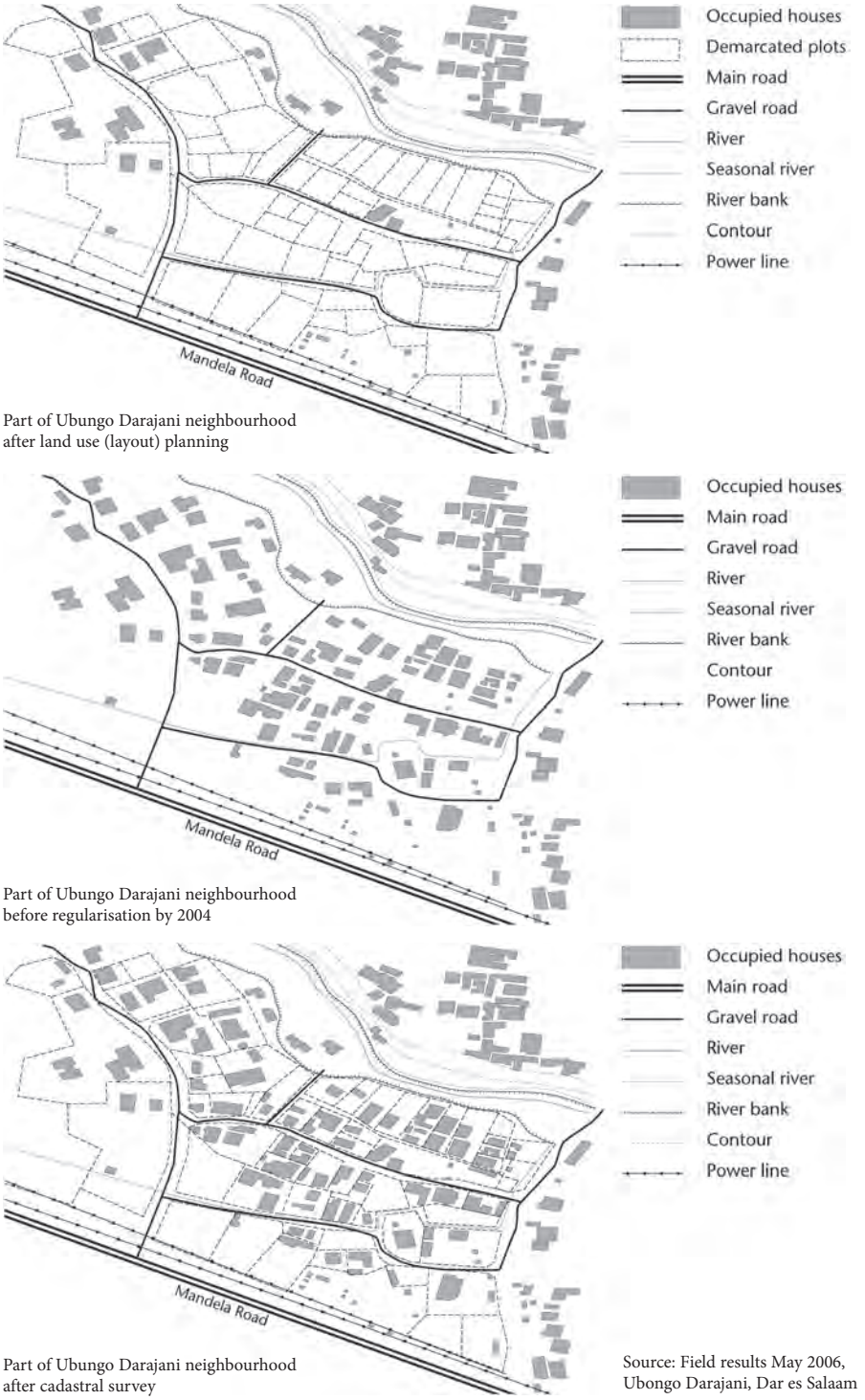
In land use planning, UCLAS undertook field reconnaissance and conducted general meetings at which the regularisation process was explained to community members. In addition, they prepared base maps, forms for negotiation and property registration; identified areas for community facilities, such as major roads and other public services; demarcated plots through negotiations and layout planning; submitted layout plans to the local authority for scrutiny and endorsement; and presented the plans to the Minister of Lands and Human Settlement Development for approval. UCLAS, in collaboration with the UDASEDA leaders, was also involved in following up on progress; 64 trips were made in implementation of the plan. Preparation and approval of the detailed layout plan in the second stage took 3.5 years. This raises questions as to why land use planning took such a long time, despite the presence of institutions and experts within the area of jurisdiction.

### *Cadastral surveying*

After the layout plan was approved by the Ministry of Lands and Human Settlement Development (MLHSD) in November 2002, local leaders convened a meeting involving all landholders to inform them that approval of the plan had been granted and that the second phase, comprising a cadastral survey, would commence. The meeting endorsed the progress and directed the community spokesperson to identify a surveyor who could help to survey the 26-hectare area. In order to strengthen the UDASEDA, a new committee with members selected from the settlement was elected to assist the established committee. The new committee was named the Community Land Development Committee (CLDC). The CLDC collaborated with UDASEDA leaders to organise the cadastral survey and title preparation. UDASEDA and local leaders were advised by the Kinondoni municipality to approach UCLAS to obtain a quote for a cadastral survey of the area. The surveying department at UCLAS submitted a quote of 21 million Tanzanian shillings (TShs), or US$19 500. Another surveyor in Morogoro (a city in Tanzania) quoted TShs 28 million, equivalent to US$26 000.

In a general meeting, the CLDC leaders informed the community of the high costs quoted by the surveyors. The meeting resolved that the committee should approach the MLHSD for help. The MLHSD referred them to Survey Consults, a private firm that agreed to undertake the work for a much lower charge.

**Figure 12.2** *Land regularisation outputs, Tanzania*




Source: Field results May 2006, Ubongo Darajani, Dar es Salaam

Following a site visit and review of the approved layout plans, Survey Consults submitted a quote of US$3 800 for 237 plots (which excluded 32 plots already surveyed). In order to start work, Survey Consults asked the community to seek survey instructions from their local authority, and community representatives wrote a letter to this effect. The local authority took nine months to process the survey instructions, from February to October 2003. The survey instruction is a permission document offered by the local authority to endorse the cadastral survey process. It is unclear why this permission, in the form of a letter, took such a long time. This kind of delay can act as a disincentive to local communities improving their urban settlements.

Following the issuing of the survey instruction, the community mobilised and collected funds for implementation during the period November 2003 to February 2004. At this stage the Ubungo Darajani councillor and the MP of Ubungo constituency stepped in to sensitise the community to the importance of contributing money in order to implement the plan (Figure 12.2).

It is important to note that in both planning stages (i.e. land use planning and cadastral survey), the provision of flexible payment terms was the most important factor enabling the community to raise funds.



### *Women landholders' contribution*

The contribution of women was important: 17 per cent of women landholders contributed in instalments, while 6 per cent contributed in full, making a total of 23 per cent who contributed to the land use planning stage. During the cadastral survey, 22 per cent contributed in instalments while 6 per cent contributed in full, making a total of 28 per cent of women landholders who contributed to the process, an increase of 5 per cent from the land use planning phase. Women's contribution in cash amounted to 19 per cent of the total of $4750 US which was collected during the land use planning and cadastral survey phases. This highlights the importance of integrating women into local land development activities.

## *Outcomes from the regularisation process*

A total of 237 plots were planned and surveyed, making them part of the formal land management system. Three new roads were opened in the settlement. Flexible planning standards for road widths were adopted instead of the 6-metre, 10-metre and 20-metre standards for footpaths, access roads and local distributor roads respectively proposed by the MLHSD. Thirty-two landholders donated land for the road expansion through mutual agreements between the landholders and Kinondoni Municipal Council. The donation of land did not change plot ownership, but boundaries were adjusted.

Other outcomes included the construction of two drainage systems with four culverts. The construction used finances raised locally after the land use plan was approved. In addition, three boundary conflicts were resolved out of court and one

in court. Most of the conflicts were first referred to and resolved by the respective Ten Cell and sub-ward leaders. In cases where sub-ward leaders failed to resolve the disputes, they were forwarded to the ward officers. If the latter were unable to resolve the case, it was referred to the police and later to a court of law. It is likely that the linkages and networking between local government, the MLHSD and institutions such as UCLAS demonstrated to the community that they could for the most part do without external facilitation. In addition, it appeared that the local community involved in the process gained confidence after their plans were approved, leading to land registration.

## *Potential of local community involvement to enhance urban sustainability*

Several aspects of the Ubungo Darajani experience were identified as major contributors to successfully involving the community in the process of land regularisation and enhancing urban sustainability. First, the willingness of the community to commit to the process through regular attendance at land development meetings was crucial. The meetings provided valuable information on the process and significantly raised the community's awareness. Second, the community took time to establish clear goals for the initiative, and mobilised itself through volunteer work in community projects to attain these goals. Through this mobilisation, the community controlled local development via their established community development committee, which ensured the inclusion of community members – particularly women – throughout the process. These actions fostered confidence in the process, accountability of participants and community ownership of progress; in turn, this led to cost-sharing arrangements, which were integral to the success of land regularisation in Ubungo Darajani.

The government contributed by supporting the initiative through legal and statutory provisions; codification of standards and processes was essential to building community confidence and involvement in the process. Government also provided training to local leaders on issues such as contract preparation, to help them protect local interests. In addition, to further protect local populations and their interests, the government offered guidance on the development of prime areas that would benefit the community, as well as on hazardous lands (as agreed by the community). Both these components – community involvement and ownership, and formal government involvement – led to accountability and commitment to the land regularisation of Ubungo Darajani by individuals, local leaders and politicians.

## *Factors that build trust and sustain local community involvement*

### *Commitment of actors to land development matters*

The selection of a community spokesperson (champion)[5] was an important factor. Even though the following list of qualities was not a requirement at the time of

election, from the discussions with many residents it became clear that they were essential for a successful spokesperson: the candidate should be an innovative and established community leader; have resided in the community for no less than 10 years; not be otherwise employed; be aware of community issues and government processes (a former civil servant would be ideal); have a keen interest in land management and development; and have an impeccable record of integrity in order to instil trust in community members.

These characteristics are integral, as the community spokesperson is the leading actor at local level in the regularisation process. For example, in Ubungo Darajani, the spokesperson was charged with following up on progress in the regularisation process and providing feedback to the community. He also collected financial contributions from the landholders and deposited them in a project account. His role was critical in the achievements recorded.

### *Embracing mechanisms for participatory decision-making*

Information dissemination, as a participatory decision-making mechanism, appears to be an important factor for community involvement in the case study. This study also noted that accurate information was required for communicating messages from the sub-ward level to individual households. Other important contributing factors were the role of politicians, such as the councillor and the MP, in chairing community meetings and sensitising residents; the use of flip charts to display information; and contributions from various social community groups within the settlement.

### *Strong community organisation and links with other local institutions*

Community organisations in Ubungo Darajani played a decisive role in the success or failure of land management. The study noted that good links with the leaders of external institutions were useful in strengthening UDASEDA. The Ubungo Darajani land regularisation project operated under the supervision of an unregistered community organisation (UDASEDA), which had links with sub-ward and Ten Cell leaders. These leaders played an active role during meetings, sensitisation programmes, the mobilisation of funds, and information dissemination. Other linkages created by the community organisation included consultation with institutions such as the MLHSD, local authorities and UCLAS. These linkages assisted with building trust between landholders and tenants, encouraging them to participate and contribute. Indeed, even though the community organisation had its own leaders, its work involved many other leaders, including sub-ward and Ten Cell leaders. This enhanced the popularity and strength of the organisation and helped to build confidence and commitment among residents. In other communities, some community-based organisations have failed or become weak because of their failure to link with other grassroots institutions.

### *Educational background of local leaders*

The literature shows that imparting education through training is an important aspect in sustaining local community involvement (Meshack 1992; Poerbo 1992). The Ubungo Darajani experience confirmed this thesis. The CLDC consisted of 10 members: one had a master's degree in economics, eight were standard eight school leavers with experience in development issues, and one was an experienced leader with no formal education. This background enabled the committee to better comprehend problems and to be innovative in the ways they mobilised and sensitised the community, both in their approach to government institutions and in utilising local potential. It is the author's opinion that education was an asset that helped the leaders to come together to share their problems and successfully formulate strategies to resolve them. Of course, the varying 'real-life' experiences of the leaders also provided important inputs to the process.

### *Deployment of grassroots leaders and social groups*

The UDASEDA operating in the settlement deployed Ten Cell leaders to assist in information dissemination, sensitisation and resource mobilisation. This enhanced the role and position of the organisation in the city because the grassroots involvement of the Ten Cell leaders, who were closer to the residents, seemed to create trust and was instrumental in the collection of contributions and commitments (particularly financial commitments) from households.

The role played by religious groups, female credit associations, business people, and credit and savings institutions such as the micro-credit institution FINCA, particularly in sensitisation, mobilisation and information dissemination, was also crucial. For instance, they helped local leaders to get in touch with those who were too poor to contribute in cash and exclude them from this commitment.

### *The land development committee*

The community selected the CLDC during a general meeting. The CLDC played a key role in strengthening UDASEDA by helping it to follow up on project progress, collect contributions from in and outside the settlement, and ensure that each landholder within the settlement received information on the project's progress. For instance, the CLDC met every Wednesday to discuss the progress made towards implementing decisions and layout strategies for further work.

### *Economic ability to contribute*

Of the TShs 1 260 000 earmarked for the land use planning phase, the local community contributed TShs 564 000 (42 per cent). About 20 high-income landholders contributed the rest. The success in obtaining contributions from the less-affluent members of the community was attributed to the introduction of flexible payments. High-income individuals contributed because they were motivated by the

good response they received from other community members, but also because they wanted to acquire land titles. Some also contributed money as a matter of prestige.

### *High proportion of landholders*

The presence of a high percentage of landowning settlers enhanced the land regularisation initiatives and decision-making processes. Of the 269 houses occupied by landholders, only 20 were living outside the settlement, 12 in Dar es Salaam and the rest in Morogoro, Tanga, Mara or Mwanza. The high proportion of landholders living within the settlement was an important social capital resource from which Ten Cell leaders, land development committee members and actors in social groups could be drawn. Often, land or property owners are more responsible and concerned about the community's welfare if they are presently community members themselves.

### *Existence of locally enforced norms*

Community leaders put in place norms for housing construction that took into account requirements for road patterns as well as spatial structure. These norms required builders to obtain a building permit, and community members to inform their respective Ten Cell, sub-ward and community organisation leaders of their intentions to subdivide and/or sell their land. The Ten Cell leaders were given a mandate to report to the sub-ward offices any house construction activities taking place within their area. This latter norm was formulated because of community reaction to a landholder whose building had encroached on a public way. Before regularisation plans were put in place, houses were constructed without any regulated framework. The new norms have helped to shape the area and are increasingly being observed.

### *Establishment of a community task force*

The community established a task force to deal with conflicts and other land disputes that emerged during the regularisation process. The task force was comprised of sub-ward leaders, Ten Cell leaders, community champion/representatives, and experts from UCLAS, who gave technical advice. Sub-ward leaders issued letters that were sent to parties in conflict and their Ten Cell leaders, who informed the neighbours. The letters were signed by the sub-ward leader to show that the CLDC had given them a mandate. Conflicting parties were invited to a meeting, where they presented their respective positions to the CLDC and attempted to resolve the conflict through negotiations and the involvement of friends and relatives. Three conflicts were resolved out of court. However, in one case that went to court, a landholder opposed community agreements and sued local leaders who were preparing and implementing a land regularisation process that would potentially affect property rights. Another landholder did not want to open up the road passing to his area as he was against the community initiative. This landholder also filed the case in court. At the time of writing, a judgment was still pending.

## *Challenges facing community involvement in land regularisation: Reflections*

Tanzania has provided opportunities for local community involvement in land regularisation activities. These opportunities are built into the Land Policy of 1995, the Land Act of 1999, the Urban Planning Act of 2006 and the Land Use Planning Act of 2006. Despite good policies and legislative intentions, a vacuum exists at the operational and grassroots levels. For example, under the Land Act, the Minister of Lands has the power to determine whether or not to declare a regularisation scheme and implement it. The minister is also empowered to delegate functions to the Commissioner for Lands to facilitate execution of the scheme. However, the substantive involvement required of the private sector and public sector institutions to initiate and implement the scheme is not emphasised in the regularisation process. Thus, the Act places landholders and their local authorities, including the village council, in a difficult position when they would like to intervene promptly and directly. This situation may discourage local community involvement in land development and management initiatives. This demonstrates the need to decentralise land regularisation powers from central to local government, to provide relevant training and to give local communities the power to initiate and implement land regularisation schemes. Local authorities and the central government could help facilitate processes where the local community experiences constraints in effective implementation, including in the provision of authenticated documents to coordinate and control land.

The Ubungo Darajani community wanted regularisation agreement forms to be issued, to confirm plot boundary negotiations and agreements. Provision of such agreement forms is, however, not permitted in terms of the Land Act (section 22(1)(e)). The Act regards such a document as unofficial and therefore issuing one for land that is not surveyed is prohibited. This may be a sound position in legal terms for controlling land development in informal settlements, but in the local context the need for documentation to authenticate and record agreements reached, particularly with respect to boundaries, is a justifiable and logical demand. Without some form of documentation, one wonders how disputes over boundaries can be settled, for example in the case of a party involved in boundary negotiations and demarcation passing away or transferring their property after an agreement has been reached.

Bureaucratic procedures for obtaining proposal approval were a constraint in fostering community involvement in land management. Land use planning procedures, which included the preparation of a plan, its presentation to and endorsement by the municipal council, and submission to the MLHSD for final approval, could take five years. This is far too long for a person wishing to use the land title or wishing to get their land regularised, and may act as a disincentive. This study calls for a reduction in the time required to process and approve layout plans, as well as the issuing of building permits and consents. If the process takes too long, it can result in the demoralisation of those at the grassroots level who want to participate in and contribute to regularisation.

Some residents noted that the short-term titles/leases offered by local authorities in urban land occupation discouraged investment in the properties. For instance, one landholder who wished to obtain title deeds for his land reported the following:

> I have got a title deed, but I have been constrained by the short-term nature of title given (i.e. 10 years). Credit institutions refuse to approve a loan arguing that the title has low betterment value.

Therefore, there is a need to consider granting long-term titles – 99-year leaseholds – to attract informal property betterment and to fight poverty.

Lack of political interest and the undefined facilitation role of the government in decision-making influenced the land regularisation process. For example, it was noted that politicians were hesitant to assist the local community due to the low profile of the settlement, meaning that their involvement would not earn them sufficient return in terms of political votes. Also, the verbal explanations given by some officials, without written statements, resulted in some residents feeling hesitant about getting involved in the process of improving their settlement. This may hinder the space for community involvement, an important aspect in fostering land security and urban sustainability.



## *Recommendations*

The following are key recommendations for the enhancement of local community involvement in land management and community networking in informal settlements, based on the findings of this study.

### *Formalise and legalise role of grassroots leaders in land management*

At present, sub-ward leaders do not have a legal mandate to engage in land management activities; thus, sub-ward leaders and community organisation leaders have been acting informally. Local leaders have, inter alia, been innovative and successful in mobilising funds from residents for implementing land regularisation. Their roles and potential to undertake regularisation would be enhanced if given a legal mandate and support. Once the role of grassroots leaders (sub-ward and ward leaders) has been formalised, it should be institutionalised by requiring all ward leaders to include a report on land development and management matters in their monthly report to the council. This will provide a basis for the council to follow up on land development problems and trends in the local areas – a task they are currently not doing.

In order to enforce monitoring of land development at the local level, sub-ward and Ten Cell leaders should also be recognised and given the necessary skills and tools to enforce land development control.

Assigning land management roles, particularly land development control, to the sub-ward leaders is important if land management functions in informal settlements,

especially encroachment on public reserve areas and land use changes, are to be effectively checked and monitored. Local authorities are not well informed about land development activities taking place at local level. It is therefore not surprising that they refer their communities back to their local leaders, whom they believe have knowledge of the land development conflicts in their localities. Thus, decentralising land management at the local level is important to ensure that local communities get involved in urban land management in informal settlements.

Sections 56 to 60 of the Land Act stipulate the procedures and actors responsible for the declaration, preparation and implementation of regularisation schemes. However, the outlined procedures and techniques are both too long and too expensive. Also, most of the powers are concentrated in the central government, with the Minister for Lands and Human Settlement Development responsible for declaring an area a candidate for regularisation, and the Commissioner of Lands responsible for implementation of a regularisation scheme, according to section 60(2) of the Act. This leads to the marginalisation of local communities in land management aspects.

Decentralisation of some of the powers from the central government to local-level actors, namely to the municipal or town council level and eventually to the sub-ward and ward level, will reduce problems associated with over-densification, which have resulted from delays in regularisation. The local authorities (city, municipal and town) and the Commissioner for Lands will still play a key role in providing technical support, scrutinising and providing standards for carrying out plans, as well as facilitating the enforcement of development controls by providing user-friendly technical guidance and putting in place the necessary procedures and instruments.



### *Provide basic training on land management issues*

The study's results indicate that technical experts, including planners, land officers and engineers, should undertake the training of local community leaders, Ten Cell, sub-ward and ward leaders, so that they can acquire basic knowledge on appropriate land parcelling, standards and procedures. Local leaders also need to be trained to record and verify measurements of constructions, such as roads, in their areas. In this regard, local authorities will have to define and provide minimum standards for footpaths, roads and plot sizes. However, local authority planners will have to closely follow up and monitor the performance of sub-ward and ward leaders.

### *Define norms and by-laws for informal land parcelling*

The Ubungo Darajani community has been divided into four clusters, namely Kwa Mzungu, Royal, Zambezi and Kwa Kidevu. The first two are better spatially organised than the Zambezi and Kwa Kidevu clusters, which seem to be haphazardly developed. This is a result of the initiatives of earlier settlers in the Kwa Mzungu and Royal clusters. These initiatives enforced socially regulated norms dealing with land parcelling, roads and the location of buildings, in consultation with the Ten Cell

and local leaders. They have proven useful in safeguarding space for future traffic circulation and the provision of public services. Replication of socially regulated norms by local authorities is important, even though such norms might not be the same as those proclaimed in town planning plans.

### *Expedite processing and approval of regularisation plans*

Because of its ability to inhibit progress, the study calls for a reduction in the time required for processing and approving layout plans, and issuing building permits and consents. Use of information and communication technologies for data storage and retrieval would improve storage and access to data records. It took one week for local authorities to trace the Ubungo Darajani land use (layout) plan, which was returned to them after approval by the MLHSD. This kind of delay should be avoided in the future.

### *Effective use of SUDP to coordinate city development*

The study revealed that neither the Kinondoni Municipal Council, which is responsible for coordinating land development in Ubungo Darajani settlement, nor the MLHSD have updated information on utility agencies' plans (Dar es Salaam Water and Sanitation Authority and Tanzania Electric Supply Company) to provide infrastructure services in the local area. During the study, it was noted that the utility agencies had drawings that they used to provide services to informal areas, but that these drawings were not based on the land use plans prepared by the community or the municipal council. The SUDP of 1999, which is the main instrument for coordinating development activities in the city, appears to have been left on the shelf while key actors, especially utility agencies, continue acting contrary to the plan, thereby defeating the participatory EPM idea embedded in it. Use of Geographical Information System technology appears to be an important tool in SUDP and in monitoring land development in rapidly urbanising settlements like Dar es Salaam.

### *Transparency and participation of settlers in land development initiatives*

Some of the landholders who refused to contribute funds said that they were hesitant because they feared that their money would be embezzled. This study emphasises the need to ensure and promote transparency in local development initiatives in order to allay residents' doubts, especially those who might hesitate to participate or contribute because they are afraid of being deceived by their leaders. All social groups in the community should be encouraged to participate and should be represented in the key development activities, including committees. In other words, local development initiatives should be inclusive, especially in terms of gender balance. Sub-ward and ward leaders should strive to ensure that women have an opportunity to effectively participate in development processes and decisions.

### *Unresolved issues*

Some landholders who participated in the case study complained because they had been given short-term title deeds, which are unattractive to credit institutions. It is not clear why the MLHSD continues to issue short-term titles. From the interviews with ministry officials, the author could not discover any sound reasons. Failure to mortgage informal properties places a constraint on the government's efforts to fight poverty by enhancing asset betterment.

Another unresolved issue is pinpointing the best time to introduce the regularisation process. Should it be introduced at infancy (when the settlement is still small and new), at a consolidation stage (when the settlement has been developed but still has some spaces which need to be maintained for other land use functions) or when a settlement is already saturated (when the settlement has no space for development and faces sanitary problems, land pollution and difficulties in adding further physical infrastructure)? This requires further work so as to inform current policy as well as reduce the criteria that a settlement has to satisfy before it qualifies for regularisation.

## *Conclusion*

Community involvement in land regularisation activities stemmed from common problems that obliged the community to come together to seek a resolution. Community involvement is seen as an instrument for engendering social capital and a strategy for resource mobilisation to secure tenure. The social capital that emerged was not only the result of some landholders striving for personal gains, but emerged because they wanted to be associated with the community achievements and were prepared to participate in and contribute to community projects in order to achieve this. This demonstrates the power of collective and social theory and networking. Some factors that sustain local community involvement, or that influence community roles and involvement in local development initiatives, are general in nature and applicable to all types of settlements; others are site specific and may lead to success in one settlement but not in another. Thus, this study argues that unless the government determines what role different interested land development partners can play to facilitate urban planning policy and legislative implementation, and ensures close supervision, monitoring and evaluation of local actor initiatives, future urban land development sustainability will be costly, especially because of increasing urban market forces and investment aspirations.

### *Notes*

1 Meaning the participatory urban planning approaches in Tanzania, as provided by the Land Act of 1999 (sections 56–60), which aim at improving informal settlements through upgrading and demarcating boundaries in an effort to enhance tenure security and improve the urban environment to stimulate economic growth and development. It includes land use planning, cadastral surveying, infrastructure provisioning and land registration processes.

2 The government circular No. 5 of 1999 issued instructions that prepared plans should comply with the intentions of the master plan or the land use scheme in terms of density, broad zoning, major roads, and approved planning standards. The instructions required that a copy of the approved layout plan be distributed to the Regional Land Development Officer, District/Municipal Land Development Officer, Regional Surveyor, District Development Director, valuers, utility agencies (Dar es Salaam Water and Sanitation Authority, Tanzania Electric Supply Company, etc.) and regional/district engineers. Local leaders, including Ten Cell, sub-ward and ward leaders, were not mentioned in this order.

3 This was disclosed during interviews with a sub-ward leader.

4 The other 10 cities are Mwanza, Moshi, Tanga, Morogoro, Bagamoyo, Tabora, Iringa, Arusha, Mtwala and Mbeya.

5 'Champion' or 'spokesperson' is used to refer to an elected landholder who was responsible for monitoring and following up on the community-initiated activities. This landholder (Mzee Vicent Gabriel Lyimo) was elected during the first community meeting on land regularisation, held in March 1997.



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# REGIONAL SCOPES OF LAND CONFLICTS AND CHANGING NORMS

# 13 *The Zimbabwe crisis, land reform and normalisation*

Sam Moyo



## *The Zimbabwean 'crisis' discourse and conflict-generating strategies*

There has been a tendency to oversimplify the 'Zimbabwe crisis', given its complex domestic, political and economic dimensions as well as the level of external influence. Imbalanced representation of the genesis, scope and intensity of the crisis, together with the tendency to overemphasise its explanation on the basis of a contested biographic approach (focusing on President Mugabe), has had the effect of limiting the key actors' capacity to resolve substantive differences and to adopt constructive strategies to resolve the crisis. Critical actors are now ensconced in an excessively confrontational discourse mode, facing a changing reality on the ground, in spite of critical political and economic problems, and fatigue with the extremist and populist discourses in polarised media and advocacy representations. The focus on punitive external 'interventions' to resolve the crisis is gradually losing credibility at home and abroad, given their conflict-generating effects. The mainstream discourse and advocacy on the Zimbabwean crisis has focused on selected governance and human rights questions, and needs to be re-examined in terms of the political (moral and philosophical) and material incentives it provides to key actors in the Zimbabwean conflict situation.

A balanced understanding of the real origins and triggers of the crisis suggests that Zimbabwe has been thrust into a process of escalating conflict generation since 1996. This was based on structural (economic and institutional) cleavages and distortions, which were not addressed through the independence settlement process and the subsequent approach to political transformation and development. The conflict in Zimbabwe has been based on the socio-economic and political effects of a range of issues, including land, race, wealth, and power differences, which remain unresolved. The institutional framework to resolve these differences has also collapsed, leading to the adoption of confrontational strategies across the divide.

The articulation of the Zimbabwean problem around the 'core' issues that have been selectively identified by the conflicting parties (especially the narrow notions of 'governance' and 'land') has tended to detract from the dialogue over the simmering, complex conflict situation. This misdirects actors away from seeking holistic solutions that go beyond procedural or governance issues, narrow human rights concerns – for example, constitutional and electoral reform – which have been emphasised

since 2000, and land reform, around which polarisation became entrenched from 1999. The understatement of these key conflict-generating development and socio-economic policy issues, as well as the impact of social problems on the capacity of state governance, underlie the failure to explain the substantive basis of repeated confrontational actions during election periods. It is due to this failure to understand the underlying issues that the interventions purportedly aimed at resolving the crisis have, instead, entrenched the conflict situation for some years.

The dialogue on political strategies used to resolve governance, policy and political differences has varied from confrontation and polarisation to consensus. The strategies that have escalated Zimbabwe's domestic conflict include a range of forms of confrontation, from violent conflict (excluding armed struggle), to low-intensity conflicts based on forms of intimidation, to the violation of a range of social and human rights. These forms of conflict have included hard-line tactics such as physical violence, verbally confrontational politics (such as hate speech), litigation, resource grabbing, formal economic disengagement from policy processes leading to informal sector activity, speculative economic behaviour, propaganda peddling, campaigning for the isolation of Zimbabwe, and the exclusion of selected actors from various types of spaces.

The Zimbabwean conflict-generation process also entails a critical international dimension. In this respect, negative and confrontational international relations between the state of Zimbabwe and the 'international community' (working directly or through local and foreign press, civil society and private sector agents) have escalated towards an impasse because of differences over a range of issues (such as sovereignty, structural adjustment programmes [SAPs], trade, the restoration of land versus governance and human rights). Conflict-inducing external interventions are reflected in the imbalances of external support (moral and material) to the two domestic sides of the conflict, with a tendency to support the confrontational strategies of one side in the divide. These interventions include negative or punitive strategies of political isolation, economic sanctions, the uneven building of local civil society capacities, focusing on oppositional capacities, and the demonisation of Zimbabwe – even when positive processes unfold. These external interventions thus drive both domestic conflict and negative international relations.

Recognition of the pervasiveness of conflict-generating behaviour across the divide, and how this shapes perceptions and the realities of the crisis, suggests the need for a comprehensive analysis and synthesis of the key political, economic and social developments – over time – in relation to domestic and external relations. Indeed, assessing Zimbabwe's 'crisis' and the trends towards normalisation requires a dynamic and contextual analysis of the multifaceted aspects of each issue which has been defined as being part of the crisis, using valid methodologies, verified information and balanced comment. Instead, contested and weak empirical information tends to be utilised in various accounts of the crisis and to describe the incidence of isolated problems, without adequate definition of the scope and forms of such incidences, and the changing scale of these problems (their breadth, intensity, frequency and timing).

Moreover, the changing context of the crisis, particularly in terms of the political situation – for example, sporadic electoral conflict, the waning of land reform contestations, the shift towards the mobilisation of private sector actors around economic policy, and the changing regional consensus on the Southern African Development Community (SADC) electoral regime – is not adequately treated by most crisis discourses. Indeed, the shifting economic situation – the changing resource scarcities, social stress in Zimbabwe, emerging elite struggles over business opportunities, resource and economic incentives, the changing availability of aid or grants for politics or advocacy, and the effects on its 'protest industry' – reshapes the conceptualisations of the crisis and prospects for normalisation.

## *The Zimbabwe 'crisis' and conflict situation revisited*

The origins of Zimbabwe's crisis of political polarisation and conflict can be found in the effects of the adoption of a competing strategy (and its contestation), from 1996, to restructure the national, political and economic management framework. This emerged through increased state intervention in the economy and the land issue in 1997 and led to the reconstitution of state relations with key social formations – various classes and interests with varied identities and forms of organisation, including those based on race, ethnicity, nationality, and generations, etc. – following the failure of the neoliberal SAPs adopted in 1990. The specific issues over which this restructuring and reform process has been contested include the economy, the land question and 'governance' (state–civil society relations, human rights and the maintenance of law and security). The external dimension of Zimbabwe's crisis has thus been a critical factor.

Whereas the Zimbabwean conflict needs to be considered against the longer-term historical conflict and the inadequate resolution of the land redistribution question that emerged from Lancaster House negotiations for independence in 1979, the focus in this chapter is on the recent resurgence of conflict based on both the historical and contemporary dimensions of differences and conflict. In this vein, there is a need to understand the conflict evolution cycle (Baregu 2003). The cycle started with the economic conflict over the economic structural adjustment programme (ESAP), which precipitated a political rupture between 1996 and 1999. It then 'exploded' between 2000 and 2002 over two elections and struggles over land repossession. Then, gradual political reform within the Zimbabwe African National Union (Patriotic Front) (Zanu-PF) and the Movement for Democratic Change (MDC) led to piecemeal, stop-start dialogue resulting in the incremental dissipation of the violent conflict between 2003 and 2005. This culminated in the relatively non-violent election of March 2005, but the economy remained constrained and international engagement was non-existent.

These conflict issues are contested in terms of both domestic interests and international relations and (dis)engagement. Thus, the current domestic contestation and conflict also reflects the competing objectives and strategies in state and society for Zimbabwe's

(re)integration into the global economy (between SAP-type and heterodox economic policy, for example) and political order (at the United Nations and other multilateral organisations, such as the Commonwealth, the G8, etc.). This contest is situated within the context of fledgling efforts by the global South to create linkages, as exemplified in Zimbabwe's nascent 'look East' policy and other SADC initiatives.

This Zimbabwean 'crisis' unfolds through the polarisation of two broad social and political interests and/or 'movements', organised around the ruling Zanu-PF party and the opposition MDC. It is mediated through struggles and conflicts over control of the state apparatus, the political process and policy-making, which use contradictory and competing frameworks of reformism and radical change. The society is polarised sharply between the competing forces. On the one hand, those who support largely rural peasants and aspiring indigenous agrarian and other capital interests are aligned through Zanu-PF to various liberation movement associations. These include war veterans, ex-detainees and *mujiba*s (war collaborators). On the other hand, there are forces that have been mobilised by the MDC, which include trade unions, largely urban NGOs, urban working-class and unemployed people, and sections of the urban middle classes. The MDC has received material and ideological support from key Western nations (including the US, the UK and the EU).

These broad-based interrelated issues (the economy, land and politics) that confront Zimbabwe have tended to be reduced by the opposition forces (supported by the Western international community) to a problem of 'governance', albeit one that is defined in the narrow liberal democratic sense. This has been theorised as a problem of the 'failed' or 'fragile' state – a situation that requires special donor coordination (USAID 2005) to secure governance reforms, rather than addressing critical social grievances.

The social forces behind the ruling party have opposed this narrow conception of 'governance' and have argued that Zimbabwe's political and economic problems arise from its distorted and unequal economic structures and perverse social distribution. The specific distribution problems cited include grievances over the validity of existing land property rights, and the uneven power relations and influences based on race and class, which have been accumulated from contested historical privileges of access to capital, infrastructure and social capital. They question the appropriateness of key existing state institutions, such as those aspects of the 'rule of law' that protect unequal and unjust land property rights within an inaccessible legal framework, and the inappropriateness of market mechanisms to address these phenomena. They argue that the liberal democratic nature of the parliamentary and judiciary systems has also failed to reverse historical injustices and to level the social, economic and political playing fields. However, these latter issues can also be conceptualised as a more broadly defined 'governance' problem. This includes the unresolved national question, the limitations of the existing neocolonial structures of the economy, the legacy of existing historical and racial imbalances and contestation, historically grounded contestations of land property rights, and various social injustices which arise from these factors.

## *The 'crisis' of international legitimacy, economic policy and global integration*

The Zimbabwean crisis entails contestation over the sovereign right of the Zimbabwean state (and domestic civil society) to make choices of strategy and procedure in economic policy (over neoliberalism as opposed to state intervention, for example); on land reform (i.e. over pure market-based land transfers versus state and popular land expropriation); and to institute political reforms (the constitutional process, electoral rules and the regulation of civil society – both political parties and NGOs) in a form and at a pace that relates to local specificities. This is in contrast to international (Western) interventions, based upon 'universal' values, policies and strategies of political and economic management. Thus, the crisis has its genesis in both substantive and procedural issues.

In the context of Zimbabwe's economic isolation (arising from the closure of Western concessional loans and private credit, commodity market restrictions, and other individually targeted sanctions) and its political isolation (through exclusion from some multilateral fora and 'condemnation' from the West), the crisis became focused on the problems of re-engagement with and reintegration into the international community. This has raised debate about the 'legitimacy' of the Zimbabwean state in the international family, thereby pitting African diplomacy against Western interventions in Zimbabwe.

The ESAP economic policy framework of 1990 to 1995 triggered major economic dislocations, particularly in the urban areas, which reached a point of social unrest by 1996. Since 1997, Zimbabwe's radical approach to land reform and a heterodox *dirigiste* (commandist) approach to economic policy management, based upon a sovereign or 'go it alone' process without international support, have prevailed, with critical negative economic and social effects.

The restructuring of land relations and the adoption of heterodox economic strategies has led to new distribution questions over land rights and economic capacity. As a result of the continued economic decline and social stress, this has led to significant urban protests and has emphasised the divide in social benefits between the rural and urban populations. It is important for domestic and external actors to recognise the structural changes in Zimbabwe that have been played out on the ground. They have also shifted 'oppositional' advocacy towards a preoccupation with human rights and electoral reform advocacy as key issues in defining Zimbabwe's international legitimacy.

The domestic crisis over Zimbabwe's external isolation, fuelled by confrontational strategies on both sides of the divide, led to critical reactions by the Zimbabwean state, including the expansion of its regulation of civil society and political parties. This has led, since 2002, to legal restrictions on the media, NGOs and public assembly in general, foreign financing of civil society and the increased use of force (including arrest and torture). This highlights the crisis of state–civil society relations, as

expressed in the degradation of key civic and political (human) rights in the face of expanding condemnation from civil society and the West. These conflict-generating processes, alongside high levels of political party violence, especially during the 2000 and 2002 elections, and sustained negative propaganda on both sides of the divide have been critical in mobilising a polarised rendition of the crisis and have fuelled questions at home and abroad about the legitimacy of the state.

Yet, to what extent is Zimbabwe unique in Africa and the SADC on the broad questions that have generated the international dimension of the crisis? The status of its governance and human rights practices, its economic policy and performance, and the attendant socio-economic conditions that define the external dimensions of the problem need to be contextualised. Zimbabwe stands out as being unique in its responses to the internal/external dimensions of the crisis, as well as in the nature and intensity of the external responses and interventions that have been brought to bear on the nation.

For several reasons, Zimbabwe is unique compared to most of Africa: decolonisation occurred late (only in 1980); it experienced extensive rural armed struggle; and it is grappling with the historical specificities of the land and racial dimensions of its national questions. Zimbabwe suffered a period of destabilisation from apartheid South Africa and resistance during its earlier transition from white minority to black majority rule, thus extending the period of high-level security and military mobilisation (from 1980 until the signing of the Unity Accord in 1987).[1] This, together with the internal armed conflict in Matabeleland, delayed the resolution of its various national questions. According to the ruling Zanu-PF, the delays were as a result of destabilisation caused by South Africa. The recent growth of civil society, especially governance NGOs, and state defiance of the SAP or neoliberal rules of the political and economic game also differentiate Zimbabwe from other African countries. Embroiled in a deep conflict situation without armed violence, which has been given excessive attention and 'punishment' by the West, the state represents a unique context of post-liberation politics. Zimbabwe was also a late adjuster, having adopted ESAP only in 1990 and experiencing its negative socio-economic effects (common in Africa) by the mid-1990s – in the post-Cold War external environment.

Yet, Zimbabwe is not unique (structurally and politically) compared to Namibia and South Africa, except in so far as it had an earlier start than those countries on post-independence nation building. Its 'model' of negotiated settlement and gradual economic and political transformation, within a neoliberal framework, is also fairly similar to that of the latter two countries. It has, however, had a longer period within which to experience the difficulties of the settlement model, with less resources (per capita and in state revenues) to address the socio-economic aspirations of the excluded majority, leading to the implosive experience arising from these 'failures'.

What sets Zimbabwe apart is that there is a high risk that the outcomes of Zimbabwe's land question, its race relations and its international relations will be replicated in South Africa and Namibia. Moreover, the desire to avoid this pattern of

radical land reform in these two countries has had a significant influence on current politics in South Africa and in the UK, given that both have large material interests in Zimbabwe, and that the UK has significant investments in South Africa. Similarly, the West's extensive investments and mineral resource interests in the three former settler countries brings a unique material interest to the international relations of the West in Zimbabwe and its neighbours. The fact that the descendants of European settlers own most of the land in these countries suggests that the former colonial powers (the UK and Germany) are likely to defend their relatives, highlighting the importance of the 'kith and kin' factor in this context. This has led to the mobilisation of extensive regional and international opposition to the Zimbabwe state.

Thus, the evolution of Zimbabwean politics, especially the evolution of state and civil society organs and their relationships, has experienced relatively unique pressures in terms of the external dimensions of political struggle and international (economic) relations. The international polarisation of the norms and values (in respect of election standards, human rights practices, economic policy, etc.), and the nature of sanctions applied against Zimbabwe – which, it is alleged, are conditioned by short-term 'regime change' issues in developed countries – brings Zimbabwe to the cutting edge of unipolar interventionism in Africa. Zimbabwe has become a testing ground of the Western hegemonic influences that now pit the regional power, South Africa, against the USA and its ally the UK (Crisis Coalition in Zimbabwe 2005) over the nature of external interventions to resolve domestic political crises. Yet the principles enunciated by the Africa Commission (2005), in terms of balancing the assessment of the African 'problem', if applied to Zimbabwe, would require different interventions to those currently in place.

A key challenge facing Zimbabwe, therefore, is how to manage the emerging coordination of external strategies and interventions in 'small' (African) states, including those with a significant material and social–historical link to the West, and where their contemporary material and political interests interface with the interests of the West. Indeed, Zimbabwe has been classified as a 'fragile state' and an 'outpost of tyranny' that represents an 'unusual threat' to US foreign policy. According to American policy, such states require concerted international attention (USAID 2005). This requires 'development and poverty-alleviation' to be a 'third pillar' of foreign policy, on a par with defence and diplomacy (US President's National Security Strategy 2002 cited by USAID 2005: v). 'Countries that lack the ability or will to provide basic services or protection' (USAID 2005: v) cannot be ignored, and a coordinated strategic approach to address the core issues of poverty and underdevelopment is proposed.

Yet the emphasis given to 'governance' tends to override the development question, and to understate the historical dimensions of underdevelopment and the external effects on governance and development of poverty and conflict. This strategy ('governance') is focused on 'anticipating and ameliorating economic instability, food security, and violent conflict, all of which are usually symptoms of the failure

of governance in fragile states' (USAID 2005: 4), rather than on the root causes of underdevelopment and poverty, which are relegated to secondary importance or not emphasised at all (such as the trade regime, debt, etc.).

The USAID's (2005) *Fragile States Strategy* argues that physical security for the movement of people and commerce, a sufficiently acceptable form of national government (including a working relationship between civilian and military leadership), agreement on a process that will result in the adoption of a Constitution, and a certain level of economic predictability (including a central banking authority, government agencies able to collect and distribute revenue, macroeconomic stability, and clear rights to property) are integral to economic recovery. Yet in the case of Zimbabwe, little international emphasis has been placed on support to the economy and the redistribution of land rights as a means of recovery. Nor is the strengthening of state institutions, as opposed to the support given to non-state sections, an issue of emphasis. These narrower notions of governance have led to the West withholding recognition of the legitimacy of the state. These contradictions of policy constitute a major aspect of the international relations crisis facing Zimbabwe.



## *The domestic 'crisis' of governance revisited*

### *State–civil society relations, state capacity and elections*

The political contestations over the interrelated conflicts of land, the economy and 'governance', including the significant influences on these by external interventions, have tended since 2000 to be focused on multiparty electoral competition – especially over electoral rules, administrative practices and election violence. In 2004, these practices (electoral rules, administrative practices, etc.) were considerably, but not yet completely, reformed, following the issuance of guidelines by the SADC. The 2005 parliamentary elections resulted in Zanu-PF remaining in power, albeit under different political conditions: Zanu-PF won a two-thirds majority in an election where reduced conflicts over land limited violence. However, these elections were deemed 'rigged' by the MDC and the West.

Economic conditions, while slightly more stable, remain inadequate, with high levels of inflation, volatile foreign currency rates, partial food security and shortages of some goods. Growth continues to be restricted by international disapproval of the land reform process, persistent droughts and the termination of Western financing through direct foreign investment and limited foreign aid, including aid for humanitarian purposes such as HIV/AIDS.

This situation does not offer good prospects for the immediate improvement of economic performance, an issue which is receiving a lot of public attention, partly as a result of the fatigue over 'political party' confrontations. Thus, the governance problem increasingly reflects concerns over development. Yet its nature remains influenced by vocal NGOs who continue to characterise it as electoral politics.

Properly defined, the governance question entails:
- reforming key state institutions such as the Constitution, the judiciary and the electoral machinery;
- maintaining key human rights (political, civic, social, economic and cultural); and
- strengthening sovereign policy-making and implementation capacity, including the capacity to ensure public participation in policy-making.

It also entails reforming the practices of political parties, including:
- their maturation from violent to non-violent strategies of interaction;
- their intra-party democracy (e.g. their constitutions, their succession processes, their consultative processes, and the competitive selection of leadership as well as parliamentary candidates); and
- their capacity to substantively engage with policies (as opposed to only, or alongside, the mobilisation of direct action).

Furthermore, correcting the governance problem entails building credible, independent and institutionalised civil society capacities (especially NGOs, community-based organisations and informal sectors) which can oversee the maintenance of a variety of social, economic and political rights, and support the delivery of some of the means required to realise these rights. This means balancing various actions, including protest, technical and legal advice, and policy formation activities in collaboration with state organisations, and directly supplying services on an equitable, non-partisan basis through accountable procedures based on explicit mandates.

The governance reform discourse and interventions have, however, overwhelmingly tended to focus on state institutions and procedures (the Constitution, elections, presidential succession, aspects of human rights, the judiciary, land property rights, and media and public order laws). Less attention has been paid to the wider aspects of state governance institutions, such as sovereign policy-making and the capacity of the state to deliver economic and social rights. International trade, debt, aid and global governance imbalances have also been neglected. Nor has much attention been paid to the need for appropriate governance reforms in political parties and civil society.

Indeed, the agenda for governance reform has been polarised in the ways in which the issues of concern are prioritised and resources allocated to address them. There has also been a failure to interrelate the effects of political, economic and land reforms. The actors on the different sides of Zimbabwe's polarised political divide have tended to selectively pursue single issues. The selective treatment of key governance issues, and their dissociation from social (economic and land) issues, has restricted perceptions of how their treatment might promote conflict management.

Thus, since the failure between 1999 and 2000 to agree on a new Constitution and related electoral and human rights legal reforms, the governance reform process has been embroiled in confrontations over land, electoral competition, economic

regulation, political and economic security issues, and media issues in the context of an escalating conflict situation.

*The human rights focus in the governance crisis*

Human rights increasingly became the most critical issue of the crisis discourse between 2000 and 2002, when the land- and election-related conflicts were at their height. Human rights retained a central role in the media for a number of years, via issues such as food access and freedom of association. As numerous publications have detailed these human rights problems, they will not be repeated here.

The major factor limiting human rights discourse remains its 'politicisation' within the electoral competition framework. The discourse fails to impartially explain the identified 'violations', especially the political motivations of the actors, as well as the institutional and policy issues which underlie them. Nor is there critical analysis of the uses to which the human rights advocacy activities have been put in the current conflict. Thus, a key challenge is to provide a sound basis for separating the principles of human rights advocacy from the interests of party politics, and to critically evaluate the standards of assessment and interventions proposed, as well as whether they are applied consistently across the globe. Within the context of Zimbabwe's (recent) history, compared to other key regional countries, inequitable assessments and 'punishment' are self-evident. This raises questions about whether the current tactics of human rights advocacy will fuel or dissipate the Zimbabwe crisis; it also begs questions about the appropriateness and effectiveness of current external 'interventions' to address the Zimbabwe crisis. The human rights challenge is to minimise the conflict and the crisis and to generate a constructive broad-based governance transition. For now, we must consider whether the current human rights advocacy discourse can resolve the conflict fairly and peacefully, and if the interventions favour the ascendance of one political formation in the conflict.

Moreover, the failure of the current narrowly-based human rights discourses to address the fundamental roots of the crisis, such as sustained poor racial relations as well as structural and historical questions underlying the unequal wealth and power relations in society, have restricted its impartiality and capacity to redress the Zimbabwe-specific conflict. Failure to underscore the inadequacy of the independence settlement, economic restructuring and racial reconciliation strategies since 1980 underlies the current contestation over the 'narrowness' of the human rights issues placed at the centre of the crisis discourse.

Indeed, the rights discourse has also hardly been adroit in recognising, for instance, the negative mobilisation of ethnic differences in the Zimbabwean body politic, including within and outside the state, and within political party formations and civil society. In particular, the remobilisation of the putative Ndebele-Shona problem, focusing on the violent 1980s 'dissident' conflict and on regional or provincial resource allocation, has been negatively pursued in the rights discourse. This pattern is exhibited in the current electoral divide, and tends to be fuelled by regional politics

and advocacy approaches. For instance, both sides of the political and NGO divide have used the food security issue as fuel for debates on its causes – especially as it relates to Matabeleland, a minority ethnic region – with limited empirical support.

Human rights discourses have also under-examined the remobilisation of elites in opposed alignments – active liberation movement forces against purportedly 'cosmopolitan' forces (young urban groups, educated professionals, etc.) – in conflicts over accumulation, land and political power. Thus, the rights-based discourses do not adequately consider – if at all – the roles of markets and uneven policies in the exclusion of various working and peasant classes from the political and economic spheres within a predominantly monopolistic domestic and external 'corporate' sector. The conflicts this has generated, in a situation of reduced state resource allocation and the pressures on 'patronage' systems (especially those that emerged during the economic liberalisation in the face of growing social expectations), and the heightened elite struggles this elicited, have not been adequately addressed by the dominant governance and rights discourses.

The structural cracks generated by neoliberal policies – such as the extreme discrepancies in rural–urban incomes and wealth, and the pressures on public resource allocation, as well as the poor rural civil society infrastructures for public policy influence – have also been understated in the human rights discourses. Thus, the human rights discourses, by neglecting the effects of neoliberal policy interventions on social conflict and state capacity to alleviate economic stress and sustain viable institutions, have selectively focused mainly on the interests of middle-class sections of society. Grievances over land, livestock and other resource expropriations during colonial times; over external resource flow imbalances; and over external influences on policy, politics and 'sovereignty', have thus received limited support in the rights discourses. Such discourses have instead tended to defend existing property relations, the market and restricted economic regulation, which in turn have tended to perpetuate political polarisation.



### *The land question, the economy and politics*

Much has been said about the land crisis in Zimbabwe, especially about its break from 'orderly' market-based principles, the extensive expropriation of land from 1997, and the land occupations in 1998, 2000 and 2001 (Moyo 2004; Moyo & Matondi 2003). These processes reflected the failure of negotiated land transfers and international support for land reform, as well as the exclusion of farm workers and significant sections of the white farming population from the process. The violent conflicts related to this issue subsided and the fate of new and old landowners became clearer by 2003/04, as did the process of bringing these actions in line with the law, as indicated by the 2005 constitutional amendment No. 17, which absolved the government from paying compensation for acquired land.

The key outstanding challenges of the land crisis are to complete legal transfers of land in the administrative courts, to hasten compensation payments, to accommodate

more excluded parties, and to improve the land use and livelihoods of settlers. The input supply constraints of the economy, persistent droughts, and economic isolation have limited the pace of agricultural and industrial recovery, hence the food insecurity and shortages-driven inflationary trends. Domestic and international engagement on these issues has been sidelined by the focus on governance issues.

## *Normalisation challenges and the triple transition*

### *Institutional processes of normalisation*

The notion of 'normalisation' is a relative, analytical concept, intended to explain the direction and degree of change in conflicting relationships and differences over key contested political, economic and social issues between significant domestic and interstate actors. It reflects the search for a broad convergence of thinking over policy, law and the implementation of strategies to resolve key differences using consensual, rather than conflictual, practices. For example, softer tactics of civil advocacy for reform in the form of parliamentary debate, scientific analysis of policies for negotiated reform, various forms of dialogue and engagement which seek consensus of ideas all generate normalisation. The fundamental goal of normalisation is to use these consensual strategies to reduce violent confrontation associated with political conflict and partisan strategies for reform, and to encourage the accommodation of opponents and opposing views.

In so doing, normalisation reflects the search for 'stable regime restoration' and/or increased capacity by the state for consensual political and policy reforms, through dialogue between the state, the private sector and civil society actors, using non-confrontational strategies and representative public participation. However, the normalisation process cannot be simply discerned from or explained by the voluntary adoption of certain behavioural tendencies by individual or organisational leaders (e.g. in the state, political parties, NGOs, etc.), but rather from the public reactions to and influences over the changing material and social conditions in the economy, as well as domestic and external political activities.

Zimbabwe has witnessed a phased, albeit slow, course of addressing key aspects of its internal crisis since 2003, suggesting the gradual normalisation of politics, economic policy processes and state–civil society and international relations. The progression from overtly violent conflicts during 1998 and 2002 to new and erratic experimental processes of piecemeal dialogue by opposing domestic forces, supported by key SADC forces, has left a question mark over existing paradigms (norms) and practices that underlie the crisis, and the various confrontational domestic strategies and external interventions. It has also raised questions about state responses aimed at addressing the main contested issues of economic policy, governance politics, human rights and sovereign international relations within the current univocal global order. Zimbabwe has gradually veered towards normalisation and convergence between the opposing domestic political and civil society gladiators, although an impasse remains with the international community.

In Zimbabwe, normalisation should also entail the de-escalation of conflicting and unproductive engagements between the state and various international actors in terms of bilateral and multilateral trade, financial aid and informational (media, intelligence and advocacy) relations. This relationship should be based upon constructive external interventions aimed at reducing socio-economic stress and political conflict, including:

- positive tactics that promote and materially support internally negotiated reforms;
- balanced information dissemination on key developments;
- the expansion of economic relations (trade, investment, etc.);
- improved aid (in terms of scope, scale and methods of delivery); and
- a reduction of material incentives provided to domestic actors for confrontational politics and advocacy in general.

Constructive external engagement and support for the normalisation process entails increasing commitments by the actors to create space for and confidence in the use of positive conflict-resolution strategies, such as diplomacy, interstate dialogue, and more balanced 'carrot and stick' approaches in their support for local actors in the conflict.

Normalisation, however, faces critical internal and external resistance, given the entrenchment of some 'conflict entrepreneurs' on both sides of the divide. These include those who seek a rapid, radical and comprehensive overhaul of the existing political power structure, leadership and policy process, and those in power bent on suppressing dissent. While residual efforts to maintain the crisis conditions and confrontational politics on various sides of the divide remain a threat to normalisation, deliberate efforts by major regional actors are required to support the achievement of a negotiated resolution of the outstanding differences of the political parties and civil society. This entails accommodating 'losers' of land reform by 'correcting' critical policy 'mistakes' made in the reform of the governance process. This can be achieved by broadening access to land and the economy, and supporting the recovery of a broad range of socio-economic victims of the crisis in the immediate short term.

### *Normalisation issues: A triple transition*

Normalisation has tended to revolve around three issues – land reform, the economy and governance. Each of these issues entails specific policy and political elements, as shown in Table 13.1. The patterns and sequences of normalisation have proceeded according to the internal capacity to control the factors involved.

**Table 13.1** *Key conflict arenas and transition issues, Zimbabwe*

| Issues | 1996–99 | 2000–02 | 2003–05 | 2006–10 |
|---|---|---|---|---|
| Domestic politics | | | | |
| Political party activism | Incipient | Confrontation | Negative | Normal |
| Trade union activism | Mass based | Mass action | Disengaged | Normal |
| NGO human rights activism | Normal | Protest | Protest | Normal |
| Land reclamation movements | Incipient | Occupation | Subsided | Stable |
| Media | Open | Confrontation | Confrontation | Open |
| Elections practice | Calm | Violent | Calm | Normal |
| Constitutional reforms | Open | One-sided | Gradual | Full scale |
| Economic developments | | | | |
| Economic strategy | Fluid | *Dirigiste* | Heterodoxy | Normal |
| Formality/informality | Informality | Informal | Influx | Normal |
| Social conditions (wages, services) | Decline | Deteriorated | Dire | Stabilising |
| Resource scarcity | Minor | Extreme | Scare | Stabilising |
| Markets operation | Robust | Underground | Fragile | Extended |
| Corruption | Growth | Extreme | In flux | Normal |
| International relations | | | | |
| Aid/credit | Declining | Closure | Closure | Normal |
| Trade relations | Normal | Deteriorating | Widening | Widening |
| Investment | Narrowing | Low | Opening up | Normal |
| Diplomatic policies/relations | Normal | Narrow | Opening | Normal |
| Media relations | Normal | Negative | Relaxing | Normal |

Source: Compiled by author



### *Land reform policy*

Zimbabwe's radical land reform process took place between 2000 and 2001, amidst wide-based land and electoral conflicts. These processes were only contained by late 2002 (after the presidential elections), when the political risk was lower; the challenge in the normalisation of the land question then shifted towards resolving 'internal' land disputes among the various beneficiaries and potential land seekers. This was done through political mediation processes within Zanu-PF and policy pronouncements based on two land reviews (Buka Report 2002; Utete Report 2003), which structured the coordination of government land allocation and acquisition processes in an orderly manner.

This normalisation process first resolved the land conflicts on the ground and then addressed the inconsistencies in policy implementation (e.g. Utete Report 2003). Legal reform processes, such as the speeding up of court confirmations and lease provisions, followed. Even here, normalisation entailed managing internal power differences in government and dialogue with sections of the white former farming community. The effort has shifted towards specific negotiations and preparations to accommodate some of the excluded (e.g. accommodating potential MDC beneficiaries, offering willing white farmers smaller farms, speeding up compensations for acquired farm infrastructure, accommodating the land rights of

Bilateral Investment Promotion and Protection Agreement farms,[2] and resolving the problems associated with farm workers' land rights). The challenge remains pursuing external financing for the compensation and resettlement process in a situation where the protagonists have entrenched positions – each blaming the other – and there is the distraction of the state–international actor dispute, tending almost exclusively towards the narrow governance issues.

Normalisation actions commenced in October 2002 (based on the Buka Report) and became coordinated in mid-2003 (based on the Utete Report). The implementation of the land reform corrections during 2004, by the Ministry of Land, faced critical political management challenges – including issues around the succession of Zanu-PF leadership.[3] Internal (Zanu-PF) resistance to the 'corrections'[4] and the slow response by former white farmers to negotiate, as well as the political risks that the electoral campaign brought for normalisation (such as cost of the land reform 'reversal'), tended to slow down the 'correction' process. It was expected at the time of writing that the post-election period preceding the cropping season, April–June 2004, would be the least risky period for decisive 'corrections', and that this would accelerate these normalisation activities. These actions would in turn result in improved land use during the 2005/06 season,[5] thus widening improvements in the economic policy normalisation process. It is important to note that an improved economic environment is critical to the normalisation and stabilisation of the land question in general. In the event, political confrontation before and immediately after the 2005 election, alongside a price control war between the government and business, and the urban clean-up of mid-2005, led to accelerated economic decline, culminating in hyperinflation from 2007 to 2008.

*Economic policy*

The second track of normalisation – focusing on economic policy and external engagement – was initiated in late 2003, with the introduction of the centralised coordination of economic policy by the Reserve Bank of Zimbabwe. The process entailed harsh measures to contain inflation and speculative (including underground) activities of the financial sector, regulation of foreign currency externalisation and corruption, as well as the gradual formalisation of foreign currency generation. This was accomplished by the introduction of a set of heterodox economic policy measures, including tight monetary policies and efforts to subsidise local production, provide investment incentives and subsidise key low-wage goods (such as electricity, transport, fuel and maize). This normalisation process suggests a gradual liberalisation of macroeconomic policy, in particular the move away from blanket price controls, reflecting the critical shortages of forex and external finance. Much of this entailed the normalisation of government–private sector relations through dialogue and advisory inputs, based on a tacit consensus over a phased process of economic liberalisation and international engagement. Significantly, repaying some of the external loans (e.g. International Monetary Fund) and increasing

policy dialogue with Bretton Woods Institutions initiated the normalisation of international engagement, although these institutions remain dissatisfied with the pace of liberalisation.

The political signals for outright re-engagement have, however, not been issued by either the West or the state of Zimbabwe, given that the challenge of resolving the outstanding differences over governance issues remains. Recent economic lapses, inflation and shortages of key goods also heightened a *dirigiste* intervention by the government of Zimbabwe to establish economic order and state authority over social and economic actors, leading to negative social effects, which in turn undermined the normalisation process.

*Governance reforms*

The third, more complex and intractable arena of normalisation is the transition – or reform – of governance. Between 2000 and 2005, governance reforms became stagnant after the failure to agree on the 1999/2000 draft Constitution. Governance problems, in the narrow sense, regressed around issues regarding the media, security and public association between 2002 and 2004, with electoral reform only moving towards partial liberalisation during mid-2004. Similarly, confrontational and violent strategies by political parties escalated from 2000 through to 2003, after which they gradually receded during 2004 and dramatically declined during the parliamentary elections of 2005.

Although gradual and at times imperceptible, governance normalisation processes started and continued from early 2004. This included addressing 'corruption' in a limited manner, initiation of private sector and other stakeholder dialogues, as well as wider governance reforms in the land and economic policy sectors. The outstanding governance reforms include:

- the need for a new Constitution;
- the further refinement of electoral law and institutions;
- the liberalisation of media and security laws;
- the regulation of political parties and civil society; and
- completing the land and economic policy challenges.

These appeared more possible in the post-2005 election period, given the Zanu-PF majority (despite its contestation), but will require a constructive political dialogue environment. This must be determined by the attitudes and strategies of the state, the main opposition party, key NGOs and the international community. Negative domestic and international comment on the March 2005 results, given the allegations by the MDC of 'rigging', have temporarily hardened attitudes and dampened the normalisation process.

The implementation of Operation Restore Order (*Murambatsvina*) from 18 May 2005, following the condemnation of the March elections by the West, threats of mass action by the MDC and its civil society alliances, the sudden 'disappearance'[6] in April of goods from formal shops, as well as private and informal sector price escalations,

further dampened the normalisation process. Yet, paradoxically, from the point of view of the government, *Murambatsvina* was intended to address the problems of lawlessness, crime and illegal land occupations, as well as economic challenges such as corruption, 'black markets' and the wider informalisation of markets and urban services. As a result, many people lost their homes, livelihoods and social capital, and the subsequent reconstruction operation (*Garikai*) faces challenges of adequate restitution and coverage. Local and international condemnation has reignited confrontational advocacy strategies and dampened dialogue. Yet the United Nations assessment of Operation Restore Order (UNHabitat Report 2005) provides many avenues for national, regional and international re-engagement, which could re-energise normalisation.

However, confrontational politics and violence resurfaced in early 2007 (when the MDC leaders were arrested and beaten) and intensified during the presidential election run-off between May and June 2008, following the March 2008 parliamentary and presidential elections, which failed to produce a clear presidential winner.

The SADC mediation process, led by the then South African president Thabo Mbeki, culminated in a power-sharing agreement signed by the rival political parties in September 2008. Negotiations for the power-sharing arrangement were painstakingly slow and only led to the formation of an inclusive government in February 2009, when Morgan Tsvangirai was sworn in as prime minister. Since October 2008, the government's economic policy stance has moved towards liberalisation (e.g. 'dollarisation', the relaxation of importation rules, and price decontrol). This suggests a convergence with the MDC's economic policy stance. Political violence has receded and the government continues to arrest key opposition actors and civil society activists. This could be considered a sign of resistance to the inclusive government process by elements within Zanu-PF. The actual outcome of this attempt to normalise Zimbabwean politics and to reintegrate the economy into world markets is yet to be seen.



## *Conclusion*

The challenges of normalisation, of both domestic and external relations and practises, require a vision that promotes the longer-term benefits of political stability, security and development, rather than the persistent tendency to emphasise electoral confrontations and the pursuit of selective punitive justice. The inclusive government now has the opportunity to promote consensual politics and dialogue in search of developing sustainable institutions which can improve governance, political practice, economic policy, judicial management and social inclusion. Attention should be paid to preventing future conflict by promoting balances in the social distribution of wealth, resources and opportunities among various social strata, whether these are defined by race, class, gender, ethnicity, region and/or other social phenomena. Improved public participation in wider policy-making processes is vital, in order to balance the voices of the wider civil society sectors and to improve their capacities

to effectively engage in the transitional issues. The current power-sharing agreement broadly provides for some of these processes.

Efforts that can strengthen the policies and institutions that sustain stability and peace, rather than those promoting polarising tactics such as negative advocacy, punitive justice and short-term political and personalised victories, will be critical to the normalisation process. Improved methods of coordinating positive policy dialogue and advocacy, balanced resource allocations, and mutual recognition of grievances and the roles of various actors need to be developed. In order to resolve the crisis and ensure normalisation, attention needs to be paid to improving the critical social and development conditions of the majority, using consistent principles, rather than promoting the competing material and social interests of political parties and NGO elites. The donor community has a critical role to play in cementing the inclusivity through reducing some of their conditions, which were based on a narrow regime-change agenda.



### *Notes*

1 The apartheid government of South Africa found itself surrounded by liberated countries which were sympathetic to the South African liberation struggles. It engaged in destabilisation activities such as bombing ANC offices in Harare and sponsoring various rebel movements (dissident activities in some parts of Zimbabwe; Renamo in Mozambique; Unita in Angola). It also engaged in military raids under the guise of defending national security.

2 Foreign citizens' farms protected by bilateral (government to government) agreements.

3 Two or three streams of Zanu-PF politicians seek to gain its leadership when the current leadership retires, and supporting radicalism around land issues appears to be one of their succession campaign methods.

4 These entailed reversing multiple farm ownership by repossessing such farms and allocating them to needy groups such as women and landless urban dwellers; retaining some former landowners under the 'one person one farm' policy; protecting Bilateral Investment Promotion and Protection Agreement farms.

5 Providing various economic incentives and regulatory measures to encourage the optimal utilisation of idle agricultural land.

6 Speculative business practice and profiteering was evident in the diversion of basic goods to the informal sector where they fetched higher prices, particularly in hard currencies. The price controls by the government exacerbated this tendency to informalise the sale of goods. At the same time, loose monetary policy, including excessive printing of money, fuelled the hyperinflationary tendency.

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# 14 *Regionalisation of norms and the impact of narratives on southern African land policies*

Chris Alden and Ward Anseeuw

> If the perception is that of Europeans, well, I suppose you are right to say my reputation has gone down. But in terms of Africa, go anywhere and I am a hero. (Mugabe's answer when he was asked if the land invasions had damaged his image, September 2002)

Indeed, Mugabe and his lieutenants have won ovations across Africa: at the World Summit on Sustainable Development in Johannesburg in 2002, at the summit of the Southern African Development Community trade bloc in August 2003, or when the re-elected Mbeki government was sworn in in 2004 at the Union Buildings in Pretoria. Mugabe is 'speaking for black people worldwide', wrote the South African journalist Harry Mashabela in 2002. Writing in the Helen Suzman Foundation's September newsletter, Mashabela pointed to the adoration Mugabe won: 'The applause and standing ovations were a tacit expression of appreciation of the courageous stand Mugabe has taken in trying to resolve the critical land problems facing his country' (*Spectator Magazine UK* 25 October 2003[1]).

Southern Africa was once seen as a region where multiparty pluralism had transcended the politics of racial exclusion and new leaders had firmly committed themselves to market economies and reconciliation. From a scholarly perspective, expectations drawn from the study of democratisation in Africa suggest that, of all the forms of regime transformation on the continent, former settler oligarchies are supposed to be most able to consolidate the gains of democracy (Bratton & Van de Walle 1994). According to these scholars, the transition would essentially be one of extending the franchise to formally excluded groups, which is in effect contiguous to the process of consolidation. The task of nation building therefore becomes primarily focused on reconciliation in the aftermath of conflict. Issues of citizenship, economic distribution and even competing versions of history are all subsumed within the normal pattern of inclusive multiparty politics.

Nevertheless, Zimbabwe's crisis, precipitated by a government-orchestrated campaign of violence against white farmers and an urban-based black opposition movement determined to unseat the ruling party through the ballot box, offers a number of challenges to these conventional wisdoms on democratic transitions in Africa. Zimbabwe turned from one of Africa's miracles into a country where anarchy, undemocratic practices and poverty have become the main features. In addition, Zimbabwe's slide into anarchy has resonated regionally, as seen by the rise in local militancy on the land issue in neighbouring states. This, coupled with the apparent

chorus of support for Zimbabwe's president by fellow southern African leaders, has recast the region as a repository of domestic tension and even instability. Since 2000, and especially since Zimbabwe's fast-tracked land reform, social movements have emerged (Landless People's Movement in South Africa), new narratives are developing (anti-imperialist movements, 'who is African' debates) and new relationships with Zimbabwe have developed (the Namibian case in particular – discussed later).

This chapter will present a deeper insight into the development of these new – often conflicting – narratives, identities and land issues. It will seek to examine and analyse the role of land as a site and source of new narratives and norms. The objective is to gain insight into the nature of the development of land narratives, not only at national level but also at the broader level of African state systems, and the degree to which the latter challenge new norms of governance of the state and frame the parameters of political debate and policy development. The first part of the chapter details theoretical underpinnings of narrative discourse, its representation function and its broader relationship to society. The second part introduces historically existing narratives which developed through the interplay between a regional system based on colonial settler communities and African oppositions and liberation movements. These conflicting narratives were set against each other, thus shaping the narratives and politics of post-independent societies. This deliberately historicised approach, which recognises the constitutive role of norms in the formation of institutions and institutional practice, leads in the third and last part to a description and explanation of the new developments and narratives concerning land, as well as how they become both influential sources of policy and political action and central to the local and regional responses to the Zimbabwean crisis in the post-2000 period.



## *From the development of narratives and norms to policy*

Narratives are understood as broad renderings of events that contain and convey meaning, as well as having a specific political context for communities in the form of discourses. Discourses are 'not simply ideas, but are also the actions, thoughts and practices that make that idea "a reality" by structuring and delineating reality and thereby making it knowable' (Dunn 2001: 56). Narrative and discourse are important interpretative devices precisely because they acknowledge deep historical process and subjectivity as being integral to social and institutional formations. The place of narrative and discourse as countervailing societally based sources of authenticity and authority is especially important in the context of weakly legitimated states. They introduce alternative accounts of history and communities' relationships to the state or to state practice that can challenge the prevailing official narrative.[2] Furthermore, in the context of societies, the use of narratives explains the saliency of ideas, memories and social custom that cuts across the boundaries of the state, resonating with communities beyond the sovereign divide.[3]

By way of contrast, the language of norms appears in this account in so far as it relates to the concerns of the institutionalisation of transnational ideas that emerge out of narratives and are ultimately made explicit in a particular set of formal and informal governing practices (Kratochwil & Ruggie 1986). Norms, defined as 'a standard of appropriate behaviour for actors with a given identity' (Krasner 1983: 2), frame the parameters of the policy debate on given issues and concurrently introduce constraints to decision-making and, under certain circumstances, changes in actor preferences. The constitutive dimension of norms, namely those norms that introduce new interests or categories of action, are reflected in new (or reformed) institutions, and empower new (non-state) actors to partake in policy-making. Transitions to democracy typically introduce new norms and/or transform extant institutions through an extension of membership and tasks or the means through which tasks are pursued (Aggarwal 1998; Gill 2000).

Following Finnemore and Sikkink (1998), new democratic norms enter the realm of the policy debate within the context of pre-established norms. Norm entrepreneurs' attempts to introduce new ideas are mediated through the standards of 'appropriateness' linked to these existing norms, holding a greater possibility of effectiveness when seen to resonate with the former. The diffusion of democratic norms follows a pattern ('life cycle') characterised by norm emergence, a 'tipping point', norm cascade and ultimately norm internalisation by state actors. The tipping point, or threshold, is especially important as it is the moment when a sufficient number of states, including influential states, have accepted the norm, thus paving the way for general acceptance by all (or nearly all) states in a regional or international system (Finnemore & Sikkink 1998). Conflicts between norms are also subject to exogenous shocks ('world time context'), which can act to discredit one constellation of norms, thus allowing another to replace it within the norm hierarchy. In southern Africa, the discrediting of racial narratives that informed settler colonialism played a crucial role in undermining support for settler oligarchies, both internationally and domestically, as did the collapse of communism in paving the way for transitions to democracy.

The motivation for acceptance of new norms by state actors is important to consider as well. Narratives rooted in social structures and practices dictate the degree to which international norms are subjected to 'localisation' and transformation when absorbed within non-Western states. Echoing this, Gourevitch (1978) and Risse-Kappen (1994) tell us that domestic structures and state–societal relations are key determinants of norm acceptance: in this context, the problematic of transnational norm diffusion in non-Western settings needs to be recognised. Acharya (2003) notes that socio-cultural factors, such as belief systems, influence the degree to which local actors in Southeast Asia employ resistance, adaptation and adoption, or replacement strategies. In particular, the gap between an international interpretation of norm acceptance through, for example, formal adherence through treaties or the establishment of institutions, and the local understanding may be considerable. Moreover, instrumentalism, as well as conformity to pre-existing norms, should be seen as a rationale for norm localisation, which carries within it the seeds of future

conflict. Cortell and Davis (1996: 453) observe that 'governmental officials and societal actors can invoke an international rule to further their own particularist interests in domestic policy debates'.

## *From liberation to neoliberal narratives in southern Africa*

The interplay between the emergence of a regional system founded and sustained by white settler communities, and the cycles of conflict, resistance and reaction which gave rise to an African opposition and to liberation movements (linked to a liberation narrative), produced a dominant narrative that shaped the politics of post-independent societies. Indeed, a *neoliberal narrative* emerged out of the transition and reflected the growing consensus on the nature of the state and its relationship to the market, something that held profound implications for society. Each of these conflicting narratives became an influential source of policy and political action in the post-colonial period and became central to the local and regional responses to the Zimbabwean crisis as it played out.



### *The liberation narrative and the dilemmas of independence*

Dispossession of land in Africa was followed by displacement, the attack on traditional society through missionary work and civilian authorities, and all the accompanying indignities of submission to an alien culture. African nationalist movements emerged from the point of the introduction of laws dispossessing Africans of landownership. The link between land and independence, even if clouded in sentimentality of loss, thus remained firm. These powerful images served as the mainstay for anti-colonial movements as they sought to challenge the right of white settler regimes to govern African peoples and territories. This produced a liberation narrative, which claimed its legitimacy in its historical opposition to colonialism with special emphasis on the peasantry and state control.

Gaining the state was the fulfilment of decades of discontent, if not outright rebellion, within African societies. The black liberation movements successfully mobilised support from peasantry and urban masses around the land question and civil rights. However, the fact of achieving and ruling underscored the modernist, anti-peasant outlook of much of the incoming leadership. As it transpired, the determination to replace the white government with a black elite was firmer than the desire to transform the socio-economic conditions of the bulk of the African population. Land restitution, once so important to liberation movements, was effectively abandoned in favour of elite transfers of resources and new ties of dependency with remaining white commercial interests. The locus of political power shifted away from the 'iron triangle' of the settler state era to one in which the urban environment was seen as the heartbeat of the nation, with the people in rural areas serving as reservoirs of political support to be drawn upon as dictated by need.

In this situation, the ambiguous position of white settler communities (or, indeed, other recognised minorities) who retain a relatively privileged status in society

whether they are significantly reduced in numbers or not, acts as a potent symbol of the living past. For a black elite in power that has assumed many of the trappings of the white settlers since independence, the temptation to invoke the liberation discourse is perhaps too great to avoid. Indeed, the expediency of doing so disallows one of the key features of 'nation building': what Renan (cited in Werbner 1998: 74) has called the necessity of forgetting, that is, papering over the conflicts of the past, which were in fact a seminal part of the formative process of creating the state. In this fashion, black elite accumulation fostered through control of the state is shielded behind a mask of (apparent) continuing white culpability and nefarious designs against African aspirations. The resulting liberation narrative shapes the very identity of the post-settler oligarchy and links it to a historical struggle against racism and colonialism in Africa in general. It is informed by three discourses: (a) one of solidarity (the liberation movement is the only rightful and legitimate heir to the colonial state by virtue of the struggle and people owe it loyalty; anything less risks a return to the colonial era); (b) one of national identity (in guise of nation building, the relationship between minorities and 'authentic' citizens is constantly redefined); and (c) one of symbolic restitution (symbolic acts, such as changing place names, replace genuine restitution and allow for a variety of elite accumulation strategies – sometimes taking the form of affirmative action or policies of 'Africanisation').

With the assumption of office, the liberation movements began to engage in the building of clientelist networks and rent-seeking practices that sought to displace the racially structured relationships of the past. Unfortunately, this approach was diametrically opposed by the dominant international narrative of neoliberalism, which itself had informed the structure of the transitional arrangements in post-settler oligarchies.

### *The neoliberalist narrative and the making of the new African state*

Neoliberalism is a narrative predicated upon rationalist assumptions about the nature of the international system as state-centric and motivated by rational calculations of self-interest. Underlying the neoliberal programme is a commitment to establishing a new African state based on market principles and democratic practices. Neoliberal prescriptions deny the state a significant role in macroeconomic management. Concurrently, through the application of 'good governance' criteria, neoliberalism narrows the political sphere of action by the state to the fulfilment of facets of electoral democracy.

Neoliberalism's influence in Africa is especially pronounced. Ever since the onset of the balance of payment crises in the early 1980s, the Western donors – as individuals, but most evidently through the International Monetary Fund (IMF) and the World Bank – have promoted the radical restructuring of developing countries through the application of economic and, from the 1990s onwards, political conditionalities.

The relationship between the neoliberalist narrative and the liberation narrative is one of conflict and accommodation. During the era of white settler rule, neoliberalism

offered a trenchant critique of the irrationalities inherent in statutory racial exclusion of the black majority in the economy (a position that found favour among the liberation movement). With the coming of independence and the trend towards black majority governments pursuing clientelist practices through such policies as the expansion of the public sector, neoliberalism has been at the forefront of criticism, again based upon the distorting effects that this has on the economy (a position that has found favour with the remaining white settlers). This critique has been extended to issues of governance as Western donors have sought to deepen the commitment to democratic values in the political systems of southern African states.

In democratic transitions, this interplay between international norms and domestic narratives, a 'two-level norm game', takes place against a backdrop of changing circumstances ('world time context') that dramatically affects state-elite approaches to new norms and institutions as well as society's relationship to them. Democratic transitions, which by definition are situated between the authoritarian past and a liberal constitutional future, are only partially embedded in the sense that while the international realm has conferred legitimacy upon the new government, in the domestic setting there may be only limited or contingent acceptance of the transitional arrangements (Jackson 1990). Finnemore and Sikkink (1998) point out that the saliency of domestic interests over international norms is at its strongest in the first phase of the norm life cycle; that is, before the proverbial tipping point that initiates a norm cascade.[4]

But while socialisation to the international community is a key source of legitimacy, the pull of conformity and the attendant search for legitimising functions can also be felt at other levels. Following Axelrod (1986), states actively seek out like-minded states ('peers') and pursue policies that demonstrate congruence with these entities as a means of enhancing their credibility with local actors as well. Sustaining that status through cultivating the relationship with other like-minded states involves trust and reciprocity, which in turn fosters elite conformity (Ostrom 1998). Especially in the non-Western case, the weakness of new institutions and practices can cause leaders to seek recourse to conformity with like-minded states as well as societal narratives whose basis is in 'traditional' social structures and practices, all of which ultimately results in the de-coupling of states from the nascent democratic norms which were foundational to the transition. This is what happened in Zimbabwe in the late 1990s.

## *Zimbabwe and the crisis of democratic consolidation in southern Africa*

It was neoliberalism that proved to be both the context and the catalyst for the crisis of the post-colonial state in southern Africa. It exposed the contradictions inherent in the post-colonial state, from the prevailing economic inequalities inherited from the colonial period to the complacency, and even predatory conduct, that accompanied the installation of a black elite in government. Moreover, it laid bare

the legal constraints on government action aimed at addressing critical economic and political problems.

### *The Zimbabwean crisis*

Briefly, the crisis in Zimbabwe, which has resulted in the effective collapse of the state, has its roots in the history of the post-independence land settlement, contemporary economic and social policy, and the particulars of Robert Mugabe's – and the Zimbabwe African National Union Patriotic Front's (Zanu-PF's) – drive to maintain power in the face of new political challengers (Meredith 2001). Underlying the crisis was the colonial legacy of land distribution in which 10 million hectares of the country's most viable land was owned – after nearly two decades of independence – by 4 500 mostly white commercial farmers and 18 million hectares was owned by about 850 000 black farmers in the so-called communal areas. The promised land distribution, which was predicated on the 'willing buyer–willing seller' at market values approach (adopted by Namibia in 1989 and South Africa after 1994), had called for 162 000 families to be resettled on 8.3 million hectares under Phase One of the Land Reform and Resettlement Programme but resulted in only 71 000 families being resettled on 3.5 million hectares of land by 1990. The slow pace of land acquisition by the government and its redistribution to party apparatchiks and regime favourites, rather than landless peasants, all served to fuel discontent within Zimbabwean society.

At the same time, Brett (2005) describes that, by 1990, the government, industry and agriculture (the latter two still dominated by white interests) had come to the conclusion that the slowing pace of the Zimbabwean economy would only be improved through substantial structural liberalisation. In fact, the implementation of a structural adjustment programme, in conjunction with the difficulties of competing in the emergent international trading environment as well as the summary cancellation by Pretoria of a preferential trade agreement, all contributed to a contraction of the economy by 8 per cent in 1993, unemployment increasing to over 50 per cent, double-digit inflation (despite World Bank predictions that it would drop) and a collapse in social services. By 1997, growing dissent among public sector workers, who had borne much of the initial brunt of structural adjustment policies, was joined by veterans of the liberation struggle who were angry at the looting of their pensions by state officials. Shaken by protests, Mugabe reopened the neglected land issue and proposed restitution through expropriation as a solution to the country's economic ailments. The hasty convening of an international donor conference in Harare in September 1998 seemed to offer a credible route to resolving Zimbabwe's land disparities. Funding amounting to Z$7.4 million (approximately US$260 000) was pledged to purchase 118 farms but the inception phase never happened due to conditions of transparency imposed by donors. Furthermore, the disclosure of irregularities in national accounting designed to underplay the costs of a declining economy and a military intervention in Congo brought about a suspension of IMF loans of US$193 million and US$140 million.

In the wake of continued economic hardship, opposition political forces began to coalesce and, in September 1999, the leader of the Zimbabwean Congress of Trade Unions, Morgan Tsvangirai, prominent trade union activists, and some white business interests came together to form a new party, the Movement for Democratic Change (MDC). However, after the ending of the Lancaster House constitutional proscriptions on mandatory white parliamentary representation in 1990, various attempts were made by Mugabe to alter aspects so as to further entrench Zanu-PF rule through the creation of a one-party state, which ultimately failed. A referendum to change the Constitution was introduced in February 2000. Contrary to expectations, 55.9 per cent of Zimbabweans polled, the majority urban based and anti-Mugabe, rejected the government-sponsored referendum.

Nevertheless, after the June 2000 parliamentary elections (in which the MDC, despite intimidation and the death of over 30 of its supporters, won 57 seats to Zanu-PF's 62 seats), Mugabe began to take aim at the independent judiciary that had been an obstacle to realising the ambitions to 'accelerated' land redistribution and increased the pace of land invasions. Opportunistic politicians, like the former government critic Jonathan Moyo, joined Mugabe in using the land issue to mobilise the simmering rural discontent – accentuated by economic privations – and, concurrently, to stifle opposition voices by invoking the language of liberation. The land invasions continued unabated and Mugabe's November 2001 decree ordered 1 000 farmers to leave their land within three months.

### *The regional response*

The ex-settler states of South Africa and Namibia acted with a curious mix of equivocation, fear and support for the Zimbabwean government actions. South African president Thabo Mbeki articulated a policy of constructive engagement (called 'quiet diplomacy'), which sought to encourage Mugabe privately on the path to reform while publicly proclaiming support for his actions (Schoeman & Alden 2003). Zimbabwe was South Africa's largest trading partner in Africa. The imposition of economic sanctions would impose high costs on South African businesses operating in the country and there was serious concern that a destabilised Zimbabwe would ignite refugee flows and greater economic chaos across the region (Africa Institute 2001). Namibia, whose direct ties with the Zimbabwean economy were far fewer, was linked nonetheless through its close monetary and trade links to South Africa. Its president, Sam Nujoma, had a close personal relationship with Mugabe, which contributed to Namibia's support for Zimbabwean intervention in the Democratic Republic of the Congo in 1998.

At the Southern African Development Community (SADC) level, despite differences behind the scenes (especially at the August 2001 SADC summit in Blantyre), regional solidarity marked the collective response to the Zimbabwean crisis in its initial phase.[5] At the same time, Mugabe began to speak openly at SADC summits of mobilising the black population of neighbouring states to launch their own land occupations of white-owned commercial farms, raising the spectre of economic

disruption and political strife across the region. His most notable articulation of this was his vitriolic attack on the British government in front of world leaders at the World Summit on Sustainable Development (WSSD) in Johannesburg in 2002. The Chief of Zimbabwe's Defence Force, General Vitalis Zvinavashe, openly declared he would not be willing to serve under a president who had not been part of the liberation struggle, a position criticised by SADC leaders (Human Rights Watch 2005). The rapturous receptions Mugabe and other top Zanu-PF officials received at gatherings around the region, including South Africa and Namibia, underscored his growing popularity with African audiences. Mashabela (2002) declared at the WSSD summit that Mugabe was 'speaking for black people worldwide'.

The ramifications of the Zimbabwean crisis for the domestic situation in the former settler states were considerable (Lahiff & Cousins 2001). Land activists, from the Transkei Land Services Organisation to the Landless Peoples Movement in South Africa to Namibian NGO and trade unionists, used the spectacle in Zimbabwe to raise questions about the continuing inequities in land distribution in their countries. Many regional NGOs, who responded with a critical review of their own situations to Moyo's comments criticising their inaction (Moyo, cited in MWENGO 1999: 7), moved to embrace a more aggressive public stance on the topic in future. New measures that they committed themselves to included 'stimulating a faster pace of land reforms by exerting pressure on government and policy makers' as well as 'influencing donors and other foreign interests to support land reform and redistribution processes' (MWENGO 1999: 42). In Namibia, the Namibian National Farmers Union, the Namibian NGO Forum and the National Union of Namibian Workers organised a march on Parliament to protest the slow pace of land reform as well as their exclusion from consultation on proposed legislation on communal land rights (*The Namibian* 8 September 1999).[6] After a visit to Zimbabwe in April 2000, the Farmers Union and the NGO Forum were able to call upon the Zimbabwean experience as a stark warning to the government and the white commercial farmers that land reform was imperative to stability in Namibia, declaring, 'Let us keep in mind that today is Zimbabwe and tomorrow could be Namibia.'[7]

The initial reaction of the South African and Namibian governments to this renewed local critique was defensive, denying the failure of their established land reform programmes to address inequalities inherited from the past, and emphasising the importance of retaining the constitutional guarantees on property. With the lack of substantive progress on land and agrarian reform,[8] both governments experienced a rising tide of protest both within and outside ruling circles. In South Africa, where the reaction to the Zimbabwean crisis had been more divided, growing pressure within the ANC to take a harder line against Mugabe had been a feature of the public debate since the middle of 2000.[9] But, at the same time, contrary expressions of support within the party were much in evidence. For example, Kgalema Motlanthe, ANC Secretary General, declared that Zimbabwe's land occupations were a 'protest action' and that the land imbalance in that country was 'immoral' (cited in Lahiff & Cousins 2001: 655). The popularity of Zanu-PF among ANC party rank and file was clearly

illustrated by the cheers that greeted Emmerson Mnangagwa, at that time Mugabe's chosen successor, at the annual ANC party congress in 2002 (*Mail & Guardian* 26 April 2003).[10] The composition of the MDC, led by black trade unionists and white agricultural interests, mirrored, in broad terms, (potentially) discontented factions within South Africa and Namibia's own political landscape: there was a visceral reaction within ANC and South West Africa People's Organisation (Swapo) circles against legitimising the MDC over the interests of a fellow liberation movement.

In the end, the power of the critique levelled by local activists (echoed – if not articulated – by Mugabe), coupled with the pressure to demonstrate tangible progress on land reform since independence, contributed to the two governments' review of their policies. Both the ANC and Swapo acknowledged the shortcomings of the market-based approach to reform, a key component of the historic compromise which ushered in the transition to democracy. As a result, government expropriation was formally introduced and implemented to pressure reluctant white farmers to put their land up for sale. In South Africa, Mbeki committed to transforming black ownership of farmland to 30 per cent of all land by 2015 and increased the finances available to the Department of Land Affairs to purchase farms as well as legal tools to speed up expropriation. In Namibia, despite inflammatory language by Nujoma, government continually underscored the emphasis on due process, as it sought to resettle the estimated 240 000 landless Namibians.

### *Enduring economies, conflicting ideas and de-coupling norms*

Ex-settler oligarchies did not consolidate their democracies more easily than other African transitional states – as had been widely expected by transitologists – but rather exhibited backsliding towards neo-patrimonial practices or even authoritarianism for a number of reasons. In the first instance, this was due to the fact that the transitional arrangements put into place a liberal constitutional regime that did not address the underlying structures of settler colonialism. SADC states, despite periods of criticism of Mugabe's actions and their ensuing impact on the region, invariably couched their collective statements in language that reaffirmed their shared identity as liberation movements and victims of colonialism. Even southern Africa's civil society actors, despite a diversity of national experiences and general distrust of government, were able to draw upon the common thread of colonialism and land dispossession by settler communities to reaffirm their shared identity and definition of the regional dimensions of the land question (MWENGO 2000). It situated the new state in relation to largely domestic rural societies with traditionalist outlooks and fellow independent states in the region, building upon common sources of legitimacy that were fostered through the operational norm of regional solidarity.

The internalisation of new norms, which Linz and Stepan (1996) considered to be the third measure of genuine consolidation, was deemed to be non-problematic for ex-settler oligarchies by transitologists, due to the basic acceptance of democratic and market practices by these predecessor regimes. However, this did not take

into account the possibility that norm diffusion could be more apparent than real. For instance, norm congruence ('grafting'), considered crucial to introducing and gaining acceptance of new norms, may allow for a temporal proximity between two norms and even an appearance of norm acceptance (Acharya 2003). Norm conflict re-emerged in times of crisis (the 'tipping point') and, in the context of the structural challenges to power which the land issue raised, could see political regimes jettison aspects of liberal-constitutionalism in favour of societally grounded norms whose saliency ensured greater political support. Far from inspiring a norm cascade, crisis at this phase in a new democracy might inspire norm de-coupling that sheds the nascent ideas and constitutive institutions for the stability offered by pre-existing norms. As the Zimbabwean crisis developed, it exposed the limitations of the liberal-constitutional regime put into place by the democratic transition – in both that country and its fellow ex-settler oligarchies to the south – bringing about a serious alteration, or even abandonment, of the constitutive norms based on neoliberalism.

Exacerbating this weak embeddedness of new democratic ideals within southern Africa has been the elite character of transition itself. Negotiated in the name of their constituencies by externally recognised parties who achieved this status usually through recourse to non-democratic armed political action (be it liberation movement or settler government), the perspectives that ultimately influenced elite decision-making on the structuring of post-independence institutions did not necessarily represent the perspectives of broader peasant-dominated societies or always reflect the assertion of democratic ideals. In this way, post-independent governing elites found themselves not only beneficiaries but also defenders of institutions and practices derived from the transition without necessarily sharing their underlying values. The end result of this process was that the transition to majority rule allowed for the coexistence of two narratives – triumph of liberation and triumph of neoliberalism – whose contingent nature and contradictions were not apparent to transitologists. Democracy had triumphed, as proven by the overwhelming electoral support new governments earned, but the conditions for consolidation were only partially in place.

## *Conclusion*

Following from the incorporation of the literature on norms, the article extrapolates upon transnational norms as an important tool for divining the role of regional dynamics in shaping formal institutions and informal practices. The impact of the wash of ideas emanating from Zimbabwe that swept across former settler states, exposing unexpected fissures in Namibia and South Africa, held influence for governments and societies alike precisely due to the interrelationship between regional and domestic norms.

While the trigger of the crisis in Zimbabwe may have been challenges posed by neoliberalism to the post-colonial state, the conflict, as played out in the region itself, came to be centred on the issue of land. The public airing of the long-buried land

question in independent states tapped into societally grounded narratives, which inspired political entrepreneurs and inadvertently began to bring pressure on these same governments. This was particularly the case with Zimbabwe, which led the way within the region in using the land issue as a counter to the challenges posed by neoliberalism. Concurrently, and here Zimbabwe again was at the regional forefront, the crisis inspired by neoliberalism provided a rationale for political opportunists to review and reinterpret the key features of the post-colonial state established by the transition from settler oligarchy.

***Notes***

1 Hartley A, 'Mugabe is their darling'. Available at www.rhodesian.net.

2 Werbner (1998: 81) speaks of these 'popular counter-memorialisations' that produced 'unfinished narratives: in which the past is perceived to be unfinished, festering in the present…'

3 Mozaffar et al. (2003) make this argument with respect to poorly understood or legitimated electoral institutions in emerging African democracies.

4 'States conform with norms at stage 2 (norm cascade) for reasons that relate to their identities as members of international society…What happens at the tipping point is that enough states and enough critical states endorse the new norm to redefine appropriate behaviour for the identity called "state" or some relevant subset of state (such as "liberal" state or a European state)' (Finnemore & Sikkink 1998: 902).

5 A meeting between Mugabe and the leaders of South Africa and Mozambique in April 2000 ended with Mbeki and Joaquim Chissano proclaiming solidarity with the Zimbabwean leader (even when privately voicing their concerns). Nujoma was consistently supportive of Mugabe's analysis of the origins of the crisis – colonial legacies and neo-imperialism – and the measures adopted by Zanu-PF to combat these factors. During the build-up to Zimbabwe's presidential elections of March 2002, South African officials sought to address the issue in the regional SADC setting, the continental forum of the Organisation of African Unity, and internationally through the Commonwealth and the UN. Following the UN's Millennium 2000 Summit, where Mbeki committed the government to play a role as intermediary between the international financial institutions and Zimbabwe – at the behest of Kofi Annan – South African officials secured IMF support for a financial package to cover some of the costs of a land redistribution programme envisaged at a 1998 UN Development Programme conference. Britain was induced to pledge US$57 million towards the process, but again the agreement fell apart as Harare refused to be moved on the issue of 'law and order' and transparency. There was a last effort to resolve the land question in advance of the Zimbabwean presidential elections at a meeting in Abuja, Nigeria, in September 2001 under the auspices of the Commonwealth Ministerial Action Group which promised British financial support for land reform, and its results were swiftly endorsed by five SADC presidents.

6 Pace of land reform, *The Namibian*, 8 September 1999. Accessed 1 March 2006, http://www.namibian.com.na.

7 Press statement released by the Namibian National Farmers Union and Namibian NGO Forum, 24 May 2000.

8 In South Africa, over 84 per cent (out of the 87 per cent) of agricultural land remained in the hands of white owners, leaving, in the words of activists, the apartheid-era landownership imbalance virtually unchanged (Anseeuw 2004). Between 1994 and 1999, only 5 000 of an estimated 63 500 land restitution claims had been settled by the government. In Namibia, where 3 800 white commercial farmers owned 80 per cent of the arable land, as little progress was made on agrarian reform. By 2001, only 97 commercial farms (totalling 568 821 hectares) had been acquired for resettlement and 1 964 black families resettled.

9 The ANC's alliance partners, the Congress of South African Trade Unions and the South African Communist Party, became increasingly vocal in their criticism of the spiral of violence and attacks on Zimbabwean trade unions and the media (Southern Africa: News Briefs, IRIN-SA@irin.org.za, 14 March 2001).

10 'Mugabe is their darling', available at http://www.mg.co.za.



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