Making Law Work: Restructuring Land Relations in Africa

Patrick McAuslan

ABSTRACT

This article explores a number of issues concerning the appropriate role for the law to play in the restructuring and reform of land relations and land tenure in Africa. Given current (external) donor tendencies, and (internal) pressures for reform from within, this is a particularly topical issue: in seeking to explore it, the author draws on his own experiences and involvement in land law reform, as well as other sources of information, concentrating on countries and events in Eastern and Southern Africa. After examining various models and country experiences, the article concludes that, while there is no single 'right way' to tackle land tenure reform in Africa, there are a number of factors which may be crucial to success, and in which the law — and lawyers — can play a vital role.

THE RELEVANCE OF LAND REFORM

Issues related to land reform in Africa are particularly relevant at this time, for a number of reasons. In the first place, the twin emphases of donors, led by the World Bank, on 'good governance' and the market economy as the keys to social and economic regeneration in Africa are increasingly seen as necessitating a greater reliance on legal forms and a legal culture similar to those operating in Western, market-orientated economies; conscious moves to adapt legal and judicial systems to that end are thus increasingly part of aid programmes.[1] Secondly, land reform, while never off the African reform agenda as advanced by the donor community, is itself increasingly presented as being a candidate for legal — that is, Western-type legal — solutions.

This article is an expanded version of the Third Alistair Berkley Memorial Lecture, given at the London School of Economics and Political Science on 30 May 1996.

1. For example, Tanzania embarked on a major multi-donor supported programme of legal system reform, the Financial and Legal Management Upgrading Project (FILMUP), in 1994. This began with a series of studies of different facets of the legal system which led to a single report by a Legal Task Force to the Government of Tanzania for onwards transmission to donors comprising some 300 recommendations for action on the legal system; see Bomani (1996). The Law Reform Commission of Uganda has just commenced on a major programme of substantive law reform that aims to enhance and be conducive to the growth of the private sector, which is to be funded by the World Bank.

Development and Change Vol. 29 (1998), 525–552. © Institute of Social Studies 1998. Published by Blackwell Publishers Ltd, 108 Cowley Rd, Oxford OX4 1JF, UK.

Consider these comments from the seminal World Bank report (World Bank, 1989: 104) in a section headed 'Redefining Land Rights':

> [F]armers must be given incentives to change their ways. One important incentive is the right to permanently cultivate land and to bequeath or sell it. Secure land rights also help rural credit markets to develop, because land is good collateral ... Traditional land tenure systems need to be codified. Titles could also be provided to groups for collective ownership ... Nationally legislated land rights are likely to conflict with prevailing customary rights. Judicial mechanisms for dealing with disputes between owners claiming traditional versus modern land rights are urgently required.

The less well-known, but much better informed FAO report by Jean-Philippe Platteau (Platteau, 1992: 293) also concludes that:

> Formalization of land rights through issuance of titles or other land-register documents is an urgent step to be taken in all areas where competition for land has become so stiff as to impose high *ex ante* and *ex post* transaction costs on the agents ... Land markets ought to be regulated in such a way that poor and vulnerable groups gain better protection of their rights of access than they have at present in the context of African dualism of land rights.[2]

Thus, whether arguing for an unregulated free market in land, or for a regulated and supervised market in land in Africa, the means to achieve these ends is seen as involving the introduction of new codes of land law.

There are also factors internal to the region which are equally, if not more significant. In December 1991, the inaugural International Conference on Planning Law in Africa took place in Maseru, Lesotho, bringing together planners and lawyers with an interest in planning and land matters from most countries in Eastern and Southern Africa (and a few outsiders) to exchange ideas and experiences on the role of law in land use management. It was agreed that a second conference should be convened two years later at which countries would report back on the extent to which they had complied with the conclusions and resolutions adopted in Lesotho. A second conference was duly held in Windhoek, Namibia in 1993 and a third, a further two years later, in Johannesburg in 1995.

The first conference was a serious attempt to grapple with practical issues of the implementation of the law. What came through very forcibly at the third conference[3] was the peer group pressure to produce results. Delegates from country after country reported either on new land management laws which had been recently introduced or were planned, or on new policies adopted which would in time lead to new laws. There seemed to be a

---

2. It may be that Platteau's report is well-known, but is disapproved of in more orthodox circles. For instance, a recently published collection edited by van Zyl, Kirsten and Binswanger (1996), two of whom work at the World Bank, advocates a market-assisted approach to land reform but, in 34 pages of references, makes no mention of Platteau's study. It defies belief that none of the three editors and twenty-two other contributors had heard of the report.
3. The author attended the first and third of these conferences.

commitment to take planning law and land law reform seriously, sparked not by external pressure from donors, but by the internal pressure not to lag behind one's colleagues in the Conference.

Quite apart from the impetus generated by these Conferences, land reform of one sort of another, through the medium of law, is high on the agenda of many countries in Eastern and Southern Africa:

- Land reform and redistribution form a central thrust of the reconstruction and development policies of the Government of the Republic of South Africa; a large number of new and far-reaching laws have already been enacted to translate policy into action.
- Land reform and redistribution have been major issues in Namibia, both before and after independence, although little urgency has been shown in tackling them. However, significant legislative moves on agricultural land reform were taken in 1995 and new types of urban land tenure are now also being developed.
- In the last four years, Zimbabwe has enacted far-reaching legislation to speed up land redistribution, although considerable circumspection has attended its implementation. Recommendations from a land reform commission are now being acted upon.
- In Tanzania, a major investigation into the manifold deficiencies of existing policies and practices on land management was undertaken, via a Presidential Commission; new policies on land were subsequently formulated in the first half of the 1990s, and the new National Land Policy (NLP), adopted by Parliament in June 1995, is now being turned into law.
- Malawi has appointed a Presidential Commission to review and make recommendations on land tenure and its reform.

In all these countries, the pressure to act is, at least in part, the result of contested democratic politics and the perceived need to meet the concerns of rural voters. This is most obvious in South Africa but also applies to Namibia and Tanzania. The commitment to legislate in Namibia was made just before the general election of late 1994, when the government felt the need to respond to a 'Peoples' Conference' on land reform which had taken place that year. The enactment of the Agricultural (Commercial Land Reform) Act (ACLRA) took place just after the election. In Tanzania, the establishment of a Presidential Commission and the drive towards finalizing a national land policy occurred as the country moved from a one-party to a multi-party political system.

Land Reform as Land Law Reform

However, the commitment to developing a legal response to land reform, to seeing land reform as being, in part, land *law* reform, is driven by something

else — an aspect of land reform which is not generally noted by external commentators and the aid industry pressing for land reform.

The South African case may be used as an example. In South Africa during the era of apartheid, indeed from 1913 onwards, there was a plethora of legislation on land tenure so far as it affected Africans. The principal characteristic of this legislation was that it deprived Africans of any rights to land and any security of title and put them at the mercy of administrative whim. Law was used to abolish law. Land reform in South Africa, then, must include land *law* reform because it seeks to change the nature of the legal regime and the legal culture that applies to African-held land. It is to replace, at best, licences or permits held at the mercy of law, with *rights* guaranteed by law.

The same approach to African land tenure was adopted in pre-independence Namibia and also, as is graphically portrayed in the Presidential Commission on Land Matters, by the post-independence land administration bodies in Tanzania. There, the pre-independence colonial approach of denying to Africans any rights in the land formed the basis of Operation Vijiji, the forced and a-legal collectivization of peasants in the 1970s. When, in the more open political system that began to develop in Tanzania in the late 1980s, peasants started seeking judicial redress for what they argued was the deprivation of 'their' land during the collectivization, the Government rushed legislation through the National Assembly to stop all judicial proceedings on land issues. It then sought to defend the constitutionality of the legislation before the Court of Appeal in *A-G v Akonaay* in 1994 — thirty-three years after independence — by solemnly arguing, through the Deputy Attorney-General, that those persons who held their land by customary law, under what are known in Tanzanian land law as 'deemed rights of occupancy', did not have a property right in the land and so were not protected by the constitutional provision against deprivation of property without compensation. As the Chief Justice pointed out in his judgement, the effect of this argument was that 'most of the inhabitants of Tanzania are no better than squatters in their own country. It is a serious proposition'.[4] The court rejected the proposition and with it the legal foundation of Operation Vijiji that land could be taken without payment of compensation. The Government accepted the judgement and enacted legislation amending the impunged Act, which allowed for the possibility of compensation to be claimed for hardships and losses suffered during Operation Vijiji. Draft legislation to implement the National Land Policy makes it very clear that all citizens in Tanzania, whatever the legal origin of their right of occupancy (the highest form of land-holding right available in Tanzania) have a property right in the land held through right of occupancy, and are thus protected by the Constitution. Thus in Tanzania, land reform is pre-eminently land *law*

4. Judgement of the Court of Appeal (unpublished transcript) 21 December 1994, p. 8.

reform: the substitution of a law to facilitate the *right* of citizens to access and hold land, for a law which had facilitated the state's *administrative control* over the citizens' access to land.

Ambivalence in Land Law Reform

If there are both external and internal pressures operating on policy-makers in Africa to use the law to restructure land relations, these pressures are pulling in opposite directions. The external, donor-driven pressures are aimed at facilitating the operation of a market for land, while some, at least, of the internal pressures pull in the direction of strengthening the security of tenure of those presently on the land. Facilitating a market in land widens the scope of the rights of landowners, while restricting their ability to dispose of land reduces their rights, whatever the merits of so doing; it is thus not always easy to reconcile these two sets of pressures.

This ambivalence about the market and the problems it might pose for social stability and peasants' land rights is evident in both the Report of the Presidential Commission and the Government's National Land Policy (NLP) in Tanzania (Government of Tanzania, 1994, 1995). The Report proposed that a special status be conferred on 'village land', so that land could only be held via a right of occupancy by those ordinarily resident in that village, and could only be assigned between villagers; non-villagers could at best only obtain leases in the land. The thrust of these recommendations was accepted, but not the details, which would have undermined the fundamental basis of all landholding in Tanzania.[5] The NLP has proposed that market transfers of land will no longer need prior approval, which is currently required, but at the same time, it states that special provisions will be needed to protect vulnerable groups from the effects of market transfers. How one achieves these contradictory aims will be addressed later.

---

5. The Presidential Commission proposed, on a 5–4 split, that a National Lands Commission (NLC) be established in which national lands would be vested in trust for the use and benefit of the people of Tanzania, while village lands, a distinct and separate category of lands, would be vested in Village Assemblies, a body of all adults in the village, which would be the manager of the village lands. The NLC was proposed as a constitutional body, independent of the executive, answerable to the National Assembly and supervised by the judiciary. The Commission did not make clear how this body would be different from other parastatals in Tanzania which, generally speaking, do not have a good reputation either for their efficiency or their probity; how it would be staffed by persons significantly different in their outlook, skills and qualities from officials in the Ministry of Lands, Housing and Urban Development, who are the current land managers; or how it would avoid undue executive pressure 'leading to malpractices' (Government of Tanzania, 1994: 149). Not surprisingly, this unconvincing recommendation, which only survived on the casting vote of the chairman, was not accepted by the Government.

Left out of the equation so far is a third pressure applying to land restructuring, which is certainly present in Namibia and Tanzania, and which one can assume is also present in South Africa in some form or other. This is the pressure for the status quo: for using the law to bolster existing arrangements rather than to change them. A new law is for public relations, not for public actions. In Namibia, for example, the ACLRA has triggered off significant differences of opinion between two, if not three, sets of officials and politicians. First there are those who argue that economic development and a healthy foreign exchange position require that the status quo of very large white-owned cattle ranches be maintained and very minimal changes be made to accommodate land-hungry Africans from the north of the country. Then there are those who argue that the evidence shows that African smallholders are in fact very efficient farmers, that ACLRA should be implemented and land acquired from the cattle ranchers to settle African smallholders on the land. Finally come those who see the Act as an opportunity to facilitate land-grabbing in the more fertile lands in the north, those displaced by the land-grabbing being compensated by land acquired from ranchers under ACLRA. Thus, at one level, attempts to revise ACLRA, to close its loopholes, to develop criteria and administrative arrangements in order to facilitate its implementation are just a technical matter for legal and other consultants to deal with. At another level, however, the issue is whether to *use* the Act to start the process of significant societal transformation for which the thirty-year war of independence was waged; to *under-use* the Act to maintain existing land relations with some cosmetic changes — the preferred option of some international agencies; or to *misuse* the Act to allow the new élite to join the ranks of large-scale landowners — the preferred option of some at least of the new élite.

In the case of Tanzania, the pressure for the status quo to be maintained comes from some officials and politicians who, as the implications of giving legal effect to the philosophy of the NLP started to become apparent (more rights to citizens, less rent-seeking opportunities for officials, more transparency in, and more opportunities to challenge the exercise of powers by officials), began to voice doubts about the new approach. If the old system worked well — as it did from the point of view of officials who could ride roughshod over citizens' land rights — why change it?[6]

---

6. A small but telling illustration of this: a provision had been put in the draft Bill providing that an official who forcibly entered onto land, or who while on land wilfully did any damage to that land, should be liable on conviction to a fine not exceeding Tshs 1 million (Tshs 600 = $1) or to imprisonment not exceeding two years. A committee which was advising on the drafting of the Bill (of which the majority were officials) proposed reducing the fine to a maximum of Tshs 1000, 'otherwise officials would fear to carry out their duties'. Exactly: the whole point was that officials should fear to abuse their powers; but officials thought officials should not be impeded in exercising their powers as they saw fit.

   Land law reform in Viet Nam seems to have run into the same problem: 'Market-orientated land property relations are not intended to reduce the control and regulation of

The Namibian case highlights one important point; to move from policy formulation to drafting laws is not, as some people assume, to move from a debate on policy to one on legal technicalities; the move changes the content of the debate but it remains, none the less, a policy debate. In some respects indeed, it becomes a sharper and more relevant debate. The broad general policies set out in, for example, the Tanzanian Government's NLP or the Namibian Government's *Land Reform: To Promote Equity and Fairness* (1994), can be readily agreed to by (almost) everyone. Who, after all, could possibly be against equity and fairness? However, when these ideas are turned into precise powers, duties, limitations, restrictions, procedures, when it becomes clearer who is to benefit and who is to lose out, then objections begin to be voiced. These are not, of course, objections on 'policy' grounds but on technical legal grounds; a particular clause 'wouldn't work'; a certain provision is 'unnecessary'; another goes 'too far', or is 'impracticable'. Sometimes, as happened in Namibia with the ACLRA, it is argued that if the law is so deficient, it would be better if its implementation were postponed until it was rectified, thus allowing yet more time for the loopholes in the Act to be exploited and the policy of promoting equity and fairness to be further undermined.

It may thus be concluded that every step down the legal path involves policy: the decision to resort to law, the nature of the legal system to be adopted, the style of the law, the sources of the law, the content of the law; all these decisions are policy decisions. This is not a particularly original point: it is worth making, however, since in the context of development and aid, it is often denied, explicitly or implicitly, and law is portrayed as the technical and relatively uncontentious means through which policy can be implemented. This is a feature of a World Bank report on its approach to legal assistance (World Bank, 1995: 5) which states: 'The Bank should ensure that its legal assistance projects are in accordance with its policy of non-interference in the politics of its member countries'. At the same time, however: 'In the light of the close linkage between economic and legal reforms, it is important that any assistance to the borrowing countries' legal reforms should be part of the Bank's country assistance strategies that identify reform priorities in a range of areas' (ibid: 7). The Bank does not vouchsafe how the latter statement is to be reconciled with the former.

---

the state on land use but to change the system of control. Even if individual households' land-use rights are strengthened to a degree close to that of fee-sample [sic] titles in advanced land economies, the ultimate power to control land-use will remain with the state' (Hayami, 1994: 12).

DRAFTING LAWS AS PRACTISING POLITICS

The business of drafting laws, of turning broad policy statements about land, which may well contain deliberate ambiguities and contradictions, into more precise implementable propositions of law, is a policy function, a political matter. This section will explore some of the problems of drafting land laws in a policy framework; in other words, it will look at drafting as politics, and discuss some of the choices that confront the draftsperson, but which rarely get a public airing.

One of the most fundamental questions is the extent to which it is realistic to use a major and inevitably complex piece of legislation, such as a new code of land law, as a vehicle for radical social reform. Is there not a danger that the act of legislating, the detailed, complex, verbal formulae put before legislators, the minutiae of debate on those details, the need for officials and citizens to master the new rules and comply with them, the inevitable slow-moving bureaucracy which clings, lichen-like, to any new reform programme, the politics of reform already noted in, for example, the Namibian case — is there not a danger that all of this will dull the edge of reform or, worse still, subvert reform by creating a situation where only those with the resources to employ lawyers will be able to benefit from reforms? Far better, if one is serious about reform, especially reform to benefit the majority, to get out and do it and let the law catch up later. This was the Tanzanian way with Operation Vijiji, where what little law there was, was largely ignored. Law was, and to some extent still is, perceived in Tanzania as an impediment to change; therefore, where the law has to be used, the style of drafting has tended to be one of conferring great powers on officials, with few safeguards or external controls. This ambivalence about law is present in many cases: two examples will serve here to illustrate the point.

Example 1: Tanzania

There were two particularly important proposals in the Report of the Tanzanian Presidential Commission. First, villagers should be able to obtain individual customary rights of occupancy to land; that is, the process of individualization of land tenure should be officially recognized and assisted in Tanzania. The rather tricky business of determining boundaries of individual plots, and who may claim what rights to the land about to be individualized, would be dealt with 'in the manner traditionally accepted in the village in the presence of members of the Village Council' (Government of Tanzania, 1994: 152). The revolutionary proposal of individual titles to land was accepted and is a policy of the NLP. Second, it was proposed that the basic dispute settlement mechanism for village land should be *Mbaraza ya Wazee ya Ardhi*, councils of village elders. These bodies were to have original jurisdiction in all land matters, including settling disputes over

individualization of tenure; they would determine their own procedures subject to the obligation to follow the principles of natural justice; they would not be bound by any civil or criminal procedure codes or the law of evidence or have lawyers appearing before them. *Mbaraza*, too, have been largely accepted by the NLP, although it remains silent on actual practice and procedures.

Both of these far-reaching proposals involve changes in the law, but the clear message of the Presidential Commission was that the new law should be similar to that which it will replace in terms of drafting style, with a few broad strokes of the legal pen giving vast powers to legally unqualified people and relying on their innate common-sense and sense of justice to get things done — just like Operation Vijiji in fact. In the light of the evidence uncovered by the Presidential Commission of the abuse of power and the chaos that accompanied the latter exercise, this approach could be described as naïve. This might be unfair; an alternative analysis is that the approach adopted by the Commission is a classic example of 'path dependency'.

North (1990: 99) summarizes path dependency as follows: 'Once a development path is set on a particular course, the network externalities, the learning process of organisations, and the historically derived subjective modeling of the issues reinforces the course ... We cannot understand today's choices ... without tracing the incremental evolution of institutions'. Applied to land and the use of law to alter land relations in Tanzania, this tells us that while the policy proposals of the Presidential Commission were indeed far-reaching, the approach to the use of law to implement them was driven to some extent by long-standing Tanzanian legal traditions which stretch back to colonial times. The real revolutionaries, therefore, might turn out not to be those who propose radical policies but those who, through the NLP, propose a radical legal methodology for implementing policies; namely a detailed and inevitably lengthy new land code in which legal rules and checks and balances replace reliance on administrative and political action based on goodwill and common sense — which, according to the evidence, are in short supply where land relations are concerned.

Example 2: South Africa

Those now in power in South Africa have clearly decided that a major programme of detailed land law reform is the key to the radical reform of land relations. To quote from the White Paper on South African Land Policy: 'The central thrust of land policy in South Africa is the land reform programme. This has three aspects; land restitution, land redistribution and tenure reform' (Government of South Africa, 1997: 1). Furthermore: 'To overcome the institutional problems and constraints to the implementation

of land reform, the following are necessary: ... the rationalisation of legislation ...' (ibid: 73).[7]

The White Paper lists six Acts and two Bills as part of the legislative programme to implement land reform, and many of these laws have established or are proposing to establish judicial institutions as key parts of the implementing mechanisms. More significant is the drafting style of these laws. In contrast to Tanzanian statutes, South African statutes are very detailed and tend therefore to be lengthy. The philosophy behind this seems to be that the detail in the law will facilitate radical action rather than hinder it. If powers and the reasons for them are spelt out clearly, then officials will be able to take, and justify, actions. This same drafting philosophy prevails at the moment in Namibia: ACLRA is a long and detailed statute aiming, on the surface, to bring about significant land reform and spelling out the methods and criteria to be used in doing this.

Here too path dependency can be seen at work. One of the most striking characteristics of the imposition and operation of apartheid in South Africa was the use of law — immensely detailed and complex bodies of laws designed to entrench in a fixed and permanent way a specific social and economic system. Law, in a painstakingly detailed form, was the primary tool used to create and implement apartheid; now, through the Constitution and the land reform programme, the same type of law and the same manner of law-making are being used as primary tools to dismantle it.

Land Law as Administrative Law

The South African approach and philosophy to legislative drafting has three main, and interlinked, merits. First, given the evidence presented in the Tanzanian Presidential Commission Report, officials armed with powers and subject to few or no restraints, cannot be relied upon to behave reasonably. Indeed, they cannot always be relied upon to behave reasonably when they *are* subject to some restraints — the old South Africa is evidence of that — but at least where there are legal rules and procedures which have to be followed, a challenge can be mounted to unreasonable behaviour. Even under apartheid in South Africa, the courts quite frequently, by a close and technical interpretation of a statute, reined back an unreasonable exercise of power, particularly in the areas of land and housing: because the decision

7. The whole White Paper is predicated on the idea that fundamental change is needed in land relations in South Africa and that this can only be brought about by vigorous and far-reaching changes to the legal framework of land relations; change starts from there. Indeed, as the White Paper makes clear, while there has been a commendable process of public participation leading up to the publication of the Paper, this has not prevented the passage of several very significant pieces of land reform legislation through Parliament in the preceding two years.

was based on the interpretation of a statute, it was hard to allege that the judges were 'interfering' in policy — a charge which becomes more plausible where statutes are very broad and 'general principles' of administrative law are used to overturn an administrative decision.

The second merit is one of considerable significance for much of the land reform going on in Africa. In much of Africa, the allodial title to land is vested in either the state, the President (Tanzania), the Nation (Lesotho), or even a National Land Commission (Ghana); this means that the citizen has to obtain land from the state or its organs, with state officials managing the land as landlords or trustees, or with the state reserving the power to bring about fundamental alterations in land relations amongst the citizenry, as in South Africa, Namibia, Zimbabwe and Kenya. In cases such as these, land law ceases to be a matter of private law, but becomes part of public law; it is, in fact, administrative law.

It could be argued that over the last thirty or so years, no branch of the law, with the possible exception of environmental law, has developed more quickly or with such universal approbation as to its guiding principles, than administrative law. Many of the newer generation of African constitutions — such as those of Malawi, Namibia, South Africa, Uganda — now explicitly provide for administrative justice to be part of the Bill of Human Rights. Administrative law or administrative justice requires that official power be bounded by legal rules, be exercised in accordance with certain principles of fairness, allow for hearings and appeals, and be subject to review. How else can this be done except through statutory provisions which go beyond merely granting powers to officials, to setting out the manner and form of their exercise and control?

In drafting the new land law for Tanzania, it became clear that much of the draft was actually applied administrative law. Even where the draft dealt with matters of substantive land law, such as remedies for breach of conditions of a right of occupancy, or determining the rent for a right of occupancy, the manner of dealing with breaches or setting the rent involved principles of administrative law, because it is public officials who are to exercise the relevant powers. It was not possible just to indicate that powers were to be exercised 'reasonably'. The South African model of spelling out in considerable detail how powers were to be exercised, on what basis and taking account of what factors, was followed. In so doing, drafting became involved in policy-making; substantive matters had to be put into the Bill which were not dealt with in the NLP. This implies that a dual test has to be applied to any assessment of the draft Bill: does it create a new substantive land law, appropriate for the conditions of Tanzania?; and does it provide a suitable legal framework for the exercise of powers by officials?

The third reason for supporting an approach of 'more' rather than 'less' law is, paradoxically perhaps, the existence of the market. Administrative justice apart, a land law which confers broad powers with few controls on officials may be adequate when the main thrust of the law is about

administrative power, and where few private rights are involved. This applied to the land relations of the majority of the population of Tanzania up to late 1994. However, once the land law recognizes and protects private rights, and facilitates dealings with those private rights in the market place, the law has to be much more specific, detailed and clear. Such aspects as the nature and limits of private rights; how they may be acquired, disposed of, burdened, lost; the whole issue of third party rights; and, where the state is to remain involved, a more exact demarcation of state power and its limits, including the payment of compensation in certain circumstances — these all have to be spelt out in detail so that all those who have private rights, or intend to try to obtain private rights in land can predict with reasonable certainty the scope and operation of the law applicable to those rights. It is no accident that the National Land Code of Malaysia, for instance, is composed of 494 sections and 14 schedules, extending to over 400 pages. Malaysia has a market economy and the Code sets out the basic land law of Malaysia, dealing both with private rights and their exercise and with the powers of officials in a market economy. The argument is that a detailed and necessarily somewhat complex land law is an inevitable part of moving towards a more market-orientated private rights based land law. Difficult though the transition will be for many people in, for example, Tanzania, Namibia and South Africa, the alternative — a continuation of a relationship to land at the mercy of officials, or worse, the proposals of the Tanzanian Presidential Commission that undefined collectivities of peasants be given large unregulated powers over land — cannot be seriously entertained.

A clear example of the dangers of a continued reliance on administration as opposed to law arose recently in Lesotho, with respect to the provisions relating to compensation for loss of land brought about by the Lesotho Highlands Water Project, a major dam-building project. After a somewhat shaky start in the late 1980s (see McAuslan, 1987), the Project has developed some good principles of compensation for loss of land and livelihood, although implementation of these principles is still inadequate.[8] As part of the process of preparation for the next phase of the Project, a major participative study has been undertaken of the compensation needs and desires of local people who will be displaced by the next phase of the Project. According to the draft report of the study: 'The Compensation Policy [of the Lesotho Highlands Development Authority] has no legal status and cannot be cited in a court of law. It serves as a set of guidelines to assist LHDA in

8. So inadequate, indeed, that the World Bank, which got the project off the ground in 1986 with sanction-busting loans to South Africa, laundered through Lesotho (the loans were made to Lesotho but guaranteed by the Reserve Bank of South Africa), has now threatened to withhold funding for the next phase of the Project. As a perceptive article in the Johannesburg *Star* pointed out, however, the World Bank's position is somewhat weakened by the fact that it made several similar threats in relation to the first phase, but never acted on them (see Lamont, 1996).

the implementation of its compensation programme' (Hunting-Consult, 1996: 52).

At a workshop in March 1996 to discuss the study, this statement was picked up and queried: what was the point of the study and the workshop if the LHDA could just ignore their findings? The consultants claimed that they were just repeating what they had been told by the Authority's legal officers; they then attempted to reassure other participants, including representatives from the area concerned, by referring to such concepts as 'legitimate expectations' and 'reasonableness', implying that even if the proposed policies were not part of a statute, the Authority could not ignore them, and that a court would take account of them in any action challenging the Authority's decisions. However, the damage had clearly been done: local people were dismayed by the statement and many of those present at the workshop had their already cynical view of the LHDA reinforced. Lay people, both formally educated and otherwise, are well aware of the difference between having to rely on administrative goodwill and having rights enshrined in the law.

A new land law, then, is by necessity a mix of public and private law, for a mix of public (administrative) and private (market) reasons. This same point had been made recently and in more general terms by two lawyers (Ajani and Mattei, 1995: 131–2) writing about property law reform in Eastern and Central Europe:

> In all modern legal systems, property law involves private law as well as a good deal of public law. Economists tend to disregard this point but it is crucial for lawyers. Lawyers see private and public law as cooperating in defining property rights. Economists usually see private law as creating property rights and public law as destroying them.
>
> Indeed, in the standard neoclassical economic approach, private law is the province of the market while public law is the province of the state ... In more sophisticated economic terms, however, property law is justified as a cure of externalities ... Each legal system will therefore establish, in addition to a private-law cure, a more or less extended public-law cure of externalities reflected by a larger or smaller role of administrative regulation and enforcement.

The crucial issue, as the authors go on to say, is to strike the right balance between public and private law for each problem.

Controlling Dispositions: Whether and How

One particular problem is that of controls over dispositions; should they be provided for, and if so, how? In much of Africa, whether as a result of internal policy decisions, of external pressures from above or, less frequently but not to be disregarded, of social pressures from below, land relations are being restructured to take greater account of the market. The ambivalence towards controls on market transactions is clear in the NLP of Tanzania. On the one hand there is one policy statement, so clear that it could almost have been

drafted by the World Bank: 'The consent of the Minister or his appointed officers is not necessary for market transfer to take place' (Government of Tanzania, 1995: NLP Policy Statement 4.2.12.(v): 15). On the other hand, there are numerous other policy statements which — equally clearly — seek to regulate the process of market transfer:

> 'No disposition will be allowed unless all development conditions have been complied with.'
> 'Regulations will be drafted to protect risk groups such as displaced persons, children and lower income people.'
> 'Special taxes will be imposed to deter land speculation.'
> 'Land ceilings will be fixed by Government . . .'
> 'Land hoarding will be discouraged by strict enforcement of development conditions . . .'
> (Government of Tanzania, 1995: NLP, Policy Statements 4.2.8.(iii); (vi); 4.2.12.(i); (ii); (iii))

In addition, special rules will continue to apply to foreign investors in land. Whilst all these provisions may be perfectly reasonable, the problem for the legal draftsperson is in reconciling the two approaches — the private law, free market approach of 'no consent', and the public law regulatory approach.

In Namibia, before the enactment of ACLRA, this dilemma was resolved by imposing on to the Registrar of Deeds — an official whose position was established for the private law purpose of registering deeds relating to land transfers — the public law duties of checking whether certain public law restrictions had been complied with, before approving the registration of a deed. This led to considerable concern on the part of the Registrar that that office was being misused; acting as a watchdog for other departments and regulatory systems would alter the character of the Registrar's office from an agency which vetted private legal documents (with the aim of ensuring their conformity with the private law and advancing essentially private transactions in the market) to a judgemental agency concerned with public law matters. Although the 'watchdog' role of the Registrar is retained under the terms of ACLRA, there is now an additional requirement that *all* transactions by settlers have to be approved by the Minister, with no provision for appeal in case approval is denied. This is not only unconstitutional (infringing the constitutional provision on administrative justice which requires that any administrative decision may be appealed against), but also totally impractical. People will either not wait for a ministerial decision on a transaction, or will ignore a negative decision, leading to be a situation in which virtually every transaction will be 'illegal'.

In Tanzania, the situation in relation to village land is fairly clear: the village councils will be empowered to regulate most transactions, since village land may generally only be transferred between villagers. With respect to land transactions under the jurisdiction of central government, the initial solution proposed was to borrow an approach from English town and country planning law — 'deemed consent' for certain transactions and classes of transactions provided for by the Act (the list could be expanded or

contracted by ministerial order), together with provisions requiring that consent be obtained for some specific transactions. This did not find favour with a workshop held to review the first draft of the Bill, which considered it too complicated. A majority view of the workshop was that consent requirements should be dispensed with altogether: that, however, would not have met the policy prescriptions which required some controls.

The alternative form of regulation suggested by the central level was to adopt a two-fold approach; pre- and post-transaction control. At the pre-transaction stage, transactions are to be graded by their value; the greater the value of the transaction, the greater the control, with an Allocations Committee to advise the Commissioner of Lands on all major transactions. Minor transactions escape pre-transaction control altogether. The value of minor transactions has been set at such a level that around 90 per cent of all transactions fall into this category, with no need for consent.[9] However, a supervisory role is retained to check on transactions which may be tainted by fraud, undue influence and the like, with the Commissioner of Lands empowered to refer any suspect transaction to the courts for their review.

In Western societies, regulation focuses on the institutions and personnel involved in market transactions rather than on the transactions themselves. In the UK, for instance, estate agents, solicitors, building societies are all now regulated via Commissions, Ombudsmen, the Office of Fair Trading and local authorities. However, it is unlikely that such a solution would work in most states in Africa, where the concern is to try to ensure that the introduction of a market in land does not lead to landlessness and indebtedness on the one hand, and a small number of large-scale landowners on the other. It is difficult to see any way of avoiding some regulatory mechanism which, in order to ensure consistency, fairness and transparency, will need to include the involvement of a central authority. This will be a departure from market mechanisms as they operate in Western economies, but not as they operate in Asian market economies; there, regulations on land transactions have long been a feature of land markets without seeming to inhibit their vigorous operation.[10]

LAND LAW REFORM AND CUSTOMARY LAND LAW

The most challenging task facing any programme of land law reform in Africa is the issue of the place of customary law in any reformed system. The

9. It is, however, made clear in the Bill that other consents may still be required, such as consent to develop land under the Town and Country Planning Ordinance or, on the sale of a right of occupancy, consent to change the use of the land. Where a mortgage is involved, the consent of the lender will, naturally, also be required.
10. For instance, a raft of consents to various transactions is required under the National Land Code of Malaysia.

cause of customary law has waxed and waned over the years. Platteau (1992, 1996) quotes several World Bank studies and reports which attribute the difficulties of improving African agriculture to the defects of customary tenure, with the proposed solution being to move towards a 'modern', individualized tenure system based on statute law. On the other hand, he also draws attention to alternative views that customary tenure cannot be ignored but must be used as the basis for any reform programme. A recent statement on this from what may be called 'the World Bank stable' is a study by Bruce and Migot-Adholla (1994) within some World Bank funded research. It concludes (ibid: 261–2) that the implication for policy-makers of the research is:

> [to] redirect attention to more incremental approaches to change in indigenous tenure systems ... We should be moving away from a 'replacement paradigm' in which indigenous tenures are to be replaced by tenure provided by the state towards an 'adaptation paradigm' ... An adaptation paradigm requires a supportive legal and administrative environment for the evolutionary change in indigenous law. Such a supportive environment implies a clear recognition of the legal applicability and enforceability of indigenous land tenure rules.

It remains to be seen whether these conclusions will lead to a clear policy change on customary tenure by the World Bank.

The policy of replacement was not solely a donor-driven policy. Kenya's policy was set in place by the colonial power in 1956 but it has not changed since independence, well over thirty years ago. Tanzania has constantly enacted legislation which purports to abolish customary land tenure, most recently in 1992. Namibia's ACLRA is based on the assumption that the land law by which settlers are to be governed is the Roman–Dutch land law, not customary law, and a draft Communal Land Tenure Bill was, at best, ambivalent about the role of customary land tenure. Lesotho's Land Act of 1979 was designed to start the process of replacement. These laws have not worked. Even in Kenya, which has the longest and arguably the most consistent customary land tenure replacement policy in Anglophone Africa, the enactment of the Land Disputes Tribunal Act in 1991 was a recognition that customary tenure could not be abolished. The Act established councils of elders to handle land disputes, applying customary law even for those lands where rights had been adjudicated and which are now governed, allegedly, by the Registered Land Act 1962, applying law based on English land law.

Although Tanzania has now opted for the adaptation paradigm, the practical implications of this are not spelt out very clearly in the NLP. Opting for this approach as a policy does not solve the issues of how to provide for it in a statute, or how to grapple with all the important ancillary problems which then arise, such as women's rights to land, the relationship between customary law and statute law, individualization of tenure and the provision of appropriate dispute settlement arrangements. These issues will be briefly discussed below.

Issues in Customary Law

(i) Womens' Rights

Approaches to tenurial reform in Africa have tended to skirt round the issue of women's rights to land. Namibia's ACLRA (enacted in 1995) and its draft Communal Land Bill (of the same year) are both silent on the matter. This is in spite of the existence of legal and policy injunctions: there are specific provisions in the Constitution that permit the Government, when enacting legislation and applying policies that provide for the advancement of persons who have been socially, economically and educationally disadvantaged by past laws and practices 'to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation' (*Constitution of the Republic of Namibia 1990*, Article 23 [3]). Furthermore, the National Conference on Land Reform of 1991 specifically resolved that a programme of affirmative action be instituted to help women gain access to land, and that all customary and statute laws which discriminate against women be abolished or amended (Yaron et al., 1992: 202–3).

Developments in Tanzania have been more fluid and illustrate a reluctance to take concrete actions. When the NLP was brought to the National Assembly in 1995, women MPs objected to the lack of specifics on women's rights; they were only persuaded to withdraw their objections to the policy by oral concessions to the effect that the Constitution requires that everyone be treated equally, implying that women would be treated equally in terms of land allocations under the NLP. In fact, the Constitution's definition of discrimination does not include any reference to gender discrimination; the Chapter on the Bill of Rights actually starts off by asserting: 'all men are born free and are all equal' (*Constitution of the United Republic of Tanzania 1977*, Article 12[1]). More significantly, the NLP itself is very ambivalent about women's rights:

> (i) In order to enhance and guarantee women's access to land and security of tenure, women will be entitled to acquire land in their own right not only through purchase but also through allocation. However inheritance of clan or family land will continue to be governed by custom and tradition.
> (ii) Ownership of land between husband and wife shall not be the subject of legislation. (Government of Tanzania, 1995: NLP Policy Statement 4.2.6: 12)[11]

11. A woman who claimed to have been responsible for the policy statement stated that the provisions on inheritance and matrimonial property were added *after* the policy statement had been approved by the workshop at which it was discussed (personal communication, first workshop on the draft of the Land Bill, Dar es Salaam, March 1996).

The statements about inheritance will ensure the maintenance of the status quo for most women and have therefore been criticized by the Tanzanian Women Lawyers' Association and other women's groups. The problem with (ii) is that it is clearly written from ignorance: there has been legislation dealing with property relations between husband and wife in Tanzania since the onset of British colonial rule, and the latest such legislation (the Marriage Act of 1971) is in fact fairly liberal on the matter. The brief on the drafting of the new land law did not encompass either succession or marriage law, so those policy statements were not taken on board. They are evidence, none the less, that there is some considerable way to go before generalized statements about women's rights, which are never far from the lips of politicians in Tanzania, are likely to be translated into practical measures on the ground — where it matters.

The draft Bill provided at various points that those concerned with the management of land should have special regard for the needs of women when considering allocation or dispositions of land; that any dispute-settlement bodies located at village level — the *Mbaraza* — must include women in their composition; and that land adjudication in connection with individual customary rights of occupancy must pay particular attention to the interests of women. The first workshop on the draft agreed to these proposals without much enthusiasm. The second workshop approved them *sub silentio*. Since then, women's groups have waged a vigorous campaign to build on them. These provisions set the parameters for action, but this issue is heavily tied up with two others — customary law, and the individualization of title.

On women's rights (as on other matters) South Africa seems to be ahead of the field. Its White Paper is much more explicit and far-reaching, proposing, inter alia:

- The removal of all legal restrictions on participation by women in land reform. This includes reform of marriage, inheritance and customary law where they contain obstacles to women receiving rights to land.
- Specific mechanisms to provide security of tenure for women, including the possibility of registering assets gained through land reform in the name of the household or its individual members (Government of South Africa, 1997: 33)

This continues the trend noted earlier of a commitment to use legislation to bring about major social change, but here too, success will be measured not in what goes into the statute book, but what happens on the ground.

(ii) Legislative Reform of Customary Law

The examples of the Tanzanian and, particularly, the South African reforms throw up the issue of customary law and legislative intrusion into that law.

The Report of the Presidential Commission in Tanzania played down the necessity or even desirability of significant statutory reform of customary land law, apart from provisions designed to prevent discrimination against women and to facilitate the granting of individual titles. It considered the reform of that law as best brought about by the slow process of judicial decisions, in the same way that common law and equity evolved in England.[12] Desirable though this may be in principle, it is impracticable both in general terms and for Tanzania in particular. In all countries in Africa, there has been legislative intrusion into customary land law; in Tanzania this has been going on for over seventy years, including several attempts to 'abolish' it altogether. The 'restoration' of customary land law, which the new Act will provide for, means that in the future customary law will derive its legality, if not its legitimacy, from statute law; and the attempt to create a Tanzanian common law, which the draft Bill explicitly charges the courts to develop, will inevitably mean that the law will derive its continued legitimacy from the top — reported judicial decisions of the High Court and the Court of Appeal — and not from the bottom, as the Report hopes will be the case.

(iii) Individualization of Title

The process of individualization of title poses the greatest challenge to the evolution of customary law. The creation of an individual right of occupancy and its allocation to an individual or a group through a statutory process *ipso facto* breaks the link between the land and customary tenure, even if the same people occupy the land. In Tanzania, however, the new law will provide that the incidents of tenure on the new holding will be governed by customary law. This is a recognition that whatever legislation is in place, in practice customary law would continue to apply — the Kenyan legislation mentioned above also testifies to that. However, the Act will intrude further: some basic rules of fair procedure will be laid down; a person may not be dispossessed of land, and no penalties for 'mis-use' or other infringement of customary tenure rules may be applied without notice; an opportunity to contest the matter at a hearing and a right of appeal are provided. More contentiously, the law will also provide that *inter vivos* transfers and other transactions designed to prevent women from inheriting or acquiring land, or

12. '[W]e recommend the continuation of the application of customary law which indeed will be the main legal regime governing land relations in the villages ... The principle here is to facilitate modernisation from below rather than attempt to oust tradition by imposing modernisation from above ... The framework suggested by us allows an organic evolution of customary law in response to changing conditions and values. In this way, we anticipate the development of a body of Tanzanian *common law* which will be a creative blend of statutory and customary law guided by democratic constitutional principles' (Government of Tanzania, 1994: 193).

obtaining credit on the security of land, may be disallowed. The justifications for these legislative intrusions are, first, the constitutional principle of equal treatment; second, the principle of administrative justice; and third, the NLP itself.[13]

Can and should legislative intrusion into customary law be minimized? Should more vigorous efforts be made to adapt it to the needs of the market place? To what extent can and should a conscious effort be made to develop a national customary law or a common law via judicial decisions? These are not matters that have been considered in Tanzania's NLP, in Namibia's policy documents or even, surprisingly perhaps, in the South African White Paper.

(iv) Adjudication

Given the central importance of land in African economy and society, and given that land disputes can and do escalate into violence and serious civil unrest and disturbances — Kenya and Ghana are two Anglophone examples — to say nothing of the total breakdown of civil society which conflicts over land can trigger (see André and Platteau, 1996), appropriate dispute settlement mechanisms are vital to successful land reform. In the past, far too few resources have been allocated to land dispute settlement procedures and institutions. The successful implementation and general public acceptance of new land laws and new rights, obligations, ways of doing things and official powers will depend to no small extent on whether efficient, effective and equitable dispute settlement mechanisms are put into place and then supplied with sufficient resources to enable them to provide justice to the people.

---

13. The Chairman of the Presidential Commission, Professor Isa Shivji, has criticized these proposals as introducing ITR (individualization, titling and registration) by the back-door. The proposals in the draft Bill, however, follow very closely the proposals in the Presidential Commission which clearly recommend that villagers may obtain, after a process of adjudication, a simple certificate of title (Government of Tanzania, 1994: 154). In an paper criticizing the draft Bill, Professor Shivji contrasts the Bill's provisions on adjudication with the Commission's, which he represents as being a village-based, participatory system without central intervention. The Bill allows for the possibility of a group of twenty villagers to complain to the Commissioner of Lands about defects in the process of village adjudication, with the Commissioner thereafter empowered to take over the process. The Presidential Commission, in proposals which Professor Shivji appears to have forgotten, proposed that a Circuit Land Court, presided over by a legally qualified resident magistrate, would subject village land adjudication to scrutiny via its supervisory adjudication, and appeals against the decisions of such a court could be taken to the Land Division of the High Court. Complaint to the Commissioner of Lands is a lot cheaper and quicker than judicial review and appeals therefrom. See Shivji (1997).

Land Law Reform: An Example

Finally, in this section, we will look at the example of Tanzania, where a two-pronged approach to land law reform is being proposed. The first prong deals with substantive law, the second with institutions of adjudication.

First, those holding customary rights of occupancy who intend to deal in them, and those with whom they may deal, may opt for their transactions to be governed by the statutory system; this is an approach used in Botswana and it avoids the problems which may arise from trying to marry up a modern transaction with customary law. A corollary of this approach is that a modern, reasonably straightforward statutory code of land law specifically tailored for the needs of smallholder peasant farmers is developed as a part of the new law. This part of the draft Bill will replace the existing 'received' land law that was imposed on Tanzania at the time of the English colonial take-over after the First World War — in other words, the land law as it applied in England on 1 January 1922.[14] Somewhat surprisingly, the Presidential Commission had recommended retaining sections of this 'received' land law, which was greatly at odds with its comment to the effect that a new basic land law should be drafted in as simple a language as possible without sacrificing accuracy. To propose that the gaps in Tanzanian land law be filled with English land law as it was in 1922 is to suggest that large parts of the basic Tanzanian land law should be drawn from laws stretching back to medieval England, couched in language which is at best complex and at worst quite unintelligible, and which in practice makes it quite impossible for the vast majority of Tanzanians to know what the law actually says.

The critical question then becomes: what law should replace the 1922 English land law? It does not seem practical to move too far away from a land law which is grounded in the common law.[15] First, neither the NLP nor the Presidential Commission suggested that Tanzania develop a totally different basic substantive land law, the Presidential Commission indeed suggesting that English law be retained. Second, the residual non-customary and non-Islamic law of Tanzania remains the common law as developed in England and modified by seventy-five years of application in Tanzania. Third, the legal profession and those managing land in the public sector are

14. Amendments have been made to the received law from time to time, most notably in 1963 when freehold tenure, accounting for about 1 per cent of the land of Tanganyika (as it then was), was abolished and all land so held was converted into a 99-year Government Lease which required extensive consequential amendments to the law. For a good, if now dated, introduction to the land law of mainland Tanzania, see James (1971), who strongly criticized the continued Tanzanian reliance on ancient English law (much of which had been fundamentally reformed in England in 1925), as being totally inappropriate to the socio-economic circumstances of the country.
15. Allowances should be made here for the inevitable biases of the author, an English land lawyer, although these may be compensated by the fact that he does have some understanding of Tanzanian land law and customs.

familiar with English legal concepts and some of the basics of English land law and there is much good sense in the comment, made by a working party surveying the land law of Northern Ireland with a view to updating it, that: 'The danger of impairing the efficiency of the legal profession [and it may be added in the context of Tanzania, the public sector land managers] by overloading it with unfamiliar law must be taken seriously' (Sheridan, 1971: 3).[16]

This is not to say that Tanzania should slavishly adopt modern English land law; the latter is, quite naturally, geared to the needs of modern English society, which is very different to Tanzanian society. In one respect, however, the thrust of many proposals for land law reform coming from the English Law Commission do offer a better model to Tanzania as it embarks on the road to a land market than some of the models and ideas on offer from, for instance, the World Bank. The overall message of the English models is that a free market in land is not self-regulating; there needs to be a regulatory framework in place to ensure that a market works equitably as well as efficiently. This message is reflected in Tanzania's new Bill.

There are other models which Tanzania may draw on. There are many countries in the Commonwealth which have land laws based on English land law, but which have modified or amended them to reflect their own circumstances and more modern thinking about the role of land law in society. Three may be briefly mentioned. First, the Malaysian National Land Code (MNLC), enacted in 1965, provides a comprehensive code of land law for Malaysia, covering both the administration of the land by public officials and substantive land law. It is this Code of Land Law that has been in operation during the last thirty years of spectacular economic growth in Malaysia. The Code makes extensive use of standard forms, contained in Schedule 1 of the Code, thus reducing the costs and complexity of dealings in land. An additional aspect of the Malaysian model which may hold lessons for Tanzania is that there is a recognition that the land law of a country is a living law which needs constant review and amendment. A year rarely goes by without some amendment being made to the Code; each year, however, two or three commercial publishers publish a revised and updated edition of

16. The document goes on to say: 'We rejected the idea of expressing the land law so as to be comprehensible to the non-lawyer. We hope we have expressed ourselves as intelligibly as possible, but there is no escape from the fact that land dealings require a law of considerable sophistication, that that requires a high degree of technicality and that lawyers will remain indispensable to any but the crudest transactions with valuable property. What we have tried to do is to suggest a system in which lawyers will be needed to deal with real problems while minimising mystique, archaism, arbitrary hurdles and mumbo-jumbo' (ibid). I agree with the broad thrust of these views but I think that it is more possible than the Working Party was prepared to concede to develop standard forms for most land transactions, certainly in Tanzania, to enable lay persons to undertake such transactions without the services of lawyers.

the National Land Code, ensuring easy access to the basic land law of the country.[17]

The second example is a major Bill published by the New Zealand Law Commission in the form of a report in 1994. This deals with many of the matters of substantive land law which need to be provided for in the Tanzanian basic land law, and in part for the same reasons: to abolish some of the outdated common law rules on land — 'ancient English statutes dating back to the thirteenth century' (New Zealand Law Commission, 1994: vii)[18] — which still survived in New Zealand; and to restate others in a clearer, modern legal form — 'One of the most important objectives of the new Act is to set forth rules of property law accessibly and in a manner which, allowing for the subject matter, can be readily understood' (ibid: 1–2). The first clause of the Bill indeed states: 'The purpose of this Act is to make the law relating to real and personal property more accessible and better suited to present and future needs by restating and developing that law and codifying it in part' (ibid). This very succinctly sums up the aims of the Tanzanian draft Bill. Since New Zealand is a largely agricultural country, with small landowners and with land to which customary law applies, this is a relevant model for Tanzania to examine.

Finally, several parts of the land law of Kenya might also provide useful models for Tanzania. The Registered Land Act of 1963 provides a well-drafted example of a modernized and simplified version of relevant parts of English land law adapted for use in an African setting. The Land Adjudication Act, and the Land (Group Representatives) Act 1968 deal with matters which the NLP considers central to Tanzanian land law. The Land Disputes Tribunals Act of 1991 provides useful pointers to the possible powers and procedures of mediation based on customary legal principles in Tanzania. There are, then, no shortage of relevant models from the common law world on which Tanzania can draw in developing its own substantive land law. It needs to be emphasized, however, that at the end of the day, the decisive issue will be whether the new proposals are appropriate for Tanzania, and whether the necessary Tanzanian adaptations have been made to laws drawn from other jurisdictions.

Turning now to the second prong of the approach to customary law, the new law proposes a dedicated system of land courts which, staffed by

---

17. The MNLC is derived from earlier land laws of the Federated Malay States which go back to the nineteenth century; see Tan Sri Datuk et al. (1989). However, Tun Mohamed Suffian makes a noteworthy point in the Foreword to the book: '... this great piece of legislation which was inspired by Tun A Razak [a former Prime Minster of Malaysia] ... took seven years of patient federal-state consultation and negotiation on the peninsula before reaching the statute book' (ibid: v). The Code may have been derived from past laws but it is very much a Malaysian law catering to Malaysian needs.
18. The quotation is from the formal letter from the Chairman of the Law Commission to the Minister of Justice, which accompanied the Report.

specialist judges, will be able to develop a new common land law of Tanzania out of the multiplicity of customary laws, received laws and statute law. This was suggested by the Presidential Commission and while the NLP agreed with the principle of specialist dispute-settlement bodies, it preferred to cast them in the form of quasi-judicial tribunals. The important issues are that any dispute settlement bodies, by whatever name, should be independent of the Executive, should be staffed by experts in both customary and statutory land law, should be regulated by straightforward procedures and should, with a minimum of expense and delay, deal with land disputes via a range of techniques — alternative dispute resolution, formal hearings, public inquiries, and informal meetings. The new law will provide for all this.[19]

LEGAL PERSONNEL AND LAW REFORM

The final matter to be dealt with in this article concerns people; legal academics and the training of personnel. One of the most striking aspects of the wide-ranging public debate on land reform in South Africa over this decade has been the leading role taken by lawyers, for the most part legal academics, in writing about the need and possible models for land reform laws.[20] The quality of the legal contributions has undoubtedly raised the intellectual and conceptual content of the debate and is likely to contribute to better laws as a consequence. In Tanzania too, the Presidential Commission on Land Matters, which has had such an important influence on the content of the NLP and the Land Bill, was headed by an academic lawyer. Concerned and committed legal scholarship, and the publications associated with it, are important; effective progress on land reform or land law reform is unlikely to be made without them.

However, legal scholarship is only one, albeit very important, role for the legal academic. New land laws providing for major programmes of land reform must also involve training of those who are to implement the laws and

19. Professor Shivji objects to the proposals in the Bill as being 'entirely appointive [with] barely any participation of the citizenry' (Shivji, 1997: 22). The Bill proposes village mediation panels as the first level of dispute settlement; these will either be traditional panels or nominated by village councils and approved by the village assembly. The Presidential Commission of which Shivji was Chairman proposed *Baraza la Wazee la Ardhi* (village adjudicative bodies) elected by villagers. The Commission, it will be recalled, also proposed that the village assembly would allocate land, and recognized that this might lead to a small minority of wealthy villagers dominating proceedings. There would, in the Commission's proposals, be nothing to stop that same group of villagers dominating membership of the *Baraza*.

20. This makes it all the more extraordinary that Klug (1996) can produce a paper about legal frameworks, without making a single reference to this voluminous legal literature on the subject of land reform.

those who are to use them. New land laws may well be ignored by the people at large if they do not perceive any benefits to be had from complying with them. This attitude is much more likely to be adopted if no effort is made to explain the laws, and the benefits, if officials continue to behave under the new law as they did under the old, and if lawyers make no effort to adapt their working practices to meet the needs of ordinary people.

The Mexican land reforms of 1992 provide a compelling example of what can go wrong if new laws are not followed up with adequate training and public awareness campaigns. These reforms were designed to introduce market forces into the *ejido* land tenure system, a village communal system of land tenure in which individuals (*ejidatarios*) had no rights, and the land could not be sold. This system was very similar to customary tenure in Tanzania and gave rise to similar economic and political phenomena — low productivity among the peasants; power concentrated in the hands of local party bosses of the one major party, the PRI, and the local *ejidal* commissioners, who controlled *ejido* land; and the growth of an unofficial land market in *ejido* land, with all the rent-seeking behaviour that that encourages. The process of reform was largely worked out in secret by a deregulation secretariat in the President's office, and was enacted in 1992. Grindle (1996) analysed the reforms as part of a wider study of reforms in economy, politics and society in Mexico and Kenya in the 1980s and 1990s; she summarized the post-enactment position as follows:

> Whether strong opposition existed or not, implementation of the new legislation would be problematic. Unlike deregulation, implementing new rights in property would require an extensive administrative infrastructure. Under the new laws and regulations, each ejido could decide whether or not its members would receive individual property rights. In order to grant individual title to land, the government needed to settle a vast number of outstanding ejido land claims. It also needed to clarify the individual status of ejidatarios and to assess the value of agricultural land if a market in land was to be introduced. An extensive system of land courts was set up as part of the reforms, but their operation was not clearly understood, even by the reformers. Ejidatarios needed to be informed of their new rights and how to implement change (Grindle, 1996: 91).[21]

Much of Grindle's summary reads like a remarkably prescient forecast of the contents of the draft Tanzanian Land Bill and the likely implementation problems. As the summary makes clear, little of what was needed by way of implementation of the reforms was provided for; opposition duly grew, culminating in the peasant uprising in the southern state of Chiapas in January 1994 in which the peasants demanded (amongst other things) the repeal of the revision of the article in the Constitution which had preceded and made possible the land reform. This is not to suggest that similar failures of implementation in Tanzania, or indeed elsewhere in Africa, will lead to

---

21. In practice, the reforms do not seem to have led to the significant changes which both opponents and proponents assumed would occur; see Jones and Ward (1997).

such a dramatic result, but the message is plain: enactment of a law to bring about fundamental changes in land relations *must* be accompanied by a planned programme of implementation in which training and public education are central both for citizens and for the professions.

Programmes of training and public education in law are a major challenge to the legal profession as a whole but particularly to its academic branch. They are also a challenge to the donor community which urges land law reform on countries in Africa. To give just one statistic; according to policies enunciated in the NLP, considerable powers of land management are to be vested in village councils in Tanzania by the new law. There are over 8000 villages in Tanzania: it is doubtful whether even 1 per cent of these have officials with any expertise in land management. Unless a quite extraordinary programme of training in the new law and how to exercise the powers provided under that law is mounted for village officials, aiming to provide no more than one trained official per village, the law will *never* be effective and may in fact be counter-productive, contributing to widening the gap of comprehension about land and law between the peasants on the one hand, and central officials and the educated élite on the other. Such a programme can only be mounted with donor support. Equally, to ensure that the new specialized land courts and *Mbaraza* are staffed by persons with some knowledge of the land laws of Tanzania will involve considerable resources. While donors might supply funds and some technical training expertise for these training programmes, the intellectual and human resource input must come from inside the country concerned.

Lawyers, and particularly academic lawyers, thus face two major challenges related to land law reform in Africa. First is the challenge of scholarship; to rise above the merely descriptive and analytical approach to writing about land law and adopt a more policy-orientated and innovative approach which offers new models and creative ideas as solutions to practical problems of land management; and, if the opportunity presents itself, to become involved in the challenging business of turning these ideas and models into legislative drafts — a scholarly endeavour, for which creative and not just critical scholarship is needed.

Second is the challenge of education and training. Here too there is a need to set aside the traditional, rather narrow functions of the undergraduate legal educator. Innovative programmes — of mass legal education, of the development of distance learning materials and instruction, of interactive learning via computer programs, of the use of radio, television and videos — and intensive short courses for all levels of officials and lawyers, will need to be developed and taught. Lawyer-reform will need to accompany law reform.

CONCLUSION

There is no one right way to tackle the issue of land tenure reform in Africa. The proposals being developed in Tanzania have been the product of a good deal more thought, investigation, preparation and participation than has occurred elsewhere in Africa, with the exception of South Africa, and the Government deserves considerable credit for that. Continued debate can only improve the prospects of success for the reforms, as more people become aware of them. It is essential that the reforms, once introduced, are carefully monitored, so that adjustments may be made as and when needed. At the end of the day, while land law reform might, just, still be the preserve of the lawyer, the products of that reform — the new laws — are the property of the nation and the nation must be assisted in embracing and working within those new laws. Only in this way can law be made to work to restructure land relations in Africa.

REFERENCES

Ajani, G. and U. Mattei (1995) 'Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics', *Hastings International and Comparative Law Review* (19): 117–37.

André, C. and J.-P. Platteau (1996) 'Land Relations under Unbearable Stress: Rwanda caught in the Malthusian Trap', paper presented at the Third Alistair Berkley Memorial Workshop. London: London School of Economics and Political Science (31 May).

Bomani, M. (1996) 'Report of the Legal Task Force', *Change* 4(1&2): 83–9.

Bruce, J. W. and S. E. Migot-Adholla (1994) *Searching for Land Tenure Security in Africa*. Dubuque: Kendall-Hunt Publishing Co.

Constitution of the Republic of Namibia, 1990. Windhoek: Ministry of Information and Broadcasting.

Constitution of the United Republic of Tanzania, 1977 (with all amendments up to 1 October 1990). Dar es Salaam: Government Printer.

Government of the Republic of Namibia (1994) *Land Reform: To Promote Equity and Fairness*. Windhoek: Ministry of Lands, Resettlement and Rehabilitation.

Government of the Republic of South Africa (1997) 'White Paper on South African Land Policy'. Pretoria: Department of Land Affairs.

Government of Tanzania (1994) *Report of the Presidential Commission of Inquiry into Land Matters. Vol I; Land Policy and Land Tenure Structure*. Dar es Salaam: Ministry of Lands, Housing and Urban Development, Tanzania; Uppsala: Scandinavian Institute of African Studies.

Government of Tanzania (1995) *National Land Policy*. Dar es Salaam: Ministry of Lands, Housing and Urban Development.

Grindle, M. (1996) *Challenging the State: Crisis and Innovation in Latin America and Africa*. Cambridge: Cambridge University Press.

Hayami, Y. (1994) 'Strategies for the Reform of Land Policy Relations', in R. Barker (ed.) *Agricultural Policy Analysis for Transition to a Market-oriented Economy in Viet Nam*, FAO Economic and Social Development Paper 123, pp. 1–36. Rome: FAO.

Hunting-Consult (1996) 'Resettlement and Development Study Task 2 Report, Vol. 2, Main Report'. Maseru: Hunting-Consult 4 Joint Venture.

James, R. W. (1971) *Land Tenure and Policy in Tanzania*. Dar es Salaam: East Africa Literature Bureau.

Jones, G. A. and P. M. Ward (1997) 'Privatising the Commons: Reforming the Ejido and Urban Development in Mexico', paper presented at a Conference on Law and Urban Space. Oñati: International Institute for the Sociology of Law (24–7 June).
Klug, H. (1996) 'Bedevilling Agrarian Reform: The Impact of Past, Present and Future Legal Frameworks', in J. van Zyl et al. (eds) *Agricultural Land Reform in South Africa*, pp. 161–98. Cape Town: Oxford University Press.
Lamont, J. (1996) 'Water Project Told to Clean Up its Act', *Star* 12 September (Johannesburg).
McAuslan, P. (1987) 'The Lesotho Highlands Water Project and Environmental Law: A Case Study in the Light of "Our Common Future" ', *Lesotho Law Journal* (3): 41–65.
New Zealand Law Commission (1994) 'A New Property Law Act'. Wellington: New Zealand Law Commission Report No. 29.
North, D. (1990) *Institutions, Institutional Change and Economic Performance*. Cambridge: Cambridge University Press.
Platteau, J.-P. (1992) 'Land Reform and Structural Adjustment in sub-Saharan Africa: Controversies and Guidelines'. Rome: FAO.
Platteau, J.-P. (1996) 'The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment', *Development and Change* 27(1): 29–86.
Sheridan L. A. (1971) *Survey of the Land Law of Northern Ireland: Report to the Director of Law Reform for Northern Ireland*. Belfast: HM Stationery Office.
Shivji, I. (1997) 'Implications of the Draft Land Bill', paper presented at a Consultative Conference of NGOs and Interested Persons on Land Tenure Reform. Dar es Salaam (15–16 May).
Tan Sri Datuk, A. Ibrahim and J. Sihombing (1989) *The Centenary of the Torrens System in Malaysia*. Kuala Lumpur: Malayan Law Journal Pte Ltd.
World Bank (1989) *Sub-Saharan Africa: From Crisis to Sustainable Growth*. Washington, DC: The World Bank.
World Bank (1995) 'The World Bank and Legal Technical Assistance', PRWP 1414. Washington, DC: The World Bank.
Yaron, G., G. Janssen and U. Maamberua (1992) *Rural Development in the Okavango Region of Namibia: an Assessment of Needs, Opportunties and Constraints*. Windhoek: Gamsberg Macmillan.
van Zyl, J., J. Kirsten and H. P. Binswanger (eds) (1996) *Agricultural Land Reform in South Africa*. Cape Town: Oxford University Press.

Patrick McAuslan is Professor of Law at Birkbeck College (Malet Street, London WC1E 7HX, UK) and Professor of Urban Management at the Development Planning Unit, University College London. He has worked for UNCHS (Habitat) as an adviser on land management and has written extensively and acted as a consultant on law reform relating to land tenure and land use planning in Africa, most recently in Namibia (1995), Lesotho and Tanzania (1996). He drafted the Report on which the Bill for the new Tanzanian land law is based.