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LAND LAW REFORM IN EASTERN AFRICA

Traditional or Transformative?

PATRICK McAUSLAN

Land Law Reform in Eastern Africa: Traditional or Transformative?

Land Law Reform in Eastern Africa reviews development and changes in the statutory land laws of seven countries in Eastern Africa over the period 1961–2011. The book is divided into two parts. Part I sets up the conceptual framework for consideration of the reforms, and pursues a contrast between transformational and traditional developments; where the former aim at change designed to ensure social justice in land laws, and the latter aim to continue the overall thrust of colonial approaches to land laws and land administration. Part II provides an in-depth and critical survey of the land law reforms introduced into each country during the era of land law reform which commenced around 1990. The overall effect of the reforms has, Patrick McAuslan argues, been traditional: it was colonial policy to move towards land markets, individualisation of land tenure and the demise of customary tenure, all of which characterise the post-1990 reforms. The culmination of over 50 years of working in this area, *Land Law Reform in Eastern Africa* will be invaluable reading for scholars of land law, and of law and development more generally.

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A critical review of 50 years of land law reform in Eastern Africa 1961–2011

Patrick McAuslan

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Preface

This book started its life as a response to a request from John Kabudi, the then Dean of the law school in the University of Dar es Salaam, to give a paper on teaching and research on land and natural resource law in Africa at a conference to celebrate the 50th anniversary of the establishment of the then faculty of law of the University College of Dar es Salaam in September 1961, of which I was one of the three founder members. I demurred to that request as I did not and do not know enough about the subject from an Africa-wide perspective. I offered instead a paper on land law reform in Eastern Africa over the 50 years of the operation of the law school, which more or less coincided with the period of time I have been working on the subject of land law within the region. I assumed that the paper would be fairly short but as I began to pull together the information needed to write it, I realised that I had taken on a major commitment. This book is the result.

I began my involvement with land law in East Africa in late 1965 purely and literally by accident. The late Dean, Professor A. B. Weston was teaching land law and suffered a horrific car accident which put him in hospital for many weeks. I volunteered to take over the course. I was due to leave Dar to take up a post as lecturer in law at LSE in December 1965 but the then convenor of the law department, Professor Ash Wheatcroft, and the then Director of the school, Sir Sydney Caine, the ex-Vice Chancellor of the University of Malaya, agreed that, in the circumstances, I could stay on in Dar until the end of the university's then academic year to complete the teaching of the course on land law. At the end of that academic year, in April 1966 the law faculty mounted a seminar on Law and Social Change in East Africa to which I contributed a paper on the control of land and agricultural development in Kenya and Tanzania – my first published venture into the field.[1]

1 McAuslan, P. (1967) 'Control of Land and Agricultural Development in Kenya and Tanzania', in Sawyerr, G.F.A. (ed.) *East African Law and Social Change*, Contemporary African Monographs Series No.6, Nairobi, East African Institute of Social and Cultural Affairs, 172–257.

Since then I have written quite extensively on different aspects of the land laws of the countries covered by this book (with the exception of Mozambique) and have had too the great privilege of being invited by the governments concerned to be involved in the drafting of land laws in Tanzania and Uganda and being involved as a consultant in reviewing and advising on various aspects of the land laws of Rwanda, Somaliland and Zanzibar. With respect to Somaliland and Zanzibar, I would make the point that in both cases, there is a government and a legal system separate from, in the case of Somaliland, Somalia, and in the case of Zanzibar, Tanzania, which has exclusive jurisdiction over land matters so in discussing developments and changes in the land laws of those two jurisdictions, no assumptions are being made about their wider political status. Over the 50 years covered by this book I have lived and worked in Kenya, Tanzania and Uganda a total of nine years and probably spent at least another year in total working as a consultant or researcher in the region. As an expatriate, I am an outsider but I would claim to have a reasonable in-depth knowledge of the laws and their social, political and economic contexts which are to be discussed hereafter. This book then is in many respects the culmination of a working lifetime's commitment to grappling with the endlessly challenging and fascinating topic of land law in the region.

I have deliberately cast my net wider than just the three countries of Kenya, Tanzania and Uganda which formed the student body of the law school in 1961 and for which the law school in Dar es Salaam was initially designed. East Africa is more than these three countries; some innovative and interesting developments in land law have taken place in the other countries in the region which include countries with a colonial background from Belgium and Portugal and so hopefully this will be a small contribution to comparative law and to becoming more aware of some of the legal developments within the region – not just in land law but in land policies and public law generally. I do not attempt to provide a comprehensive and detailed survey and analysis of the statutory land laws of the countries covered in this book but focus on aspects of the post-1990 statutory land law reforms in each country which allow some conclusions to be drawn about the nature and thrust of the reforms. With the exception of Somaliland, which was a British dependency between 1887 and 1960, all the countries are members of the Commonwealth and members too of various Eastern African political and economic groupings, so they form an already existing unit.

In the days before the Research Assessment Exercise (RAE) and Research Excellence Framework (REF), it was quite common to try out ideas which might ultimately form part of a book in papers at conferences and articles in journals. Alternatively, articles previously published may later seem, when one comes to write a book, to represent a position or to contain information which fits perfectly into the book although not written with a book in mind. So naturally rather than setting out to deny or repudiate what one has written previously or rewrite the same piece using different words, one uses and adapts

what one has already written. There are now, alas, dangers in this sensible scholarly approach as a book composed in part of previously published papers might be categorised as not sufficiently original to merit assessment. This book is very largely original but I have used previously published work as the basis for some of Chapters 4, 7, 12 and a good deal of Chapter 13. I make no apology for this. The total of such 'borrowings' amounts to about 15% of the book.

Over the course of 50 years, I have accumulated an enormous number of intellectual debts from colleagues in academia and in the world of consultancy. I cannot possibly list all of them but I would like to record the chiefest of them here. First and foremost, the late great Hastings Okoth-Ogendo, a fellow former student of Wadham College Oxford (as was my first Dean, AB). He more than anyone set the intellectual tone of debates on land issues in East Africa, combining social and political understanding of the issues with an acute understanding of the limits and role of the law to solve (and create) problems. I have learned much from Justice George Kanyeihamba, my first PhD student at Warwick University and a friend and colleague from that time in the early 1970s onwards. We may have differed from time to time but I should record my debt to Issa Shivji and his knowledge of and writings about Tanzanian land issues. I have always found Mgongo Fimbo too to be a mine of information and ideas about Tanzanian land law. Amongst my colleagues in English academia, several of whom were also colleagues in Dar, I should like to thank William Twining for over 50 years of friendship and intellectual stimulus in Dar, at Warwick and in London. I owe too an enormous debt to Yash Ghai my former colleague in Dar and Warwick for his input into my intellectual development over the years. John McEldowney, Abdul Paliwala and Sol Picciotto have always been willing to exchange ideas and provide stimulus to my work. I must record too a special thanks to my former colleague at Birkbeck, Thanos Zartaloudis who read through an early draft of the whole manuscript and made many pertinent comments so vastly improving the quality of the book.

Amongst my colleagues from the world of consultancy, I must record my great debts to Liz Alden Wily and Martin Adams from both of whom I have learned so much about land issues in Eastern Africa. I would also like to record my thanks to Jon Lindsay, Senior Counsel, Environment and International Law, World Bank Legal Department and formerly in the legal department of the Food and Agriculture Organization of the United Nations for his support and his incisive comments on many of my reports submitted to the Bank on land issues. I have benefitted enormously from his input into my understanding of land issues.

I have been fortunate too in the institutions, which means the collectivity of persons that make up the institutions, of which I have been a member: the law faculty at Dar in the early 1960s which was an intellectual hot-house; a part of the new society of Tanganyika as it was then that was the catalyst for

me as for so many other people to develop new ideas and new approaches to legal education, to legal scholarship and ultimately to a life-long interest and involvement with the fascinating subject of land.

In the 1960s everyone wanted to come to Dar so as a young lecturer one had the opportunity to meet with some of the intellectual giants of law, the social sciences and politics in Dar. From the law there was Aubrey Diamond, Tony Bradley, Jim Read from the UK who stayed in Dar to become a colleague in the law school for three years; from the USA, Quintin Johnstone who retired from Yale Law School aged 96 last year, the late great Tom Franck, an introduction to law and life which with me as with many others we carried back to the UK and influenced the development of legal education and scholarship here. The challenge of the new has I suppose been a motivating force of my work – made much happier working with colleagues creating a new law school or crafting a new land policy or land law.

Then there was the law school at Warwick University from the late 1960s which did so much to facilitate my development as a contextual land lawyer; and the law school at Birkbeck from the early 1990s which has been both a very stimulating and very tolerant environment for me to continue to teach and research in land law at both the undergraduate and post-graduate levels. Nor should I omit my three years as an international civil servant working as the Land Management Adviser in the Urban Management Programme based in UN-Habitat in Nairobi between 1990 and 1993. I benefited immensely from working with colleagues from different disciplines and different countries, particularly Mark Hildebrand and Jens Lorentzen in UN-Habitat and Catherine Farvacque-Vitkovič in the World Bank. None of these people or institutions are in any way responsible for the errors and shortcomings of this book.

I should make special mention too of the law school at Birkbeck and my colleagues there. I am a part-time colleague and I often disappear, sometimes during term, on various consultancies. My colleagues and my students have been remarkably tolerant of my absences and I have undoubtedly gained as has this book from the vibrant critical and intellectual climate which has been created in the law school. I find too that I often do my best writing when in the field and this book has benefited from being written while on mission in Afghanistan, Bangladesh, Cambodia, Kenya, Laos, Somaliland and Tanzania.

Lastly but by no means least, I would like to say thank you and pay tribute to Dorrette, my wife of 45 years. She has had to put up with a lot from me over the years of our marriage – my absences abroad, my 'absences' at home when I am writing – yet throughout she has provided a home and a caring environment without which I would not be half the person I am. This book is dedicated to her.

Introduction

This book sets out to survey and assess efforts at the reform of land law made by seven countries in Eastern Africa between 1961 and 2012. The limits of what is being attempted in this book must be made clear at its outset. The book focuses on those parts of land law that have been the subject of statutory reform over the 50-year period and in particular over the last two decades, and not on those laws that have not been the subject of reform even where they should have been. So in the case of Uganda for instance, the focus will be on the reforms introduced by the Land Act 1998, which did not embrace title registration even though the dreadful Registration of Title Act, first enacted in 1922, is long overdue for reform. It will not consider the law of mortgages other than in the context of issues of gender and land law reform where efforts to reform the Mortgage Decree of 1974 have been tried but have so far come to nought. Similarly with the introduction of a law to regulate estate agency in 2005 which I participated in and reform of the law and practice of land registration in Tanzania where I was involved with a team of consultants making detailed proposals for reforms in 2009. These proposals have not yet been acted upon and so are not discussed in this book.

Nor will customary land law be discussed as such. This is not in any way to devalue or downplay the supreme importance of customary tenure in the lives and livelihoods of the vast majority of the citizens of all the countries covered in this book. But a book can only be so long and any attempt to review and comment on changes in customary tenure in seven countries over a 50-year period would take time and space which would reduce the possibility of any book such as this ever seeing the light of day. In any event, there are many people far better qualified than I to write about customary tenure both generally and with respect to customary tenure in the countries of Eastern Africa covered by this book.[1]

1 For the latest general overview, see Alden Wily, L. (2012) *Customary Land Tenure in the Modern World*, Washington D.C., Rights and Resources Initiative.

Equally, the focus is on assessing the statutory reforms as such; what seems to have been their impact; what are their strengths and weaknesses and what conflict and issues have they given rise to. So the book will not consider land administration issues in the context of the postconflict although no less than four of the countries under review have been involved in conflict where land was one of the issues of the conflict – Mozambique, Rwanda, Somaliland and Uganda – and land was a major factor in fuelling the post-election breakdown of law and order in Kenya in 2007–2008.[2]

The countries surveyed in the book are Kenya, Mozambique, Rwanda, Tanzania, Somaliland, Uganda and Zanzibar (which retains its own system of land law and land administration separate from mainland Tanzania). The book is in two parts; Part I starts by setting up the conceptual framework for consideration of the reforms; justice as a key concept; and the twin approaches of transformational v. traditional; the former aiming at change designed to ensure social justice in land laws, the latter aiming to continue the overall thrust of the colonial approach to land laws and land administration. Part I then reviews in a summary form the land laws inherited at independence and the changes made to those laws during the first three decades of independence. It looks in more detail at the development of land law and management in Kenya and Tanzania during that period as those two countries provided contrasting models of land administration which were both highly influential within the region. Both systems, however, built on their colonial inheritance.

Part II provides a more in-depth and critical survey of the land law reforms introduced into each country during the era of land law reform which commenced c.1990. It suggests a changed intellectual climate which rediscovered the importance of law as a major contributory factor to the international community's support and pressure for land law reform within countries in the region. The general conclusions from the country surveys are that (i) land markets have been accepted and provided for everywhere; (ii) a corollary is that customary tenure is on the way out, albeit in varying speeds in different countries; (iii) all reforms write in a considerable degree of central governments' continuing involvement in land administration; (iv) the reforms do not adequately address the urban land problem and nor do the reformed urban planning laws. Looked at in terms of a transformational v. traditional approach to land law reform, while most reforms have elements of the

2 I have discussed these issues in two papers: McAuslan, P. (2011) 'Post-Conflict Land in Africa: The Liberal Peace and the Transformative Agenda', in Home, R. (ed.) *Local Case Studies in African Land Law*, Pretoria, Pretoria University Law Press, 1–19; and 'Postconflict Statebuilding: the Liberal Peace and the Transformative Alternative' (2011), a paper given at a conference on Security Sector Reform and the Rule of Law at the 6th Hague Network Rule of Law Meeting, The Hague, April. Somaliland was discussed in the first paper, Rwanda and Somaliland were discussed in the second paper.

transformational in them, the overall effect of the reforms has been traditional: it was colonial policy to move towards land markets, individualisation of land tenure and the demise of customary tenure. Implementation of the land law reforms leaves a good deal to be desired as there is a shortage of money and too much ambivalence on the part of implementers to move in a transformational direction. Part II concludes with some comments on land grabbing and what it tells us about the whole saga of land law reform surveyed in this book.

The conceptual framework of the book

A survey of land law reform over 50 years must be informed by some set of principles, concepts, theories or ideas by which to judge what has taken place, otherwise the survey will amount to little more than a descriptive catalogue of laws. In trying to develop an appropriate set of principles, I assumed that I would be able to draw on a range of writing from and about land issues within the region which themselves used and developed fundamental principles and theories and would be able to construct my framework of analysis drawing on this range of regional scholarship.

In particular I assumed that the concept of justice would loom large in such writing since the absence of justice has been a constant theme in writing about the colonial impact on land rights in Africa. While there is great range of writing about land problems in the region with some informed by at least implicit ideas about justice or fairness or similar concepts, there is, with one very important exception – that of women's rights to land – little writing which takes justice or a similar concern as the central organising concept in discussing land issues either generally or with respect to specific issues or countries. Astonishingly too, the major publication on land policy in Africa produced by the powerful triumvirate of the African Union (AU), the African Development Bank (ADB) and the Economic Commission for Africa (ECA) in 2010 did not use the word 'justice' once in their whole report.[3]

Given the many conflicts – often involving physical violence and deaths – and disagreements about land, rights to land and land management in all the countries discussed in this book, the absence of writing on fundamentals in or about the region in relation to land is remarkable. It is arguably even more remarkable when we consider the outpouring of writings dealing with issues of justice with respect to land issues which has emerged from South Africa since the ending of apartheid in 1994. This writing is particularly rich and

3 African Union, African Development Bank and Economic Commission for Africa (2010) *Framework and Guidelines on Land Policy in Africa: Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods*, Addis Ababa, ECA.

innovative with respect to urban planning[4] where issues of justice and the rights to the city are explored but basic questions of justice are raised too with respect to the land reform programme enshrined in the Constitution and pursued by the African National Congress (ANC) government since 1994. These approaches have not been taken up in Eastern Africa,[5] although they are discussed with respect to Mozambique when that country is classified as being part of Southern Africa and themes of justice and land are explored in that region as a whole.[6] I do have some concerns about the general applicability to Africa of theories and ideas developed in the context of the practice of South African urban planning and the reality of South African cities but this is not the place to raise them. I entirely approve of a general focus on justice in assessing land reform both urban and rural, in South Africa where the emphasis is on righting the balance of justice over land between black and white South Africans. I think it is an equally appropriate focus for assessing land reforms in Eastern Africa and in adopting such an approach, I think it relevant to quote Edward Soja, whose views on spatial justice I will refer to later:

> Seeking to increase justice or to decrease injustice is a fundamental objective in all societies, a foundational principle for sustaining human

4 See in particular, Watson, V. (2009) 'The planned city sweeps the poor away . . . Urban planning and 21st century urbanisation', 72 *Progress in Planning*, 151–193. It must, however, be noted that Cape Town where much of this writing comes from is still a de facto highly segregated and unequal city; Polgreen, L. (2012) 'Blacks See Divides in a Rainbow City', *New York Times*, 1 April; Myers, G. (2011) *African Cities: Alternative Visions of Urban Theory and Practice*, London, Zed Books, 93–94, 96–97 and especially 121–136; and Pieterse, E.A. (2008) *City Futures*, London, Zed Books. See further on this, Chapter 12.

5 Discussing aspects of justice in relation to land has never been a theme of academic writing on land law in Eastern Africa. The following is a representative selection of essays on aspects of East African land law: Obol-Ochola, J. (ed.) (1969) *Land Law Reform in East Africa*, Kampala, Milton Obote Foundation, 16 essays, none on justice, no index; Kiriro, A. and Juma, C. (eds) (1991) *Gaining Ground: Institutional Innovations in Land-Use Management in Kenya*, 9 essays, none on justice; no reference to justice in the index; Fimbo, G.M. (1992) *Essays in Land Law Tanzania*, Dar es Salaam, Faculty of Law, University of Dar es Salaam, 8 essays, none on justice, no references to justice in the index; Juma, C. and Ojwang, J.B. (eds) (1996) *In Land We Trust: Environment, Private Property and Constitutional Change*, Nairobi, Initiatives Publisher, 14 essays, none on justice, one reference to administrative justice in the index; Okoth-Ogendo, H.W.O. and Tumushabe, G.W. (eds) (1999) *Governing the Environment: Political Change and Natural Resources Management in Eastern and Southern Africa*, Nairobi, ACTS Press, 10 essays, none on justice, no reference to justice in the index; Wanjala, S.C. (ed.) (2000) *Essays on Land Law: The Reform Debate in Kenya*, Nairobi, Faculty of Law, University of Nairobi, 13 essays, one reference to justice in the index; Kameri-Mbote, P. (2002) *Property Rights and Biodiversity Management in Kenya: The Case of Land Tenure and Wildlife*, Nairobi, ACTS Press, no references to justice in the index.

6 Action for Southern Africa (ACTSA) (2010) Position Paper: *Southern Africa and Land: Justice Denied?*

> dignity and fairness. The legal and philosophical debates that often revolve round Rawls' theory of justice are relevant here . . . The specific term 'justice' has developed a particularly strong hold on the public and political imagination in comparison with such alternatives as 'freedom' with its now strongly conservative overtones, 'equality' given the impact of a more cultural politics of difference and the search for universal human rights, detached from specific time and place.[7]

Justice then is a concept used in all societies to assess the merits of both public and private actions. In adopting a justice approach to assessing land reforms in Eastern Africa, one must begin by discussing the concept of justice itself and attempt to formulate an overarching statement of what might be meant by justice in relation to land reforms. There are in my view two strands of what might be called land-related justice which need to be considered in attempting to arrive at such a position: spatial justice; and the 'just city' approach. In addition, no one attempting to discuss issues of justice in relation to practical matters can ignore Rawls's or Sen's general discussions of justice.

Spatial justice derives from the ideas and writing of Lefebvre but the key developments and indeed texts which translate Lefebvre's ideas into the concept of spatial justice come for the most part from geographers. In trying to explain the concept, I shall draw on Edward Soja's work of which the latest example is *Seeking Spatial Justice*,[8] a book that combines an exploration of spatial justice as a theoretical concept with a discussion of activist movements in Los Angeles which he sees as examples of what planning and campaigning action may achieve when informed by a critical spatial imagination.

In a paper written in 2008 on 'The City and Spatial Justice', Soja sums up what he means by spatial justice:

1. In the broadest sense, spatial (in)justice refers to an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice. As a starting point, this involves the fair and equitable distribution in space of socially valued resources and the opportunities to use them.
2. Spatial justice as such is not a substitute or alternative to social, economic, or other forms of justice but rather a way of looking at justice from a critical spatial perspective . . .
3. Spatial (in)justice can be seen as both outcome and process, as geographies or distributional patterns that are in themselves just/unjust and as the processes that produce these outcomes . . .

7 Soja, E.W. (2008) 'The City and Spatial Justice', paper at a conference on Spatial Justice, Nanterre, September, 3.

8 Soja, E.W. (2010) *Seeking Spatial Justice*, Minneapolis, University of Minnesota Press.

> 4 Locational discrimination, created through the biases imposed on certain populations because of their geographical location, is fundamental in the production of spatial injustice and the creation of lasting spatial structures of privilege and advantage . . .
> 5 Combining the terms spatial and justice opens up a range of new possibilities for social and political action, as well as for social theorization and empirical analysis, that would not be as clear if the two terms were not used together . . .

For Soja then, spatial justice goes beyond analysis. It provides a platform for action. And this approach appears to be a common characteristic of proponents of spatial justice. Thus, the editors of a 2007 special issue of the American journal *Critical Planning*,[9] devoted to spatial justice state:

> This volume proceeds from the notion that justice is, and should be, a principal goal of urban planning in all its institutional and grassroots forms . . . What do critical spatial thinking and practices contribute to the pursuit of justice? . . . The appeal for a 'just' society has been a powerful rallying point for a wide range of social justice movements . . . As the texts in this volume reflect, the renewed recognition that space matters offers new insights not only to understanding how injustices are produced in space, but also how spatial analyses of injustice can advance the fight for social justice . . .

The importance of maintaining a radical approach to notions of spatial justice were explained by Andrea Pavoni in a commentary on a lecture Soja gave in London on his book in late 2010.[10] Pavoni noted that

> Spatial justice . . . is a call for the necessity of an action which however, is always imbricated, always contingent, always spatial and thus unavoidably ethical, political – against post-political belief on the possibility of an impartial action, only focused on pragmatic, non-ideological 'ideas that work', spaces that fix. This is why spatial justice does not simply stress the need to intervene on space but more radically, the unavoidable conflictuality and violence of any intervention and thus the need to deal with these aspects.

Thus, the proponents of spatial justice see it as an oppositional force to existing systems of land management and urban planning, challenging their

9 (2007) 14 *Critical Planning*, a UCLA student-managed and refereed journal of urban planning, 1.

10 Pavoni, A. (2010) 'Looking for Spatial Justice', *Critical Legal Thinking*, http://criticallegalthinking.com/2010/12/01/looking-for-spatial-justice/, 2.

innate conservatism. With respect to land in the countries under review, spatial justice as mode of critique is highly relevant as it is undeniable that there is massive spatial injustice in the distribution of land and in the processes that have contributed to that unequal distribution of land. I will return to this point below.

Pavoni notes that Soja specifically differentiates spatial justice 'from the notion of just city'. It is possible to understand this difference when we turn to the notion of the just city as advanced by Susan Fainstein.[11] She states:

> My aim in this book is to develop an urban theory of justice and to use it to evaluate existing and potential institutions and programs . . . My effort within the urban context is to 'name' justice as encompassing equity, democracy and diversity and to argue that its influence should bear on all public decisions . . . The justice criterion does not necessarily negate efficiency or effectiveness as methods of choosing among alternatives but rather requires the policy maker to ask, efficiency or effectiveness to what end? . . .
>
> Nancy Fraser[12] distinguishes between affirmative and transformational strategies for addressing injustice. The former corrects inequitable outcomes without disturbing the underlying social structure; while the latter works by changing the social framework that gives rise to injustice . . . She finds a middle ground by calling for 'nonreformist reforms' which would operate within existing social frameworks but 'set in motion a trajectory of change in which more radical reforms become practical over time' . . .

Although Fainstein deliberately does not address the urban planning issues of cities in the developing world, her approach has much to commend it and can be applied to the issue of land reform which might embrace both nonreformist reforms and how they can be used to set in motion a trajectory of change leading to more radical and fundamental reforms.

If there is one common theme running through these two diverse approaches to land-related justice, it is distribution; the fair and equitable distribution in space of socially valued resources and the opportunities to use them (spatial justice) or moving from the planners' obsession with economic development to a concern with social equity (the just city). I shall return to this question of distribution below.

11 Fainstein, S.S. (2010) *The Just City*, Ithaca, Cornell University Press, 5, 18.

12 Fraser, N. (2003) 'Social Justice in an Age of Identity Politics', in Fraser, N. and Honneth, A., *Redistribution or Recognition? A Political-Philosophical Exchange*, New York, Verso, 72–80.

Before turning to an examination of the Eastern African land situation applying concepts of justice to assess the system, I want to touch on the approaches to justice of Rawls and Sen.

Fainstein summarises Rawls's basic argument as follows:

> As is well known, Rawls begins by positing an original position in which individuals, behind a veil of ignorance, are unaware of their status in whatever society to which they will belong. In the original position individuals will act fairly and therefore articulate the elements of a just society . . . His argument is that free individuals, acting rationally will choose a rough equality of primary goods so as to assure that they will not end up in an inferior position. In his most recent formulation, he states that this involves 'a framework of political and legal institutions that adjust the long-run trends of economic forces so as to prevent excessive concentration of property and wealth, especially those likely to lead to political domination'.[13] Rawls has been so influential because, within a vocabulary acceptable to proponents of rational choice theory, he presents a logical argument that defends equality of primary goods as the basis of justice without resort to natural law, theology, altruism, Marxist teleology or a diagnosis of human nature.[14]

Until the appearance of Sen's *The Idea of Justice*,[15] the Rawlsian approach to justice had been very dominant but Sen has offered an alternative approach to justice which I think is more relevant to issues of land reform and which I would claim that in practice, both Soja and Fainstein adopt. Sen characterises Rawls's approach to justice as one of *transcendental institutionalism* – the search for perfectly just institutions and in taking this approach Rawls is following a long tradition of political philosophers stretching back to Hobbes. Sen on the other hand adopts the approach of *realization-focused comparison* which also has a long tradition going back to Adam Smith. 'Those focusing on realization-focused comparisons were often interested primarily in the removal of manifest injustice from the world that they saw.'[16] Sen sets out his stall thus:

> Importance must be attached to the starting point, in particular the selection of some questions to be answered (for example, how would justice be advanced?) rather than others (for example, what would be perfectly just institutions?). This departure has a dual effect, first of taking the comparative rather than the transcendental route, and second,

13 Rawls, J. (2001) *Justice as Fairness: A Restatement* edited by E. Kelly, Cambridge, MA, Harvard University Press, 44.

14 Fainstein, op. cit., 15.

15 Sen, A. (2009) *The Idea of Justice*, London, Allen Lane.

16 Ibid., 7.

> focusing on actual realizations in the societies involved, rather than only on institutions and rules.[17]

His book explores that journey. It does seem to me that the comparative approach and a focus on actual realisations is more practical and more likely to lead to positive outcomes. Could not one suggest for instance that Fainstein's 'nonreformist reforms' is a classic illustration of the comparative route: how can we make things better than they are at present rather than how can we construct the ideal system of land management through land reform? Particularly when we are assessing justice with respect to land legal systems in seven different countries, it is necessary to bear in mind Harvey's view that, in Fainstein's words, '[he] accepts that the content of the term justice takes on different meanings depending on social, geographical and historical context. At the same time, he insists that the word retains usefulness as a mobilizing concept . . .'[18]

If justice is to be the key mobilizing concept in assessing the land reforms of the Eastern African countries under review, I want to focus on approaches to reform and their connection to justice. Nancy Fraser makes reference to affirmative and transformative approaches to reform – affirmative being in effect no reform at all but merely affirming the status quo – suggesting that the 'nonreformist' reform approach can lead on to the more fundamental transformative approach. It is the latter approach that I want to discuss in the context of a South African legal analysis of the transformative approach with respect to land reform.

I The transformative approach

There is a major theoretical study on land issues by the South African lawyer van der Walt, which has so far gone unnoticed by the South African school of urban planning theoreticians, that I consider offers a key starting point for an analysis of the trajectory of land law reform in Eastern Africa.[19] Van der Walt summarises the purpose of his book, which was written with the South African property regime as its backdrop, as follows:

> In short, the argument is that . . . the property regime, including the current system of property holdings and the rules and practices that

17 Ibid., 9.

18 Ibid., 11. The reference to Harvey is: Harvey, D. (2002) [1993] 'Social Justice, Postmodernism and the City', in Fainstein, S.S. and Campbell, S., *Readings in Urban Theory* 2nd edn, London, Wiley-Blackwell, 386–402.

19 van der Walt, A.J. (2009) *Property at the Margins*, Oxford, Hart Publishing. It may also be noted that while the South African urbanists have ignored van der Walt's writings, he in turn makes no reference to Pieterse's book (footnote 4) which uses the concept of transformation as a way of explaining what is needed in the cities of the South to begin the process of accepting the urban poor as full members of those cities.

> entrench and protect them, tends to insulate itself against change (including social and political transformation) through the security- and stability-seeking tendency of tradition and legal culture, including the assumptions about security and stability embedded in the rights paradigm . . . the rights paradigm tends to stabilise the current distribution of property holdings by securing extant property holdings on the assumption that they are lawfully acquired, socially important and politically and morally legitimate. This function of the rights paradigm tends to resist or minimise change, including change brought about by morally, politically and legally legitimate and authorised reform or transformative efforts.[20]

The author sets out to examine the extent to which the rights paradigm has acted to frustrate or weaken transformative efforts aimed at the protection of marginalised and weak land users and occupiers. He examines anti-eviction policies and laws in South Africa, Germany and England on the basis that such laws and policies are, in effect, a direct challenge to the rights paradigm which stresses the sanctity of private property rights and the very limited interests in land which squatters, tenants holding over, and other similar occupiers have.

For the purposes of this book it is not necessary to explore in any great detail van der Walt's thesis as he develops it in his book. What I find most illuminating however is his use of the concept of 'transformative' and 'transformation' as the guiding principle in his thesis.

He explains transformation in the context of changes in land law as follows:

> The central question of this book is whether it is possible to theorise property in the context of social and political transformation that highlights the fundamental tension between protection of established property interests and promotion of socio-economic justice through some form of redistributive politics . . . I contextualise this question within a society committed to large-scale political, social and economic reform away from injustice and inequality, and towards the establishment of a constitutional democracy based on human dignity, equality and justice . . .
>
> Generally speaking, the upshot of recent property theory has been to provide reasons for the argument that property is not absolute and that it can be and is regularly subjected to restrictive regulation based on valid considerations of morality and public interest . . . [B]ut the property analysis I have in mind raises more fundamental issues by asserting that traditional notions of property do not suffice in transformational

20 Ibid., viii.

> contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply cannot do the transformative work that is required. In this perspective, it is not sufficient to demonstrate that property is subject to (regular and often extensive but nonetheless exceptional) public-purpose restrictions; the point is to identify and explain instances where transformation justifies changes that question the very foundations upon which the current distribution of property rests . . .
>
> In a very fundamental sense the transformational setting means that property loses its traditional central position and acquires a marginal character . . . Acknowledging the social origins and nature of property also implies that social justice affects and shapes the property regime; conversely, recognition of the need for social reform implies acceptance of the justification for reform of the property regime . . .[21]

Transformation then refers to changes in land law which have as their avowed and deliberate aim the righting of past social and economic injustices and the creation of a system of land law which is designed to ensure that those formerly maltreated or unfairly discriminated against by the land laws are given at the least an equal opportunity and preferably a favourable position in a new land law regime by the redistribution of rights and opportunities to enable them to better their life chances. Transformational change then can be seen very much as an example of tackling spatial injustice: as confronting 'the production of spatial injustice and the creation of lasting spatial structures of privilege and advantage . . .'[22] In short, it is a way of assessing the justice of a programme of land law reform.

While South Africa is the prime example of such an unequal property regime in Africa, the whole colonial property regime introduced into Africa during the late 19th and early 20th centuries by the various colonial powers was such that it might be reasonable to suppose that, once independence had been regained, states would set about transforming these property regimes so as to redistribute land and property rights to those who had been deprived of them during and as a result of the colonial interlude. So transformation is a highly relevant concept through which to assess the justice of the trajectory of land law reforms in Eastern Africa over the last 50 years.

21 Ibid., 13, 16, 21. Although not mentioned in his book, an early example of a transformation approach to land law reform in South Africa is the Transformation of Certain Rural Areas Act No. 94 of 1998 dealing with land held by the Coloured communities in South Africa. Pienaar, J.M. (2010), 'Lessons from the Cape: Beyond South Africa's Transformation Act', in Godden, L. and Tehan, M. (eds), *Comparative Perspectives on Communal Land and Individual Ownership*, Abingdon, Routledge, 186–212.

22 Soja, op. cit., 3.

2 The traditional approach

I use the term a 'traditional approach' to property in an African context to describe an approach that accepts the colonial origins of the structure of land law in the country concerned and accepts too the colonial and post-colonial external analysis of the 'problems' of land tenure and the solutions to those problems. I suggest that the traditional approach is what Nancy Fraser refers to as the affirmative approach which is the do nothing approach or at best the nonreformist approach: reforms which operate within the existing social framework but leave the underlying injustices, particularly distributional injustices, untouched.

This requires a brief historical excursus.[23] Leaving aside the early origins of the type of colonial land law that applied in British (and I would argue, other European) colonial dependencies, the key development of what may be called a predatory land law was the creation of a land law within the dependency which effectively marginalised the indigenous inhabitants and made it virtually impossible for them to hold on to their land with a secure tenure. This was achieved by, on the one hand, the development of a land law modelled on the land law of the imperial power which applied to freehold land (and its equivalent in other European empires) and, on the other, the vesting of land governed by indigenous law in the colonial government – Crown land in British dependencies – which could be disposed of by the colonial government with minimal formality and less compensation, since the theory behind it was that the colonial government was merely succeeding to the radical title to land of the indigenous rulers and the subjects of those rulers had no security of tenure as they had no recognisable private rights in the land they occupied.

The effect of such a system of land law was to create a dual system of land tenure: recognised property rights for Europeans (and as time went on in the colony, some of the indigenous population and/or some other non-native residents in the dependency – Asians or Lebanese, for example) and a status which in English legal terms amounted at best to a tenancy at will of the Crown, and at worst, a status not much better than a bare licensee whose squatting on 'vacant land' was barely tolerated.

Looking at the table in the Appendix, we can see that this was exactly the position adopted in Mozambique by the Portuguese authorities by the law of 1901, in Uganda (as the British illustration) by the Crown Land Ordinance of 1903, in Rwanda by the application in 1927 of the 1886 Belgian law applicable to the Congo (Belgium was the mandatory power under the League of Nations and assumed the administration of Rwanda in 1919). Although the

23 For a fuller discussion of my position on this, McAuslan, P. (2007) 'Land Law and the Making of the British Empire', in Cooke, E. (ed.) *Modern Studies in Property Law*, Vol. 4, Oxford, Hart Publishing, 239–262.

basic land law applicable in Tanganyika, also a mandated territory, by an amendment to the Lands Ordinance in 1928 purported to give Africans better rights in the land they occupied than e.g. their confrères in Kenya and Uganda, in practice the courts held that they too only had permissive occupation of their land.[24]

Thus at independence, states succeeded to the position of the colonial government: they became the allodial owners of the land. There were some variations on this – land which was privately owned remained so – but the essential point was that land on which the African citizens of the state lived and farmed became public land (Uganda, Tanganyika) or trust land (Kenya) or vacant land (Rwanda, Mozambique) or some such term which had the effect of vesting such land in the state or the President or sometimes in 'the people' but with the usage administered on their behalf by the government.

If this is one element of the traditional approach to property, the other element is the broad and continued acceptance of an external – in effect an ex-colonial – analysis and set of recommendations on the 'problem' of customary tenure – the tenure of the majority of the population in all countries under review. I would claim that this too goes back to colonial times. In the 1950s as colonialism began to wind down, the decision was taken to make a deliberate attempt to privatise and individualise land tenure, principally in African dependencies.

The best-known example of this policy comes from Kenya and its programme of land adjudication and registration which commenced in the mid 1950s but it is often forgotten that the policy impetus for this was the report of the East Africa Royal Commission in 1955[25] which covered Tanganyika (as it then was) and Uganda as well as Kenya and had a profound influence on British colonial development policy generally. It recommended that:

> Policy concerning the tenure and disposition of land should aim at the individualisation of land ownership and mobility in the transfer of land which, without ignoring existing property rights, will enable access to land for economic use
>
> Land tenure law cannot simply be left to evolve under the impact of modern influences. A lead must be given by governments to meet the requirements of the progressive elements of society by applying a more satisfactory land tenure law.
>
> . . . exclusive individual ownership of land must be registered . . .
>
> Individual rights of land ownership should be confirmed by a process of adjudication and registration . . .

24 James, R.W. (1971) *Land Tenure and Policy in Tanzania*, Dar es Salaam, East African Literature Bureau, 96–97.

25 (1955) Cmd. 9475, London HMSO. The quotations are from pp. 428–429.

The whole chapter in the Report on The Tenure and Disposition of Land of which the above are extracts of the summary of the conclusions of the chapter is couched in this vein. Not only did it influence British Government policy; it clearly too influenced World Bank policy[26] and set in train policies and legal developments to support them which have lasted to this day. Thus the latest World Bank policy document on land – *Land Policies for Growth and Poverty Reduction*[27] – although more tolerant of customary tenure than its 1975 predecessor is still concerned to stress the importance of a land market and formality of rights:

> Property rights to land should be defined in a way that makes them easy to identify and exchange at a cost that is low compared with the value of the underlying land . . .
>
> The key advantage of formal, as compared with informal, property rights is that those holding formal rights can call on the power of the state to enforce their rights. For this to be feasible, the institutions involved need to enjoy legal backing as well as social legitimacy, including accountability to and accessibility by the local population . . .
>
> In many countries of the developing world, insecure tenure rights prevent large parts of the population from realizing the economic and noneconomic benefits, such as greater investment incentives, transferability of land, improved credit market access, more sustainable management of resources, and independence from discretionary interference from bureaucrats, that are normally associated with secure property rights to land . . .[28]

In sum then, a traditional approach to land law and land law reform in Eastern Africa is one that adopts and continues the colonial approach of vesting land in the state, maintains a dual system of land tenure and at the same time adopts an overall policy perspective of moving towards a land market based on registered title to land which implies or as we will see, in some cases expressly, provides for the disappearance of customary tenure and, perhaps most important, makes no or little effort to address the inequalities and

26 The two World Bank report, *The Economic Development of Tanganyika* (1961) and *The Economic Development of Uganda* (1962) (such reports were a *rite de passage* of newly independent states in the 1960s) both referred approvingly to the report and recommended that individualisation of land tenure along the lines recommended in the report be adopted in both countries. See too the immensely influential World Bank *Land Reform Policy Paper* (1975), Washington D.C., which argued for the replacement of customary tenure with individualisation of land tenure on the basis of modern statute law (discussed below).

27 Deininger, K. (2003), Washington D.C., a co-publication of the World Bank and Oxford University Press.

28 Ibid., xxii, xxii, xxv.

injustices of the land tenure system inherited at independence and indeed does equally little to prevent its continuance and worsening thereafter.

Adopting a transformation/traditional approach, an implicit assumption is being made that changes in land laws over the 50-year period which is the subject of this book have been concerned with and should therefore be judged by reference to issues of land rights, perhaps rather narrowly defined: who has them; who should have them; who manages them; how are disputes resolved? But it is most important not to lose sight of the fundamental point that land reform – changes in the rules about land rights brought about by legislation and administration which is the focus of this book – are highly political issues and the driving force behind reform may not be, as might be being urged by e.g. the World Bank, improving security of tenure, increasing agricultural productivity or creating land markets but internal political pressures, so the measure of what kind of land law reform is introduced *and is then implemented* should be judged not so much by abstract concepts of transformation or tradition as by the reality of national politics. If national politics dictates transformation, there will be transformation; if it dictates the status quo dressed up as reform, then tradition will prevail. These matters will be taken up again in the concluding chapter of this book but they should be borne in mind throughout the book.[29]

In turning now to a more detailed overview of the different countries included in this survey, one salient point must be made at the outset. What we will find is that in several cases, there is a mixture of the transformational and traditional; in some cases both approaches are pursued in tandem; in others, first one then the other is pursued. An obvious question to which this book will offer some preliminary answers is what appears to have motivated the changes of policy in different countries: can we see a coherent thread of external pressures pushing states in a particular direction; or did states make changes of their own volition once convinced that existing policies needed to change?

Even allowing for possible gaps in the table, one very striking difference between Kenya, Tanzania, Uganda and Zanzibar (hereafter collectively referred to as KTUZ) and the other countries under review is the considerable amount of detailed land laws with which these four countries entered independence compared to the other countries. I shall consider the land law base of the KTUZ countries and the changes they initially made first.

29 Manji. A. (2006) *The Politics of Land Reform in Africa*, London, Zed Books; Boone, C. (2007) 'Property and Constitutional Order: Land Tenure Reform and the Future of the African State', 106 *African Affairs,* 557–586.

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Part I

The position at independence

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Chapter 1

A survey of the land laws

1.1 Kenya[1]

Land in Kenya always had a very high profile during colonial times and this was reflected in the land laws and the clear division between African-occupied land and predominantly British-settler-owned land.[2] The colonial position is well summarised by Migot-Adholla[3] et al.:

> Under colonial rule a dual system of tenure was instituted in which white settlers and private corporations were granted freehold titles or leaseholds in accordance with the provisions of the Land Titles Act 1908 later amended to provide for registration under the Torrens system (Registration of Titles Act 1919).[4] During this period, most African areas were considered Native Trust Reserves, in which traditional tenure systems remained intact. As a strategy of political control, colonial administrators designated some local notables and 'chiefs' or installed certain marginal persons to the position, creating customary authorities with jurisdiction over almost all local matters except criminal justice . . .

1 Berman, B. (1990) *Control and Crisis in Colonial Kenya: The Dialectics of Domination*, Oxford, James Currey; Parsons, T.H. (2010) *The Rule of Empires: Those Who Built Them, Those Who Endured Them and Why They Always Fall*, Oxford, Oxford University Press, chapter 6: 'British Kenya: The Short Life of the New Imperialism'.

2 McAuslan, P. (1967) 'Control of Land and Agricultural Development in Kenya and Tanzania', in Sawyerr, G.F.A. (ed.) *East African Law and Social Change*, Contemporary African Monographs Series No. 6, Nairobi, East African Institute of Social and Cultural Affairs; Ghai, Y.P. and McAuslan, P. (1970) *Public Law and Political Change in Kenya*, Nairobi, Oxford University Press, chapters 1, 3. Okoth-Ogendo, H.W.O. (1991) *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, Nairobi, ACTS Press.

3 Migot-Adholla, S.E., Place, F. and Oluoch-Kosura, W. (1993) 'Security of Tenure and Land Productivity in Kenya', in Bruce, J.W. and Migot-Adholla, S.E. (eds) *Searching for Land Tenure Security in Africa*, Dubuque, Kendall/Hunt Publishing Co, chapter 6, 119–140, 123.

4 This sentence is not strictly accurate. The Land Titles Act 1908 remained in being and applied only at the coast. The Ordinance of 1919 introduced the Torrens system into Kenya and titles outside the old Protectorate could be transferred and re-registered under that law. Both these laws were replaced by the Land Registration Act 2012.

The late 1950s saw a major policy initiative – the Swynnerton Plan[5] – to begin the process of creating individual registered titles for Africans out of customary tenure in Kenya and this necessitated a plethora of laws being passed which culminated in the Registered Land Ordinance in 1962 which has, since that date, been the foundation of the statutory land law of Kenya. While the whole exercise has over the years been the subject of considerable adverse criticism, discussed in more detail below, it would seem at first sight that it could be categorised as a transformational legal reform, aiming to sweep away the dual and unfair system of land law and replace it with a unified system of land law applicable to all persons alike in Kenya and as a part of this process, in the immediate aftermath of independence, sweep away too the legal reservation of certain land in Kenya for Europeans only. With the advantage of hindsight, this analysis may be challenged. Looking back from the vantage point of 2008, three authors[6] summarise the position in Kenya on the basis of the decisions and arrangements made at independence:

> Kenya has retained, virtually unaltered, the colonial legal framework and ordinances for land administration, for the protection of private rights and the regulation of access to land. This has strengthened the position of the state over the control of land by making it the 'main landlord'. It has also served to entrench private ownership of land and in the process has ratified the titles of colonial settlers as absolute owners of expropriated land. This has sealed the fate of the landless and squatters, thereby intensifying the tenure insecurity of the poor. The current legislative framework reaffirms the history of land dispossession and land grabbing and ties this into ethnic factors.

These issues will be discussed in more detail later.

1.2 Tanzania[7]

Tanganyika entered independence with the same dual system of land law: statutory rights of occupancy[8] for settlers, a very small amount of freehold land which was a hold-over from the German period of colonialism and

5 *A Plan to Intensify the Development of African Agriculture in Kenya*, compiled by R.J.M. Swynnerton (1954) Nairobi, Colony and Protectorate of Kenya.

6 Karuti, K., Lumumba, O. and Amanor, K.S. (2008) 'The Struggle for Sustainable Land Management and Democratic Development in Kenya: A History of Greed and Grievances', in Amanor, K.S. and Moyo, S. (eds) *Land & Sustainable Development in Africa*, London, Zed Books, 100–126.

7 Iliffe, J. (1979) *A Modern History of Tanganyika*, Cambridge, Cambridge University Press.

8 For the genesis of rights of occupancy, James, R.W. (1971) *Land Tenure and Policy in Tanzania*, Dar es Salaam, East Africa Literature Bureau, note 3; 93–95.

deemed rights of occupancy for African occupiers of land under customary tenure which, as noted above, were only 'permissible' statutory interests in land. Tanganyika or Tanzania as it became in 1964 after the union with Zanzibar too determined on land reforms which again at first sight might appear to be thought to be transformational but in a very different form to Kenya's. First, the very small amount of freehold tenure was abolished in 1962[9] with all freeholds converted to 99-year government leases. Second, over the course of the first decade and a half of independence Tanzania developed its *ujamaa* or villagisation policies with laws to match.

Kenya's policies of individualising land tenure were formulated in the last era of colonialism and continued into the era of independence. Perhaps not so well known is that Tanzania's policies of villagisation – bringing peasants into village settlements so as to provide better social, health and educational facilities – was also based on colonial policies.[10] Just when Kenya was formulating the Swynnerton Plan in 1954, Tanganyika was beginning supervised settlement schemes with close supervision of settlers[11] under the Tanganyika Agricultural Corporation and these schemes were rapidly extended after independence. A Village Settlement Agency (VSA) was set up in 1963 to take over some existing schemes. The VSA also piloted some settlements for a villagisation programme. The first Five Year Plan 'proposed to settle almost half a million people on 70 schemes consisting (sic) over £12 million . . . by 1969'.[12]

Ujamaa villages were an extension of these early projects and had their own legal framework via the Land Tenure (Village Settlements) Act 1965. This Act substituted statutory rights for customary tenure: the village would obtain a right of occupancy known as a settlement right from the Commissioner of Lands and the individual villager would ultimately obtain a derivative right held subject to conditions which emphasised that community interests in the land were not lost when an individual interest was created. But just as

9 I recall that at the time this decision was regarded by some in the expatriate community as a grave breach of undertakings given before independence as to the sanctity of property rights. But freehold titles amounted to about 1% of the land in the country and there was no Bill of Rights in the Independence Constitution of 1961 guaranteeing private property rights.

10 The following is based on Cliffe, L. and Cunningham, L. (1973) 'Ideology, Organisation and the Settlement Experience in Tanzania', in Cliffe, L. and Saul, J.S. (eds) *Socialism in Tanzania Vol.2: Policies*, Dar es Salaam, East African Publishing House, 131–140. See too Fimbo, G.M. (1974) 'Land, Law and Socialism in Tanzania', in Ruhumbika, G. (ed.) *Towards Ujamaa: twenty years of tanu leadership*, Dar es Salaam, East African Literature Bureau, 230–274.

11 Interestingly, the policy of close supervision was known as the transformation approach and this policy too was taken over by the independent government. The World Bank was a strong proponent and supporter of settlements schemes in the early years of Tanzania's independence.

12 Cliffe and Cunningham, op. cit., 132.

in Kenya, so here, the aim was to substitute statutory tenure for customary tenure. The underlying message of the East Africa Royal Commission (EARC) and the World Bank's mission report of 1961[13] seems to have been taken on board by the independent government – that there was no long-term future for customary tenure in a modern African state. Further evidence for this may be derived from the Nyarubanja Tenure (Enfranchisement) Act of 1965 which enfranchised *nyarubanja* tenants but in such a form that converted their customary tenure into a statutory tenure, subject to conditions, under the Act.[14] So Tanzania too, as will be discussed in more detail below, adopted and continued colonial policies and for the most part colonial land laws into the era of independence.

1.3 Zanzibar[15]

It would be tempting to discuss the complex land laws and practices of pre-independence Zanzibar in some detail if only because one suspects that very little is known about them even in Tanzania and also (and perhaps more importantly) because the inequities of the land laws were a major trigger for the Revolution which overthrew the Sultan of Zanzibar and the Independence Constitution in January 1964, one month after independence.[16] Instead a useful summary of the immediate pre-independence position by Jones[17] will have to suffice:

> A debate over the merits of the various types of land tenures intensified in the 1950s and early 1960s. As we have seen, the land laws made distinctions between Africans, Arabs and Indians. These group identity distinctions were carried over into the realm of debates about the merits

13 World Bank, (1961), op. cit., especially 90–100.

14 For details, see James, op. cit., 70–90.

15 Lofchie, M.F. (1965) *Zanzibar: Background to Revolution*, Oxford, Oxford University Press; Bissell, W.C. (2011) *Urban Design, Chaos, and Colonial Power in Zanzibar*, Bloomington, Indiana University Press.

16 Törhönen, M. (1998) *A thousand and one nights of land tenure: The past, present and future of land tenure in Zanzibar*, London, Royal Institute of Chartered Surveyors, 25. The book contains a very detailed discussion of the pre-independence land law drawing a good deal on Middleton, J. (1961) *Land Tenure in Zanzibar*, London, HMSO.

17 Jones, C. (1996) 'The Evolution of Zanzibar Land Law from Colonial Times to the Present', in Debusmann, R. and Arnold, S. (eds) *Land Law and Ownership in Africa*, Bayreuth, Bayreuth African Studies, 131–183. This chapter is a detailed study both of the customary tenure and of the colonial legislation and main judicial decisions of the courts on land law from the epic case of *The Secretary of State for Foreign Affairs v Charlesworth Pilling and Co* [1901] AC 373, onward. Although this case arose from a dispute about compensation for land acquisition for the Kenya/Uganda railway in the coastal strip of the East African Protectorate (later Kenya), it concerned the relationship between Zanzibar land law which applied in the coastal strip which was part of the Sultan of Zanzibar's domains and English land law.

> of different forms of land tenure. The African land tenure was characterised as communal ownership and anti-progressive, the Arab tenure as individualised and more progressive. Even the disadvantage of fragmentation under Islamic inheritance law (e.g. multiple heirs of the extended family ending up laying claim to one hectare) could be overcome by sale of the land, thus keeping the land market for monied social groups fluid although it could be administered as one agricultural unit by one family member in the name of the others. The debates were sharpened by economic hardships.
>
> Rice, a staple food, became acutely short and there was a rush back to the land for survival. The actual cultivators of the land were evicted by once absentee land owners. They were labelled 'squatters'. Many joined the Afro-Shirazi Party in 1957. The myth of 'squatters' had won out over early efforts of British colonial officials at the end of the last century to understand African land tenure. But the 'squatters' got their nemesis in the form of the 1964 Revolution in Zanzibar.[18]

Zanzibar's post-independence land law was truly transformational as one would expect from a government that come to power through a revolution which overthrew the long-standing Arab hegemony of the island state.[19] The Confiscation of Immoveable Properties Decree 1964 was the basic legal document that heralded 'land reform measures [which] swept away centuries of repression where most of the real farmers of the land were legally regarded as squatters on the landlords' property and thus enjoyed no security'. All land was to be public property and a land reform office was established to oversee land redistribution. By 1973, over 24,000 acres had been distributed to poor families 'who had thus for the first time, been able to gain access to land'.[20] Jones summarises the land reform:

> The purpose of the confiscation decree was to amalgamate and redistribute immovable properties . . . The President on advice of the Revolutionary Council was allowed to distribute land only for agricultural purposes evidenced by an 'instrument' setting out the terms of the grant. The general terms of all grants were life tenure for the grantee and spouse, with the right of inheritance upon their deaths by those direct descendants of the grantee . . . Covenants – reminiscent of the British agricultural officers under the Protectorate on making good husbandry a condition in their written leases for continued tenancy – attached to the

18 Ibid., 154–155.

19 Lofchie, op. cit.; Field-Marshal John Okello (1967) *Revolution in Zanzibar*, Nairobi, East African Publishing House; Mapuri, O.R. (1996) *Zanzibar, The 1964 Revolution: Achievements and Prospects*, Dar es Salaam, Tema Publishers Co, 60, Appendix 1 Tables 10 and 11.

20 Mapuri, ibid., 60–61.

> grant, e.g. good management and husbandry . . . The inclusion of the provision that the land distributed should be used for agricultural purposes made the land a shamba, thus preserving the control of the grantee or Government over trees planted on the land . . .
>
> The number of families estimated to have been involved in the agricultural lands distribution is about 22,000. In terms of land, only about 14% of agricultural land was involved.[21]

Törhönen provides a little more detail of the programme:

> Land was allocated to people for free and neither rents nor taxes had to be paid . . . each grantee received a title deed and 500 shillings in a public ceremony . . . The main peasant beneficiaries were Hadimus and mainland immigrants of the first half of the century, groups that had formed the major part of supporters of the Afro Shirazi Party. Many of the grant receivers were the same that had been share-cropping, i.e. squatting the parcel in question earlier. In other words . . . to some degree the squatters received grants for their earlier cultivations . . .
>
> By 1972 all confiscated land, except in areas which were very infertile, had been allocated. After that grants have been allocated only in very limited numbers, the last new Three Acre Plot being given in about 1976 . . . [I]n 1974 the government had decided not to distribute any more land for a permanent occupancy, but just for cultivating food crops and some cash crops. They excluded clove and coconut trees, since those indicated permanence. People were encouraged to return to the squatting system, i.e. to cultivate temporary crops under permanent trees that belonged to somebody else. Ten years after the revolution people were encouraged to return to a system similar to pre-revolution time due to the concern of the declining food production. The revolutionary land reform could be said to have finished then. The players of the land tenure game had changed a bit but the game was still much the same.[22]

So while the impression was given of a major land redistribution programme, in fact, in terms of land redistributed, the programme was very modest. Wakf (a permanent religious plot of land under Islamic law, can also be called waqf) land was left untouched. The rice valleys were not distributed. Grantees obtained three acre plots. What was significant however was that there was clearly a policy of substituting statutory tenure for customary tenure. As will be discussed later, this land reform did not solve the problems of poverty amongst the African population.

21 Jones, op. cit., 157–158.
22 Törhönen, op. cit., 35, 37.

1.4 Uganda[23]

Uganda represents a good example of a country accepting the colonial legal arrangements of land tenure and continuing them without any significant changes when independence was gained in October 1962. Only one major change was made to the colonial position. Despite strong criticism of the EARC's recommendations, the Ugandan colonial administration had embraced the recommendations:

> It convinced three districts (Kigezi, Ankole and Bugisu) that demarcation and registration of individual titles would give customary landowners secure titles and would eliminate disputes over ownership and land boundaries. These districts were the most highly populated districts in the country and they happened to have the most land disputes. Pilot schemes were set up in the three districts to adjudicate individual ownership of parcels of land in accordance with customary law. Once the land was surveyed and the boundaries appropriately marked, the adjudicated owner could then apply to the Director of Lands and Survey to be registered as proprietor of an estate in freehold in respect of the land, and would be entitled to be issued a certificate of title under the *Registration of Titles Act*. Legally, customary land law ceased to apply to the land, instead statutory and common law applied just like any other freehold land. After Uganda became an independent state . . . the policy advocated by the EARC almost came to a standstill.[24]

Earlier in 1962, the Public Lands Ordinance was enacted in March (at independence it was renamed the Public Lands Act) which embodied the recommendations of the 1961 Constitutional Conference. The Act repealed the Crown Lands Ordinance of 1903 and set up a Uganda Lands Commission (this was in effect re-established by article 118 of the Independence Constitution) which was to hold and manage any land vested in it. Crown land which was renamed public land was vested in the Uganda Lands Commission. Land Boards were established for any Federal State and any district which had the same functions with respect to land in the state or district,

23 Thompson, G. (2003) *Governing Uganda: British Colonial Rule and its Legacy*, Kampala, Fountain Press; Chrétien, J.-P. (2003) *The Great Lakes of Africa: Two Thousand Years of History*, New York, Zone Books.

24 Mugambwa, J. (2007) 'A Comparative Analysis of Land Tenure Law Reform in Uganda and Papua New Guinea', 11 *Journal of South Pacific Law*, 39, 42.

such functions to be exercised for the benefit of the people of the area. The Act to a large extent repeated the provisions of the Crown Lands Ordinance, the effect of which is well summarised by Mugambwa:

> Although the post-colonial government rejected the recommendations of the EARC, it did not formulate any formal alternative policy to promote customary land tenure. What was formally Crown land after independence was renamed public land. From a legal point of view, the status of customary land tenure remained the same. Although under the *Public Land Act* 1962, indigenous Ugandans had a right to occupy any unalienated public land without prior consent, s 22(1) of this Act provided that the relevant government body 'shall not be prevented from making a grant in freehold or leasehold of public land . . . merely by reason of the fact that such land or any part thereof is occupied by persons holding under customary tenure'.[25]

This meant that most Ugandans who occupied land under customary tenure continued to be in effect tenants-at-will of the state. Uganda had before independence a very complex system of customary land tenure which was a mixture of statute law and customary law[26] and it was a clear outcome of the negotiations leading up to independence that this system was to remain in being. It was only after independence that changes began to be made to the system. These have been described by Musisi as follows:

> The early years of post-independent Uganda from 1962 saw very little governmental action over the land issue. This was understandable in so far as the impact of any new system would be felt more in Buganda, where private land ownership was most concentrated yet conditions were quite volatile in the political field as a result of its entrenched rights under the Independence Constitution. In the meantime, however, the hostile attitude against the peasant was intensifying. In 1964, the Buganda Planning Commission was blaming the peasant for the underdevelopment of the country. It declared the barrier to economic progress to be the land system generally and the Kibanja tenancy system in particular. This was no doubt the view of those who were registered proprietors of land wanting to push out the peasant and turn him into a wage labourer on their lands.
>
> To be sure, this hostility was part of a contradiction which faced the policymakers. On the one hand there was the need to see 'progress' by dispossessing the peasants and in turn encouraging more production for the market away from subsistence. But, on the other hand,

25 Ibid., 43.

26 The whole system as it was at independence is well summarised by Morris, H.F. and Read, J.S. (1966) *Uganda: The Development of its Laws and Constitution*, London, Stevens and Sons, chapter 15.

the production which was being agitated for, directed as it was towards interests outside Uganda, needed to be profitable. This profitability was based upon the payment of low prices to small peasants who lived from the land.

This contradiction was resolved in a negative way for the peasant. From the late 1960s, government policy was clearly to advance the capitalist farmer and to attract European and Asian capital as well as managerial skill towards agriculture. The 1966 'revolution' which abolished the Independence Constitution was the first official step towards concretizing this policy in the post-independent era. Under Article 108(5)(b) of the 1967 Constitution, ownership of public lands and powers of control over them were vested in the Uganda Land Commission. In 1969, the Public Lands Act (No. 13 of 1969) was passed whereupon all former official estates in mailo tenure were made freehold. Under this law, people could acquire and register up to 500 acres of land (or more with the consent of the minister).

This move benefitted the better-off Ugandans, who, with credit from foreign donor agencies, could evict peasants and obtain the more fertile and easily accessible lands for their ranches and commercial farming. Therefore, although at the official policy level this step was seen as being beneficial to the country in so far as it was intended to develop agriculture, only a minute portion of the population was likely to benefit. The majority, that is, the peasants, were left out.

This policy of supporting or encouraging a 'largescale' farmer, which had been pursued since the 1940s, continued even during the Amin regime. In 1975, a new law, the Land Reform Decree, was passed. From a populist point of view, this law was designed, inter alia, to end and prevent unreasonable areas of land being left undeveloped by their owners or occupiers, especially individuals without justification for so doing, as well as to facilitate, promote, and maintain better development and use of land and the national resources for the economic and social well-being of the people of Uganda.

Thus, under the decree, all land in Uganda became public land, with the Public Lands Commission as the administrative authority. All mailo lands, freeholds, and any absolute ownership of land hitherto existing were abolished. Such tenures were converted into leaseholds granted by the commission without payment of any premium. It further abolished the payment of busuulu and envujjo (these are Baganda words used to describe forms of land tenure in Buganda with reference to the rights of landlords and tenants. The words were used in a colonial law enacted in 1927 to try and settle relations between landlords and tenants in Buganda, part of Uganda. The law has been described as the first rent restriction law in tropical Africa), which had been modified by the 1928 law. Nobody henceforth had any right to transfer customary title on any public land. Only improvements could be transferred. Any occupation of public land

> under customary tenure without the commission's authority was also prohibited. The decree introduced a 'zoning scheme' system where lands in particular localities were not to be used unless they complied with such a scheme. Noncompliance with such requirement rendered the land concerned subject to a 'period of unuse' and it could, therefore, be taken over by others willing to follow the law.
>
> There was nothing progressive about this law despite its alleged abolition of semi-feudal land ownership; it just transferred security from the old owners to new hands. With its prohibition of loans from banks for purposes of buying land or developing it, the new policy made it clear that only those with money could now acquire land or develop it . . .[27]

This analysis is of considerable interest for two reasons. First, it shows that underlying what appeared to be significant constitutional (and unconstitutional) and legal reforms in the first two decades of independence in Uganda, the fundamental land relations within Uganda remained the same: peasant farmers with no security of tenure in their occupation of land but large-scale landowners still given preferential treatment. Second, it shows that despite what appeared to be a radical approach to land tenure – the abolition of land ownership in whatever form it existed up to that point, the Land Reform Decree was based on a statutory form of tenure; customary tenure was 'abolished'. Thus, these reforms cannot be seen as transformative; rather, they are foursquare in the traditional colonial approach.

1.5 Rwanda[28]

Turning now to Rwanda, the position at and after independence can be summarised from a study by Blarel:[29]

> The current land tenure system in Rwanda is the result of the complex interaction between the sets of indigenous rules and the body of written laws. Before the arrival of the Tutsi pastoralists around the 16th century, the tenure system developed by the Hutu agriculturalists was characterised by a collective tenure system (the *ubukonde*) . . . Under this system

27 Musisi, J.S.A. (1982) 'The legal superstructure and agricultural development: Myths and realities in Uganda', in Arntzen, J.W., Ngcongo, L.D. and Turner, S.D. (eds) *Land Policy and Agriculture in Eastern and Southern Africa*, UN University, chapter 11. At the time the author was a lecturer in commercial law in the faculty of law at Makerere University.

28 Chrétien op. cit.; Prunier, G. (1995) *The Rwanda Crisis: History of a Genocide*, Kampala, Fountain Press, chapter 1.

29 Blarel, B. (1993) 'Tenure Security and Agricultural Production under Land Scarcity: The Case of Rwanda', in Bruce and Migot-Adholla, op. cit., chapter 4, 71–95. The research on which that chapter is based was carried out in 1988.

ownership of land was vested in the community . . . and leaders of the clan or lineage acted as trustees . . . Use and alienation rights were distinguished . . .

The land tenure rules gradually imposed by the *batutsi* operated mainly through two distinct systems: *isambu*, applying to agricultural areas and *igikingi*, applying to pastoral areas . . . Under these systems, usufruct rights were no longer entrusted to the community as a whole but were instead allocated individually by the political authority. The new tenure system was predicated largely on the political decision of the Tutsi chief rather than on notions of membership in the kinship group . . . In addition to the discrimination inherent in kinship and political tenure systems, the colonial rule introduced a new law distinguishing between indigenous and nonindigenous land . . . [see table in the Appendix under Rwanda for application of the decree of 1886], [the latter being] land acquired by foreigners, which fell under the jurisdiction of the codified land tenure rules following land registration and was recognised by full ownership rights in the Western sense.

An important decree (July 11 1960) provided that all nonregistered land, under customary or occupancy rights would henceforth become part of the domain of the state, from which the holder's rights could not be expropriated without compensation. The same decree established procedures for the establishment and purchase of customary rights. It also allowed current holders of customary rights to obtain private individual ownership by reclassifying the land on which private exclusive use rights from the indigenous tenure system was held to the codified and legal tenure system by a process of land registration.

The foregoing decrees were ratified after independence by the Rwandan Constitution of 1962. The discrimination between kinship (*bahutu*) and political (*batutsi*) tenure systems was abolished because both the customary *ubukonde* and the clientele system were outlawed . . .[30]

Since independence, the state has intervened little in land matters and only three decrees have been issued. The 1976 decree specifies that for land under customary or occupancy rights, sales may occur only if the seller would retain at least two hectares of land and if prior authorisation from the government is obtained.[31] Two additional decrees (July 23 and

30 'A high level of social tension between landowners and tenants throughout the country at the end of the 1950s caused a system of land clientelism to be legally suppressed and prohibited by a decree at the birth of the first republic.' Andre, C. (2003) 'Custom, Contracts and Cadastres in North West Rwanda', in Benjaminsen, T.A. and Lund, C. (eds) *Securing Land Rights in Africa*, London, Cass, 154.

31 Andre states that the decree prohibited the sale and purchase of land but the regulation was not respected in rural areas 'and as a result, distress land sales have increased at an exponential rate since the beginning of the 1990s . . .', ibid., 154.

> 25 1975) define the rules and procedures for compulsory acquisition by the state and corresponding compensation principles . . .[32]

Rose puts a slightly different slant on post-independence land law. She states:

> After Rwanda's independence from Belgium in 1962, customary land law was increasingly influenced by formal legal enactments at the national level. The Constitution of December 20, 1978 (Article 93) and of June 10, 1991 limited the scope of customary law, in general, by stipulating that a customary law shall only be in force as long as it has not been replaced by a formal law and does not contradict any part of the Constitution.[33]

This is a quite significant difference to Blarel and suggests that at that point – that is pre-1994 – Rwanda was a good example of the traditional approach: moving away from customary tenure and placing emphasis on formal registered tenure and a land market.

Throughout the period from independence to the mid-1990s the land situation in Rwanda was deteriorating with more and more people trying to gain a livelihood from smaller and smaller plots of land[34] and Andre and Platteau draw attention to the connection between the genocide and the crisis over land holdings. The traditional approach apparently had nothing to offer this crisis. As will be discussed later on, the government that took over after the genocide has adopted a vigorous reformative approach to land tenure which has in turn sparked considerable criticism.

1.6 Mozambique[35]

1.6.1 The colonial experience

Moving on now to Mozambique, it might be worth going back a little into this country's colonial past. It may not be fully appreciated that Mozambique had contact with the Portuguese as early as the 16th century as did many of

32 Ibid., 79, 80, 81.

33 Rose, L.L. (2004) 'Women's Land Access in Post-Conflict Rwanda: Bridging the Gap Between Customary Land Law and Pending Land Legislation', 13 *Texas Journal of Women and the Law* 197, 207.

34 Andre, C. and Platteau, J.-P. (1996) 'Land Tenure under Unendurable Stress: Rwanda Caught in the Malthusian Trap', CRED Centre de Recherche en Économie du Développement, Faculté des Sciences économiques et sociales, Facultes Universitaires Notre-Dame de la Paix, Namur.

35 Duffy. J. (1961) *Portuguese Africa*, Cambridge, MA, Harvard University Press.

the Arab-dominated cities and city states on the East Coast of Africa. Mozambique was initially considered by the Portuguese as a source of silver and gold and as a base for trade. In the early years of Portuguese colonialism, there was no significant land settlement. Settlement did not really commence until the mid-17th century on the basis of the *prazo*, a system based on the medieval feudal organisation of Portugal. *Prazos* were very large estates and the owners were in theory responsible for the development of the land and the protection of their inhabitants but many were in practice absentee landlords living in luxury in Goa, Lisbon or Mozambique Island.[36] *Prazos* developed an unenviable reputation as centres[37] for slavery for Africans and conspicuous consumption for Portuguese settlers. Attempts to abolish them in the early 19th century were ignored by the *prazeros*. In 1880, all *prazos* were declared to be the property of the Crown but the comment of Duffy is very significant on the continued operation of the system:

> The head tax, the obligation of the native to work for the proprietor, the commercial monopoly within the borders of the *prazos* all remained intact . . . By these oppressive measures (to be adopted by every other colonial power in Africa) the African was kept in a state of subjugation and exploitation.[38]

Prazos were reformed in 1890 and given a form which they retained until their final abolition by the Salazar regime in the 1930s. They were converted into 25-year concessions that were auctioned off to the highest bidder. The renter had certain obligations to the African residents of the land but many of the basics of the old system were retained and so many of the abuses of *prazos* continued. In the 19th century too, many Portuguese established hundreds of smaller farms and Africans were moved off the best land and resettled on more marginal lands.

At the outset of the 20th century several laws were enacted that on their face appeared to provide Africans with more rights to their occupation of land. By the Law of May 1901, all land which did not constitute private property in accordance with Portuguese law was state domain and available to the African population. A Decree of 1918 reserved certain areas for exclusive use of Africans. In 1955 the Native Statute for Angola and Mozambique, a law enacted in Portugal provided by article 38: 'Natives who live in tribal organisations are guaranteed, in conjunction, the use and development, in the traditional manner, of lands necessary for their villages, their crops and for the pasture of their cattle.'

36 Ibid., 82–85, 307–310.
37 Ibid., 82–89.
38 Ibid., 86.

Tanner[39] summarises the position on the ground which gave the lie to the effectiveness of the laws enacted in the first half of the 20th century:

> By the mid-20th century, the agrarian economy consisted of several very large plantations, hundreds of small commercial farms in private, mainly Portuguese hands, a large network of small and large trading enterprises and thousands of indigenous family farms often but not always on more marginal lands.
>
> In this way small Mozambican farms, settlers and large plantations were all tied into the colonial and international economy . . . Nor was it simply a case of foreigners gaining at the expense of Mozambicans. Some indigenous producers and even wage workers also gained, while local leaders and leading families were able to exploit the economic and political opportunities on offer in a way that is still evident today . . .
>
> {Under the Decree 43 894 of 1961: Regulation Regarding the Occupation and Grant of Land in the Overseas Provinces} land was classified into three classes; essentially urban land, around the main cities and towns; land around villages where local people maintained their systems of production; and lastly land considered by the colonial state as 'free' and available for handing out to new investors (i.e. the rest of the country) . . . Most 'free' areas were 'occupied' through long established cultural and historical ties and apparently 'empty' spaces were often essential for the overall production system practised . . .
>
> Colonial laws however gave the State the legal justification to allocate large areas to colonists and plantation enterprises. The interests of the State and its investors often overrode those of 'the population' . . . and although the colonial government assisted with the removal of local people to new areas and offered token compensation, the loss of key river valley resources resulted in dramatic shifts in indigenous production systems . . .

1.6.2 Independence 1975–1992

Independence was achieved after an armed struggle in 1975 in which:

> thousands of rural people joined the Armed Struggle . . . simply to oust the Portuguese and get their land back. Independence led to a socialist agrarian model however and many were disappointed. Instead of being returned to their original owners, colonial plantations were nationalised

39 Tanner, C. (2002) *Law-Making in an African Context: The 1997 Mozambican Land Law*, FAO Legal Papers Online No. 26, Rome, FAO, 4, 5.

> [in 1975], expanded in some cases and managed by the State in the name of the people. Other land was subject to 'villagisation' and co-operative programmes with roots in the Tanzanian experience.[40]

The Land Law which provided for this was enacted by the People's Assembly in 1979. At the time it was hailed as a revolutionary land law and in the terms used in this book was very much a transformative law. A fulsome explanation of it was provided by Albie Sachs, then working in Mozambique:

> In many countries that have been independent for decades we do not witness the transfer of land from the colonialists to the hands of the people. In most cases reforms occur that tend to adapt colonial law and customary law to the new situation in which a national bourgeoisie replaces a colonial bourgeoisie. For us the recovery of the land is integral to the process of the Mozambique revolution. Because of this it can never signify the mere substitution of names on property titles nor the return to forms of appropriation and usage peculiar to feudal tradition . . .
>
> In essence the principles of the *Land Law* . . . synthesized the experience of generations of poor and dispossessed Mozambicans in their struggle to regain the land. If the object of land law is normally to legitimate possession by conquest, the new Mozambican law set out to legitimate repossession by revolution . . .
>
> The argument of imposed law versus traditional law must be regarded as a false one in the light of revolutionary law. The basic themes of the new *Land Law* came from the peasantry themselves, at a time of intense struggle against both foreign domination and indigenous power structures. The *Land Law* emphasises that the people do not simply inherit law, or submit to law imposed on them from the outside. They create law, and become themselves the instruments for the implementation of the new norms which they have evolved . . .
>
> Lawyers need by no means be silent amid the roar of revolution. On the contrary, they have an important role to fulfil, not as opponents of change but as activists for progress, helping to clarify and apply the new norms in a way which facilitates the desired transformations, that eliminates arbitrariness and that defines in clear and understandable terms the rights and duties of citizens . . .[41]

40 Ibid., 6.

41 Sachs, A. and Welch, G.H. (1990) *Liberating the Law: Creating Popular Justice in Mozambique*, London, Zed Books, 31, 37, 44, 45. This chapter was first given as a paper in the Institute of African Studies, Harvard University in 1980.

Alas, the reality did not live up to the expectations. Tanner charts the reality:

> The State . . . proved incapable of managing the huge new enterprises and by the mid-1980s most were technically bankrupt . . . Peasant farmers also rejected the new villagisation model and adapted to the new situation as best they could . . .
>
> The State Farm policy that required the removal of local people who had re-occupied the *colonatos* immediately after independence had also fuelled antagonism towards the new regime in Maputo. These and other tensions [political differences within FRELIMO] were exploited by RENAMO with backing from South Africa and the Smith regime in Rhodesia leading to a long and bitter civil war that destroyed much of the rural economy . . .

The civil war finally ended in October 1992 with the General Peace Agreement in Rome which gave the rural economy a chance to recover and respond to the market liberalisation and other reforms that FRELIMO had in fact began to introduce in the late 1980s when a limited privatisation of the agricultural sector had been permitted. Arguably then Mozambique had come full circle in the first 17 years of independence. A grossly unequal form of land tenure and use created by the Portuguese was transformed in theory by a law which aimed to create a more equitable system via state ownership of land and the establishment of village co-operatives. There were however still elements of the old system in practice in the creation of large state farms in place of large private plantations where local people were again forced to give up their land rights and become workers for the new *Empresas*. As with Tanzania, then, transformation in the form of villagisation was tempered with path dependency – the continuation of the colonial past of the use of force to implement the new policies.

1.7 Somaliland[42]

Somaliland was a British protectorate between 1887 and 1960. It was granted its independence by Britain on 26 June 1960. Five days later, it voted to merge its independence with the newly created Somali Republic which came

42 Lewis. I. (2008) *Understanding Somalia and Somaliland*, London, Hurst and Company; Bradbury, M. (2008) *Becoming Somaliland*, Bloomington, Indiana University Press/ Progressio; Battera, F. (2004) 'State- and Democracy-Building in Sub-Saharan Africa: The Case of Somaliland – A Comparative Perspective', 4(1) *Global Jurist Frontiers* 1–21; Poore, B. (2009) 'Somaliland: Shackled to a Failed State', *Stanford Journal of International Law*, 117–150, a thorough analysis of the case for international recognition (one of a plethora of articles in US law journals arguing the case for recognition of Somaliland as a state); Caplin, J. (2009)

into being on 1 July 1960.[43] After a promising beginning, the Republic of Somalia succumbed to a military coup in 1969. After an increasingly brutal rule which ultimately degenerated into a civil war, the president Siad Barre was overthrown in 1991. The people in the former Somaliland in North-West Somalia had been amongst the leaders of the civil war against Barre and had suffered accordingly. Hargeisa, the largest town in the North-West was bombed by Barre's air force based in Hargeisa and shelled by his army. Enormous destruction and loss of life took place. Over 50,000 people lost their lives; countless others were injured and lost their homes and all their possessions.

After Barre fled Mogadishu, in early 1991, the civil war between different groups in Somalia continued. In the North-West, however, in May, 1991, at a conference of the Somaliland Communities at Burao, they reasserted their independence with effect from 18 May.[44] From that time onwards, Somaliland has regarded itself as an independent state and the citizens of that state have set about the process of rebuilding their state and nation. Without any legal recognition from any other state in the world community, and relying overwhelmingly on their own resources, on remittances from the diaspora of Somalilanders which now amount of some $450 million a year and increasingly on aid from various UN agencies, the EU and other donors, they have established a viable, democratic and reasonably well-run state.

It has not been easy. For the first few years, warlords both within Somaliland and from outside were a constant threat. But the government persevered. Gunmen have been disarmed. Now only the police in Hargeisa carry weapons. Peace and security have been restored more or less throughout the land. Only a border dispute with Puntland[45] – another unrecognized breakaway state in

'Failing the State: Recognizing Somaliland', 30 *Harvard International Review*, 9–10, a useful overview of the case for recognition; Kaplan, S. (2008) 'The Remarkable Story of Somaliland', 19 *Journal of Democracy*, 143–157, an enthusiastic encomium for Somaliland. It is not easy to determine how much different potential audiences are likely to know or are prepared to know about Somaliland, i.e. whether persons are willing to accept the *fact* that there is a separate entity in the North-West of the geographical area known as Somalia which has been functioning as a separate *political* entity for 20 years having all the usual manifestations of a state – in many respects indeed to a greater extent than many entities in Africa recognised by the African Union and the international community as states, Somalia being an obvious case in point. The summary that follows assumes some knowledge and a not entirely closed mind on the subject.

43 Cotran, E. (1963) 'Legal Problems Arising out of the Formation of the Somali Republic', 12 *International and Comparative Law Quarterly*, 1010–1026.

44 The referendum that confirmed this declaration produced a larger majority for independence than that held in East Timor. It was declared by international observers (including some unofficial ones from the USA) to be free and fair.

45 Puntland regards itself as a constituent state within a Federal Somalia. However, it has recently fallen out with the Transitional Federal Government (TFG).

the North-East of Somalia – threatens the peace.[46] As one statistic of the astonishing transformation which has been brought about, 14 years ago at the height of the civil war and general lawlessness, Hargeisa shrank to around 10,000 inhabitants.[47] Today it has a population of over half a million and while there is much poverty, there is little crime in the city.

A Constitution has been adopted which provides for a President, a two-chamber Parliament (the second chamber being an appointed house of traditional elders), a Bill of Rights and an independent judiciary. The first President was Mohamed Egal, the leader of Somaliland at independence in 1960. When he died in 2002, it was widely assumed both within and outwith Somaliland that conflict would break out over the succession. It did not. By the evening of the day of Egal's death, Somaliland had a new President; the Vice-President was elevated to the post. Presidential elections were held the following year and when the result was disputed by the opposition who had lost by a mere 80 votes in a nation-wide poll, the matter was resolved peaceably by the elders. A much-delayed Presidential election took place in June 2011 with the opposition winning.[48] The President wished his successor good luck and retired from office. Local governments have been re-established, local elections held, services are beginning to be provided to the people and local taxes collected. Disputes are for the most part being settled peaceably although there are still grave problems of conflict between pastoralists and those who have grabbed communal pastoral land and enclosed it, claiming private ownership.

Colonial Somaliland was part of the common law system. When Somaliland joined up with Somalia, a major exercise in 'legal integration' commenced managed by an Italian team.[49] It would not be entirely unfair to say that the integration consisted in large part of the application of Italianate codes to Somaliland. The Penal Code for instance was drafted by an Italian lawyer in the early 1960s and was applied throughout independent Somalia: it was and

46 Of late however there have been some kidnappings and killings within Somaliland almost certainly orchestrated by al-Shaabab, an Islamic group fighting the TFG in Somalia. Many of the leaders of al-Shaabab come from Somaliland.

47 I was shown photographs of Hargeisa as it was in 1991. Barely a single house had a roof on it. All have now been rebuilt.

48 During the election campaign, I was in Djibouti with a team of Somalis working on a Mogadishu City Law. I came into the meeting room when Djibouti television was showing pictures of a boisterous election procession winding its way through Hargeisa. The Somalis from Mogadishu watching TV were absolutely gobsmacked by the sight of a peaceful contested election taking place in Somalia (as they still regard it). They themselves were in danger of their lives from al-Shabaab if it became known in Mogadishu that they had been working on secular laws with people like myself. The team leader banned a photographer from taking any photos of our meetings.

49 Contini, P. (1969) *The Somali Republic: an Experiment in Legal Integration*, London, Frank Cass & Co.

is (in theory it still applies) a magnificent intellectual feat of no practical utility.

There was a conscious and deliberate campaign by Barre to wipe out and destroy the legal heritage of Somaliland. All the old British colonial collections of Somaliland statute laws were destroyed, the law reports in the High Court were looted and vanished. There are now no collections of any laws of any kind in Hargeisa.[50] But this has not prevented Somaliland from basing its development on law.

What is clearly happening is that Somaliland is slowly creating a new autochthonous constitutional and legal system, geared to meeting its own needs and principles, and based on its own traditions. Kaplan puts it thus:

> Somaliland has achieved these successes by constructing a set of governing bodies rooted in traditional Somali concepts of governance by consultation and consent. In contrast to most postcolonial states in Africa and the Middle East, Somaliland has had a chance to administer itself using customary norms, values, and relationships. In fact, its integration of traditional ways of governance within a modern state apparatus has helped it to achieve greater cohesion and legitimacy and – not coincidentally – create greater room for competitive elections and public criticism than exists in most similarly endowed territories.[51]

The people I met and worked with in 2003 – councillors, officials, lawyers – were concerned to create and work under a law which they could understand and which would have resonance with the residents of the country: they had experienced the reverse and did not want a repeat. The same concern is very apparent in my missions in 2009–2011 on developing a land policy and reforms to land laws. My task was not to write the policy or the laws – that is emphatically not wanted – but to work with the government and the community to develop a participative inclusive process leading to the creation of a policy and accompanying laws. Far from there being a 'failed state', a 'black hole' in the Horn of Africa, there are people in Somaliland committed to

50 My informants were the Minister of Justice and the Dean of the Faculty of Law at the new University of Hargeisa. I was not able to visit any libraries or other places where some old laws might still exist. One of the officials in the City Council with whom I was working produced the Town Planning Ordinance of 1947 (Cap. 83 of The Laws of the Somaliland Protectorate, 1950 edition) which I was told was still, in theory, in force. It was this official who had a prized copy of the English language version of the Penal Code. I went round the law library in the university in December 2009. It had virtually no law books of any kind whatsoever apart from a few novels by John Grisham. Other towns in Somaliland do have old records. I was told by the former chief executive of Burao District Council that it has land records going back to the 18th century when the Ottoman Empire was the dominant power on the coast.

51 Kaplan, op. cit., 144.

building a state governed by law, willing to work with external assistance but not in any way dependent on it and determined to pursue their own way in a largely hostile world.

Commentators have said that Somaliland is a 'challenge' to the international community; it is in many respects a threat for if it can succeed on its own and with minimal aid, where is the leverage over development and law reform which the international community attempts to exert over so many countries and where will the money and invitations for foreign trips come from to enable the rulers of those countries to live high on the hog as they do now? No wonder there is resistance to the recognition of a state which complies with every traditional formal requirement for recognition of a state in international law – a defined territory (the old British Somaliland Protectorate); a government with the monopoly of force within the state; and the support of the people.

This brief history provides the necessary background for the evolution of land law in Somaliland. A major report prepared by the Food and Agriculture Organization of the United Nations (FAO)[52] provides a succinct summary of the evolution of land tenure and land law in Somaliland up to the coup of 1969 which brought about fundamental changes. Since little is known about this subject it is useful to set out this summary:

> Before colonial times the Somali society had an effective system of governance. This traditional system, which is still in use in Somaliland today, managed all societal relations between communities, such as conflicts, resource sharing, and the provision of the rule of law, through the customary laws (*Xeer*). The *Xeer* has rules for sharing of pastures, water and other natural resources. Every member of the clan had the right of access to the rangelands and water resources of the territory inhabited by his/her clan community.
>
> The rangeland resources were managed on a collective basis. Every person had a property right to anything created by him (e.g. a shallow well). Such property could be inherited according to the regular Islamic *Shari'a* rules of inheritance. In higher rainfall areas land was sometimes enclosed (fenced) for farming (cropping). In such farming communities everyone had a right to the use of a piece of cultivable land. In urban areas plots of land and other assets were privately owned . . .
>
> During the British colonial rule in Somaliland the land tenure system shifted from communal ownership to private ownership and new management procedures, such as land registration, title deeds and land taxation, were introduced in urban centres. Agricultural land could be leased for 50 years, and urban land for an indefinite period. As many former

52 FAO (2009) *Land Use Planning Guidelines for Somaliland*, Project Report No L-13, Nairobi, Somalia Water and Land Information Management, 1–3.

> pastoralist people were settling in the regions of Awdal and Waqooyi Galbeed in the 1900s, the colonial administration allocated some communal grazing land to those who wished to change their livelihood from pastoralism to agropastoralism and then demarcated a boundary between grazing and arable land areas against the wishes of the pastoralists . . .
>
> After independence and the unification of Somaliland and Somalia the government introduced new land rights, whereby every Somali was allowed to live and farm anywhere, irrespective of his/her clan or area of origin. The traditional free grazing in the rangelands and the colonial land rights were maintained. Commercial livestock production was encouraged. Grazing reserves were used as holding grounds for export animals, and rangelands were increasingly privatized . . .

Major changes took place after the coup of 1969 as Besterman and Roth explained:[53]

> With the introduction of a socialist revolution the new government announced a series of agrarian reforms aimed at stimulating growth and economic development. Between 1970 and 1976 the government passed as many as 22 laws regulating the agricultural sector . . . GSDR [Government of Somalia Democratic Republic] planners at the time perceived nomadic agriculture as the root cause of Somalia's agricultural malaise; they perceived that common ownership was environmentally degrading, that nomadic pastoralism was unproductive and that traditional institutions were inefficient. The reforms set forth to (a) place control of land in the hands of the state; (b) draw the population into new occupations (settled farming) that would reduce farm imports as a cushion against drought and, (c) substitute modern institutions of production and marketing for what were then perceived as inefficient traditional organizations.
>
> The Agricultural Land Law of 1975 and subsequent decrees were the statutes that governed formal land tenure relations in the whole of Somalia from 1975. According to this law all land resources were owned by the State. Responsibilities for management of land resources and the authority to allocate land were under the direct jurisdiction and control of the Minister of Agriculture. The Minister could issue concessions (leaseholds) on land for agricultural purposes to cooperative societies, state farms, autonomous agencies, local government bodies and private individuals or companies. Since all land was owned by the State, individuals with registered leaseholds were tenants of the state with certain rights and restrictions.

53 Besterman, C. and Roth, M. (1988) *Land Tenure in the Middle Jubba: Issues and Policy Recommendations*, Madison, Land Tenure Centre, 6, 9, 10.

> Land registration at the time of the Land Law's enactment was made compulsory. Any person who did not register his or her land within six months of the law's enactment theoretically lost all state recognized rights to land. All land holders, excluding cooperatives and state farms, must voluntarily apply for a variable term lease 50 years in duration, and renewable. An individual or family might obtain only one lease per household. Total land holdings are restricted to ceilings of 30 hectares of irrigable land and 60 hectares of non-irrigable land. Ceilings for banana plantations were raised to 100 hectares, and waived entirely for cooperatives, state farms, private companies and autonomous agencies.
>
> Registered leaseholds could not be bought, sold, leased, rented, or mortgaged, although rights might be transferred if the lessee were incapacitated or died . . . The government might repossess land that exceeded size restrictions, was used for non-agricultural purposes, was unnecessarily fragmented or was not farmed for two successive years . . .

This then was the land law which nominally applied in Somaliland when it determined to reassert its independence in 1991. Paradoxically, an avowedly socialist government in Somalia had in 1975 gone further down the transformation road of 'abolishing' customary tenure and moving towards a system of statutory tenure – very much in line with the EARC approach – than most other countries in the region at that time. It had not however gone down the route of private ownership of land.

Conclusions

The seven states whose land laws and policies have been surveyed in this book so far came to independence in the 1960s and 1970s. With the exception of Zanzibar – an odd exception in many respects for although a part of the United Republic of Tanzania from April 1964 it went its own way on land matters and Somalia – all the states exhibited to a greater or lesser degree a traditional approach to land law. Kenya adopted wholesale the colonial policy and laws on individualisation and registration of title and the corollary – the substitution of statutory land law based on the English land law for customary tenure. A review in 1968 confirmed the approach adopted and resulted in a revised and expanded legal framework but no changes to the thrust of the laws. Tanzania took over and dramatically increased the colonial policies and laws on settlement schemes and gave these policies and laws a transformational spin but with a traditional approach in two senses: statutory tenure in villages was designed to replace customary tenure; and force was used to herd peasants into villages (though it must be said that force was never the primary tool of land tenure administration in colonial times in Tanganyika). Uganda took over and continued the colonial pattern of land tenure with the Land Decree

of 1975 accentuating the role of the state and the lack of any clear rights of tenure for occupiers of land held for customary tenure.

Rwanda too in these early years of independence was a good example of the traditional approach: moving away from customary tenure and placing emphasis on formal registered tenure and a land market. Mozambique like Tanzania initially adopted what looked like a transformational approach but with many traditional elements – large estates with agricultural labourers albeit state-owned and a policy of villagisation but in each case peasants were compulsorily moved from what they regarded as 'their' land – but by the end of the civil war in 1992 had already taken several steps down the road to a much more traditional approach to land matters with an acceptance of a role for private occupation and use of land. The ending of the civil war accelerated that process as millions of internally displaced persons and returnees went back to their original areas and resumed land use and occupation under customary tenure. Somalia as already noted attempted a transformation approach but, in practice, conflicts rapidly emerged between the statutory system and customary systems so that by the time Somalia collapsed as a state and Somaliland re-emerged as a state in 1991, the formal legal land management system had effectively ceased to exist.

Chapter 2

The lack of any drive for land reform 1961–c.1990

There was no concerted effort in any country in this period with the exceptions of Zanzibar and Somalia, both avowedly socialist states, to challenge the existing social and economic arrangements of land rights or to mount a major legal programme of land reform, that is a programme of laws which have as their main goal reducing poverty by substantially increasing the proportion of farmland controlled by the poor and thus their income, power and status.[1] Lipton offers one analysis of why land reform was not on the agenda at this time:

> Is land reform irrelevant in sub-Saharan Africa, due to ample land and not-too-unequal forms of traditional or communal tenure? That is how the elderly remember Africa 50 years ago.[2] Then – though land scarcity was already visible in parts of Kenya, Lesotho, the Sudan, Rwanda and elsewhere – unused land, almost as good as land already farmed was indeed available in much of Africa. However tripled rural populations, and land loss due to erosion, depletion and urbanisation have turned memory into myth . . . Further much of Eastern (and especially Southern) Africa is marked by unaddressed severe post-colonial land inequality that is only now being challenged. Far from being irrelevant to land reform, Africa is much of its future.[3]

So there was no political pressure for land reform throughout much of the area covered by this book because land was on the whole easy to access. Where it was not, as in Kenya where there had been an armed insurrection in the 1950s, the colonial government commenced programmes to meet the demands for land but in a way which was designed to maintain the underlying principle of private ownership of land. Ditto with the independent governments of Zanzibar in 1964 and Mozambique in 1975.

1 Lipton, M. (2009) *Land Reform in Developing Countries: Property Rights and Property Wrongs*, London, Routledge, 1.
2 Michael Lipton and I were exact contemporaries at Oxford in the mid-1950s.
3 Lipton, op. cit., 295.

This would explain too why during this period from 1961 to c.1990, there was no real concerted effort by the international community of international financial institutions (IFIs), United Nations agencies and bilateral donors to push and pressure states in Africa to reform their land laws to facilitate the operation of land markets, the individualisation and registration of title and the move away from customary tenure. Platteau notes that as opposed to Asia and Latin America:

> Africa was not on the agenda of land reform during the first decades following the Second World War. Only a few countries – Egypt . . . Ethiopia where land relations were typically feudal; and South Africa and Zimbabwe (formerly Rhodesia) where good lands were (and still are) monopolised by white minorities – were deemed to deserve a significant transformation of their agrarian structure. For the rest, Africa, especially sub-Saharan Africa was regarded as a 'special case' or 'a problem-free continent' . . . on account of its abundant land endowments and the flexibility of its communal land tenure institutions . . .
>
> In the period before 1975, the [World] Bank did not take any active interest in land reform nor for that matter in any programme of institutional reform . . . There is no doubt that land tenure issues were overlooked by the World Bank . . . The fact of the matter is that land reform was considered 'too political' for Bank financing. The view was held by the Bank that 'the distribution of land was a matter of national policy and internal politics . . .'[4]

Platteau notes that a major change took place with the publication of the Bank's 1975 seminal policy paper on land reform which:

> unambiguously placed land-related issues in their broader context of people's unequal endowments in productive resources . . . This emphasis on equity considerations in the context of land hunger . . . clearly suggests that the Bank's attention continued to be focused mainly on the situation prevailing in Asia and Latin America.[5]

There were however aspects of the policy paper which were of direct relevance to African countries. The paper 'recommended that communal tenure systems be abandoned in favour of freehold titles and the subdivision of the commons'. The conceptual basis for the Bank's policy prescription was the need to develop secure property rights and facilitate the operation of a market for

4 Platteau, J.-P. (1992) *Land reform and structural adjustment in Africa: controversies and guidelines*,Rome, FAO Economic and Social Development Paper 107, 5, 6, 7.

5 Ibid., 11.

land. 'That well-functioning land markets can promote efficiency-enhancing land transfer is well recognised.' To enable land markets to operate efficiently, formal titling is necessary and 'the titling process requires a clear legal basis and a streamlined institutional infrastructure that is capable of administering the process efficiently'. The functioning of land markets could be improved if regulations which restrict land use and transfers were reduced or eliminated since 'a review of these policies finds that they have rarely achieved their goals'. These policies have stood the test of time with relatively minor changes summed up as follows:

> In the 25 years since that paper was published, these guiding principles have remained the same, but it is now recognised that communal tenure systems can be more cost effective than formal title, that titling programs should be judged on their equity as well as their efficiency, that the potential of land rental markets has often been severely underestimated, that land-sale markets enhance efficiency only if they are integrated into a broader effort at developing rural factor markets and that land reform is more likely to result in a reduction of poverty if it harnesses (rather than undermines) the operation of land markets and is implemented in a decentralised fashion. Achieving land policies that incorporate these elements requires a coherent legal and institutional framework together with greater reliance on pilot programs to examine the applicability of interventions under local conditions.[6]

It was only in the 1980s that Africa began to feature in specific World Bank thinking on land issues. In 1987 a report was published in which Falloux opined that many African countries required 'a total redrafting' of their land laws which have become 'inconsistent and ultimately ill-adapted to the actual situation in the field'. What sub-Saharan Africa needed was not only land reform but the setting up of the whole machinery of a formalised land legal framework since most countries in the continent had 'neither actual cadastral services nor a land taxation system'.[7] When the Bank turned from studies of land matters in African countries to programmes, however, it was not because of a concern with issues of equity but as part of programmes of structural adjustment. The Bank considered that most African countries exhibited deep-seated structural problems such as inadequate infrastructure, poorly developed markets, limited administrative capacity and severe shortage of

6 Deininger, K. and Binswanger, H. (1999) 'The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges', 14 *World Bank Research Observer*, 247–276, 246, 248, 252, 263. Both the authors were World Bank employees.

7 Falloux, F. (1987) 'Land management, titling and tenancy', in Davis, T.J. and Schirmer, I.A. (eds) *Sustainability issues in agricultural development – Proceedings of the Seventh Agricultural Sector Symposium*, Washington D.C., World Bank, 190–208.

qualified personnel. Enhanced capacities of people and institutions from the village to the upper echelons of government and industry were needed in countries in Africa and this embraced land law, land markets and land institutions no less than financial institutions and financial markets. Free land markets were indispensable to improving the efficiency and the growth performance of agriculture in sub-Saharan countries.

Chapter 3

Two case studies from this era

1.1 Introduction

The approach discussed in the previous chapter set the scene for the commencement of a major push by the World Bank, UN agencies and donors from the 1990s onwards to encourage or at times require land reform in policies, practices, laws and institutions in Africa. Before this period is discussed however in Part II I want to turn to, and consider in a little more detail, the two major programmes of land management in the region that were and remain still of great influence in the development of policies and programmes of land reform in the region: Kenya's programme of land titling and Tanzania's programme of villagisation.

Despite the many criticisms made of the Kenyan programme of the individualisation and registration of land title, to be discussed below, it is still held up as a model from which one can learn what to do or not do when going down this particular route. The many proposals for reforms outlined in Kenya's National Land Policy of 2009 do not touch this programme; indeed the concerns are to speed up the programme and extend it. Laws and practices first developed in Kenya to provide for the individualisation and registration of land title have been adopted and adapted elsewhere in Africa – within Eastern Africa, both Tanzania and Zanzibar drew on Kenyan laws during their land reform programmes and, outside the regions, Malawi drew heavily on the Kenyan land titling laws – so a more detailed study of the programme is relevant for the lessons it can offer elsewhere.

Tanzania's programme of villagisation also provided a model for some countries; Mozambique in the early years of independence and Rwanda after 1994, and its espousal of a 'high modernist' approach to peasant agricultural practices was followed closely by Somalia.[1] It too has been the subject of

1 As I finalise the text of this book before sending it off to the publishers, I am working for UNDP in Laos, assisting in the preparation of a national land policy. Laos has a villagisation policy remarkably similar to Tanzania's of the 1970s for the same reasons and with the same willingness to resort to force if villagers don't voluntarily move to larger villages.

criticism not least from inside the country itself and of many studies and has now more or less been abandoned as an element in the country's land policies and laws. But it continues to exert a powerful influence on Tanzania; not just with respect to land management but with respect to governance as the many thousands of villages are now a powerful force in local government. Here too the lessons that can be learned from this major socio-economic exercise are worth highlighting and learning from.

1.2 Individualisation of tenure in Kenya

It has been noted above that Kenyan policies and laws on land tenure arrangements at independence were taken over unchanged from the colonial period. The only significant change was that all native reserves and trust lands were at independence designated Trust Lands and were to be held under the trusteeship of county councils rather than under that of the central government. But the main policy of individualisation and statutory registration of customary land tenure and the legal framework necessary for the implementation of this policy was continued. Migot-Adholla et al. summarise implementation:

> Although the policy of individualisation was justified on economic grounds, its early implementation had a decidedly political motive. Colonial policymakers thought that it would be the beginning of a process that would create a class of African rural elite, rooted in land and committed to private enterprise, which would also provide liberal political leadership. The policy did not entirely depart from the benevolent paternalism of the earlier colonial period, which explains its persistent ambiguity. To protect African peasants from dispossessing themselves, policymakers felt that local land committees should closely monitor land transactions. In fact, the land committees have acted instead to undermine the free operation of land transactions, permitting them only among members of local communities. Thus despite more than 30 years of registration, a land market, which was considered to be a key benefit of tenure conversion has not yet clearly emerged in the former reserves. This situation, in turn, has nullified the credit and investment objectives of registration. A recent amendment [Land Disputes Tribunals Act 1990], providing for referral of land cases in the first instance to arbitration by officially approved 'elders' has further thrown the administration of registered land into confusion . . .

However, there are two slight variants. If villagers don't move, the army might arrive and explain that if they won't move, they might be attacked by bandits and the army won't come to their aid. On the other side of the line, there is an occasional willingness to compromise; two villages, A and B, might be notionally combined as village C with the villagers left where they are.

> Tenure conversion does not appear to have extinguished indigenous tenure systems in Kenya. Indeed, recent amendments suggest official recognition of the persistence of indigenous land tenure practices. Yet the administrative selection of 'elders' with neither recognized expertise in indigenous tenure practice nor good knowledge of provisions of the Registered Land Act appears to reduce dispute settlement to a costly bureaucratic travesty. It is therefore debatable whether land registration and administration as practiced in Kenya today can still be justified on the grounds of their economic benefits . . .
>
> The hypothesis that security of tenure leads to higher yields through its effects on credit, inputs and land improvements was not supported by evidence produced by our data and analysis . . .
>
> We found that land titles were not closely related to the breadth of rights . . . This finding shows the persistence of indigenous tenure systems and suggests that it is difficult for governments to legislate changes in the way communities control their most precious resource. Likewise land titles have not prevented a high incidence of disputes . . .[2]
>
> Because the possession of a title does not appear to benefit farmers through credit use and increase in yields, many farmers will continue to find the cost of obtaining a title greater than its benefits . . . In the areas studied, most transactions have been carried on in accordance with indigenous practices rather than the statute law. While unregistered dealings are considered illegal, the reintroduction of elders is itself a tacit affirmation of the persistence of indigenous tenure practices. But more significantly, the Kenyan situation dramatizes a policy ambivalence arising from legal syncretism. It is not clear which law the elders are expected to apply: customary, statutory or natural justice. This ambivalence suggests the need for a simplified land administration system requiring existing legislation to be unified and updated to conform with current social and economic reality.[3]

This last tantalising thought was not further explored so we are left to speculate on what kind of new laws the authors had in mind. In any event no notice was taken of their suggestion until the advent of the new Constitution in 2010 which will be discussed below. Nonetheless their overall criticism is little less than devastating of the policies and their legal back-ups pursued in Kenya since before and then after independence (and since the policies and laws have continued since their research and its publication in 1993, this period now is over 50 years). The paper from which the above quotations are taken was an academic/practical study sponsored by the World Bank and

2 'Reduction of disputes was a major objective of land registration but our study finds that most reported disputes have occurred after the land adjudication and registration process', Bruce, J.W. and Migot-Adholla, S.E. (eds) *Searching for Land Tenure Security in Africa*, Dubuque, Kendall/Hunt Publishing Co 134.

3 Ibid., 124, 139.

co-published by the World Bank and to that extent, the authors were (and this is no criticism of them) slightly constrained in what they could say. It was an economic paper with some guarded political overtones.

No such constraints were present in the paper by Kanyinga et al.[4] They too were examining the continuation of policies and laws from colonial times to their present. But theirs' was a more political analysis. They show how the application and mis-application of these policies and laws on individualising tenure have been used over the period of Kenya's independence to facilitate the small political and administrative elite's accumulation and appropriation of vast amounts of land at the expense of the ordinary peasant. They detail the ways in which first the Kenyatta regime and then the Moi regime abused their powers under the law or just ignored the law to acquire public and private land to reward their supporters and destroy their opponents. Even the Kibaki/Odinga regimes although making some half-hearted efforts to reverse the worst excesses of the past in the words of the authors 'lack the political will to confront the elites, who use the political process to protect their selfish interest from the demands of the landless and poor for land reform'.

Their general conclusions draw out much more broadly than the earlier quoted study of the socio-economic effects of the last 50-plus years of land policies and practices in Kenya:

> The uncoordinated resistance of many communities to attempts to expropriate them and the violent repression of their struggle by the state have thrown the brazen grabbing of public land into the political limelight . . . This has resulted in a growing bridge between the spontaneous struggles of communities to defend their land, which often involve violent resistance to repression, and the demands of middle-class civil society organisations for accountability, the rule of law and the integrity of public spaces including the preservation of forest resources . . .
>
> The structure of landownership and land administration within the post-colonial state has been characterised by continuity with colonial land policies rather than change . . . The new elites who inherited political power also inherited intact the scheduled areas [former White Highlands] and penetrated the peasant agricultural land through the resettlement schemes . . . Big landowners have increasingly accumulated landholdings through distressed land markets and allocations of public land through political patronage of the state . . . The result has been a significant increase in the numbers of smallholdings and a decline in their size: many of them are not adequate to provide sustainable livelihoods . . .[5]

4 Kanyinga, K., Lumumba, O. and Amanor, K.S. (2008) 'The Struggle for Sustainable Land Management and Democratic Development in Kenya: A History of Greed and Grievances', in Amanor, K.S. and Moyo, S. (eds) *Land & Sustainable Development in Africa*, London, Zed Books, 100–126 at 123.

5 Ibid., 123, 124, 125.

Not merely is the post-colonial state of Kenya continuing with colonial policies and laws but the analysis of this quoted paper shows the almost uncanny resemblance of the modus operandi of post-colonial governments and landowning elites to that of the early colonial governments of a century ago and how they used the law to dispossess the African peasants and pastoralists of their land and punished them when they showed resistance.[6] This continuity will be further explored when we turn to consider the land policies and the new land laws being enacted to implement the relevant provisions of the 2010 Constitution in Chapter 11.

3.3 Villagisation in Tanzania

Villagisation in Tanzania was the principal form of rural land use and tenure in the country for the first 25 to 30 years of independence. It did not spring up fully grown in December 1961 nor did it disappear as a formal government policy overnight. The high phase of villagisation was from the early to mid-1970s to the late 1980s and just as Nyerere's famous pamphlet of 1967 *Socialism and Rural Development* may be seen as the ideological basis and foundation of villagisation, so the equally famous Shivji Commission on Land Matters of 1992[7] may be seen as sounding the death-knell of what Scott refers to as 'high-modernisation' villagisation.

Villagisation had its origins in what Scott calls colonial high-modernist agriculture in East Africa and as it was developed in the aftermath of the Second World War it in turn owed its origins to the example of the Tennessee Valley Authority created in the 1930s in the USA as part of President Roosevelt's New Deal. In Scott's words:

> The point of departure for colonial policy was a complete faith in what officials took for 'scientific agriculture' on the one hand and a nearly total scepticism about the actual agricultural practices of Africans on the other.[8]

6 Ghai, Y. P. and McAuslan,P. (1970) *Public Law and Political Change in Kenya*, Nairobi, Oxford University Press chapters 1, 3.

7 Ministry of Lands, Housing and Urban Development, United Republic of Tanzania (1994) *Report of the Presidential Commission of Inquiry into Land Matters*, Uppsala, Scandinavian Institute of African Affairs. Professor Issa Shivji was the chair of the nine-person (eight men, one woman) Commission which was appointed in 1991 and reported in 1992. The Commission provides a very full picture and analysis of the state and problems of villagisation and the hardships of the peasants. If I do not make reference to it in this section, this is not because, of any objection to it but because for my purposes, Scott's chapter on the programme brings out the key points that need to be made for the analysis being put forward in this book. References to Scott are to Scott, J.C. (1998) *Seeing like a State: How Certain Schemes to Improve the Human Condition have Failed*, New Haven, Yale University Press, chapter 7: 'Compulsory Villagization in Tanzania: Aesthetics and Miniaturization'.

8 Ibid., 226.

As we shall see, this same attitude permeated party and government officials and even Nyerere himself in the programme of villagisation.

'At the outset of independence villagisation was a central goal of Nyerere and TANU.' In this Nyerere was strongly supported by the World Bank but while the Bank was concerned solely with increased agricultural output to generate a marketable surplus for export, Nyerere had a threefold aim: the delivery of services; a more modern productive agriculture and the encouragement of communal socialist forms of co-operation. He was concerned that villagers should begin living in *proper* villages – planned villages, planned by experts. Initially he insisted that the creation of ujamaa villages be gradual and completely voluntary but even quite early in the programme he was prepared to accept that if peasants did not grow the crops they were required to, then it might be necessary to force them to grow those crops. Here too Nyerere was following both colonial practices and the approach of the World Bank in its 1961 report on the Tanganyikan economy:

> That report was laced with the era's standard discourse about having to overcome the habits and superstitions of a backward and obstinate peasantry . . . While its authors hoped that 'social emulation, cooperation and the expansion of community development services' would transform attitudes, they warned darkly that 'where incentives, emulation and propaganda are ineffective, enforcement or coercive measures of an appropriate sort will be considered'.[9]

It is important then to make the point that when coercion of villagisation began, it too had both colonial and, perhaps even more important, impeccable international credentials and support behind it. Coercion became official government policy in December 1973. Juma Mwapachu explained the thinking behind the policy:

> The 1974 Operation [Planned] Villages was not to be a matter of persuasion but of coercion. As Nyerere argued, the move had to be compulsory because Tanzania could not sit back seeing the majority of its people leading a 'life of death'. The State had therefore to take the role of the 'father' in ensuring that its people chose a better and more prosperous life for themselves.[10]

The practical effect of this philosophy was that violence was inevitable, threats were almost universal and people were told they would be denied famine relief and other resources if they did not move when told to. The

9 Ibid., 231, 232.
10 Ibid., 234.

villages themselves were highly organised but increasingly codified, as was preferred by a bureaucracy; that is the same villages could be and were built everywhere:

> . . . the modern planned village in Tanzania was essentially a point-by-point negation of existing rural practice which included shifting cultivation and pastoralism; polycropping; living well off the main roads; kinship and lineage authority; small, scattered settlements with houses built higgledy-piggledy; and production that was dispersed and opaque to the state . . .
>
> Until 1975 the state's efforts to control production outside its own state schemes took the classic colonial form: laws mandating that each household grow certain crops on a minimum number of acres. A variety of fines and penalties were deployed to enforce these measures . . .
>
> The next step was regulated communal production . . . anticipated in the Villages and Ujamaa Villages Act 1975 . . .
>
> The aim of Tanzanian rural policy from 1967 through the early 1980s was to reconfigure the rural population into a form that would allow the state to impose its development agenda and in the process, to control the work and production of cultivators. Nowhere is this more explicit than in the document for the third five-year plan (1978): In the rural sector, the Party has had great success in resettling the rural peasantry in villages *where it is now possible to identify able-bodied individuals able to work* . . . The village government will see to it that all Party policies in respect of development programmes are adhered to . . .
>
> The underlying premise of Nyerere's agrarian policy, for all its rhetorical flourishes in the direction of traditional culture, was little different from that of colonial agrarian policy. That premise was that the practices of African cultivators and pastoralists were backward, unscientific, inefficient and ecologically irresponsible. Only close supervision, training, and, if need be, coercion by specialists in scientific agriculture could bring them and their practices in line with a modern Tanzania . . .
>
> It was precisely the assumption, to quote a Tanzanian civil servant of a 'traditional outlook and unwillingness to change' that *required* the entire series of agricultural schemes from ujamaa villages to forced relocation to the supervised cultivation launched by the colonial and the independent regimes. This view of the peasantry permeates the 1964 World Bank report and the first Tanganyikan five-year plan . . . Thus the plan declares; 'How to overcome the *destructive conservatism of the people* and generate the drastic agrarian reforms which must be effected if the country is to survive is one of the most difficult problems the political leaders of Tanzania have to face.'
>
> Nyerere entirely agreed with the majority of the extension officials who believed that their job was to 'overcome [the farmers'] apathy and attachment to outmoded practices' . . .

> Settling people into supervised villages was emphatically *not* uniquely the brainchild of the nationalist elites of independent Tanzania. Villagization had a long colonial history in Tanzania and elsewhere, as program after program was devised to concentrate the population. The same techno-economic vision was shared, until very late in the game, by the World Bank, United States Agency for International Development (USAID) and other development agencies contributing to Tanzanian development. However enthusiastically they were in spearheading their campaign, the political leaders of Tanzania were more consumers of a high-modernist faith that had originated elsewhere much earlier than they were producers . . .
>
> The Tanzanian state's relative weakness and unwillingness to resort to Stalinist methods as well as the Tanzanian peasants' tactical advantages, including flight, unofficial production and trade, smuggling and foot-dragging, combined to make the practice of villagization far less destructive than the theory.[11]

These quotations from Scott focus on what might be called the governmental side of villagisation and are designed to bring out both the rough and ready way that villagisation was implemented, the continuity with the colonial approach to rural land management and the support Tanzania received, at least initially, from the World Bank. The point that must be made then is that the government and Nyerere in particular were not ploughing a lonely and idiosyncratic furrow in pursuing villagisation but were very much part of mainstream international thinking and action on tackling peasant 'backwardness' and 'conservatism'.

One matter which has not been dealt with in any detail however is what happened to the land rights of the peasants who were relocated and what interests in land did they receive in their new villages? It is here that the Shivji Commission comes into its own but I do not intend to try to duplicate its report. Instead I refer to a study on land tenure and villagisation by Swantz in the village of Bunju near Dar es Salaam over two periods 1965–1970 and 1987–1989:[12]

> In the coastal areas . . . many [people] were settled on land belonging to other villagers and under trees that did not belong to them . . . When the villages were restructured, land was to belong to the village, but the general rule was that individual households were allocated one half to one acre plots near the houses and one to three acre plots for cultivation

11 Ibid., 238, 239, 241, 242, 247.

12 Swantz, M.-L. (1996) 'Village Development: On Whose Conditions?', in Swantz, M.-L. and Tripp, A.M., *What Went Right in Tanzania: People's Responses to Directed Development*, Dar es Salaam, Dar es Salaam University Press.

> . . . Ordinarily people did not lose the land on which they worked before the restructuring if the land was within the boundaries of the new village system . . .
>
> Officials paid little attention to villagers' loss of buildings and old cultivated fields. Under such conditions little consideration was given to the customary modes of transferring land and property rights from one occupant to another or to inheritance practices . . . The conventions for land transfer were discarded in the coastal villages at the time of villagization . . .
>
> The customary institutions were respected differently in areas like the mountainous Kilimanjaro Region and other regions where customary land rights had been firmly entrenched over several centuries. There, inherited land was virtually untouched by villagization and little actual moving to new village sites occurred . . . People were not forced to give up their right to individual plots of land, even if they were forcibly moved to new village sites. Thus the treatment of land rights during villagization varied considerably throughout the country, depending on the strength of pre-existing claims to land ownership. This meant that in the regions which were more entrenched in the market economy, traditional land rights were upheld, whereas the groups which resisted incorporation into the external market economy lost their land rights . . .
>
> The impact of villagization on women's rights was similarly not given adequate attention . . .
>
> The village policy was built on the principle that land was common property and belonged to the State but the villages were custodians of all land within their borders. The Ujamaa Villages Act 1975 did not however detail the extent of the authority of the Village Council which allocated land to the villagers . . .
>
> The ambiguities around land issues as well as over the rights to natural resources within village borders, frequently brought the village into conflict with higher state authorities . . . The village leaders whom I interviewed . . . were not clear about the laws that regulated the rights of the villagers and ordinary villagers were even less knowledgeable about these laws.
>
> The obvious ambiguity in land allocation procedures left ample room for mismanagement and manipulation of land issues especially since 1985 when individuals were permitted to obtain lease holding. Land had gradually become a commodity, even though it could not legally be sold until the end of 1992.[13]

13 Ibid., 144, 145, 148, 157, 159, 160.

Swantz goes on to show how land sales greatly increased during villagisation as people in Dar es Salaam sought land in areas surrounding the city as city land was becoming expensive and villagers saw land sales as a way of diversifying and increasing their income. She also makes the point that the sale of land by local villagers was an expression of autonomy and resistance in the face of external attempts to control their way of life and this was in a sense a continuation of the coastal people's long-standing resistance to incorporation into imported value systems. 'They have not embraced so-called "modernization" as defined either by the colonial or the independent government.'[14] Her chapter lends support to Scott's final point quoted above that the peasants had various ways of bypassing the worst effects of the practice of villagisation.

The two papers between them give a pretty accurate picture of the casual way that the government treated the law applicable to villagisation and villagers, a characteristic also brought out in the Shivji Commission and thoroughly exposed and condemned in the iconic case of *A-G v Akonaay*[15] where the Court of Appeal rejected the Government of Tanzania's claim that land held under customary tenure was not property in the same sense as rights in land held under statutory tenure and in any case all land was vested in the President of the Republic and there was no legal basis for the court to require payment for unexhausted improvements when land under customary tenure was taken away from people. As Chief Justice Nyalali memorably put it: 'if the Attorney General is correct, then most of the inhabitants of Tanzania mainland are no better than squatters in their own country'.[16] Compensation was payable whenever someone was deprived of their land and so compensation was in principle payable to those deprived of their land under villagisation policies.

3.4 Conclusion

Kenya and Tanzania went two fundamentally different ways in their land policies and land laws after independence. Yet there are similarities. Both countries' governments took over and continued with some considerable enthusiasm and commitment policies developed and first introduced by colonial governments. Both countries' governments received the enthusiastic support of the World Bank and it is easy to forget how, 50-odd years ago, that was an imprimatur that was eagerly sought after, greatly valued when received and taken to mean that one was on the right track. There was little, if any dissent, from the Bank's approval which also meant the Bank's financial support and financial support from bilateral donors. Both countries' policies

14 Ibid., 137.
15 (1995) TLR 80.
16 Widner, J.A. (2001) *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*, New York, W.W. Norton & Co., 371.

too were to eliminate customary tenure by administrative means and early laws before or after independence were shaped to that end. Finally, both countries' governments, as the quotations from the various sources show, were, and, as the paper by Kanyinga et al. shows, still are in the case of Kenya, willing to ignore and transgress the law as it affects ordinary people in order to achieve what the elites wanted to achieve.

In each case too, policies and laws turned sour; in Kenya the elites used the processes of the market and the individualisation of tenure not to create a land-owning democracy but the reverse – a land-owning authoritarian state in which the people were deprived of their land. In Tanzania, the elite had the best of intentions to use the law and their powers to help the people choose 'a better and more prosperous life for themselves' but again did the reverse – the people were coerced into doing as the elites demanded of them and in the process, many lost their land. Whereas Tanzania's elite was, during the era of high-modernisation, vocal in its condemnation of the backwardness of the peasantry, Kenya's elite had no policy to denigrate the peasantry but in terms of actions towards them and their land, adopted much the same approach. In each case then while the colonial legacy may appear to have much to answer for, the governments cannot escape their responsibilities for the state of their land relations by the 1990s. It is then to the 1990s and the commencement of the era of land law and land policy reform within the whole of the region which is the subject of this book that we now turn.

Part II

The era of land law reform c.1990 onwards

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Chapter 4

The global intellectual climate for land law reform

4.1 Introduction

There is not a country under review in this book that has not since 1990 undertaken major reforms of their basic land law. Although this is set out in the 50-year table in the Appendix, it may be helpful just to list the countries and their new land laws at the outset of this Part:

Table 4.1 New land laws in the era of land law reform

COUNTRY	*NAME OF LAW*	*DATE*
Kenya	Physical Planning Act	1996
	National Land Commission Act, Land Act, Registered Land Act	2012
Mozambique	Land Law	1997
	Regulation on Urban Soil	2006
Rwanda	Organic Land Law	2004
	Land Use and Development Planning Law (draft)	2011
Somaliland	Land Management Law	2001
	Urban Land Management Law	2008
Tanzania	Land Act	1999
	Village Land Act	1999
	Land Use Planning Act	2007
	Urban Planning Act	2007
Uganda	Land Act	1998
	Physical Planning Act	2010
Zanzibar	Land Adjudication Act	1990
	Registered Land Act	1990
	Land Tenure Act	1992
	Land Transfer Act	1994
	Land Tribunal Act	1994
	Urban and Rural Development and Planning Bill	2010

What has brought about this extraordinary outburst of regional legislative activity? Has it been purely so many individual country initiatives or has there been behind all the countries some more general intellectual movement

or donor pressure or perhaps an element of both? As we begin to examine each individual country's experience we shall see that there were, not surprisingly, specific circumstances in each case that impelled land law reform but in addition, I would argue – have argued – that there was an intellectual climate abroad which in effect encouraged or pushed countries into seeing that land law reform – land law reform of a certain kind – was if not essential then certainly something that was an appropriate way forward to developing a better system of land management.

4.2 The global intellectual climate for land law reform

At this point and from here on in the book, I make no apology for making use of personal experiences in discussing the development and reform of land laws in Eastern Africa and in advancing a view on the possible background intellectual climate that lay behind the reforms that are to be discussed.[1] It is necessary to go back to the Urban Management Programme (UMP),[2] a programme with three major partners: UN-Habitat (where I was based for three years), the United Nations Development Programme (UNDP) and the World Bank, which was launched in the mid-1980s and whose overall aim was to offer advice and assistance in five major areas of urban management to the national and city governments of the developing world. Land management was one of the five components and I become involved as a consultant to the Programme in the late 1980s before joining it full time for three years in 1990.

Land management as a component of the UMP was for intra-bureaucratic reasons divided between UN-Habitat and the World Bank with the Bank being concerned with tenure and transactions (land markets) and UN-Habitat with land use planning. The dominant message coming out of the UMP in its early years was the importance of land markets and the relative unimportance of land use planning. Even when a more even-handed approach to markets and planning was adopted[3] the message remained that planning

1 Based on an unpublished paper given at a conference in Belo Horizonte, Brazil in 2001 and again at a conference on Law and Development in London in 2002: 'From Greenland's Icy Mountains, From India's Coral Strand': The Globalisation of Land Markets and its Impact on National Land Law. That paper in turn drew on other unpublished and published writings of mine.

2 Wegelin, E. (1994) 'Everything you always wanted to know about the urban management programme (but were afraid to ask)', 18 *Habitat International* 127–137; McAuslan, P. (1997) 'The Making of the Urban Management Programme: Memoirs of a Mendicant Bureaucrat', 34 *Urban Studies*, 1705–1727. I was the Land Management Adviser 1990–1993 and convenor of the UMP 1992–1993 and Wegelin succeeded me as convenor.

3 Dowall, D.E. and Clark, G. (1992) *A Framework for Reforming Urban Land Policies in Developing Countries*, Urban Management Programme 7, Washington D.C., World Bank;

should facilitate rather than impede land development – nothing wrong with that message – and that land development is best achieved by harnessing market forces to the process rather than relying on the public sector.

The UMP had a major input into shaping global policies on land markets. Where did the law come in? At the outset of the UMP in 1986, there was no place for law as a relevant discipline in the ongoing debate either on urban management generally or on urban land management in particular. Law was not a discipline which found a place either in UN-Habitat[4] or in the Urban Development Division of the World Bank – the partner division of UN-Habitat in the UMP. Even when, in the research phase of the UMP, law was brought into the programme's land management component in 1989, it had no immediate impact on policy. Keynote urban policy documents produced by the World Bank[5] and UNDP[6] in 1991 made no reference to the role of law in the implementation of recommended policies. Indeed, if anything there was a certain antipathy to law; law was seen as synonymous with regulation, control and too much government and the early approaches to what has now become the philosophy and strategy of enablement was hostile to any 'interference' as it was seen then, to the market. This approach to law was in keeping with the general view on the importance of law in development which was held by development and aid agencies – multilateral and bilateral – for the best part of three decades from the early 1960s: it did not rate; it was not very important.

Just five years after the publication of the two key urban policy documents noted above, the Habitat Agenda and the Global Plan of Action (GPA) were adopted at the UN-Habitat City summit in Istanbul in 1996. These documents adopted and advanced the global agenda of the beneficent effect of land markets. In addition however, what is very striking about the GPA is the stress laid on the central role of law in its implementation, particularly at the national level. What brought about the change?

Farvacque, C. and McAuslan, P. (1992) *Reforming Urban Land Policies and Institutions in Developing Countries*, Urban Management Programme 5, Washington D.C., World Bank.

4 Incredibly it is only in 2011, when UN-Habitat launched a project to develop what it called Urban Legal Knowledge (ULK) that the agency advertised for and appointed a lawyer as such specialising in ULK. His previous work had been with the FAO which specialises in rural land issues. I was hired in 1990 as a land management adviser, not as a lawyer.

5 World Bank (1991) *Urban Policy and Economic Development: An Agenda for the 1990s*, Washington D.C., World Bank.

6 Cheema, G.S. with Work, R. (1991) *Cities, People and Poverty: Urban Development Cooperation for the 1990s*, New York, UNDP.

In a paper I wrote in 1998[7] I suggested that the breakthrough came about from two directions; market and governance. I will briefly rehearse these arguments here. The market breakthrough came from the collapse of the command economies in Central and Eastern Europe and in the Commonwealth of Independent States; the governance breakthrough came from the internal and external pressures on governments in Africa to democratise themselves. In the first case, it quickly became apparent that the whole legal edifice of the command economy erected by Communist regimes had to be replaced by a legal edifice of a market economy. Policy guidelines were not enough; they had to be backed up by what market economists and World Bank personnel had hitherto taken for granted – viz, law; so law reform featured very strongly in all programmes of external aid to Eastern European countries from the early 1990s, including law reform on such matters as land law, housing law and urban planning law and the creation of financial institutions to service urban development.

In the second case, the drive towards democratisation in Africa often took the form of new constitutions, the introduction of Bills of Rights into existing constitutions, reform of electoral laws to facilitate multi-party political activity and elections and the introduction of new or more effective means of redress of grievances against unlawful government action. More important from the viewpoint of the World Bank, the International Monetary Fund and aid agencies, however, the impact of structural adjustment to African economies must be noted; whereas at first, the thrust of external pressure to reform economies was to remove constraints on the operation of the market which often meant removing legal constraints, by a transference of experience from Eastern Europe, it soon became apparent that structural adjustment would entail legal reforms as well.

If these were the two principal reasons for the renewed IFI interest in law at the beginning of the 1990s I think one can point to additional reasons for the renewal of an interest in law as a central tool of market-led development and its appearance in the GPA which derive in part from experiences in Latin America. First, is the fact of market-led land reform programmes which had been on-going in Latin America over the preceding two decades.[8] These programmes had proceeded through the medium, inter alia, of law. Second, interest had never entirely been lost in issues of law and development, although the high hopes entertained in the 1960s and early 1970s of the benefits of a legal input into development had long since disappeared. But

7 McAuslan, P., Bringing the Law Back In: Land, Law and the Habitat Agenda, Paper at an international seminar; School of Government of the João Pinheiro Foundation, Belo Horizonte; published as Chapter 6 in McAuslan, P. (2003) *Bringing the Law Back In; Essays in Land, Law and Development*, Aldershot, Ashgate.

8 Hendrix, S.E. (1995) 'Property Law Innovations in Latin America with Recommendations', XVIII *Boston College International and Comparative Law Review*, 1–58.

there had been a renewed practical interest of the World Bank and the UNDP in legal reforms, again particularly in Latin America[9] and alongside that had come a reflowering of writing and research on issues of law and development. Law had begun to be seen and discussed as a central tool of implementation of economic market-led reforms. On this analysis, the Habitat Agenda and the GPA were reacting to rather than leading the way in a focus on law.

This is not to downplay the importance of the GPA. In my view the real originality and important of the GPA from a legal perspective is that the two strands of law reform referred to earlier – market and governance – came together in the GPA. That alone would make the GPA noteworthy as giving an international imprimatur to law reform as a major tool of domestic policy implementation. There is, however, a greater significance to the GPA. A careful reading of the GPA shows that it connected up the internal political agenda of governance law reform to the external market agenda; it refers to human rights, to a gender perspective to policy, to more open government, to access to justice, to the right to challenge government actions in the courts, to participation and democracy. These are linked up to the market-led precepts of reform: the GPA was one of the first international official documents to make the connection between democracy and markets.

The argument here is that the GPA both responded to and advanced the global agenda of using land markets and laws as principal tools for land management and development. What were the specifics of its policies? The position of the GPA can be put best in its own words:

> To ensure market efficiency, Governments at the appropriate levels and consistent with their legal authority should:
>
> . . . [P]eriodically review and adjust legal, financial and regulatory frameworks, including frameworks for contracts, land use, building codes and standards;
>
> Employ mechanisms (for example, a body of law, a cadastre, rules for property evaluation and others) for a clear definition of property rights;
>
> Permit the exchange of land and housing without undue restriction and apply procedures that will make property transactions transparent and accountable to prevent corrupt practices.
>
> To ensure an adequate supply of serviceable land, Governments at the appropriate levels and in accordance with their legal frameworks should:

9 Rowat, M., Malik, W.H. and Dakolias, M. (1995) *Judicial Reform in Latin America and the Caribbean*, Technical Paper 280, Washington D.C., World Bank.

> Recognize and legitimize the diversity of land delivery mechanisms;
>
> Develop land codes and legal frameworks that define the nature of land and real property and the rights that are formally recognized;
>
> Ensure simple procedures for the transfer of land and conversion of land use . . .
>
> To promote efficient land markets and environmentally sustainable use of land, Governments at the appropriate levels should:
>
> Re-evaluate and if necessary periodically adjust planning and building regulatory frameworks . . .
>
> Support the development of land markets by means of effective legal frameworks, and develop flexible and varied mechanisms aimed at mobilizing lands with diverse juridical status;
>
> Review restrictive, exclusionary and costly legal and regulatory processes, planning systems, standards and development regulations.
>
> To improve the effectiveness of existing housing finance systems, Governments at the appropriate levels should:
>
> Establish, where necessary, a comprehensive and detailed body of property law and property rights, and enforce foreclosure laws to facilitate private-sector participation.[10]

There is a good deal more in the same vein throughout the GPA. These then are the global precepts which all countries were urged to follow – indeed in some respects, obliged to follow as the GPA is a species of soft international law – in adapting their land management policies and practices to equip themselves to compete in the global economy. UN-Habitat followed up the GPA with the launch of Global Campaign for Secure Tenure, an on-going and very influential tool, one element of which has always been promoting legislative reform.

There is finally another very important global input of which we must be aware. Alongside the words of Habitat II there was the reality of the burgeoning international property market and its pressure for common and 'international' standards of real estate law. Several social scientists[11] have commented on this but from the perspective of this section of this chapter,

10 (1996) *Habitat Agenda*, Nairobi, UN-Habitat, paras 72 (b), (c), (d); 76 (a), (k), (n); 77 (a), (b), (e); 81(e).

11 Leaf, M. and Pamuk, A. (1997) 'Habitat II and the Globalization of Ideas', 17 *Journal of Planning Education and Research*, 71–78.

the following legal comment on the case for the uniformity of land laws is quite significant:

> Uniform laws promote economic development by making it easier for those engaged in commerce to expand beyond jurisdictional boundaries. Uniform laws simplify transactions . . . While the need for uniform laws in commerce is most pronounced in the field of commercial law – *e.g.*, sales of goods, commercial paper and security interests in personal property – the increasing sophistication of real property financing has accentuated the advantages of uniformity in land laws as well.[12]

In addition to the creation of an intellectual climate favourable to land law reform in the direction of promoting land markets, it is necessary too to note that the World Bank, USAID and other donors also played an important role in pressing or assisting countries to move towards a market-friendly land law. The conversion of the World Bank to this cause was noted in Chapter 3.

12 Schreiberg, S.L. and Levy, H.A. (1993) 'The Uniform State Law Movement in the United States as a Model for the Development of Land Privatization Legislation in the Newly Independent States' (unpublished manuscript) quoted in Burke, D.W. (1995) 'Argument for the Allocation of Resources to the Development of a Well-Defined System of Real Property Law in the Czech Republic', 29 *Vanderbilt Journal of Transnational Law*, 661–690.

Chapter 5

Zanzibar

I turn now to examine and comment on the land law reform programmes of the seven countries discussed in this book. I will deal with the countries in the order in which they enacted their reformatory laws, starting with Zanzibar. Jones summarises the position by the early 1980s:

> While the legal landscape (as compared to the British Protectorate) changed, the economic landscape remained as precarious as ever. The obligation of all occupiers of land grants from the Government or customary lands to cultivate crops according to Government production plans was not sufficient to avoid a food crisis.[1]

Törhönen provides the background to the development or the new land laws:

> In the early 1980s the Government of Zanzibar started to tackle the problems of agriculture . . . [T]he post-revolutionary land tenure system had proved ineffective both in providing secure tenure and serving the needs of the government . . . Together with agricultural policies there was an obvious need to tackle the land issue . . . a land policy was required to be created with the following principles:
>
> - land was to remain national property
> - re-registration of land and the creation of a national land use plan
> - a land commission to be established
> - the commission to be represented in local governments for controlling proper land use and cultivation
> - a new land and conservation legislation to be produced.

1 Jones, op. cit., 161.

The ownership of land and the use of land were given special notice. The principles for the ownership of lands were:

- the Three Acre Plot allocation to be revised
- abandoned, neglected or illegally possessed land holdings to be reallocated to those who would treat them more properly . . .
- the Commission for Lands and Environment to be responsible for reallocating land
- to stabilise land ownership by legal allocation.

Already . . . in 1981, the Government of Zanzibar had decided to establish a steering committee for reviewing current land administration problems in Zanzibar and to propose new land policy approaches for Zanzibar and Pemba . . .

Following is the scope that the committee formed for the creation of a land policy . . .

- to establish a range of tenures and a variety of methods for holding land that will give expression to the community goals, traditions and values
- to give secure tenure to those nationals who wish to invest in the land and promote development
- to define public and private rights in land, as well as the responsibility for stewardship of the land
- to spell out the guiding principles and the machinery for administering Government or state land
- to facilitate an equitable distribution of land resources; this means that subdivision and transfers need to be reasonably easy to execute under state supervision and control
- to facilitate transactions in land and to establish an appropriate machinery for recording and enforcing transactions as well as for settling disputes
- to promote the efficient utilisation of land for the purpose of settlement, agriculture, forestry, mining, recreation and other necessary activities
- to protect the interests of future generations by conserving soils, water, nature, forests and energy sources
- to make sufficient land available for public purposes as and when needed
- to anticipate and accommodate popular aspirations as manifested through squatting and uncontrolled settlement
- to enhance public revenues through land taxation and to enable the recovery of public expenditure on land development and the provision of services.

> These principles may have been adopted from professional literature and international donor related statements. They differ from the latter only by not mentioning the stimulation of land markets. The socialist ideology did not allow such wordings in 1982, even though these objectives are clearly supportive to free land market . . .
>
> The proposal stressed the role of the local government in land administration, plot allocation, enforcement of covenants and settlements of disputes. Officially the land policy statement was approved by the Inter-Ministerial Committee on Land . . . The only thing that is not there and that every donor would have included, is the gender issue. The land policy does not mention women at all . . . Otherwise, it . . . could be introduced into any country. Perhaps, that is why it looks a bit suspicious.[2]

The first step in the development of a new legal framework was the creation of the Commission for Lands and Environment in 1989. Its land department was to coordinate land distribution for different purposes, find legal and administrative strategies in settling land disputes arising from land distribution and devise procedures for valuation of land property. The Act introduced a new element in tenure rights – 'natural land' of which the Government was the sole owner. This land is defined as 'natural land minus any useful man-made development thereon'. Jones explains the concept:

> This means that the Government is vested with all land underlying any developments, as well as any undeveloped land, In effect the Government, vested with the physical land underlying any developments on it, may intervene in the environmental use of the land, but it is to recognize the ownership and occupancy rights of other persons in the developments thereon for 'ownership' is defined as 'the development on the natural land or anything connected with and incidental to it, including a legal right to occupancy of the land' . . . Any land not occupied legally . . . or not developed would by default vest in the Government.[3]

A series of laws followed over the next three years, noted in Table 4.1 in Chapter 4. They had as their overall aim the introduction of a system of

2 Törhönen, op. cit., 56, 57, 58, 59. The author does not elaborate on the 'suspicious' nature of the land policy but it is reasonably clear that he was implying that this was much more a policy produced by or with the considerable assistance of donors on the basis of an international template than solely by the revolutionary government. Norman Singer, a US consultant, played a major role in the development of the policy. It certainly more or less disavowed 25 years of land policies, laws and practices in Zanzibar.

3 Jones, op. cit., 162–163.

registered individual titles via a process of land adjudication which could be made the subject of the normal range of market transactions – sale, lease, mortgage – but all such transactions had to be approved by a Land Transfer Committee. Failure by the Committee to act means an automatic referral to the Land Tribunal but if the Committee made a decision, an appeal to the Land Tribunal could only be considered if the Tribunal establishes that a point of law is involved. 'The Committee would be able to withhold its consent mainly for the reasons that the transfer would deprive the transferor – or dependents and heirs – of sufficient livelihood, or the transaction is a mortgage or will result in improper use of land.'[4]

Törhönen highlights the importance of the Land Tenure Act:

> The Land Tenure Act was drafted in early 1991. It was composed by a committee of Zanzibari land professionals.[5] Singer wrote that the Act is '. . . *designed to define all land relationships on the islands of Zanzibar*'. It was to replace the decrees given right after the revolution in 1964 and to supplement the acts passed at the end of 1989. [I]t passed the House of Representatives as Act number 12. The President of Zanzibar signed it later, but the version he assented had some wordings changed compared to the version that had passed the House. This has caused contradictions in the law . . .
>
> The Land Tenure Act of 1992 is the main land law as it was designed to define all land relationships in Zanzibar. It regulates mortgaging and leasing, inhibits fragmentation and sets rules for the transactions. It is divided into eight different parts: I Preliminary, II Public Land, III The Right of Occupancy to Land, IV Right to Ownership of Trees, V Grants of Public Land, VI Leases, VII Termination of Rights to Occupancy and VIII Miscellaneous Provisions . . .[6]

Jones provides a most interesting and original analysis of the overall policy – more I think philosophy – behind the laws and in particular behind land adjudication:

> The use of the words 'rights of occupancy' 'interest holder' 'Government vested with the natural land' . . . betray a favouring of one kind of perception of land value over another. The choice is basically between treating land as security (associated with social purposes of living and working) or as capital, associated broadly with making money and financing debts. It is the notion of favouring land as security as well as a means of

4 Ibid., 173.
5 Under advice of Professor Norman J. Singer from the Faculty of Law in the University of Alabama (footnote in the quote)
6 Törhönen, op. cit., 62, 63.

> preserving identity that runs as a common thread in the Zanzibari land laws. When translated into legal rights, this implies a right to land . . . The right to land is analogous in terms of its validity to the right to a fair wage guaranteed in various human rights instruments or a right to work and is even more appropriate in an agrarian society in which the majority live on the land and have rituals tied to the land. The right finds legal expression in the Land Tenure Act of 1992 guaranteeing every Zanzibari an agricultural grant during his/her lifetime . . .
>
> The right to land as a means of survival (and all the ties it implies to community) seemingly has been given priority over the right to make a profit . . .
>
> The further genius of the Zanzibar land laws is that the right to land does not necessarily mean communal tenure. The right to land is made the function of occupation and occupation made a function of ability to use the land . . . The ideal that informs adjudication of land occupancy, i.e., how far a claim can be allowed to fall short of or must be made to approximate the ideal, is not absolute command over land as property, but rather adjusting rights of occupancy in order to make the right to land realizable for most . . .[7]

This interesting theory does assume that Zanzibari land occupiers will not see their occupation of land as a means of making a profit from the land, that the Land Transfer Committee will function as it is meant to and that a land market will in effect be the exception rather than the rule. I am bound to express some scepticism on whether the ideal as set out by Jones will be the norm. The latest information on the operation in the land laws does not allow one to draw any firm conclusions either way since there is a major question mark over the effectiveness of the system:

> . . . Rights of Occupancy can only be granted to Zanzibari citizens and it only has legal effect when registered under the Registered Land Act. However, due to the absence of the Registrar of Lands and without a registration system no rights of land had been registered until 2009.

The Land Tenure Act was amended in October 2010 to extend the land lease period from 49 years to 99 years. As of now the local and foreign investors can access property through a land lease that is limited to a maximum term of 99 years. The Department of Lands and Registration (DoLR) has issued about 14–15,000 grants providing a right of occupancy and 887 land leases of which 617 are current. However, the land registry specified under the Land Registration Act has not been established on an operational basis which raises

7 Jones, op. cit., 179.

questions on the legal status of the existing rights. In 2010 the Minister issued about 600 new grants providing the Right of Occupancy. It is estimated that there are about 80,000 outstanding requests for allocation of land, so it is obvious that the authorities cannot fulfil the demand. In addition on issued grants and leases, there are about 25,000 three-acre plots (TAPs) in rural areas that were provided to the people for agricultural use after the revolution.

The Land Adjudication Act (1989) sets out procedures for the adjudication of rights through systematic adjudication and registration. Some pilot adjudication activities has been undertaken earlier, including work carried out by the Commission for Lands and Environment in the early 1990s with the assistance of the Government of Finland. This pilot terminated due to political and social problems in the mid-1990s and the adjudication results were never registered.[8]

Since the turn of the century however various ambitious projects have been started to implement or reform the new laws with little co-ordination between them and little benefit for the citizenry. The Finnish Government recommenced co-operation with Zanzibar in 2003 with SMOLE – Sustainable Management of Land and Environment. The first phase concentrated on pilot schemes with a second phase commencing in 2009 to generalise the results from the pilot schemes.[9] Progress has however been slow. The main obstacle has been the lack of qualified human resources and the low level of salaries that have not motivated staff to work.[10]

Alongside this programme, the government of Tanzania created a property formalization programme with Hernando de Soto's Institute for Liberty and Democracy known as 'Mpango wa Kurasimisha Rasilimali na Biashara za Wanyonge Tanzania (MKURABITA)' with the aim of empowering the poor majority to use their properties to generate more wealth. MKURABITA is a programme designed to come up with appropriate reforms, an implementation plan and a proposal to put in place an institutional framework for monitoring and evaluating the progress of formalizing the extralegal economic sector.[11] This programme was applied to Zanzibar and came up with a detailed package of proposals for reform in 2008. However as two commentators noted:[12]

8 Onkalo, P.J. and Sulaiman, M.S. (2011) 'Zanzibar: Sustaining the Environment at the Confluence of Cultures', FIG Working Week, Bridging the Gap between Cultures, Marrakech, Morocco, 18–22 May.

9 Government of Finland/Revolutionary Government of Zanzibar (2009) Programme Document for Sustainable Management of Land and Environment Phase II, July 2009–June 2013, Zanzibar, summarises what has been accomplished so far.

10 Ibid., 10.

11 United Republic of Tanzania Programme Management Unit (2008) The Property and Business Formalization Programme Reform Proposals Vol. III: Property Formalization Reform Outlines and Packages for Zanzibar, Zanzibar, 4.

12 Ibid., 10.

> The approach of the MKURABITA did not follow the legislation in Zanzibar. It tried to establish the Land Registry in the village level but as the required legal proceedings were not followed the adjudication cannot be registered in the legal register. The Land Tenure Act only provides protection to the properties registered in the Land Registry. There is also no capacity in the local level to maintain the registry with geographical information and the approach does not support the overall goals of the Zanzibar vision 2020.

The programme thus contradicted the SMOLE programme by attempting to create an alternative system of title registration. Too much work was done by the consultants outside Zanzibar and that made it difficult to raise awareness of the programme and its assumed benefits among the people who were to be the beneficiaries.

The Tanzanian government also secured the financial support of the World Bank to implement the Business Environment Strengthening for Tanzania (BEST) Programme. The objective of the BEST Land Sector Component for Zanzibar was to establish an efficient land administration with accurate land information, efficient land registration processes and services, and efficient and effective land dispute settlement processes. According to the project document, the Zanzibar land sector component had to address, inter alia, the following:

- *A New National Land Policy*: that recognizes existing tenure regimes and best supports the social and economic development of Zanzibar.
- *Appropriate Legal Framework*: including a review of existing legislation and regulations and enactment of new legislation to support an efficient land market . . .
- *Effective Resolution of Land Disputes*: involving the clearance of the backlog of land disputes and building capacity for the better operation of the Land Tribunals . . .[13]

So if BEST were to be followed, the whole reform effort would be revisited and rewritten.

Myers characterises the reforms as follows:

> The overall effect of legal and legislative reform was a grafting of neoliberal ideas of individual property and security of land tenure into a socialist system. As a result of COLE [Commission of Lands and Environment] and ZILEM's [Zanzibar Integrated Lands and Environmental Management – the earlier Finnish programme] work, right-of-occupancy

13 Ibid., 10.

> deeds are now held by foreigners for most of Unguja's island eastern beachfront and for major plots within the city's historic core, Stone Town . . . The urban poor have had little say in the conception of what urban services needs should be addressed under neoliberal governance.[14]

Thus, the whole programme of land law reform appears to be following in an uncanny reprise, the patterns of colonial meddling with land tenure in Zanzibar with no perceived benefit to the ordinary citizens of Zanzibar. If BEST is followed, it will be more of the same.

14 Myers, G.A. (2011) *African Cities: Alternative Visions of Urban Theory and Practice*, London, Zed Books, 131.

Chapter 6

Mozambique

The Land Law of 1997 is held out as one of the, if not the, most advanced land laws on the African continent. Its reputation has benefited immensely from the detailed and positive overview of the making of the law written up by Christopher Tanner, an FAO consultant who played and is still playing an important role in the development of the law.[1] His summary of the law and its making sets the scene:

> The Mozambican case offers important lessons at a time when land policy and reform is high on the agenda in many African countries. Firstly, it is an excellent example of the 'sociology of law' at work. Sociological analysis preceded the drafting of new legislation and subsequently guided it at every step. There were two sides to this sociology however, and both were important to the ultimate outcome. On one side, the team drafting the legislation was guided by policy recommendations rooted in sociological and agro-economic assessments of the land management 'norms and practices' of the vast majority of Mozambicans.
>
> On the other side, the wider sociology of Mozambican society and politics was fully taken into account, to develop a strong consensus and ensure that the new law was widely accepted as legitimate. At no point were the interests of one group favoured exclusively over another. The process was instead guided by two basic principles: protect existing rights, and create secure conditions for new investment that would benefit local people and investors alike. The result is a law that gives legitimacy to practices already followed by the vast majority of the population, while also offering secure conditions for new private investment in rural areas.
>
> The second point is that this law is also an important development tool, and was explicitly designed as such. Indeed equitable and sustainable development is its major underlying objective. It is *not* a law

1 Tanner, C. (2002) *Law-Making in an African Context: The 1997 Mozambican Land Law*, FAO Legal Papers Online No. 26, Rome, FAO.

> that simply defines and protects land rights; it does *not* assume that once its work is done, things will remain as they are. Quite the opposite – it creates the conditions for change, for a long-term but *gradual and well managed* process of rural development: through the adaptation of local structures to modern land management methods (and vice versa); through a process that should allow local people to realise and use the capital value currently locked up in their one key asset (their land); and through the decentralisation and democratisation of land and natural resource management right down to community level. It is this process that will stimulate a profound process of social development amongst newly empowered communities.[2]

It was clear from the time of the making of the peace agreement in 1992 that major changes were needed on 'the land question'. The 1979 Land Law was still in place but its philosophy did not accord with the move to a more market-orientated economy that FRELIMO had begun to adopt in the mid-1980s. Once the peace agreement was signed, refugees and internally displaced persons (IDPs) began to return and wanted to reclaim their land and new investors began to come in and acquired land from the government at no real capital cost. This immediately caused tensions with existing land occupiers. By the time a new government took office following multi-party elections in October 1994 a programme of research was already under way with the support of the University of Wisconsin Land Tenure Centre and USAID. National consultants were also involved and an FAO technical team came in to work on the policy and other donors were involved. There were then powerful external pressures to develop a land policy and law that supported the market economy which had to be balanced against the need to preserve the rights of existing peasant land occupiers which were protected by the Constitution.

The Constitution provided that all ownership of land is vested in the state and cannot be sold, mortgaged, or otherwise encumbered or alienated; the use and enjoyment of land is to be the right of all the Mozambican people, this right can be granted to individuals or to groups/corporate persons and most importantly, the Constitution also mandates that in awarding land use titles, the state should respect existing rights acquired through inheritance or occupation.

The fundamental aims of National Land Policy which emerged from this process of research and discussion was summed up in the policy as follows:

> Safeguard 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.

2 Ibid., 1.

The land policy explicitly accepted that the customary land systems were carrying out an important public service at very low cost to the state. Research undertaken in developing the land policy had shown that:

> customary tenure systems still accounted for over 90 per cent of land tenure rights in the nation, and that customary leaders' control over and management of land and natural resources remained strong and was seen by villagers as legitimate . . . chiefs were more or less successfully distributing parcels of land to community members, mediating internal land-related conflicts, and maintaining and protecting community graveyards, sacred forests, communal areas and sites of historical importance . . . Customary land management units – and the boundaries between these units – were still recognised and considered valid by local people and could be identified through processes of participatory fieldwork.[3]

The policy therefore was to recognise customary land rights and management institutions and in going down this path, FRELIMO had to reverse a central tenet of its long-standing strategy and modernising philosophy which had been to abolish chiefs and customary land management institutions which had been seen as relics of the colonial past.

Once the land policy had been approved, the Land Commission established in 1995 moved on to develop a new land law to provide for its implementation. After what Tanner and following him, Knight describe as 'one of the most participatory law-making processes in African history to date',[4] the Land Law was enacted in 1997. Knight's summary of the principal elements of the law give a fair overview of it:

> Mozambique's land law turned *de facto* customary rights into *de jure* tenure by recognising customary norms and practices as one way of acquiring the state 'right of use and benefit' (*Direito de Uso e Aproveitamento da Terra* or DUAT, in Portuguese). Under Mozambique's 1997 land law, land use rights can be attained in three ways:
>
> 1 Through 'occupancy by individual persons and by local communities, in accordance with customary norms and practices which do not contravene the constitution' (art. 12(a));
> 2 By 'occupancy by individual national persons who have been using the land in good faith for at least ten years' (art. 12(b));

3 Knight, R.S. (2010) *Statutory recognition of customary land rights in Africa: An investigation into best practices for law-making and implementation*, FAO Legislative Study 105, Rome, FAO, 106, 99–150.

4 Ibid., 106.

3 By 'authorization of an application submitted by an individual or a corporate person' to government land administrators, which may then allocate 50-year leasehold rights, after consultation and approval by the community within which the land requested is located . . . (This mechanism is the only route open to foreigners and to national and international companies).

Importantly, the land right is legally the same, regardless of whether it is acquired under customary terms, good faith occupancy, or public application and consultation. In all three cases, it is a private right and holders can exclude third parties. Furthermore, 'men and women, as well as local communities, may be holders of the right of land use and benefit' and may obtain this right either 'individually or jointly with other individual and corporate persons by way of joint titling'. The use and benefit of the land is free for 'family uses, local communities and the individual persons who belong to them'.

Under the first two methods of acquiring a right of land use and benefit, affirmatively registering one's land claims is not necessary; Article 14§2 very clearly states that 'the absence of registration does not prejudice the right of land use and benefit acquired through occupancy . . . provided that it has been duly proved . . .' Under the land law, 'Local communities who occupy land according to customary practices' automatically 'acquire the right of land use and benefit' (regulations, art. 9§1). Anyone who had been granted land rights 'in accordance with customary norms and practices which do not contradict the constitution' before the land law was passed (or who had been living on land for ten years in good faith) thereafter automatically held a formal right to use and benefit, as strong as any paper title granted to an investor. None of these customary rights need to be proactively, formally registered; the absence of paperwork proving title does not factor into the strength or validity of land rights. Land rights exist and are enforceable regardless of whether any administrative action or formalization procedure has been taken. These rights are secure, inheritable, and can be transferred to third parties, either internally within the community or to outsiders through a formal consultation process . . .

As described above, lawmakers never attempted to establish one single definition of tradition or 'custom' in Mozambique. Rather, the land law was designed to be a dynamic, flexible instrument that would be able to accommodate many different kinds of land rights and landholdings at once and allow for national political and economic change over time . . . To achieve this, the law simply states that a) rights are acquired by customary norms and practices, and that when participating in resource management, conflict resolution and titling, the 'local communities use, amongst other things, customary norms and practices' (art. 24). What exactly those practices and norms

actually are or should be was left undefined. In so doing, the law created parameters that were sufficiently vague to encompass the nation's myriad customary systems within one law . . .

To best safeguard rural smallholders' existing land claims and ensure that villagers would be able to continue . . . using the land according to customary usage, lawmakers chose to make the community the foremost legal entity, whose borders are clearly protected from outsider infringement and within which traditional mechanisms of land use and management may prevail. Mozambique's land law therefore establishes that generally, as under custom, community lands are the meta-unit, from which all other land and natural resources rights are derived. Within the community borders, a range of individual or family and other bundles of rights exist, all allocated and managed by the local land management system according to the prevailing set of customary principles. Through Articles 10 and 12, a 'local community' can be a title holder over the land used and occupied by all of its members . . .

The law defines a local community as: 'a grouping of families and individuals, living in a territorial area that is at the level of a locality or smaller, which seeks to safeguard their common interests' (art. 1§1). This definition is grounded in community occupation and use of land (based on the prevailing land use, kinship and internal management systems of each community) and was designed to be able to be used in the wide variety of cultural and ecological contexts of Mozambique. The definition establishes community size as being 'at the level of a locality or smaller' . . . Indeed, various forms and arrangements of community or group are possible under this definition of 'local community'. A community may be a traditional unit based on clans or chieftainships, extended families, or simply a group of neighbours . . .

While it is not mandatory to formally register community land use rights, communities may choose to register their rights and receive documentary proof of their land claims . . . This titling and registration process does not create the right; it only provides documentary evidence of the pre-existing right. The methodology developed for the purpose is called 'community delimitation' . . . [and is not unlike land adjudication but applied to community land as opposed to individual land rights].

As with communities, Mozambican nationals may acquire land rights either through 'customary norms and practices', or 'good faith' occupation. This process is also automatic for individuals: no affirmative steps need to be taken; such individual and family land use rights were formalized the moment that the land law came into effect. The absence of a legal document does not undermine the strength and validity of a family's or individual's land claim.

> The 'right of use and benefit' acquired by occupation by Mozambicans is a permanent land right. Yet because all land is owned by the state, land cannot be sold or transferred by rights holders. However, 'all infrastructures, structures and improvements existing upon the land' may be sold or transferred.
>
> . . . [I]n addition to customary rights and good faith occupancy for ten years or more, the third way to acquire a right of land use and benefit is through 'authorization [by the state] of an application submitted by an individual or corporate person in the manner established' by the land law . . . [T]his is the *only* way foreign individuals and both national and foreign corporations can acquire a right of land use and benefit. These applications will only be awarded if they involve 'an investment project that is duly approved' and if foreign applicants have met the appropriate residency requirements . . .
>
> Granted rights of use and benefit are awarded for a term of 50 years, renewable for another 50 years upon application. This right is transferable and inheritable . . . Importantly, before being granted a right of land use and benefit by the state, investors must also carry out a consultation with the community or communities in which the land to be granted is contained, 'for the purpose of confirming that the area is free and has no occupants' . . . Thus an investor . . . must consult the community legally holding the right of land use and benefit over this land (as acquired by custom) and proactively ask the community itself to grant the land. At the consultation, the community may agree or may refuse to cede the requested land to the investor. Applications for rights of land use and benefit will not be processed unless local community consultation has taken place . . . These obligatory community consultations are a central tenet of Mozambique's land law.[5]

There were deliberately many ambiguities and open-ended provisions in the Law which was to be supplemented by Regulations and a Technical Annex. These ambiguities in part reflected the tensions involved in the enactment of the law. Tanner refers to old ideas which still had strong support in 'important circles' and how difficult it was to escape from the past:

> Ingrained ideas and a reliance mainly on past and 'close-to-hand' experience to inform policy can so often result in 'new' approaches that are in effect old ones dressed up in new clothes.
>
> An excellent illustration of this is in fact in the new 1995 Land Policy. Having espoused a radical and progressive set of new principles, the implementation model tacked onto the policy document actually took

5 Ibid., 107, 108, 110, 113, 120, 125, 126.

> things right back to the old colonial model, overlaid with new arguments about protecting local people while promoting national development. The country was still seen as divided into several clear types of land, not in the western sense of zoning into agricultural, residential or commercial areas etc, but in relation to who can use it. One – Type A – is very reminiscent of the old colonial category reserved exclusively for local agriculture (i.e. the 'family sector'), and it is only within these areas that customary land law and management was to be applied. The rest of the country is effectively then 'free' for the State to manage, apparently safe in the knowledge that the subsistence needs of rural people are looked after and therefore in a new atmosphere free of conflict . . .
>
> Many people still argue that it is necessary to give local people exclusive rights behind secure borders in order for them to be adequately protected. Given the overall constellation of power and economic interests however, this approach would inevitably place the majority of rural people either on the more marginal land (as happened in colonial times), or within much smaller areas than those indicated by the farms – and socio-economic – systems approach.[6]

Tanner's concern about slow implementation voiced in 2002 has more worryingly been backed up by Knight, writing in 2008:

> Despite enormous education and sensitization efforts for both communities and state actors by civil society organizations and the Centre for Legal and Juridical Training . . . more than a decade after it was passed, the 1997 land law is still far from being properly implemented. These implementation problems have their roots in weak political will and lack of oversight. To date, the government of Mozambique has not allocated adequate funding, training, or personnel to local, district and provincial land administration bodies, and has instead focused primarily on promoting investment.[7]

People's awareness of the law was extremely weak. Communities did not know how to defend and enforce their rights. There was insufficient technical capacity in the government and in the private sector to implement the law. The judiciary remained weak and understaffed so disputes which were not settled at the local customary level tended to be dealt with by the administrators who were not particularly sympathetic to community complainants. This

6 Tanner, op. cit., 47, 48. He went on to note that investors were getting new use rights without adequate consultation and that there were institutional and political blockages which were contributing to slow implementation.

7 Knight, op. cit., 131.

was because research had found that state land administrators had not fully understood the land law's central premise: that customary claims were as strong as formally-registered or granted claims. But ignorance of the law is compounded by what appears to be attempts to undermine it by the government itself through decrees which limit the scope of community delimitation and more fundamentally, the size of community lands. 'Even more worryingly, the Government . . . has now claimed the power to declare that "unused" community land is "free" and then claim jurisdiction over such lands.'[8] The government has assured communities that if they keep their land under use they will not lose it but there is no definition of what 'under use' means. The government exhibits a lack of support for community land rights during consultations with investors. There is no or very little oversight of intra-community land administration.

A USAID Country Profile of 2011 repeated many of these concerns:

> A majority of thousands of rural residents are unaware of their land rights as communities and as individuals. Those who are aware . . . lack financial or technical support necessary to assert their rights effectively. Communities that lack support are ill-equipped to delimit their land, prepare development plans . . . or meaningfully engage in negotiations with prospective investors. Smallholders who lack such support are unable to demarcate and register their land rights . . . and defend their rights against third parties . . . in general the law has been inadequately implemented in most areas . . . To date, most of the population are not as yet benefiting adequately from the legal reforms and more than half are poor . . . Local officials . . . are often unaware of the law governing the land rights of communities and individuals . . . In many cases the required consultation between investors and communities has been met only in form, not substance.[9]

The USAID Profile notes that the Millennium Challenge Corporation (MCC) is funding a comprehensive Land Tenure Services Project that includes work on policy and legislative review through the Land Policy Consultative Forum established by the government in October 2010 and recommends that donors get together to provide a services centre model for delivery of services to communities and their members to enable them to recognise and benefit from their land rights. Useful though this would undoubtedly be, the real problem, as noted by both Tanner and Knight, is that there is a question-mark over the government's commitment to the law and in particular to its stress on the

8 Ibid., 137.

9 USAID Country Profile (2011) *Property Rights and Resource Governance Mozambique*, Washington D.C., USAID, 1, 3, 4.

primacy of community land rights and community land management through customary processes. Knight is quite blunt on this:

> Of most concern is that data on the land law's implementation overwhelmingly indicates that state officials do not have the political will to see the full enactment of the land law. Implementation difficulties have been exacerbated by various government efforts to effectively block its more progressive aspects. The changes to Article 35 that make community land rights subject to state approval, the highly flawed practical implementation of community consultation exercises, and the lack of state funding channelled to support community delimitations are just the most glaring of various indications of the state's aim of slowly eroding the legal strength of community land rights . . . Furthermore, Decree 15/2000's effective re-instatement of administrative control over communities (by turning 'community authorities' into a kind of extension of state administration) and the resulting conclusion that only these authorities need be consulted for approval of an investor's land claim application are further indication that state actors are seeking to more tightly control land and natural resource management, and would prefer to retract the entire community's right, as co-title holders, to jointly and actively decide how they want to administer and manage their lands. Most importantly . . . despite various constitutional assurances, there are currently no legal mechanisms either in the land law or in Mozambican law through which communities can protect themselves from government officials' decisions to cede vast tracts of community land to foreign or national investors, for, ultimately, the land is owned by the state, and communities hold only 'rights of use and benefit' . . .[10]

The optimism of Tanner writing at the turn of the century has given way to the pessimism of Knight writing a decade later. But even she did not know of the government's establishment of a body, with the support of USAID, to review policies and laws with the clear aim of removing restraints on the transfer of rural land use rights, conferring more rights on investors and limiting the government's role in reviewing exploitation plans. Tanner's prescient comment about the revival of the old colonial approach to land rights would appear to be coming to pass: community land 'reserves' with limited amounts of land available for the people and a flourishing land market for 'investors' both national and foreign able to acquire and use (or not as they see fit) 'unused land' taken from the land of communities who have no redress for this abuse of power.

10 Knight, op. cit., 148, 149.

Chapter 7

Uganda[1]

Many persons in Uganda considered that the Public Land Decree of 1975 was the best attempt up to that point to solve the land issue in Uganda. But the law was never properly implemented. Between the date of its promulgation and the mid-1980s, there was almost constant civil war and no real commitment on the part of any government – and there were several – to apply the law. On the ground, there was a confused and chaotic operation of land tenure systems. This led to a multiplicity of land disputes, lack of security of tenure for those occupying land under customary tenure, the exclusion of women from land utilization decisions, widespread degradation of land due to unsustainable methods of resource use and encroachment into protected areas.

At the policy level, it was a different story. From the mid-1980s, the World Bank began to involve itself in agriculture policy reforms, and land tenure reform commenced as an offshoot of that initiative. In 1987, a working group on land tenure recommended that the effect of the Land Reform Decree be studied and a sound national land tenure policy be formulated, conducive to agricultural development and consistent with positive steps to rehabilitate and update the Land Registry. This study recommended in 1989 that the Land Reform Decree be repealed and that a new policy should facilitate the development of a market for land based on freehold titles. Mailo owners, mailo tenants, leaseholders on public land and customary tenants (those holding public land under customary tenure) should be able to obtain freehold title to the land they occupied and freely deal with it thereafter. Mailo owners would be compensated for land occupied by tenants that was converted to freehold land through a process of leasehold enfranchisement.

These recommendations were accepted by a group that met to consider them, and a technical committee was then set up to convert these policies into

1 This chapter is derived from McAuslan, P. (2003) 'A Narrative of Land Law Reform', in Jones, G.A. (ed.) *Urban Land Markets in Transition*, Cambridge, MA, Lincoln Institute of Land Policy. This in turn was revised and expanded into Chapter 13 of McAuslan, P. (2003) *Bringing the Law Back In; Essays in Land, Law and Development*, Aldershot, Ashgate, 310–352.

legislation. That committee produced a draft law, which was, in some respects, a repeat of the Public Lands Act (1969), but with some significant differences; for example, mailo land was not reinstated, but freehold tenure was. Customary tenure remained in its usual state of limbo, but the possibility of conversion to freehold via a process of adjudication was provided for. Leasehold titles could be automatically converted to freehold title. The draft law proposed a high degree of administrative management of land via the Uganda Land Commission.

Further consultation took place on these proposals. Another committee was established to carry out a nationwide consultation exercise, particularly with respect to the implications for customary tenure of conversion to freehold. As a result, a new Bill was put together by the Technical Committee on Land Tenure Law Reform, which reported to the agricultural secretariat of the Bank of Uganda in June 1993. This new Bill steered an uneasy course between freehold tenure on the one hand, and state control, to be exercised by the Land Commission, various district level bodies and local authorities on the other.

It is at this point that the constitutional dimension of land tenure reform began to kick in. Starting in 1992, a major exercise in constitution-making got under way in Uganda, and land was a key issue. After much debate, various important and not wholly consistent provisions were adopted in chapter 15 of the Constitution that came into effect in October 1995, which need to be outlined.

Four matters are of particular note. First is the conferring of rights of ownership on persons occupying land under customary tenure. No longer are they customary tenants on public land. Under the Land Reform Decree, all land in Uganda was previously public land, and even under the Public Land Acts and the earlier Crown Lands Ordinances, all customarily occupied lands were public lands. As a result, the effect of this ownership provision is to confine public land as a category to land actually owned by public authorities or clearly set aside for public use.

Second, mailo land is restored. In practice, as successive committees recognized, the incidents of mailo tenure are the same as the incidents of freehold tenure, but the symbolic significance of mailo land was too great to be ignored by the Constitution. However, given its restoration, it was equally necessary to tackle the problem of landlord/tenant relations on mailo land, and lawful and bona fide occupants of land especially as commitments were made to the peasants in Buganda on this matter by the National Resistance Movement (NRM) during the civil war that preceded the collapse of the Obote II regime and the coming to power of the NRM in early 1986.

Third, it was also necessary to grapple with the continuing problem of land relations in Kibaale District. It was impossible to reach agreement within the Constituent Assembly on these matters, so clauses were inserted in the Constitution to provide for a temporary freezing of the status quo with the long-term solution thrown into the lap of the new Parliament.

Fourth, the Constitution provided for leasehold enfranchisement in respect of leases of public land – not automatically, but in accordance with provisions to be made by Parliament. This provision however was consistent with the aim of eliminating public land, which is the cornerstone of Article 237. No effort was made to address the issue of any potential conflict of land rights between customary occupants of leasehold land and the leaseholder. That, too, was left for Parliament to sort out.

Finally, the Constitution provided that within two years after the first sitting of Parliament elected under the Constitution (that is by 2 July 1998), Parliament should enact a law to give effect to the general principles on land enshrined in the Constitution.

One important conclusion from this background to the Land Act is that while much policy-related work had taken place on land tenure issues in the preceding 15 years, the government did not produce any national land policy. Insofar as a national land policy exists, it has to be pieced together from the Land Act, other laws, and statements by the President and ministers both in discussing the Act and such matters as agricultural development, environmental protection and poverty alleviation. The act itself has been represented at various times as being a positive contribution to all those matters. Although the absence of a national land policy was recognised as being a deficiency, and work started early in the new century to develop one, more than a decade after the coming into effect of the Land Act, all that had been achieved by September 2009 was a fourth draft of a national land policy. There the momentum seems to have stalled.

The Land Act addresses six principal concerns. First, customary ownership. The Constitution provides that persons occupying land under customary tenure shall henceforth be owners of the land they are using and occupying, and may obtain a certificate of customary ownership as documentary evidence of that ownership. This is to be achieved via a process of adjudication and demarcation of boundaries and rights in the land conducted by Parish Land Committees (PLC), which will pass up their recommendations on applications for certificates to the District Land Boards (DLB). On the recommendation of a DLB, a recorder, located at sub-county level, will issue and register a certificate of customary ownership. The Act makes provision for third-party rights in land to be recorded at the time of adjudication and the certificates will be issued subject to those third-party rights being protected. Adjudication of customary rights is entirely voluntary and is based on a process of sporadic adjudication; no specific provision is made for systematic adjudication of areas of land on the basis of a majority decision by persons in the area to proceed down that route.

Persons owning land under customary ownership may undertake the full range of transactions in land – both commercial (sale, lease, mortgage) and family (gifts, devises by will). Where certificates of customary ownership have been issued, they will be the medium of transactions, which, to be valid, will

have to be recorded in the register. The act expressly states that a certificate of customary ownership 'shall be recognized by financial institutions . . . as a valid certificate for purposes of evidence of title', though no sanction is provided if financial institutions decline to comply with that peremptory and somewhat unrealistic command.

Persons owning land under customary law, instead of applying for certificates of customary ownership, may proceed to apply for a freehold title. The same processes of adjudication of rights will have to take place, but the demarcation of boundaries and the measurements of the relevant plot will have to comply with the standards set out in the Survey Act, and registration of the title will be under the Registration of Titles Act, a much longer and more costly process than obtaining a certificate of customary ownership. Freehold ownership may be granted, subject to conditions that will be designed to protect third-party rights.

Second, tenants' rights. The Act provides for persons wishing to own and manage land under customary or any other tenure on a communal basis to form themselves into a Communal Land Association. This will be able to hold land that may be used by persons or families on an exclusive basis and hold and manage land to be set aside for the common use of members of the association, in accordance with rules agreed to by members. Tenants of private landlords – known in the Act as lawful or *bona fide* occupants of land – are enabled to obtain certificates of occupancy in respect of their occupation by a process similar to that available to customary owners wishing to obtain certificates of customary ownership. Certificates of occupancy are issued by recorders and are registered in the simplified register kept at subcounty level. Tenants by occupancy have in effect perpetual leases, for which they are required to pay only a nominal rent (though they may lose their lease if they do not pay the rent and have no reasonable excuse for not so doing). They may bequeath their lease as of right, but with respect to commercial transactions (sale, subleasing, mortgaging), they must obtain the consent of the landlord. In the event of a dispute between landlord and tenant, for example, on the consent to a transaction, appeal lies to a Land Tribunal.

Tenants wishing to sell their leasehold and landlords wishing to sell their freehold reversionary interest must first offer their interest to, in the first case, the landlord, and in the second case, the tenant. Where agreement cannot, even with the aid of the services of a mediator, be reached on the sale, the parties may sell their respective interests on the open market. As an alternative to sale, the parties may agree between themselves either to subdivide the land in agreed proportions, each becoming the freehold owner of a portion of the land, or to become joint owners of the land. In urban areas, the local council may require, as a condition of granting permission for development, that landlord and tenants agree together on a programme of planned development, which must include arrangements for the future ownership and

occupation of the development. This provides the legal basis for the parties to agree to land sharing or land readjustment projects.

Tenants are empowered by the act to acquire their landlord's interest (leasehold enfranchisement), but the Act does not give the tenant any right to require the landlord to sell his or her interest to the tenant. This is despite Article 237(9)(b) of the Constitution requiring that Parliament shall enact a law 'providing for the acquisition of registrable interest in land by the occupant', which would seem to imply that the occupant should be given the right to acquire the landlord's interest. This provision was directed particularly at the long-standing tenure problems in Kibaale District, and it is this opportunity to acquire the landlord's reversionary interest that was the original driving force behind the creation of the Land Fund.

Tenants holding leases granted out of former public land are also empowered to apply to the DLB in which the freehold reversionary interest is vested for leasehold enfranchisement. Where the application is in respect of less than 100 hectares, it may be granted if certain conditions connected to the lease are met. The enfranchisement is free. Where the application is in respect of more than 100 hectares, then, in addition to conditions relating to the lease, the application must be in the public interest (undefined in the Act), and the applicant must pay the market value for the freehold reversion.

The Act repeats and fleshes out the provisions of the Constitution on DLBs. The most important of these is that in the performance of its functions, a DLB shall be independent of the Uganda Land Commission and shall not be subject to the direction or control of any person or authority, but shall take into account national and District Council policy on land. For each of the 45 districts, a DLB must be set up to hold and allocate land that is not owned by any person or authority; facilitate the registration and transfer of interests in land; take over and exercise the powers of a lessor in respect of leases granted out of former public land; and compile and keep under review compensation rates payable where land is to be compulsorily acquired. Boards may acquire land, alter, improve and demolish buildings, and sell lease or otherwise deal with land held by them. Expenses and fees of the boards are to be charged to District Administration funds.

Below the DLBs are the parishes. For each of the approximately 4,517 parishes, there shall be a PLC, and in each of the 64 gazetted urban areas and divisions of a city, an Urban Land Committee (ULC). PLCs are the first port of call for those wishing to acquire certificates of customary ownership, and they are responsible for carrying out the processes of adjudication of boundaries and rights. Their recommendations on titling and on the protection of third-party rights are passed on to the DLBs and, if accepted, form the basis for the issuance of a certificate of customary ownership by the recorder. As such, they play a fundamental role in the implementation of the Act.

The Act provided that courts, other than the High Court, should cease to have jurisdiction over land disputes. Instead, for each district there was to be

a District Land Tribunal consisting of a chairperson, qualified to be a magistrate grade I, and two other members. All the members of the tribunal are to be appointed by the chief justice on the advice of the Judicial Service Commission. For each sub-county, urban area and division of the city, there were to be respectively a Sub-county Land Tribunal and an Urban Land Tribunal. All these members were to be appointed by the Judicial Service Commission. The Act, however, was silent on which body would be responsible for administering and funding the running costs of the tribunals. The land tribunals have jurisdiction over land disputes relating to the grant, lease, repossession, transfer or acquisition of land, whether arising under the act or otherwise, and whether between individuals or involving the land commission or other authorities with responsibility relating to land. Tribunals also have jurisdiction over amounts of compensation payable for land compulsorily acquired. District Land Tribunals hear cases on appeal from sub-county and urban tribunals, and appeals follow from the District Land Tribunals up to the High Court.

In addition to land tribunals, the Act provides two alternative channels for dispute settlement. The first is customary dispute settlement and mediation: traditional authorities may continue to exercise their functions of determining disputes over customary tenure or acting as mediators between the parties to a dispute. Second, a mediator may be appointed by a land tribunal to assist parties to reach an amicable settlement. A mediator is not required to have any special qualifications; they must, however, be people of high moral character and proven integrity who must exercise their functions in accordance with the principles of natural justice and with general principles of mediation and conciliation.

The Act provides for a Uganda Land Commission, a body of five persons, all of whom are appointed by the President with the approval of Parliament. The commission's principal function is to be the government's estate agent and property manager, and to that end, it may undertake the full range of transactions and activities in relation to land. One important activity is to arrange for the surveying and titling of the land used, occupied or set aside for public purposes in Uganda – in effect the residue of public land. In the past, when virtually all land was public land and it was a simple process to order people occupying land under customary tenure to move from the land, there was no need to survey and register land used, occupied or set aside for public purposes. Now, however, when most land is privately owned, the lack of clear boundaries to public land is causing grave problems for public development projects.

The Act gives another function to the Commission – to manage the Land Fund that is also established by the Act. The Fund comprises monies appropriated by Parliament, loans obtained by government, grants from donors and funds from other sources approved by the minister responsible for lands in consultation with the minister responsible for finance. The Fund is to give loans to tenants to enable them to acquire the registrable interests referred to

in Article 237(9)(b) of the Constitution; to enable government to purchase or acquire registered land to enable tenants by occupancy to acquire registrable interests pursuant to the Constitution; to resettle persons made homeless by government action, natural disaster or any other cause; and, to assist other persons to acquire titles.

From the start, there were problems of implementation. No attempt had been made by the government to estimate the costs of implementation. One unofficial estimate was that over 20,000 public officials would be needed to implement the Act. The Treasury made plain that there was no way such public funds could or would be made available. Attempts to persuade Districts to share officials and Land Tribunals were rejected. Officials in the Ministry of Water, Lands and Environment who under the Act would be losing powers over land and the benefits that went with the exercise of such powers set about to sabotage the implementation of the Act and were very successful in so doing. There was considerable obstruction by the Judicial Service Commission to appointing members of the Land Tribunals. Ten years on, no Land Tribunals had been established yet the courts had ceased under the Act to have any jurisdiction over land disputes. One study[2] done of the incidents of conflicts over land in Uganda concluded that:

> . . . government interventions that have aimed to reduce land conflict in the past do not seem to have been effective, and by de facto eliminating the institutions that had traditionally dealt with conflict without establishing new ones to take their place, may even have helped to increase the overall incidence of conflict, in addition to the possibility that the lack of attention to women's rights may have made it more difficult for widows to avoid inheritance-related conflict.
>
> Our results imply that in Uganda, land-related conflicts have a negative impact on productivity as well as equity . . . The fact that in Uganda, legal changes aiming to reduce the incidence and impact of conflict did not automatically result in success implies that in order to be effective, such legal initiatives need to be complemented by effective implementation. The evidence of a significant and quantitatively large output-reducing impact of land conflict emerging from our sample, over and above the social tensions that are associated with it, implies that even if implementation will require some effort, expending this effort is likely to be justified, both from an economic and social perspective.

This is a damning but fair assessment of the overall impact of the Land Act, enacted with such high hopes in 1998. Two issues in particular which have

2 Deininger, K. and Castagnini, R. (2006) 'Incidents and impact of land conflict in Uganda', 60 *Journal of Economic Behaviour & Organisation*, 321–345, 342.

bedevilled the effectiveness and implementation of the Act are those of women's rights and the problems of tenants and bona fide occupants of land. These must be discussed.[3]

Turning to the issue of tenants and bona fide occupiers, this issue goes back to the beginning of the colonial regime in Uganda in 1900. It has festered for over a century and the Land (Amendment) Act 2010 is the latest attempt to grapple with it but is likely to be no more successful than all the others. The Act was first introduced into the National Assembly in 2008 but did not reach the statute book until 2010. A masterly and critical overview of the Bill was written by Julia Schwartz[4] and the following longish extract explains the background to the Bill, its contents and defects:

> . . . Most lawful and bona fide occupants are occupants of so called mailo land situated in Buganda. Before colonisation, most of this land was controlled by the Kabaka who assigned it to his bakungu and batongole chiefs. It was occupied under a semi-feudal system by peasants who had to pay tribute to the chief or work for him. In the 1900 Agreement Buganda land was distributed between the British Protectorate Government and the Kabaka, the royal family and some thousand chiefs and notables. The Government's land was called Crown land and the other part became known as mailo land. The local peasants or cultivators (bibanja holders) who had previously settled on mailo land became tenants who had to pay ground rent (busuulu) and tribute on produce (envujjo) for the crops like cotton or coffee they grew. Over the years, land lords increased their busuulu and envujjo which led to riots and the Busuulu and Envujjo reform law in 1927. These laws fixed the busuulu and envujjo at a certain rate and at the same time stipulated that no bibanja holder could be evicted by the owner except upon a court order and save for public purpose or for other good and sufficient causes. In Toro and Ankole, the Toro Landlord and Tenant Law of 1937 and the Ankole Landlord and Tenant Law of 1947 introduced similar provisions for the relationship between tenants and registered owners. These laws were abolished by the 1975 Land Reform Decree which, at least in theory, transformed all mailo and freehold land into leasehold and left bibanja holders without security of tenureship and owners without a right to charge busuulu or envujjo. It was not until the 1995 Constitution and the 1998 Land Act that both mailo and freehold tenure were reintroduced and security of occupancy guaranteed again.

3 Women's rights to land are discussed in Chapter 13.

4 Schwartz, J. (2008) 'What Should be Done to Enhance Security in Uganda and Further Development? The Land (Amendment) Bill 2007, its Shortcomings and Alternative Policy Suggestions', http://library.fes.de/pdf-files/bueros/uganda/05914pdf. Available only in this form.

In the effort of reinstalling the legal situation as it was before 1975, the 1998 Land Act now defines mailo tenure as a form of tenure which involves the holding of registered land in perpetuity but permits separation of ownership of land from the ownership of development on land made by lawful and bona fide occupants.

'Lawful occupants' are defined by the Land Act as those who (a) occupied land by virtue of the Busuulu and Envujjo Law and the Toro or Ankole Landlord and Tenant Law, or (b) entered the land with the consent of the owner and include a purchaser, or (c) occupied land under customary tenancy but whose tenancy was not disclosed or compensated for when a certificate of leasehold was issued.

'Bona fide occupants' by law are those who have been living on a plot unchallenged by the registered owner or agent for 12 years before the coming into force of the 1995 Constitution (i.e. since October 1983), irrespective of whether they have been squatters or not. Bona fide occupants also include those who have been settled on land by the Government before 1995, but in this case the owner needs to be compensated. Thus, even people who have come on land after the 1975 Land Decree and who had been illegal tenants all these years, now enjoy security of tenure under the Land Act.

It is important to note that even under the Land Act the eviction of such bona fide and lawful occupants may only be effected on grounds of non-payment of rent and only by order of a Land Tribunal. In Section 31 of the Land Act 1998 as amended by Section 14 of the 2004 Amendment Act, it is provided that tenants are to pay a nominal rent which is to be determined by the Land Boards with the approval of the Minister. This rent has to be of a non-commercial nature. Only failure to pay this rent for more than two consecutive years may lead to the termination of the tenancy. Before evicting tenants, the owner has to follow a detailed procedure . . . Except for non-payment of rent, the Land Act does not list any other grounds which could allow owners to evict lawful and bona fide occupants.

Security of occupancy is further entrenched in the Registration of Titles Act which in Section 64 (2) stipulates that land included in any certificate is subject to the interest of any tenant even if it is not specially notified as an encumbrance on the certificate. This means that any buyer of titled land buys subject to any encumbrance on it including rights of bona fide and lawful occupants. Thus, under current law, even a purchaser of land may carry out eviction only for non-payment of rent and only upon court order. In sum, this means the proposed amendment, by stipulating that eviction may only take place on grounds of non-payment of rent and only upon a court order does not introduce any new rights for tenants. It restates, albeit more clearly, the current law . . .

In view of these rather marginal and purely institutional changes one might wonder why the amendment has been proposed at all. Considering the current situation of the land administration system, it appears that the main reason for the amendment is . . . to respond to institutional shortcomings. The 1995 Constitution and the 1998 Land Act introduced a decentralised system of land management and dispute settlement. The main authorities responsible for all land matters at district level are supposed to be the District Land Boards, assisted by Land Committees at division or sub-county level . . . Land disputes shall be handled by special Land Tribunals at district level . . . However, to date both the Land Tribunal and the District Land Boards could not fulfil their functions for lack of funding and an ineffective regulatory framework. According to the Land Act, District Land Boards are supposed to be supported by five technical staffs (Registrar, Valuer, Surveyor, Physical Planner, Land Officer). To date, most Land Boards are only manned by one Land Officer or have not been set up at all . . . Land Tribunals have even been totally abandoned, resulting in the piling up of land cases with civil magistrate courts . . .

The proposed amendment, in an apparent move to circumvent these resource problems, now gives the Minister the authority to determine the rent and empowers normal courts to issue eviction orders. These institutional changes . . . do not address the real cause of evictions.

The cause of current evictions is not the lack of laws protecting occupants but rather these laws themselves, which create conflicting rights over land, as well as the lack of a functioning registration system and a coherent land policy that could guide land administration. The current provisions which allow the owner to only charge a non-commercial rent and to only evict tenants for non-payment of this rent leave the registered owners with practically no authority over 'their' land. This might be understandable and apt for land which is occupied by tenants who are heirs of bibanja holders who already had been on the plot with authorisation of the Busuulu and Envujjo Law of 1928 or the Toro or Ankole Landlord and Tenant Law. It is however problematic for so called bona fide occupants who are given security of occupancy by the mere fact that they have been occupying land unchallenged by the owner for 12 years before the coming into force of the 1995 Constitution . . .

The situation is further complicated by the fact that most landlords are not identical with, or heirs of those to whom land was assigned by the 1900 Agreement. Rather, they bought their land from somebody, and thus expect authority over their land as return for their investment. The restriction of rights is also problematic in cases where landlords have allowed people to settle on their land without special licence or leasehold contract for less than 12 years. These occupants, even if allowed to only settle temporarily, qualify as 'lawful occupants' under the Land Act and

cannot be evicted if the owner wants to use his land differently. This is hard to understand given that it was solely the consent of the owner to temporarily settle on the land which made them lawful occupants . . .

Correspondingly, it is often hard to understand for registered owners why they should have no authority over their land. Meanwhile, there is a great demand for land, especially in the central region, which steadily increases in commercial value. As a consequence, land owners have tried to circumvent the restrictions imposed by the law by selling of the land titles to people who have either the money to compensate the occupants or the army muscle to evict them forcefully. The major cause of the evictions taking place is thus not non-payment of rent, but the conflict of rights of registered owners and occupants. This conflict of rights also explains why surveys have found that disputes over mailo plots are significantly higher than for plots under e.g. customary law.

In some cases, evictions are also simply caused by flawed judgements of courts or because local authorities lease or sell land to investors even though it is occupied by tenants or customary owners . . . According to a lawyer's report, registrars and magistrates have been giving eviction orders without visiting the land in question to establish what is on the ground or without even hearing the evidence from the person to be evicted . . .

Another reason for land conflicts and unlawful evictions is the fact that there is no functioning land titling system . . . as of 2005 the country had only two registrars at the central Land Registry in Kampala to handle all nationwide applications for land titles . . . As a result, certain crucial document verification steps were skipped and the system of filing back land titles/certificates to ensure orderly record keeping has collapsed.

This vacuum has been used by criminals to forge titles. Officials at the Ministry of Lands estimate that about 300 forged land titles are in circulation in Kampala. Even the titles registered by the Land Registry under due procedure are often inaccurate since so-called beacons were destroyed in the 1970s and 1980s . . . This lack of proper record keeping and persistent inaccuracies in the registry have also severely contributed to tenure insecurity, especially in urban areas and areas under mailo tenure, thus making evictions easier.

The described conflict of statutory rights and the lack of accurate land titling not only cause insecurity and evictions, but still worse, are adverse to development . . . As regards mailo tenure, the law itself has additionally logged out large areas of land from the development process. Since owners of occupied land lack authority over their land and cannot evict tenants, they are prevented from developing their land or from renting it out to tenants who might be more productive . . .

Selling is further complicated by the fact that owners lack certificates and have difficulties receiving one. It is also difficult for owners to use

> their land as a financial security and thus allow money borrowing for new investments and economic development. Financial institutions are hesitant to accept owners' titles as the law does not allow banks to evict tenants on land to recoup their money in case the borrower defaults. And as long as it is occupied by tenants who only have to pay a non-commercial rent, its value is near zero . . .
>
> Occupants, on the other hand, who by law have the right to develop the land, either lack the resources or the will to develop the land. Given the chaos at the Land Registry, occupants have difficulties in acquiring certificates of occupancy, adding to their insecurity and making them more prone to being evicted. Since insecurity generally discourages land related investment, occupants – who by law are the ones supposed to develop the land – remain hesitant to engage in long term investments. This hesitance is increased by ignorance of the legal provisions . . .
>
> In sum, the current law combined with the mess in the land registration system discourages investment and causes the concerned land to fall out of the land market and the credit system. By doing so, it is adverse to development.
>
> The proposed amendment does not address any of these problems. Rather, the new Section 32A simply reiterates the current law by stipulating that occupants might only be evicted for non-payment of rent. Since evictions are rarely caused by non-payment of rent, empowering the Minister to determine rent and courts to issue orders of evictions for non-payment of rent will not stop evictions. The real problem, i.e. the relationship between the occupants and the registered owners, the lack of a functioning land administration and registration system, and the consequences this has for development, is not addressed by the amendment . . .

President Museveni has however hailed the Act as a major reform:[5]

> The NRM has struggled single-handedly and passed the Land Amendment Bill. It will be criminal for anybody to illegally evict tenants (lawful, bonafide or settled by the Government) from their bibanjas. This means that any landlord, corrupt official, corrupt police man, greedy soldier or corrupt magistrate can no longer evict a tenant (kibanja owner) illegally. If he does so without a court order and in accordance with the law, the State now has the powers to arrest him or her and charge him in court. His actions will also be null and void. This is an interim measure that creates security of occupancy for the kibanja owner.

5 Museveni, Y. (2009) 'President Museveni hails Land Amendment Act', *New Vision online* 6 September 2009.

> Nevertheless, it does not mean that the basic paralysis in the land system in Buganda and in some few other parts of the country is resolved. The landlord cannot use his land because it is physically occupied by the tenants and has been so for scores of years. The kibanja owner also does not have full ownership (title). It also discriminates the peasants in Buganda. In the 1995 Constitution, we provided that even customary owners, not to mention leaseholders, in the rest of the country can convert their ownership to freehold.
>
> The peasants in Buganda, however, because they are in this bondage in the parasitic system created by the British to buttress their colonialism, cannot benefit from this constitutional provision. It is amazing that those, who claim to love Buganda so much can support this injustice even for a moment.

He proposed to develop a programme of soft loans to help kibanja owners to buy 'their' land from the landowners. But the Land Fund established by the Constitution in 1995 and fleshed out by the Land Act in 1998 was expressly designed for that purpose and it has not hitherto been used for that purpose.

There is then a major question-mark over the Land Act 1998. I saw it as a major if not the major land reform law in the region when it was enacted because of its apparent recognition of customary tenure as an equal tenure to the three statutory forms of tenure: freehold, leasehold and mailo. But a combination of a lack of resources and, on the part of many officials, a lack of commitment, if not active hostility, to the Act and the resolute opposition of Buganda to the amendment Act of 2010 has left land management probably in a worse position than it was before the Act was passed. Tinkering with the existing law is not the solution: Schwartz is correct to say that it is the 'laws themselves, which create conflicting rights over land, as well as the lack of a functioning registration system and a coherent land policy that could guide land administration' which is the real problem. Forty years ago West[6] singled out the Land Registration Act as being a major impediment to effective land administration and so it remains. The revolution created by the provisions in the Constitution on customary tenure remains stillborn as old colonial laws and tenure systems continue to exert an over-powerful influence.

6 West, H.W. (1970) *Land Policy in Buganda*, Cambridge, Cambridge University Press.

Chapter 8

Tanzania[1]

By the beginning of the 1990s, the widespread dissatisfaction amongst the rural population with villagisation and the state of land relations could no longer be ignored. President Mwinyi established a Presidential Commission to review and report on land matters. The Commission reported at the end of 1992[2] and its report which was highly critical of the existing state of affairs on rural land management set in train a process of public debate and policy

1 I only became aware of a major new work on Tanzanian land law after I had submitted my manusrcript to the publishers: Rwegasira, A. (2012) *Land as Human Right: A History of Land Law and Practice in Tanzania*, Dar es Salaam, Mkuki Na Nyota. I have read the book and regret that it has not been possible to refer to it in this book. It is a major work of scholarship and the author is to be congratulated on his work. There are some gaps, particularly on mortgages but overall the profession and law students are fortunate in having (not before time) a book on the modern land law of Tanzania which finally replaces James's book of 1971.

As many people involved in land in Tanzania are aware, there has been something of a difference between Issa Shivji and myself on the genesis and content of the land laws enacted in Tanzania in 1999. This is not the place to reprise those differences. This footnote sets out the facts of my involvement. The Presidential Commission on Land Matters chaired by Issa Shivji reported in November 1992. The NLP was approved by the National Assembly in Tanzania in July 1995. The British Government was approached by the Tanzanian Government to make me available to assist with the drafting of land laws to implement the NLP in September 1995. I made a preliminary visit in November 1995 to be briefed on the task and gave a lecture in the faculty of law in Dar es Salaam on the proposed work. I met Issa during that visit and informed him of what I was being asked to do. I commenced work in January 1996 and spent five months between January and November in Tanzania on the drafting, assisted by a four-person Tanzanian Support Group. Two workshops were held on the draft; one in March 1996 on work done up to that point; one in late October 1996 on the whole draft. Many changes were made to the drafts in the light of those workshops. The National Land Forum met for the first time in April 1996. Discussions on the Bills both within and outside government continued for two years. The Bills were brought to the National Assembly for first reading in November 1998 and passed in February 1999. I was involved, together with Mgongo Fimbo, in drafting the regulations and forms in 1999 and 2000. The Acts were brought into effect in May 2001. For a discussion of our differences, see Manji, op. cit., especially chapter 4, though she is incorrect to say that I was involved in writing the NLP.

2 I was working in UN-Habitat in Nairobi at the time and was invited to give evidence to the Commission in 1992, which I did.

reform, in which the World Bank took an active – some might say too active – role owing to its unhappiness with the thrust of the Commission's Report which culminated in the adoption by the National Assembly of the National Land Policy (NLP) in July 1995.

The NLP did not adopt all the recommendations of the Commission, the Ministry taking the view that it was the constitutionally mandated advisor to the President and government on land matters and it therefore had the responsibility to advise the Cabinet on what recommendations should and should not be accepted. When during the drafting of the Bill which ultimately became the Land Act and the Village Land Act, I stated in a memorandum that the NLP and the Commission Report were the two key policy documents I was using in preparing the draft, I was called to order by the Permanent Secretary of the Ministry who told me quite firmly that the NLP was the document to which I should have regard as that had taken from the Commission's Report all the necessary information and ideas that the government had accepted.[3]

The philosophy behind the NLP may be stated in the following six propositions:

1 The overriding role of land as a major national resource which must be used and managed in the national interest;
2 The primary importance of providing for security of tenure and title to all citizens;
3 The need for transparency and accountability in the exercise of public power over land; in terminology well known to lawyers, for openness, fairness and impartiality in the public administration of land;
4 The need to create the conditions for the operation of an efficient *and equitable* land market;
5 The need to bring about a greater involvement of the citizenry, both directly and through their representatives, in the management of land;

3 For a truly excellent overview of the making of the NLP and the resultant land laws, see Tsikata, D. (2003) 'Securing Women's Interests within Land Tenure Reforms: Recent Debates in Tanzania', in Razavi, S. (ed.) *Agrarian Change, Gender and Land Rights*, an UNRISD publication, Oxford, Blackwell Publishing Co. See too Larsson, P. (2006) *The Challenging Tanzanian Land Law Reform: A study of the implementation of the Village Land Act*, Stockholm, Royal Institute of Technology: 'The core of the [national land] policy was developed in accordance with the recommendations in the commission report, suggesting how to deal with the serious land problems and the numerous land-disputes,' 43. A more accurate summation is Roughton's: 'In 1995, Parliament adopted a National Land Policy incorporating some of the Commission's recommendations . . .' Roughton, G.E. (2007) 'Comprehensive Land Reform as a Vehicle for Change: An Analysis of the Operation and Implications of the Tanzanian Land Acts of 1999 and 2004', 45 *Columbia Journal of Transnational Law,* 551–585, 565. There is not much about the operation of the laws but the article is a good, clear and succinct summary of the content of the laws.

6. The importance of providing an appropriate Tanzanian legal framework for, and mechanisms for dispute-settlement and the redress of grievances in relation to, land management.

These six basic principles of the NLP were translated into the Land Act and the Village Land Act of which the following are the principal features.

8.1 The role of the national government

The Commissioner of Lands, the senior central government official responsible for land in Tanzania is placed in a central role in land administration. Given this central role by the Commissioner, it is important that the holder of the office and all officials acting in the name and with the authority of the Commissioner can be called to account for the way they exercise their powers. So reasons must be given for decisions, some decisions must be formally approved by courts before they may take effect and other decisions may be appealed, or referred to or challenged in courts, or to specialist bodies.

8.2 The role of civil society in the implementation of the law

The land laws provide a legal framework for the operation of a market in land. Land markets function as part of the private sector of the economy and the principal actors which make the market work are themselves part of the private sector: lawyers; estate agents; land surveyors and valuers; lenders of funds, etc. The new law will hopefully assist the land market to operate more effectively and equitably but it is likely to have some teething problems. It will be essential that the private sector is involved in a formal way in reviewing the operation of the Act and in developing the forms and regulations that are needed to operationalise the Acts.

It is for this reason that a National Land Advisory Council has been established by the Act with representatives of civil society represented on it: (a) to review and advise the Minister on the NLP and recommend changes where necessary; and (b) to review institutional frameworks and advise the Minister on jurisdiction and organisational structures of the institutions involved in land matters. There is a need to ensure that the voice of outside experts and actors in the market are heard to ensure that any amendments or additions to the law take account of the needs, realities and concerns of the market. Such a committee can also act as a buffer between the Minister and potentially untoward pressures from the private sector. A feature of a market economy is the rapid growth of special interest groups pressing governments to bend the law or administrative practices in their favour. So such a council can both represent and filter the views of the private sector to the Minister.

8.3 Village land and the national interest

The fundamental principle that all land is public land and as such vested in the President as trustee for and on behalf of the citizens of Tanzania is maintained as the bedrock of the land law. The whole of the Land Act and the Village Land Act and the continued administration of land is based on that principle. Within this framework, village land, the land used by the majority of people in Tanzania is given greater protection than it has had hitherto. In a very real sense, the success of any new land law will turn on whether villagers are satisfied that their concerns about not losing their land have been met.

The Village Land Act addresses this challenge of greater protection for village land. It provides for an elaborate mechanism for the transfer of village land to general public land. This mechanism has been set up to ensure, on the one hand, that very careful consideration will always be given to any proposal to take large areas of land from the villages, i.e. from use by villagers, but on the other, that in the final analysis village land may be taken for national and public purposes. The law recognises that the Government, like governments all over the world, must have the right to acquire land, if necessary compulsorily, from the citizen *but* government must follow fair procedures in the exercise of this power and must pay fair compensation.

8.4 The operation and regulation of the land market

In a land market as opposed to total government-controlled land allocation and transfer systems, the nature and style of regulation changes, but the fact of regulation does not. In place of discretionary regulation operated in secret by public officials, there is substituted legal regulation operated more openly by, for the most part, lawyers and private sector professionals, policed by the courts. The NLP recognised that the market should be allowed to operate free of restrictions but that some controls would be needed. Clearly, there is some ambivalence here and the law had to come up with a way of reconciling what appears on the surface to be conflicting positions.

On the other hand, there is a good deal of evidence from all over the world and from both the present and the past that the introduction of a land market can lead to those inexperienced in market transactions being taken advantage of by those well versed in them. So it is perfectly reasonable to provide a mechanism and a process to review any disposition which may have been tainted by fraud or undue influence. These are grounds well recognised by the law as providing a reason to reopen a transaction. The Commissioner is given power to ask a court to reopen a transaction; a not unreasonable addition to the law given the likely disparity in such a transaction in resources and market sophistication between a peasant or poor urban seller and a property developer or high income well-educated buyer.

A chapter of the Land Act provides for a new law on mortgages. Many reports had drawn attention to the lack of any effective system of credit for smallholder farmers, small business people and for those wishing to buy or build modest houses and the need too for loan terms easily understood by low-income people and for small but frequent loans. The new law sought to meet that need, making specific provision for 'small mortgages' – mortgages below a certain monetary value where special protections are accorded borrowers.

A view was expressed at the workshop to discuss the draft law that the balance of this part of the law was weighed too heavily in favour of the borrower; unless lenders could realise their security with a minimum of legal formalities, they would not lend and a land market would not take off. The provisions were very carefully revised and adjustments made to meet this concern but the basic framework remains; borrowers may seek relief in court from lenders' actions and the courts' powers of policing mortgages – always part of the law of Tanzania via the reception into Tanzania of the doctrines of equity – is placed on a statutory basis. The new law does not significantly increase borrowers' remedies but places the law on a clear statutory basis. In the case of small mortgages, the courts were given extensive powers to provide relief to borrowers who may be in temporary difficulties but who in the opinion of the court will be able to meet commitments if they are adjusted accordingly. The fate of this chapter is discussed in more detail below as a sub-case study on the role of the World Bank in national land law reform.

8.5 Village land administration

At the heart of the new law are the provisions on village land. So important are these that they were hived off from an earlier draft Bill and put into a separate Village Land Act. These provisions give effect to the principle outlined in the NLP that village lands will be administered by the village community. In most cases the Act gives decision-making to the village council and leaves the village assembly, a meeting of all adult villagers, with a backstopping job; confirming or otherwise some council decisions or initiating others. Village councils are elected and like most other countries with systems of elected local authorities, they are entrusted with the powers to manage resources on behalf of their electors. Some villages are within the jurisdiction of urban local authorities; in such cases, villages will continue to administer their land but in co-operation with urban authorities.[4]

4 One of the principal criticisms made of the Village Land Act by both Shivji and Manji is that it substituted the Village Council for the Village Assembly as the main agency for the management of land in villages. One of the villages which was the subject of some research into peri-urban land was Mbezi-Luisi Village on the outskirts of Dar es Salaam. The 2002 census put its population at 35,688. Assuming 40% of that population were aged 18 or

Recognising however, that there is always a danger that some councillors might abuse their powers of land management, the Act provides several mechanisms for giving advice to councils; for villagers to call in outside supervision and assessment of the way councils have exercised their powers; and ultimately for taking over the management of village land if there is no other way to clear up a mess.

The Village Land Act provides for a system of adjudicating rights in land and the providing of villagers with a 'customary right of occupancy of indefinite duration' which will be registered in a village register. This is a major innovation for under the system of *ujamaa*, peasants had no title to their land and could be and often were removed, sometimes forcibly and compelled to occupy other land. Here, the aim is to provide security of tenure to peasants so as to provide them with rights against officials. Transactions with land are permitted – with the approval of the village council if the transaction is with a non-villager. Customary law will still apply to land occupied by villagers and for the foreseeable future most villagers will continue to rely on that law.

8.6 Validating informal tenure and transactions

The NLP makes plain that the urban poor who through no fault of their own are living in informal settlements without any proper legal tenure are to have their land holdings recorded and recognised. The Land Act accordingly provides for a participatory process of regularisation of tenure in informal settlements; this was at the time it was enacted one of the first examples in Anglophone Africa of provisions in the law to provide for such an approach to regularisation. In addition, the Act makes provisions for creating specific residential licences to be granted or deemed to have been granted to informal settlers, pending the grant of, e.g., a right of occupancy. A fuller legal framework was developed via Regularisation Regulations which provide for processes of upgrading, urban adjudication of land rights and land readjustment.

over (a conservative assumption) that would mean that the village assembly would consist of 14,275 persons. The notion of such an assembly dealing with the day-to-day business of land management calls to mind Kropotkin's idea in *The Conquest of Bread* that all the inhabitants of a particular neighbourhood would come together at a convenient time to redistribute houses: 'it is a real Revolution this time, comrades, and no mistake about it. Come to such a place this evening; all the neighbourhood will be there; we are going to redistribute the dwelling houses . . .', 108. As Gray notes: '"A solemn council forthwith to be held at Pandemonium" says Milton; but it would be a feeble affair, compared to the great night when all the inhabitants of Battersea, Lambeth, Stockwell and parts of Wandsworth assemble in Battersea Park to talk over a little bit of business in the matter of houses.' Gray, A. (1946) *The Socialist Tradition: Moses to Lenin*, London, Longmans, Green and Co, 368. A fortiori, when the inhabitants of Mbezi-Luisi get together to talk over a little bit of business about land.

There is, however, another huge problem of informal settlements; this is the problem of the middle class informal settlements, brought about over the last 20 to 25 years by the operation of the informal land market in Tanzania. As a result of this market, very large numbers of people have bought and paid for land and built substantial houses or otherwise developed the land yet because they did not get consent to the transaction and have not registered their title or their documents of title technically they have no title to their plot. One cannot pretend that this has not happened; the only feasible solution to the situation is to create a mechanism for people to validate their land holdings and this is provided for by the Land Act.

8.7 A Tanzanian common law of land

The two Acts aim to create a clear Tanzanian statutory framework for the operation of a market for land. Provisions dealing with sales, leases, mortgages, easements and co-ownership geared to the specific needs of Tanzania replace rules of English law going back, in some cases, to mediaeval times. The law drew on various laws and proposed laws from different countries within the Commonwealth – England, Kenya, Malaysia and New Zealand. It provided for a dedicated system of independent dispute-settlement bodies to deal with land disputes and generally police the new land law. Providing a fair, speedy, expert and efficient system of dispute-settlement would greatly assist the acceptance of the new law by people generally and is vital to the operation of a land market and to transparent land management by officials. These proposals, however, were not ultimately accepted and the government, unwisely in my view, created via the Land Disputes Courts Act 2002 a hierarchy of administrative tribunals to deal with land disputes which came under the authority of the Minister. The Act did provide, however, for a specialist Land Division of the High Court to which appeals from the tribunals may lie.

The final point concerns the development of a Tanzanian land law; the creative blending together by the courts of the customary land laws of Tanzania and the new statute law, aided in this by using relevant and appropriate developments and precedents from the common law world of which Tanzania is a part. Section 180(2) of the Land Act provides that as from the coming into effect of the Land Act no more English statutes of general application could ever be held to apply to Tanzanian land law and subsection (3) directs the courts to develop a Tanzanian common law of land:

> On and after the commencement of this Act, it shall be the duty of all courts in interpreting and applying this Act and all other laws relating to land in Tanzania to use their best endeavours to create a common law of Tanzania applicable in equal measure to all land and to this end the courts shall apply a purposive interpretation to this Act and shall at

all times be guided by the fundamental principles of land policy set out in section 3.

Since the enactment of the Land Act and the addition of the Land Disputes Courts Act, there have been several important amendments to the Act, all concerned principally with mortgages. These must now be considered.

8.8 The saga of the mortgage law

The Land Act 1999 was brought into force in May 2001. From very early on in its life, the banks led by a South African banking group in Tanzania took exception to the new law on mortgages. The banks claimed that the law prevented them from taking possession of the land of a defaulting debtor. That was not the case. The Land Act abolished the ancient English legal remedy of foreclosure which as it existed in the version of English law which applied in Tanzania permitted the mortgagee (the lender) to take the whole of the defaulting borrower's land irrespective of the relationship between the amount of the outstanding loan and the value of the land. The new law quite clearly permitted the mortgagee to serve a notice on a defaulting borrower requiring payment and if that notice was not complied with within two months, to serve another notice specifying that he intends to enter into possession of the land and sell it. There is a duty of care imposed on the mortgagee who sells to obtain the best price reasonably obtainable at the time of sale.

The real complaint of the banks was that whereas under the old law, few borrowers knew of their (limited) rights, the new law holds a more even balance between lender and borrower; because it is new and written down in a statute, more people will know of their rights (the old law was a product of English judicial decisions which few people knew anything about) so that banks will not have such an easy ride as in the past.

The banks further objected to the apparent granting of powers to the courts to re-open mortgages, the making of which or the terms of which were prima facie oppressive, illegal or discriminatory. They objected to the numerous time limits for actions to be taken which they considered hindered their exercise of discretion and gave too many opportunities for defaulting mortgagors to escape the consequences of their default. They objected too to the willingness of the courts to grant injunctions to prevent actions for possession and sale for 'non-meritorious' reasons. Finally, they objected to the new concept of 'small mortgages'.

The use of the word 'apparent' in the above paragraph is deliberate. The relevant sections of the old Chapter X – sections 141 and 142 – were an attempt to codify the existing judicial precedents on these matters which were already a part of the law of Tanzania. No or very few new powers of

intervention were granted to the courts by those sections. As for foreclosure, it was being replaced by the much more efficient statute-based remedies of possession and sale in many countries in the Commonwealth and Tanzania was not unique in moving in this direction.

The objection to small mortgages was the most incomprehensible. First, the concept was a response to numerous reports of the lack of an appropriate vehicle for making small loans to peasant smallholders who wish to move, via small loans taken out for short periods, to growing cash crops. Ditto for small *jua kali* business people. Second, small mortgages were a facility for small businesses; there was never any suggestion that banks would be compelled to lend on small mortgages so that if banks did not like them they would not have offered them; there was no need to insist on their abolition. Third, all the evidence from other developing countries is that poor people taking out small loans for short periods with banks have a much better repayment record than middle and upper class borrowers so that the small mortgage facility was a potential money-spinner for the banks. It has to be said that this objection showed how out of touch with the needs of Tanzania most of the banks were, and to the extent that this objection was taken up by IFIs, how out of touch they were and are with the needs of Tanzania.

The banks pursued their objection with the World Bank. An official in the World Bank consulted me on the matter. I wrote a memorandum in May 2002 for that official in which I pointed out these matters and explained that compared to the old law which Chapter X of the Land Act was replacing, the remedies provided by the new law and the time-scale within which these remedies could be activated were much superior:

> In contrast to the minimum time of *one year* which it takes to obtain a final foreclosure order (assuming access to the court is almost instantaneous) a mortgagee can proceed to a sale in *160 days* from the time of first default – first notice may be served one month after default of any obligation (s.125(1)); not less than three months to pay any monies due (s.125(2)(b)); notice to take possession not earlier than one month after service of the notice (s.129(1)); notice to sell the mortgaged property not earlier than 40 days after service of the notice (s.131(2)) (different actions may be taken concurrently). (An early Tanganyikan case of *The Mortgage Company of Costa Rica v The Kibaranga Estates* (1935) 1 TLR(R) 503 suggests that the 'normal' redemption period may be three rather than six months but even if that were the general practice, the Land Act period is still 110 days quicker than the foreclosure period.) *Thus the mortgagee of mortgages other than small mortgages has been provided with a set of remedies that more than halves the time that must elapse before he/she/it may realise their security compared to the remedy of foreclosure.* A mortgagee of a small mortgage is in no worse position than before since he/she/it still has to go

> to court to obtain a court order as was the position with an order for foreclosure.[5]

The memorandum went on to point out that within the Commonwealth, only in the case of South Africa and countries following the Roman-Dutch law in Southern Africa did foreclosure still seem to be the principal remedy of the mortgagee, albeit under the control of the court and that there seemed to be no good reason why Tanzania should adopt Roman-Dutch legal remedies in respect of the rights of the mortgagee.

Whatever the impact of that memorandum on the official, the World Bank had clearly got the bit between its teeth. At an investors' conference in Tanzania in July 2002, the President of the World Bank strongly urged the need for reform of the law on mortgages. The President of Tanzania agreed saying that there were general clauses in the land law which had not encouraged potential investors in commercial agriculture. 'Agricultural specialists say that at present, the land laws are very complicated and makes the question of ownership a difficult one.'[6] A Financial Sector Assessment

5 Paragraph 17 of the opinion. Italics in the original memo. A copy of the opinion found its way to the firm of City solicitors hired by the Government of Tanzania to prepare a new mortgage law. The firm agreed with the view that foreclosure should remain abolished and that possession and sale were the appropriate remedies to use in connection with defaulting mortgagors.

6 'Tanzania: land reform needed for agricultural investment', http://www.irinnews.org./report.asp? Report ID=28923, UN Office for Humanitarian Affairs reporting the conference of 22 July 2002. It is difficult to know what part of the land laws were complicated and made the question of ownership a difficult one. Apart from 1% of the land that was alienated in freehold to German settlers during the German colonial period (1884–1916) there has never been private ownership of the land in Tanzania or its predecessor Tanganyika. The Land Act 1999 maintains that position. Information derived from interviews in November 2004 was to the effect that a serious problem of double allocation of land which bedevilled the system under the old law and so made the question of ownership a difficult one was now a thing of the past thanks to the Land Act's clear rules on who had the power to allocate land. It may be that these 'specialists' are concerned because it is now much more difficult to grab land from villages and peasant farmers than was the case under the old law so that creating vast commercial farms out of village and peasant land without the full co-operation of villages and villagers is, if the law is complied with, much more difficult than in the past. It may, however, be that the concern was precisely that Chapter X of the Land Act 1999 made it easier for banks to take possession of land from defaulting mortgagors (other than mortgagors with small mortgages) than had previously been the case. As we will see, the new Chapter X introduced by the Land (Amendment) Act 2004 makes it harder for banks to repossess land in use as agricultural or pastoral land. This will undoubtedly benefit large-scale landowners. One suspects that these 'specialists' and even the President of the World Bank himself had not familiarised themselves with the new land law but had focused on the fact that Tanzania does not permit freehold ownership of land and has put some hurdles in the way of foreign investors acquiring rights of occupancy. It is unlikely too that the World Bank (or indeed at the time James Wolfensohn, the then President of the Bank) understood what the underlying law of mortgages of Tanzania was or how the new law fitted into and made use of that law.

mission from the World Bank in September 2003 increased the pressure for change:

> The comparative absence of longer-term credit is often remarked and blamed on the Land Act 1999. Undoubtedly this altered the balance of protection away from the lenders and towards the borrower and introduced many uncertainties. There has been continuous pressure from the banks for extensive changes in this law to allow them to secure lending on landed property with greater assurance. It is unlikely that much expansion of longer-term finance can be expected without some amendments to the land law, though it will not be a panacea as it is not only in Tanzania that financiers are reluctant to commit funds to uncertain ventures even if secured by a mortgage on real estate.[7]

This was followed up by detailed requirements from the Bank as described by Bruce[8] which shed a very different light on the Bank's approach to land law reform than that described by the Land Policy Review report:

> In Tanzania the 2003 PRSC[9] (P074072) and Grant identified a number of inadequacies in the Land Acts, particularly related to collateralization, foreclosure, consent by spouses, customary and small mortgages, default notices and third party mortgages. Under this initial PRSC, the Ministry of Lands prepared a position paper on changes that may be needed in the laws. Drafting of amendments to the Land Act and their delivery to Parliament for approval were made trigger conditions for the 2004 PRSC (P074073). The LDP[10] for this Second PRSC noted that the Act was amended in February 2004, clearing the way for individuals and firms to use their land as collateral.

7 Financial Sector Assessment Report (2003) Washington D.C., World Bank, para. 6. The effect of this comment and seeming support for the banks' position was rather spoilt by the preceding paragraph which noted that large swathes of the economy were working with little formal credit and put this down to poor physical infrastructure and the fact that a high fraction of the population reside in remote rural areas. 'Neither banks nor microfinance institutions (MFIs) have made any significant headway finding secure and cost-effective ways of lending to these areas.' These challenges and the failure of banks to address them long pre-dated the Land Act 1999.

8 Bruce, J.W. (2006) 'Reform of Land Law in the Context of World Bank Lending', in Bruce, J.W., Giovarelli, R., Rolfes, L. Jr., Bledsoe, D. and Mitchell, R.(eds) *Land Law Reform: Achieving Development Policy Objectives*, Washington D.C., World Bank, 11–65, a fascinating insider's view of the subject. The quote comes from 26–27.

9 Poverty Reduction Support Credits.

10 Letter of Development Policy. The legislative steps to be undertaken to bring about the policy changes for which the PRSC is being made available are normally described in an LDP which 'is written by a client government official to the World Bank as part of the lead up to a loan, for instance a PRSC', 24.

In these circumstances, the Government of Tanzania agreed to revise the new law. The Attorney-General took the lead[11] and made arrangements with a City of London firm of solicitors to rewrite the law on mortgages. This they duly did and the Land (Amendment) Act 2004 is the result. The firm argued in their commentary on their draft Bill that the aim of the Bill was to provide a modernised law of mortgages for Tanzania. The law they were replacing was derived from an English Law Commission Report of 1991 containing a new draft Land Mortgages Bill and a New Zealand Law Commission Report of 1994 containing a draft of a New Property Law Act which included a chapter on mortgages,[12] both laws being adjusted to take account of the needs of Tanzania. Those parts of the new Chapter X that altered the law owe a good deal to the English Law of Property Act 1925 with important additions introduced in 1970 and 1973.

The banks were still not satisfied. I was hired as part of a team to write the regulations to enable the new amending Act to be applied. I tried to smuggle back into the law via the regulations some of the pro-mortgagor provisions which had been eliminated by the Act of 2004. In addition, I tried to provide for issues of unconscionability in relations between mortgagors, third parties especially spouses, and mortgagees as was set out in *Royal Bank of Scotland v Etridge (No.2)*.[13]

These draft regulations were clearly the equivalent of showing a red rag to a bull. A further report was commissioned on mortgages in Tanzania,[14] the

11 It was put to the author that the Attorney-General acted without much consultation with the Ministry responsible for lands which fully understood the scope of the law on mortgages and saw nothing untoward about it.

12 New Zealand Law Commission (1994) *A New Property Law Act: Report No. 29*, Wellington.

13 [2001] 4 All ER 449.

14 Rabenhorst, C.S. and Butler, S.B. (2007) *Tanzania: Action Plan for Developing the Mortgage Finance Market and Report on Legal and Regulatory Issues in the Mortgage Market in Tanzania*, Washington DC, Urban Institute. There is no indication in the report as to who or what organisation commissioned it. The list of interviewees does not contain one person or organisation that could be said to represent mortgagors. The report clearly did not understand the law of mortgages in Tanzania which is a bit of a handicap if one is penning a report on the subject. It persisted in arguing that foreclosure of mortgages continued to exist in Tanzania despite the clearest possible provision in 125 of the Land Act that 'any rule of law, written or unwritten entitling a mortgagee to foreclose the equity of redemption in mortgage land is abolished'. It kept on referring to 'practices around the world' as justifying arguments and draft provisions which adopted heavily pro-mortgagee positions without stating which countries had such practices and clearly being in complete ignorance of the fact that Tanzania's mortgage law is: (a) based on the rules of equity derived from English law which has had from time immemorial a tenderness towards mortgagors (and has not stopped 'robust' mortgage markets developing in England and all the other countries around the world which follow common law and equity as their basic law); and (b) on reasonably current English statutes on mortgage law which gives the courts an important role in policing mortgagees' powers of taking possession and selling the homes of defaulting mortgagors. If the authors had wanted to, they could have reviewed the

contents of which were so extreme in their partiality to mortgagees that even the government baulked at adopting all their recommendations. In the Mortgage Finance (Special Provisions) Act 2008, the balance between mortgagee and mortgagor in relation to default by the mortgagor and to unconscionability was however shifted very heavily in favour of the mortgagee. Where a mortgagor of a dwelling house is in default, instead of the provision in the Land (Amendment) Act 2004 that a court may grant relief to the mortgagor 'if it appears to [the court] that in the event of its exercising [its powers of relief] the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage . . .', the provision in the Act of 2008 requires that it must appear to the court:

> with a high degree of certainty, that in the event of its exercising that power (a) the mortgagor is likely to be able, within a reasonable period, to pay any sums due under the mortgage . . . and (b) there is sufficient value in mortgaged property that despite the delay, in the event that the mortgagor fails to cure his default and pay the sums due, the mortgagee will be likely to recapture the amount of its entire claim from sale of the property,

tests which will be almost impossible for the mortgagor to discharge. If a mortgagor in default has to show a high degree of certainty that he or she will pay any sums due under the mortgage, he or she would have been unlikely to have defaulted in the first place and no one can predict with any degree of certainty whether a mortgagee will be able to recoup its entire claim from the sale of the mortgaged property. The law does not provide for any regulation on what a mortgagee may load on to a

problems of an unregulated mortgage market with largely unsophisticated mortgagors which existed in Zanzibar in the 1930s and thereafter and which was a contributory factor to the rough and ready land expropriation which took place after the revolution in 1964 which might have more resonance in Tanzania than 'practices from around the world'. See Jones, op. cit. Its ideological position was that mortgagees should be allowed to operate in a free market with very few restrictions imposed upon them and that most mortgagors who wished to challenge the exercise by mortgagees of their powers of 'foreclosure' were unmeritorious and should be prevented or limited by law from doing so. The Urban Institute is a US institution but the authors seemed to be unaware or dismissive or both of the considerable controls placed on mortgagees' powers of foreclosure by many US states. If it was not for the fact that, unfortunately, its pro-mortgagee stance found its way into the Mortgage Finance (Special Provisions) Act 2008, the report could have been dismissed as a 'last hurrah' of the pre-credit crunch world before the world as a whole woke up to the fact that an unregulated mortgage market is a recipe for national and quite possibly international financial disaster to say nothing of a great deal of human misery. It is puzzling why there is so much international effort to create an uneven playing field between mortgagees and mortgagors in Tanzania and why there appears to be so little effort in Tanzania to stop it.

mortgage by way of fees, expenses, and other charges so as to boost its 'entire claim'.

With respect to unconscionability section 141 of the Land Act permits an application to be made to the court by a mortgagor alleging that undue influence by a third party was used in order to procure a mortgage in circumstances where the mortgagee had notice thereof. A new subsection (2) of section 141 provides that:

> Notwithstanding subsection (1), upon receipt from the mortgage applicant and any other third party having interest to the mortgage including any spouse identified by the mortgage applicant, of a signed and witnessed statement that they have understood and consented to the terms and conditions of the mortgage as their own free act and deed, a mortgagee shall have satisfied obligations under subsection (1) and no mortgagee shall be required to make further inquiry regarding such matters and no claim of undue influence shall be permitted as a defence against enforcement of a mortgage or exercise of a power of sale by or on behalf of any person signing the document.

The cases, alas, are legion where persons have been prevailed upon to sign a mortgage document not knowing or understanding what they are signing or that advice received before signing was defective[15] so this provision too is unfairly weighed against parties who may be taken advantage of. It is not to be supposed either that mortgagees in Tanzania are pure as the driven snow which the Act of 2008 assumes as may be evidenced the important Court of Appeal decision in *National Bank of Commerce v Czurn*.[16]

15 *National Westminster Bank v Amin* [2002] 1 FLR 735. Advice given to parties who did not speak English by a lawyer who did not speak Urdu, the only language the parties understood. *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. Two elderly Italian migrants unfamiliar with written English were requested by their son to execute a mortgage over property they owned in favour of the appellant bank in order to secure the overdraft of a company which the son controlled. The son misrepresented to his parents that the mortgage was limited in amount and duration. The respondents were further unaware that the company was in a precarious financial predicament. The High Court of Australia found that the respondents were in a position of special disadvantage vis-à-vis the bank in relation to the proposed guarantee due to their age, limited understanding of written English and no experience of business in the field in, or at the level at, which their son and the company engaged. On the evidence, the court found that the bank must have been fixed with knowledge regarding the circumstances of the respondents.The court intervenes upon proof of conduct lacking the requisite degree of propriety so as to justify upsetting common law rights.

16 (1998) *Tanzania Law Reports* 380. Collusion between the bank as mortgagee, selling a farm of the mortgagor at a gross undervalue without informing the mortgagor who was abroad and the purchaser of the farm. The case is discussed in more detail in McAuslan, P. (2009) *Carrying Out the Needs Assessment for the Registry of Titles (Lands/C/1)*

Not all is lost, however. The drafters of the Act of 2008 had, fortunately for potential mortgagors, clearly forgotten about the Fair Competition Act 2003.[17] The Act's object is to enhance the welfare of the people of Tanzania by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania in order, inter alia, to protect consumers. The Act applies to the suppliers of goods and services, and service includes:

> Any rights (including interests in, and rights in relation to, real . . . property) benefits, privileges or facilities . . . provided, granted or conferred under any contract for or in relation to . . .
>
> (a) the performance of work, including work of a professional nature, whether with or without the supply of goods . . .

Part V of the Act deals with unconscionable conduct. Section 25 states in part:

1 No person shall, in connection with the supply or possible supply of goods or services to a person engage in conduct that is, in all the circumstances, unconscionable.
2 Without in any way limiting the matters to which the court may have regard for the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to . . . a consumer, the court may have regard to:

   a the relevant strengths of the bargaining positions of the person and the consumer;
   b whether as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier;
   c whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
   d whether any undue influence or pressure was exerted on, or any unfair tactics were used against the consumer or a person acting on behalf of the consumer by the person in relation to the supply or possible supply of the goods or services . . .

Task 6: Legislative Review, Dar es Salaam, Ministry of Lands, Housing and Human Settlements Development, United Republic of Tanzania, consultancy carried out for Swedesurvey as part of an IFC Private Sector Competitive Project.

17 Discussed in some detail in relation to the proposal to regulate estate agency in Tanzania in McAuslan, P. (2006) *Land Market Regulation and the Regulation of Estate Agency in Tanzania: An Issues and Options paper*, Dar es Salaam, BEST. The authors of the report noted in footnote 14 clearly did not know the Act existed.

These provisions are an exact copy from Australian fair trading legislation[18] and while in some respects provide a statutory enactment of aspects of equitable unconscionability, in other respects they appear to go beyond the doctrines of equity. The Explanatory Memorandum accompanying the provision when it was first introduced into the Australian law envisaged that it would cover conduct of the kind which occurred in the leading Australian case of *Commercial Bank of Australia Ltd v Amadio*[19] but Dal Pont after reviewing cases on the section where judges differed on whether it went beyond the equitable principles of unconscionability concluded that 'the limits of s 51AB are yet to be fully explored'.[20]

What is important to note is that the section:

> relates to unconscionability *both* in the process of effecting the contract (termed 'procedural' unconscionability and typified by the equitable doctrine of unconscionability) and regarding the nature of its terms (what is called 'substantive' unconscionability). In other words, statute empowers the court to consider not only the process whereby a contract was effected but also whether the terms of such contract generate an unconscionable *result*.[21]

Thus, mortgagees are clearly covered by the Act and cannot ignore their statutory duties or liabilities thereunder.

The alteration of the mortgage law in Tanzania and indeed the whole development of the Land Act 1999 has been discussed in considerable detail as, of all the laws developed during this era of reform and discussed in this book, this is the law which had had the best documented, most detailed and specific, and most egregious outside IFI and donor involvement in the development and content of a national law so it makes an excellent case study of this kind of interference. From the development of the national land policy, through the drafting of the law,[22] demands for changes in the law, the drafting of the changes, and the proposals for more changes to suit the needs of

18 Section 25(2) of the Tanzanian Act is copied from s 51AB of the Australian federal Trade Practices Act 1974. This provision was inserted into the 1974 Act as s 52A in 1986 and was renumbered as s 51AB by the Trade Practices Legislation Amendment Act 1992.

19 (1983) 151 CLR 447. Dal Pont, G. (2000) 'The Varying Shades of "Unconscionable" Conduct – Same Term, Different Meaning', 19 *Australian Bar Review*, 135–166.

20 Dal Pont, ibid., 163.

21 Op. cit., 163. Italics in the original.

22 I do not exclude myself from being an outsider. In my defence I would argue that in drafting the original Land Bill in 1996, my services were specifically requested by the Tanzanian Government, I worked closely with a four-person team of Tanzanian lawyers, I stuck closely to the NLP in drafting the Bill (and used the report of the Shivji Commission) and I knew something about Tanzanian land law having commenced my study of it in 1965.

external financial entities, outside agencies and persons were intimately involved and certainly in relation to demands for changes in the mortgage law, the interests of ordinary Tanzanians were virtually ignored. It is not an episode of 'donor' involvement in national law reform that reflects much credit on the international community. But nor, must it be said, do the Tanzanian government and civil society organisations concerned with land come out of the episode too well. The government appears to have caved in to the IFIs without a fight and civil society organisations, some of which had been vociferous in their criticism of the Land Act and Village Land Act made no public effort to challenge the pro-mortgagee reforms introduced into the law by the government at the behest of the IFIs.

8.9 The Village Land Act

Arguably the Land Act 1999 as amended and the Mortgage Finance (Special Provisions) Act 2008 are applicable to a very small number of Tanzanians. The statutory land law that applies to the vast majority of Tanzanians is the Village Land Act 1999. This law has been the subject of more research and provoked more discussion amongst commentators than the other Acts and a summary of this debate may be given here with a general concluding comment by myself. In view of my involvement and the controversy that it has generated, I will put the commentators' views in their own words. For this purpose, because I think his analysis is a fair one I will adopt as a starting point the binary position of Robin Palmer as summarised by Sundet:[23]

> Robin Palmer juxtaposes two diametrically opposed interpretations of the Land Acts.[24] One is that presented by Liz Wily, who did work on the Land Acts as a consultant for DFID and the Ministry of Lands. Issa Shivji, who was the Chairman of the Land Commission, and who has continued to do analytical work relating to land, puts the other forward. The contrasting of these two scholars' positions is instructive, particularly their respective evaluations of the Acts' treatment of the key issues of village land and the safeguarding of customary tenure. Liz Wily comes down heavily in favour of the new Acts, and classifies them as 'basically sound', arguing that they are the best of their kind in Africa in terms of 'vesting authority and control over land at local level'. Issa Shivji,[25] on the

23 Sundet, G. (2005) 'The 1999 Land Act and Village Land Act: A technical analysis of the practical implications of the Acts', http://www.fao.org/fileadmin/. . ./1999_land_act and village_land_act.rtf.

24 Palmer, R. (1999) 'The Tanzanian Land Acts, 1999: An Analysis of the Analyses', http://www.oxfam.org.uk/landrights, Oxford, Oxfam.

25 Shivji, I.G. (1999) 'The Land Acts 1999: A Cause for Celebration or a Celebration of a Cause?', Keynote Address to the Workshop on Land, held at Morogoro, 19–20 February 1999. (Also available at http://www.oxfam.org.uk/landrights.)

other hand, finds little to commend the Acts, and sees them to achieve little but to consolidate the status quo:

> the Acts now entrench in law what was the practice. Which is to say that the administration, management and allocation of land are placed squarely in the Executive arm of the Central Government under a centralised bureaucracy.

Sundet[26] aligns himself with Shivji:

> The inevitable conclusion emanating from this [analysis] is that both Acts are ill conceived. Their guiding principles, which are found in the National Land Policy, are centralising, anti-market and make assumptions on the impartiality of civil servants that accord poorly with realities and good economic practice. This is not a cheerful conclusion . . .

Seven years later, Larsson[27] who did field work on the implementation of the Act after quoting Alden Wily's view made this concluding comment on his findings:

> Whether this is true or not, will be for the future to examine. Also many other presumptions connected to the land legislation have to be passed through reality, before it is possible to know how they will actually be received. The cited interviews reflect the positions and ideas of a limited number of individuals. They draw conclusions from their bases of knowledge, experience and points of view. Despite this inherent subjectivity, it is likely indisputable that the decisive factors of success for the implementation will be: i) the future decisions and policies of the national leadership; ii) the collective choices and actions of the villagers themselves, whether to support the implementation or to reject it; iii) the factors of the surrounding world, that like previous land reforms will influence the financial environment in which the implementation is being launched . . . The previous Land Ordinance was put upon Tanzania from above, creating a legal framework that never fully recognised large parts of the Tanzanian country specifics. In this aspect, the land acts seem to be better tailored, although it is also criticised for having obvious weaknesses. A relevant factor in this discussion is that this important piece of legislation is created in a democratic environment, and will therefore be able to be further moulded through the coming years of public debate . . . the Land Act and the Village Land Act are undoubtedly indicating a promising future for Tanzania.

26 Op. cit., 13.

27 Larsson, P. (2006) *The Challenging Tanzanian Land Law Reform: A study of the implementation of the Village Land Act*, Stockholm, Royal Institute of Technology, 67–68.

In the same year, Roughton[28] ended his review of the Acts with this comment:

> The Land Act of 1999, the Village Land Act of 1999 and the Land (Amendment) Act of 2004 are, in many ways, bold and innovative efforts to create an equitable land tenure system in Tanzania. They acknowledge the need to clarify existing land rights, to give villages more control over village lands, and to address the unequal rights that women often possess under customary law. However the Acts are flawed in several respects. First, they place too much authority over village lands with the central Tanzanian government, inviting abuse and corruption. Second, they attempt to implement a land market that Tanzania's limited business and educational infrastructure may be unable to support. Finally, many of the reforms they establish, including equal rights for women in land matters may be difficult or impossible to enforce at local levels.
>
> The problems that Tanzania faces are not unique . . . Some of these problems . . . could be solved by amending and revising current statutes and regulations. Others . . . cannot instantly be solved by legislative means. They require fundamental changes in social norms. Nevertheless, the Land Acts show that the Tanzanian government is willing to take progressive action to address the land tenure problems it faces. The government should now embrace the challenge of correcting the problems of its Land Acts in a way that addresses Tanzania's unfortunate colonial history and the needs of the modern world . . .

Finally, Rachael Knight's[29] exhaustive and detailed study – the most thorough yet undertaken – ends thus, after penning detailed criticisms of the Act which echo many of Shivji's:

> In the balance, the Village Land Act is arguably one of the best in Africa in its careful, solid and repeated protections of the land rights of vulnerable groups in the context of both customary and statutory law. However, at root the question of implementation may decide the end results, the complexity and length of the law may mean that the poorest of the poor never learn about their rights, new administrative structures are never set up or funded and only certain sections are fully implemented. Or, as we see in the current struggles of SPILL and MKURABITA, a very good law may be tossed aside because of shifts in political and economic ideology without ever being fully implemented.

28 Roughton, G.E. (2007) 'Comprehensive Land Reform as a Vehicle for Change: An Analysis of the Operation and Implications of the Tanzanian Land Acts of 1999 and 2004', 45 *Columbia Journal of Transnational Law*, 551–585, 585.

29 Knight, op. cit., 151–211, 211.

I think that final point is the key: the lure for the political and administrative elites of benefiting financially from land deals with foreign investors is leading them to ignore the Act and grab village land either for themselves or in partnership with foreign investors or to sell to foreign investors. The fact that they are ignoring and flouting the Act is paradoxically some evidence that it was on the right lines; after all if it was, as its critics claim, a charter for an elite-driven land market, there would be no reason to ignore it. And alas, as too many examples from African and other countries demonstrate, whatever the merits of a law, if those with power are determined to set it aside, they will set it aside and there is little that those without power can do about it. Vigorous action in the courts may delay or even stop some land grabs but that requires dedicated and fearless lawyers, a strong final court of appeal – South Africa springs to mind here on both counts – and a government that will, however reluctantly, accept defeat. Whether these characteristics of governance are present in Tanzania is moot.

There is one final point that may be made on the Acts with particular reference to the Village Land Act. Critics claim that the Acts vest too much power in central government officials who are not subject to adequate controls. There are three answers to that; first, the Acts, rightly in my view, were designed to give effect to the NLP: it is no business of a draftsperson to substitute his or her views for those of Parliament and the NLP made plain its views on the ultimate responsibility of central government for land matters. Second, there are a myriad of controls though I would concede that it requires legal advice and assistance to use them. Third, while drafting I was aware that there were real dangers in creating an administrative system that had the Commissioner of Lands both exercising powers through officials yet was the person to whom one complained about the behaviour of those officials; in a sense both gamekeeper and potential poacher. I therefore suggested a dedicated land ombudsman as a safeguard for those subject to official power over land. The Tanzanian Support Group was unanimous in rejecting this suggestion: in the words of one member, there were already too many ways for people to complain about government action and it was not desirable to add to them.

The alternative scenario to the Acts is that suggested by the Shivji Commission and rejected by the government: vesting land in the villages and allowing villagers to manage the land themselves with advice and guidance only from central government officials. Au fond, I think this approach is the exact opposite of the colonial (and at times the independent) governments' attitude to the peasant which can be characterised as the myth of the stupid peasant: that peasants are stupid and conservative and if necessary must be forced to modernise. The alternative view is very old and goes back at least to Tolstoy if not before; it may be called the myth of the noble peasant. Peasants are somehow better than the rest of us and if allowed to manage themselves and their resources will always do so in a fair, reasonable and lawful manner.

I do not believe that to be the case. Peasants have their share of the good, the bad and the ugly and without pretty close supervision, there would be those who would grab land, oppress their fellows especially women, ignore the law, forget about justice and rights, take and receive bribes. Whatever the structure of land management in other words, there will be always be a need for a legal superstructure to guide and if necessary to require land managers, both those at the top and those at the bottom, to observe and practice administrative justice in land management. However imperfectly realised, and even more imperfectly implemented, that was the overarching aim of the Land Act and the Village Land Act.

Chapter 9

Somaliland[1]

Norton notes that most of the information about the operation of the 1975 Law comes from Southern Somalia as little effort was made to apply it in the north of the country but at least initially it was the land law that applied and was recognised as applying in Somaliland at renewed independence. Nor are there wanting people in Somaliland who consider that the law has some merit. It has clearly influenced the development of the Land Management Law in 2003 (which on its revision in 2008 became the Urban Land Management Law) to which we will now turn.[2]

Although Somaliland has been peaceful and governed by a stable government for almost 20 years, its land sector still reflects a postconflict situation. There are many refugees, many IDPs,[3] land vacated by those who fled the civil wars have been grabbed by others, pastoral land has been unofficially privatised and there are constant disputes over both rural and urban land. The 1975 Land Law has been set aside and other laws relating to land have been enacted. But there is no clear national land policy and the fundamental issues relating to land – state or private land ownership; the plurality of land laws; and institutions and processes of dispute settlement – have yet to be resolved and may be discussed here.

1 Norton, G. (2008) *Property, Land and Housing in Somalia*, a publication sponsored by the Norwegian Refugee Council, UNHCR and UN-Habitat, Nairobi, UN-Habitat from whose site it can be downloaded, 93, 94, 82. This is an absolutely superb work. It is difficult to think of a better work on national land issues in the countries covered by this book.

2 What follows is based largely on reports I have written during my missions to Somaliland undertaken for UN-Habitat. Nothing in these reports must be taken as representing the views of the agency.

3 This is a major source of conflict between UN agencies and the government. As Somaliland is not recognised as a state by the international community, persons moving from Somalia to Somaliland are deemed to be IDPs by UN agencies while the government regards them as refugees and treats them accordingly. For instance, at one session of a discussion on the modalities of creating a land policy the issue of IDPs and refugees was raised. It was suggested that IDPs, i.e. persons displaced from elsewhere in Somaliland, should be located on the outskirts of towns while refugees, i.e. persons from Somalia, should be located even further out of town.

I wrote a note in 2009 on three issues which arising out of discussions on developing a land policy came across as needing further consideration. These matters have not yet been resolved and the note may be reproduced here. The three issues are:

- ownership of land and what that means in the context of Somaliland;
- interrelationship between the laws – secular, sharia and customary;
- disputes over land and how to resolve them.

9.1 Ownership of land

According to article 12(1) of the Constitution:

> The land is a public property commonly owned by the nation, and the state is responsible for it.

Section 1 of the revised Urban Land Management Law (ULML) states:

> In principle, apart from Allah, the ownership of the territory of the country lies with the Government of Somaliland (in accordance with Article 12, section 1 of the Constitution). Therefore, the authority to manage, transfer ownership in and to propose laws for such land is vested solely in the Government.

These two legal provisions, although designed to dovetail in with each other, do not do so (although the caveat must be made that I was working off translations of both the Constitution and the ULML). The Constitution states that land is commonly owned by the nation with the state being responsible for it, while the ULML states that the ownership of the *territory* of the country lies with the government. A distinction is usually drawn between the territory of a country and the land within the country that make up the territory. All states assert *imperium* or sovereignty over the territory of the state but that does not necessarily carry with it *dominium* or ownership of land within the state.

Equally, there is a difference between the government acting as the responsible agent for the nation that owns the land in common and the government owning the land. In the first case, the government may be seen as a trustee of the land exercising its powers for the benefit of the people – very much along the lines of Islamic principles. In the second case, the government is the absolute owner able to do as it likes with 'its' land.

To the extent that there is any difference between the Constitution and the ULML, the former must prevail. It is possible to reconcile article 1 of ULML with the Constitution as the article concedes that 'in principle, apart from Allah . . .' the government owns the territory which does imply that it is

recognised that ownership is not absolute but is an ownership in principle as there is a higher authority behind the government's ownership.

The problems of the government's ownership of the land do not stop there, however. Throughout the ULML there are constant references to persons owning land. Indeed, article 19 of the Law has this very explicit legal provision:

> The period of ownership of permanent land shall be as follows:
>
> a The period of ownership of permanent land for anybody who complies with this law, and who develops the land, shall be unlimited.

It is true that various other provisions in the Law make it plain that land even in permanent ownership can be taken away if it is not used in accordance with the law; that those who obtain land for speculative purposes will not be allowed to undertake transactions with the land and those who obtain land in the centre of a town but cannot afford to develop it may have the land taken away or exchanged for a plot in a less prominent position. So ownership is clearly not unconditional, though it may be of indefinite duration which is what 'unlimited' is taken to mean.

Is the ownership of a citizen of the same nature as the ownership of the state? Or to put it another way, is the state, every time it, or an authority on its behalf, allocates permanent land to a citizen divesting itself of its ownership of that land so that in time, the state will own very little land as more and more citizens obtain permanent ownership of plots? It should be noted that the state via the Ministry of Agriculture can issue ownership titles to farms under the Agricultural Land Ownership Law (ALOL) 1999 so the divesting of land applies as much to agricultural as to urban land. Furthermore, that law confirms the titles of those who owned farms before it came into force.

There is nothing in either ULML or ALOL to suggest that apart from ownership being conditional on proper and legal use – very much a principle of Islamic land law – ownership of land by a citizen differs in its nature from ownership by the state. If the citizen's land is acquired for a public purpose, compensation must be paid for the buildings on the land and an alternative plot must be allocated to the dispossessed citizen. As we have noted, ownership of land in Somaliland can potentially last for ever.

There does, however, appear to be a lacuna in the law with respect to pastoral land. To quote the Academy for Peace and Development's (APD) *No more 'Grass grown by the Spear'*:[4]

4 Academy for Peace and Development (2007) *Land-Based Conflict Project Somaliland Report*, Hargeisa, 17.

> . . . pastoral grazing land as well as its ownership is not defined in any law. In the absence of a clear definition of grazing land, the right of the Ministry of Pastoral Development & Environment to allocate grazing land to pastoralists can be used arbitrarily. As a result, land ownership and user rights of pastoralists are not secured within the legal system, making them particularly vulnerable for land grabbing by farmers, town dwellers or others . . .

Earlier the APD report summarised its understanding of land tenure in rural areas 'especially in pastoral areas where no state law exists':

> Degaan ownership: in traditional Somaliland society, private ownership of pastureland did not exist . . . Until today, access to natural resources is based in communal ownership and cooperation with other groups. Generally the concept of degaan describes the traditional claim for land ownership by a certain clan-group
>
> Xeer agreements: Affairs are regulated by contracts between clan groups. These contracts define rules for the management of land and other issues, and set up sanctions for the case that agreements are broken by one of the parties
>
> Flexibility: . . . Pastoralists need to move to where they find water and pasture for their livestock. Consequently, xeer agreements between groups need to be constantly renegotiated and redefined
>
> Responsibility of clan authorities: clan elders regulate clan affairs on behalf of their people.[5]
>
> The revival of clan-based politics and reduced public confidence in the supremacy of the rule of law has emboldened the claiming of communal pastoral land as traditional homeland of a specific clan . . .[6]

If these quotations are an accurate summary of the situation with respect to pastoral land, they do suggest that private land ownership does not as a matter of practice extend very far outside urban and peri-urban areas or if it does, it is in a sense 'unofficial' – that is unsupported by law.

Two points may be made on the present state of affairs on land ownership. First, there is no a priori reason why private land ownership should apply across all types of land. It might make sense in urban areas and with respect to sedentary agriculture but not for pastoralism. In any event, even if a policy decision is taken that Somaliland will move towards universal private land ownership: (a) this does not have to exclude communities from owning land – private land ownership does not have to mean individual land

5 Ibid., 13.
6 Ibid., 17.

ownership; and (b) different rules can be developed with respect to different types of land to provide for the modalities of creating and supporting private land ownership.

Second, if private ownership is to be the basis of land management in Somaliland, then there is a need for a comprehensive law dealing with all forms of private land ownership rather than a series of overlapping and incomplete laws such as exists at present. Such a law will have to cover how land may be acquired from the state; how it may be used; how transactions may be carried out and subject to what regulation; when land may be taken back (resumed) by the state and subject to what safeguards, procedures and assessment and payment of compensation. Some but only some of these matters are covered in the revised ULML and in the ALOL.

9.2 Interrelationship between the laws – secular, sharia and customary

Raising the issue of a comprehensive law on land ownership leads naturally on to the second key issue: the interrelationships between the laws – secular, sharia and customary. This was a matter which was clearly of concern to the participants in a Somaliland Land Management Workshop of March 2008. Two direct questions were raised on the matter and the following answers were given:

> Question 1: There are three different sources of land law in Somaliland [sharia, secular and customary]. Which one can best deal with land conflicts?
> The best land law for resolution of land conflicts is the secular law no. 17/2001.
>
> Question 2: What is the relationship between LML no.17/2001 and customary land law?
> i The two are complementary and not contradictory
> ii Law no. 17/2001 was formulated from both customary law and sharia.

Several comments may be made on these exchanges. First, Law 17/2001 was admitted to be deficient in its provisions on dispute settlement. The revised ULML now provides by article 28 that a special tribunal consisting of representatives of different Ministries all with interests in land will deal with all land disputes. This will be discussed further below. Second, there does seem to be some ambiguity on Law 17/2001: it is a secular law but it was formulated from sharia and customary law. The connection with sharia has already been noted: ownership of land is a conditional ownership which will be forfeited if proper and legal use is not made of the land. It is not immediately obvious that any other principles of sharia are enshrined in ULML.

The connection with customary tenure is not so clear: with the exception of articles 1 and 28, the details of the law are concerned with urban land: its allocation, planning, use, building, and registration, none of which has a connection with customary law. The APD report states quite bluntly that:

> . . . official legislation does not have much value in the rural context . . . In the absence of strong and capable institutions to implement formal laws and manage land issues, traditional councils of elders by and large remain the most influential and effective bodies to address the problem. In cooperation with the Mayor and the District Council they manage land on the basis of customary law . . .

Given what that basis is – earlier quotations from the APD report summarise that – it is very difficult to see any of the provisions of ULML either being drawn from customary tenure or applicable to rural land.

The issue of the relationship between customary tenure and a national statutory land law is one that has been and is still being played out in virtually every country in Sub-Saharan Africa. This is the issue of legal pluralism: whether it is possible or desirable for more than one system of law to exist in a state. I presented a paper on this issue at a UNDP workshop in 2005[7] and an extract from the conclusions of that paper indicates my position on legal pluralism which is relevant to Somaliland:

> In general terms, more and more countries in Africa have seen the futility of attempting to 'abolish' customary tenure. There is no reason to suppose that those countries that are still persisting in that misguided policy will be any more successful than those countries which have tried, failed and are now adopting a pluralist approach. The real problem now is not so much governments in Africa as governments, IFIs and the private sector outside Africa which are reluctant to try to work with or on some cases particularly in the private financial sector even to begin to understand the strengths of customary tenure . . .

Somaliland of all countries in Africa should be aware of the deleterious effects that attempts to abolish customary tenure have had since the Land Tenure Law of 1975 tried precisely to do that. It contributed to the total collapse of any ordered system of rural land tenure and management of natural resources throughout Somalia from which Somaliland is still in the process of recovering. Attempts to 'abolish' customary tenure merely drives it underground; people

7 A summary of the paper is published in Mwangi, E. and Patrick, E. (2006) *Land Rights for African Development*, Washington D.C., Collective Action and Property Rights (CAPRi), UNDP, International Land Coalition, 9–11.

in rural areas continue to observe it but as the state does not recognise it, a gulf grows up between official law and the interests which the state considers exists in the land based on that official law and the reality: what rights and interests in the land people live their lives by.

If, as the APD report indicates, customary tenure and law still operate in rural areas, it might be preferable to accept that position and ensure that the new committee established by section 28 of the ULML takes full account of customary tenure when hearing appeals against decisions made by local councils of elders and other local bodies in rural areas. Over the course of time, both the committee and courts hearing appeals from the committee would be able to bring about an element of commonality in the diverse rules of customary tenure applicable in Somaliland. These decisions could be backed up and supported by judicious and careful legislative reforms. It would be preferable to take that route to the development of a national land law than trying to force the pace by wholesale abolition and replacement of customary tenure with a new statutory code of land law.

9.3 Disputes over land and how to resolve them

It is clear both from interviews which I had during my visit in December 2009 and from the APD reports and other reports produced by a succession of consultants that disputes over land, both rural and urban, remain a major threat to peace and stability in Somaliland. The existence of so many unresolved disputes is the outward manifestation of the very considerable socio-economic transformation which has taken place in Somaliland in the last two decades. Urban areas, particularly Hargeisa, have expanded very rapidly so that formerly rural land has been converted to urban land, often without much regard to legal forms, legality or principles of justice and fairness. Large numbers of people now live in urban areas without clear title to land or any effective means to obtain title and this gives rise to many urban land disputes. In rural areas, enclosures and land grabbing have reduced and undermined traditional common land use rights used by pastoralists. Formerly state-owned agricultural land has been privatised, again often with little regard for legality. Poor enforcement of what law there is has added to the causes of conflict.

The government is aware of these fundamental changes which have taken place in Somaliland but as yet has not arrived at a considered position on how to address them. Hence the concern for the development of a national land policy and following that, the reform of laws and institutions to implement the policies and try to resolve the conflicts and tensions over land.

The above analysis suggests that there needs to be a twin track approach to land dispute settlement. The long-term approach is the development of a realistic land policy – realistic in the sense that rather than trying to turn the

clock back to some 'golden age' of the past, policy-making starts from the current position and seeks to introduce legality, justice, openness, sustainability and equity into the management of land which may well entail the reorganisation and reform of some existing practices of land tenure and land ownership in both rural and urban areas. The clear enunciation of the principles on which any such policies and laws are based will help convince the citizenry that they are designed to bring about stability and fairness in land management and so encourage compliance with them.

The shorter-term approach is to pursue the steps taken by the introduction of section 28 of ULML together with a greater recognition and use of traditional dispute settlement processes being used in rural areas and a strengthening of the existing functions of district councils under the Regions and Districts Law to assist in the resolution of land disputes at the local level. This might involve amendments to that Law and to the ULML to provide for legal backing to decisions of traditional mediation committees and to increase the role of district council sub-committees for peace and conciliation which as reported by the APD report appear to have a 'very limited ability to solve conflicts and manage land issues'. Consideration could be given to providing them with powers to take a lead in attempting to settle urban land disputes and determine boundaries between plots through community registration of titles.

Turning now to the ULML, the law combines an urban planning law with aspects of land tenure. In 2003 I wrote a detailed critique of the law with suggestions for changes but since, when amendments were made to the Law in 2008, no attention was paid to the suggested changes, no purpose would be served by repeating them here. Rather, the conclusions I came to after my mission in 2010 may be used to end this brief overview of land law in Somaliland.

There is clearly some considerable ambivalence about what laws should apply in rural areas. At a workshop to discuss some of the fundamental issues that would need to be addressed in a national land policy, some participants seemed to accept that *xeer* and traditional dispute settlement mechanisms should continue to apply in rural areas. Others, however, pointed to recent statute law particularly the Land Management Law, 17 of 2001 (LML) and its 2008 amendment and renaming as the ULML which established a special Ministerial committee to deal with land disputes as providing a national system for the settlement of disputes.

The ULML is a law dealing with urban land. It covers the following subjects: the allocation of land; the planning and control of development of land; aspects of land tenure including registration of title; appropriation of land for public use and compensation; demolition of buildings; land disputes; and building regulation. It is and was no more than an outline law which needs considerable fleshing out by regulations which have not yet (mid-2011) been made.

Writing in 2003 my overall conclusion on the ULML was that it was a valiant attempt to create the legal framework for a land management system for Somaliland. Its major deficiency was that it presumed the existence of Master Plans as the basis for all decisions on land management and these did not exist. Local authorities were thus left with no guidance on how they should exercise their powers of land allocation or granting construction permits. The second most serious deficiency is its unwitting discrimination against the urban poor – the vast majority of the inhabitants of the urban areas of Somaliland – which if applied as required by the law will also adversely affect economic development. Its third serious deficiency was the attempt to introduce a system of title registration when there was and still is no possibility of any capacity to operate such a system. The unvoidable conclusion then was that the ULML needed to be revisited and revised as soon as possible. This has not happened. It is a tribute to the competence of land management at the local level, both by local government in urban areas and traditional elders in rural areas, that land management has not given rise to serious unrest in either area, although land disputes still proliferate.

The crucial issue in relation to land management is of the same nature as that which applied to governance of the state: how much of traditional systems should be incorporated into governance and how much of international 'best practice'? With respect to urban land, UN-Habitat is clearly committed to furthering the case for international best practice; Global Information Systems (GIS),[8] a complex building code,[9] a detailed urban planning guide[10] are being developed and Somalilander officials are being trained to apply these techniques.

With respect to pastoral and rural land, the situation is not clear. If, as the APD report indicates, customary tenure and *xeer* still operate in rural areas, it might be preferable to accept that position. It would be preferable to take that route to the development of a national land law than trying to force the pace by wholesale abolition and replacement of customary tenure with a new statutory code of land law.

The government is aware of these fundamental changes which have taken place in Somaliland but as yet has not arrived at a considered position on how

8 Barry, M. and Bruyas, F. (2007) 'Land Administration Strategy in Post Conflict Situations: The Case of Hargeisa, Somaliland', FIG Working Week, Hong Kong SAR China.

9 Agevi, E. (2008) *Pro-Poor Planning and Building Regulations, Standards and Codes for Somaliland*, Report to the Somalia Urban Development Programme, UN-Habitat. These are very detailed and likely to be quite beyond the building capacity or the pocket of the urban poor in Somaliland. They would illegalise most of the buildings in Hargeisa and all other urban areas in Somaliland.

10 Demisse, B. and Kishiue, A. (2010) *Urban Planning Manual for Somaliland*, Nairobi, UN-Habitat. It is not clear at whom it is aimed. Urban planners are few and far between in Somaliland.

to address them. Hence the concern for the development of a national land policy and following that, the reform of laws and institutions to implement the policies and try to resolve the conflicts and tensions over land.

What is lacking is any overarching theoretical or philosophical approach to the development of policies or laws on land in the situation that Somaliland finds itself in.[11] I confess to some scepticism at attempts to introduce international best practices into urban land management which are so far removed from the practical experiences of most of those living in urban areas in Somaliland. If such an approach is to be adopted, it might be better to adapt the concept of 'The Right to the City' to urban land management in Somaliland with its stress on equal rights for all to the city. Equally, it would be better to support traditional dispute settlement mechanisms than try to replace them with statutory systems which would not have legitimacy in the eyes of the people. In the case of Somaliland then, a transformational approach to land reform would be to adopt the same approach as was taken to state building: develop from an indigenous base rather than from an international template.

11 With all due respect to shari'ah or Islam in general they do not seem to have developed any equivalent of the right to the city or a transformative approach to land reform. Hallaq, W.B. (2009) *Sharī'a Theory Practice Transformations*, Cambridge, Cambridge University Press, chapter 16, especially 297–301; Sait, S. and Lim, H. (2006) *Land, Law and Islam*, London, Zed Books. The Consultation Draft Constitution of the Somali Republic of 2010 does make an attempt at setting out founding principles which are based on the Quran and Sunna and the higher objectives (maqasid) of Shari'ah; articles 2 and 3.

Chapter 10

Rwanda

In some respects, discussing the land reform laws of Rwanda is the most difficult of the tasks confronting this or indeed any writer surveying land reform policies laws and practices in Africa. This is quite simply because there are two diametrically opposed points of view about the reforms to land tenure in Rwanda: there is the official view on the reforms and the view of the critics. The official view points to the laws and the policies and official explanations of their purposes; the critics point to the hidden agenda, the 'real' thrust behind the reforms, an approach which tends to draw vitriolic criticism in turn from the government.

We must start off with the official position. Over the first few years of the first decade of this century the government developed a very detailed national land policy and alongside that policy it developed and enacted an Organic Land Law (OLL) in 2005. On the position on the existing land laws of the country, the conclusion of the policy was that '. . . The laws relating to land are scattered and obsolete. They must be updated and compiled into one law which is applicable to all land users in Rwanda.'[1] The policy also stated in policy statements 5.1.3 and 5.2.3:

> Customary land tenure as it exists in Rwanda has become obsolete and does not offer any economic advantage to the *tenants* [italics added] or the state.
>
> Customary land rights and land use rights legally granted by the competent authority should give to the beneficiary full rights of ownership *through a long lease* [italics added] which guarantees security of tenure and raises land value which is essential to both the tenants and the state.
>
> In rural areas, the registration and the granting of the registration certificate for a 99-year long lease will follow strict rules established by the land law . . .

1 Rwanda Ministry of Lands, Environment, Forests, Water and Mines (2005), *National Land Policy (draft)*, Kigale, 16.

> The registration certificate will be issued for both land ownership in urban areas and the 99-year long lease in rural areas, and it will be renewable in the latter case.
>
> According to custom, land ownership is held by whoever occupies the land first. This rule has always been respected in our society. However in modern times, land acquisition by occupation has become obsolete since all vacant land belongs to the State. Likewise the provisions of decree-law No. 09/76 of 4 March 1976 article 1 stipulate that '*all land not held under the written law and affected or not by customary law or land occupation belongs to the State*'.

And consider too these very significant statements in NLP 5.10.1, 5.10.2 and 5.10.3:

> Legally the duality of the laws brings about an element of compassion in land management. The Rwandan peasant, just as the city dweller, considers himself as the owner of his plot of land, while the government considers itself as the prominent owner of the land . . .
>
> One unified land law will define accurately the rights and obligations of title deed holders.
>
> Elaboration and implementation of the law establishing the land regime in Rwanda in order to support the National Land Policy.

Rwanda then proposed to join the (dwindling) ranks of those states in Africa which aimed to 'abolish' customary tenure and replace it completely with registered statutory tenure. How has this been achieved? Who has what kind of rights in land in Rwanda? It is necessary to consider some of the fundamental principles of the Constitution, the NLP and the OLL.

Article 30 of the Constitution states that 'private ownership of land and other rights related to the land are granted by the state'. This is a very significant sentence for it makes clear that the scope and content of the 'private ownership of land' derives from the state and is not seen as any sort of natural right which pre-dates the existence of the state. What is involved in a private right of ownership is for the state to determine.

At this point I want to use elements of a paper by Sagashya and English[2] which summarises very well the basics of the NLP and the OLL:

> In 2004, the Government of Rwanda developed a National Land Policy to enable the population to enjoy a more secure form of land tenure and bring about proper land utilisation, efficient land management and

2 Sagashya, D. and English, C. (2009) *Designing and Establishing a Land Administration System for Rwanda: Technical and Economic Analysis*, Kigale. Authors' note: The authors wish to express their appreciation to the Government of Rwanda, through MINRENA and its

administration. The Guiding Principles underpinning this policy were as follows:

i Land is the common heritage of past, present and future generations;
ii According to the Constitutional principle of equality for all citizens, all Rwandans enjoy the same rights of access to land without discrimination;
iii Land tenure and land administration should guarantee security for the holder of a title deed and should ensure optimum development of land;
iv The guarantee of rights in land is a pre-requisite to sustainable management and proper use of land, being the source of development and life;
v Methods of management and use will differ according to whether it refers to urban or rural land, land comprising hill terrain, marshlands and natural reserves;
vi Fragile zones that are of national interest should be protected;
vii Good land management should include a good planning system, including organisation of houses and regrouping of plots for a more economic and productive use of the land resource;
viii A well defined and strengthened legal and institutional framework is indispensable for the implementation of the land policy.

The Organic Land Law 2005 (OLL), commences with eight General Provisions which provide the foundation for the specific measures detailed in the subsequent Chapters. Key amongst these are:

- ***Article** 3, which declares that the land is the common heritage of all Rwandans, past, present and future and that, notwithstanding the recognized rights of people, the State has supreme powers to manage all national land, is the sole authority with the power to grant rights of occupation and use of land and has the right to expropriate private land for public purposes, on prior payment of fair compensation.*
- ***Article** 4, which provides for equality with respect to the land rights to be enjoyed by individuals (natural persons) and corporations (legal persons), prohibits discrimination by gender or origin and provides for spouses to have equal rights to land.*
- ***Article** 5, which provides that all persons in possession of land acquired under customary law or by virtue of authorisation granted by government or by purchase, who are recognised as the owners of that land, are entitled*

newly formed National Land Centre/Office of the Registrar of Land Titles and DFID for permission to present this material. The authors also acknowledge the significant contributions made to this work by a team of national and international consultants and specialists. The views presented are entirely those of the consultants and authors and do not necessarily represent the views of DFID or MINRENA. I was one of the team who contributed indirectly to this report. My work on analysing the key articles of the OLL is reflected in the parts of the paper quoted here.

to documentary title to the land in the form of an emphyteutic (long term) lease.

- ***Article 6**, which provides for the grant of absolute title to land to Rwandans or foreigners who invest in Rwanda by carrying out works of a residential, industrial, commercial or similar character on land.*
- ***Article 7**, which provides that the OLL protects equally rights over land resulting from custom and written law and specifies the classes of persons who, in the context of the OLL, are recognised as customary landowners.*

The OLL recognises three broad categories of land, namely: *the private land of individuals* (including both natural and legal persons), *land vested in the State* and *land vested in the Local Government Authorities* (Districts, Towns and Municipalities). Land in the latter two categories is further divided, in the conventional manner under Civil Law, into land in the public domain and land in the private domain respectively . . .

The provisions of the OLL with respect to these categories of land can be summarised as follows:

i Private land

Private land is comprised of land acquired under customary or written law, by purchase, gift, exchange or partition. This includes land to be held under emphyteutic leases[3] which create property rights analogous to full ownership during the term of the lease, and by virtue of absolute title.

With respect to land acquired under customary law, the OLL provides for title to be conferred on individuals who are recognised as the customary landowners in the form of an emphyteutic lease for a renewable term of 3 to 99 years, as specified by Presidential Order. What this means is that anybody who has a claim of right to land nationalised in 1976, either

3 The reference to an emphyteutic lease may be derived in part from a footnote I wrote about the French word for lease – bail – and the word used in the French language version of the OLL for lease which is 'contrat d'emphytéose' which is also used in the Droits d'Enregistrement as 'droit d'emphytéose'. 'Rental agreements or tenancies (*huur/bail*) are personal contracts which do not grant rights in the land itself . . . The right of *superficie* and of *emphyteusis* are more like the common law long lease'. '*Emphyteusis* . . . grants the holder a right in rem [a right of property good against all the world] who may enjoy the use of the land and its produce as if it were his own for a limited period of time in return for payment of a fee.' Hurndall, A. (1998) 'Belgium', in Hurndall, A. (ed.) *Property in Europe: Law and Practice*, London, Butterworths, paras. 5.1.1, 2.1.3.1. This most valuable book deals with the land laws of 19 different jurisdictions in Western Europe. I concentrated on Belgian law as this seemed to be the most apt civil law to discuss in relation to Rwanda. Note also: 'Although the Romans used the term "dominium", the holder of land by *emphyteusis* was also treated in many ways as an owner.' *Butler v Baber* 529 So.2d 374, 381 (La. 1988). Louisiana is a state in the USA which uses the civil law.

under customary law or by virtue of official authorisation, or who has purchased such land, may apply for documentary title to that land. The OLL does not specify what evidence will be required to support such a claim of right. The procedures whereby such leases will be obtained from the State or Local Government Authority in which the land is vested are specified by Ministerial Order.

The OLL provides for the continued grant of absolute title to land to persons investing in the construction on land of works of various kinds that would inevitably result in the annexation of their immoveable property to the land.

Registration of title to land is compulsory. While rights based on land are freely transmissible upon death and transferrable by sale or gift, and land may be leased, rented out, encumbered or mortgaged in accordance with the Civil Code no transfer, mortgage, emphyteutic lease, rental agreement, or servitude is binding on third parties unless recorded on the register. In cases of joint ownership, the prior consent of specified family members is required for the lawful transfer or mortgage of land, long term rental agreements and creation of servitudes.

These arrangements effectively mean that the existing forms of private land tenure – both under the Civil Code and customary law will be replaced with new forms of tenure that will give all existing landowners a new set of rights and obligations embodied in a registered title. This will include rights to use the land, to exclude others, within set limits, and to dispose of it . . .

At the time of its enactment the OLL was only an enabling legal framework for land tenure reform requiring other legal and administrative instruments for implementation. The drafting required was substantial both for secondary orders (decrees) and tertiary regulations. The immediate strategic priority was to prioritise the main orders, agree the details for drafting and prepare a plan for reconciling the new systems with the old. Over 20 orders (ministerial and presidential) were required, including detailed orders relating to leasing and registration of land.

For reasons which were not explained in the quoted paper, very few of these decrees and orders have been made in the years since the enactment of the OLL which in effect means that much of the OLL is unimplemented. Only two Ministerial orders have been made; the Ministerial Order of 2008 Determining the Modalities of Land Registration[4] and The Ministerial Order of 2010 Determining the Modalities of Land Sharing.[5]

4 No.002/2008 of 1 April 2008.
5 001/16.01 of 26 April 2010.

As noted above land registration is compulsory as the following provisions of the Order make very clear:

4 The private ownership of land and the emphyteutic lease can only be legally established by a Certificate of Registration of the title recognised or granted by the State.
5 Transfers of title of immoveable property, whether between living persons or by death, can only occur by registration.

Systematic land registration is preceded by a process similar to land adjudication. The government aims to complete the process of registering all titles by 2013. At that point holding land by customary tenure or acquiring land via customary processes will cease to exist as a legal option.

What comes through then on government websites (of which there are many all singing from the same hymn sheet) is an immensely efficiently executed land tenure revolution – a transformative land tenure exercise if there ever was one. The old-fashioned ethnic-based land tenure, redolent of conflict and strife has been swept away, and the government has fashioned a modern market-based statutory tenure system in which everyone is treated equally and an objective title registration system provides similar security for all landholders.[6] Foreign investment is welcomed. No country in the region, indeed in Africa as a whole, has so wholeheartedly bought into the post-conflict statebuilding liberal peace agenda consensus: democratic elections, the market economy in relation to land and adherence to the rule of law.

Why then are there critics of the land reform programme as there are of the genuineness of Rwanda's adherence to the other pillars of the liberal peace agenda.[7] I think there are two strands of criticism: one is concern that the effect of the land reform and parts of the OLL that do not feature in the government's publicity about land reform and the OLL, may unwittingly disadvantage the rural poor; the other strand is that there is nothing 'unwitting' at all about the reforms; they are deliberately targeting the rural poor and to make the criticism absolutely plain, these critics give names to the elite who will benefit from the reform and the poor who will lose out: the elite are the minority (15%) Tutsi who are ruling the country and the poor are the majority (85%) Hutu.

6 Nkurunziza, E. (2010) 'Low cost Titling in Africa, Land Tenure Regularisation in Rwanda', Presentation to the World Bank Annual Land Conference, Washington D.C., World Bank.
7 Reyntjens, F. (2011) 'Rwanda, Ten Years on: From Genocide to Dictatorship', 110 *African Affairs*, 1–34; Brown, S. (2011) 'The Rule of Law and the Hidden Politics of Transitional Justice in Rwanda', in Sriram, C.L., Martin-Ortega, O. and Herman, J. (eds) *Peacebuilding and the Rule of Law in Africa: Just Peace?* London, Routledge, 179–196; Smith, S. (2011) 'Rwanda in Six Scenes', *London Review of Books*, 17 March, 3–8.

As an example of this first strand of criticism, consider these conclusions reached by Ansoms after a very careful and detailed paper looking into the changing trends in land use, distribution and property rights in post-conflict Rwanda. The author is discussing the socio-economic implications of some of the provisions of the OLL:

> When land is not efficiently conserved and productively used, or in more specific terms when it is degraded or has not been used for 3 consecutive years, sanctions can be imposed [under the OLL]. These typically take the form of requisitioning the land for a period of 3 years by the minister or any other competent person . . . Further, in case of dispossession, the owner can only request for repossession in writing, explaining how he or she will commit to productive exploitation of the plot in question. When rejected, the only further option is to appeal to court. The formality of these procedures leaves little room for illiterate farmers with little financial means to fight their case.
>
> To conclude, and in firm contrast to the pre-war policy that aimed for land consolidation mainly through equalising redistribution, the new land law promotes land consolidation through concentration in the hands of farmers that can guarantee increased productivity and sustainable land while limiting the land transaction options for the majority of land-poor farmers. Further, the law gives the local authorities a large margin for interpretation of what is 'productive land use', which allows them to remove small-scale farmers from their 'underexploited' land in favour of more professional, commercially-oriented and competitive farmers.
>
> Overall, one should not overestimate the power of official policy to dominate the land arena . . . Nonetheless, the strategic choice made in the land policy and law will obviously have important implications in terms of land distribution and social conflict. Indeed, we could conclude that the new formal land policy provides those on top of the societal ladder, with an additional tool in setting the rules of the game to their hand. As a result, the bargaining power of poor small-scale peasants in their 'struggle for land' is seriously affected. By focusing on a largely output-oriented growth logic, the official policy disregards the need for equitable land management.
>
> This may have two important implications. First, it might disrupt the Government's goal to create pro-poor growth by focussing on the agricultural sector. Based on cross-country evidence, Deininger and Squire[8] find that inequality in land holdings has a profound negative impact upon the degree in which the poor participate in economic growth.

8 Deininger, K. and Squire, L. (1998) 'New Ways of Looking at Old Issues: Inequality and Growth', 57 *Development Economics*, 259–287.

> Indeed, while targeting the high-potential larger farmers, the question remains what will happen to the majority of non-competitive non-professional, often subsistence-oriented rural agents, restrained to jump on the train towards 'modernity'. Second, the changes in power relations and bargaining power of different groups might enhance new types of land conflict. As shown in the analysis of André and Platteau,[9] these conflicts can lay at the basis of more widespread frustration and societal alienation.[10]

These sombre conclusions are echoed by Isaksson:[11]

> The results of empirical estimations drawing on data on the land tenure arrangements of over 5,000 Rwandan households indeed suggest systematic within-country inequalities in land rights, with households headed by women or young individuals and households that have been displaced due to conflict or that have resettled in the Imidugudu village settlements all reporting significantly weaker rights than their respective comparison groups. The weaker rights reported by young household heads seem to be driven by household composition factors and the size and structure of land holdings, and the weaker rights among Imidugudu and conflict-displaced households appear attributable to the concerned groups being over-represented in regions where land rights tend to be weaker . . .
>
> The same inequality pattern emerges both when considering rights over the total land utilised by the households – including land that is leased or sharecropped – and when focusing solely on rights over land that can be classified as owned. Hence, the observed inequalities are not only the result of systematic variation in tenure arrangements, but also exist when comparing households cultivating plots under similar land tenure regimes . . .
>
> The results of the present paper indicate that unequal property rights to land constitute an important inequality dimension that exists on top of inequalities in terms of the size of land holdings. As such, they highlight the need to – unlike much of the quantitative literature in the

9 Andre, C. and Platteau, J.-P. (1996) *Land Tenure under Unendurable Stress: Rwanda Caught in the Malthusian Trap*, CRED Centre de Recherche en Économie du Développement, Faculté des Sciences économiques et sociales, Facultes Universitaires Notre-Dame de la Paix, Namur.

10 Ansoms, A. (2008) 'A Green Revolution for Rwanda? The Political Economy of Poverty and Agrarian Change', Institute of Development Policy and Management Discussion Paper, Antwerp, University of Antwerp, 41.

11 Isaksson, A.-S. (2011) 'Unequal Property Rights: A study of land right inequalities in Rwanda', Working Papers in Economics No. 507, Department of Economics School of Business, Economics and Law, Gothenburg, at University of Gothenburg.

> field – carefully evaluate how property rights apply to different segments of the population in a country. Moreover, the findings point to the importance of considering *effective* land rights and, when evaluating land reform, of carefully monitoring the extent to which changes in de jure land legislation translate into de facto developments in the field. With respect to the Rwandan case, considering that the country is in the process of implementing an extensive land reform, it is crucial that policy makers are aware of existing inequalities in terms of effective land rights. With the legislative reform follows two major challenges – ensuring that the new law is enforced and that households are informed about its content. The results of the present paper can help guide this process, and provide a point of reference for future evaluation of the reform's distributional effects.

These papers may be seen as principally economic and as such politically neutral. They investigated, reported upon and analysed the situation in the field with no overt political agenda to pursue. This makes their arguments all the more powerful and persuasive. Pottier,[12] whose writings on Rwanda exhibit a scepticism, to put it no higher, on the self-image propagated by the post-genocide government, offers an analysis which tends towards the second strand of the criticism:

> One direct result of this insistence on uniformity is that the official view on past land tenure regimes reduces historical complexities in an attempt to homogenise the collective memory. This watering down of complexity, which extremists may construe as a re-interpretation of history to mask Tutsi privilege, is not conducive to building peace . . .
>
> But there is a further, more fundamental way in which the Land Act and Land Policy have failed to engage with the complexities of everyday life. The architects of the new law and policy, just like the foreign consultants brought in by the post-genocide government and its donors, have too easily been persuaded that land fragmentation is 'bad' and land consolidation is 'good' . . .
>
> The vision of a vibrant agricultural sector from which the land-poor will exit to take advantage of equally vibrant off-farm opportunities is the pinnacle of voluntary blindness . . . given that landscape transforming initiative (*imidugudu* [villagisation] especially) have so far failed to bring evidence of enhanced agricultural productivity, one must question whether *consolidation through expropriation* can be considered a viable

12 Pottier, J. (2006) 'Land Reform for Peace? Rwanda's 2005 Land Law in Context', 6 *Journal of Agrarian Change*, 509–537, 532–533; Pottier, J. (2002) *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century*, Cambridge, Cambridge University Press.

> option. Whatever local authorities may say about no one being forced to give up land, resource-poor people will lose their land . . .
>
> The chief concern regarding Rwanda's plans for agrarian reform should be that implementing the 2005 Land Law will amount to an endorsement of widening class differences . . . those who implement the Law are unlikely to want or be able to reverse the current situation in which the urban rich are buying up large swathes of land in impoverished rural areas . . . It appears that restrictions on land acquisition have been dropped . . . The ethnicization of landlessness – the deserving landless are clearly identified in the Land Policy as (Tutsi) 59-ers who returned from exile – may be expected to cause controversy and anxiety especially in those households [Hutus] whose plots add up to less than 1 ha . . .

The final area where critical comment has been made of government land policies and practices is with respect to *imidugudu*, or villagisation. In 1996 the government adopted a national habitat policy which required all Rwandans living in scattered homesteads to reside in government-created villages. In practices very reminiscent of villagisation in Tanzania, over the next four years, without any legislative backing or consultation, the government moved hundreds of thousands of citizens into *imidugudu*, a significant number against their will. This is how Human Rights Watch[13] described the operation of the policy:

> Hundreds of thousands of homeless Rwandans, most of them Tutsi returnees, but some of the survivors of the genocide and other victims of the conflict, moved willingly to the settlements.
>
> At the same time and without fanfare, local authorities began insisting that rural-dwellers who had homes, both Tutsis and Hutus move to *imidugudu.* It even compelled home-owners to destroy their homes before making the move. High-level national officials claimed to have never authorised coercion to enforce this policy, but they knew local officials used threats and force to make people move . . .
>
> The first to relocate, many of them Tutsi returnees to genocide survivors received ready-built homes or materials for construction from foreign-funded agencies. Those who moved later, many of them Hutu or Tutsi who were obliged to leave solid homes, received little or no assistance. Many of them lacked the resources to build houses and cobbled together temporary shelters of wood, grass or leaves and pieces of plastic. Some have lived in such temporary shelters for two years or longer. According to information gathered in late 1999 by the UNDP and the

13 Human Rights Watch (2001) *Uprooting the Rural Poor in Rwanda*, London, 1–2.

> Rwandan government, well over half a million *imidugudu* residents live in such shelters and unfinished houses . . .
>
> In implementing the rural resettlement program, local officials in many communities established *imidugudu* on land confiscated from cultivators, most of whom received no compensation . . .
>
> In conjunction with establishing *imidugudu*, local officials provided land for repatriated Tutsi refugees who had none. In parts of . . . [some] . . . prefectures, they obliged landholders to share their holdings with those who came from outside the country . . . Some who refused to cede their property to others were punished by imprisonment. Authorities also appropriated land for officials, military officers and the associates, including businessmen, and permitted these powerful persons to confiscate land for themselves . . .

Human Rights Watch goes on to note that the pace of villagisation slowed down by the turn of the century as donors pulled back from supporting a programme they were beginning to feel uneasy about.

At its lowest then, there is a question-mark over the justice, transparency and honesty of the purpose of the Land Policy and the operation of the OLL in Rwanda. What appears at first sight to be an excellent example of market-led land reform fully in keeping with modern 'international standard' approaches to land management seems on a deeper and more careful analysis to be a reform *designed* to benefit the urban elites at the expense of the rural poor and to make matters worse, re-exacerbate the long-standing tensions between Tutsis and Hutus.[14]

14 Reyntjens's gloomy conclusions on the general performance of the post-genocide government may be quoted as being very applicable here: 'Such conditions constitute a fertile breeding ground for more structural violence, which creates anger, resentment and frustration and may well eventually again lead to acute violence.' Op. cit.

Chapter 11

Kenya

All the countries hitherto reviewed in this Part have undertaken major land law reform programmes over the last two decades. Kenya is at the time of writing in the midst of such a programme. The combination of the long-drawn out constitutional reform process (where the first attempt at reform was defeated at a referendum where land issues played an important role in the campaign) together with the violent aftermath of the flawed election of 2007, much of it involving disputes over land, brought land reform issues to the fore and the land chapter of the 2010 Constitution heralds a major programme of land law reform. Work on a national land policy had commenced in 2004 and after a wide ranging process of consultation, a draft NLP was agreed in 2007 and after some delay the policy was adopted by government and Parliament and published in 2009.[1] The NLP, the Constitution and the proposed land law reforms will be reviewed here.

The NLP is a very wide ranging and immensely ambitious document. Its mission and objectives are best set out in its own words:

> **Mission of the Policy**
> To promote positive land reforms for the improvement of the livelihoods of Kenyans through the establishment of accountable and transparent laws, institutions and systems dealing with land.
>
> **Objectives of the Policy**
> The overall objective of the National Land Policy is to secure rights over land and provide for sustainable growth, investment and the reduction of poverty in line with the Government's overall development objectives. Specifically the policy shall offer a framework of policies and laws designed to ensure the maintenance of a system of land administration and management that will provide:
>
> a All citizens with the opportunity to access and beneficially occupy and use land;

1 Republic of Kenya Ministry of Lands (2009) *Sessional Paper No. 3 of 2009 on National Land Policy*, Nairobi, Government Printer.

b Economically viable, socially equitable and environmentally sustainable allocation and use of land;
c Efficient, effective and economical operation of land markets;
d Efficient and effective utilisation of land and land-based resources; and
e Efficient and transparent land dispute resolution mechanisms.

The philosophy behind the NLP which all the proposals and recommendations are based on is set out as follows:[2]

> Land is not just a commodity that can be traded in the market. It represents the following multiple values which should be protected by both policy and law:
>
> a Land is an economic resource that should be managed productively;
> b Land is a significant resource to which members of society should have equitable access for livelihood;
> c Land is a finite resource that should be utilized sustainably; and
> d Land is a cultural heritage which should be conserved for future generations.

The criticism of past policies, laws and practices was that only the first value was recognised and the NLP was committed to take the other values into account.

The NLP then proceeds over some 60 pages to set out a range of activities which it commits governments of the future to carry out. A Land Act is to be drafted which will provide for many of the proposals in the NLP. Key matters which it noted should find a place in a future Constitution were the classification of land into public land, community land and private land. Public land comprises all land that is not private land or community land and any other land declared to be public land by an Act of Parliament. Community land refers to land lawfully held, managed and used by a given community to be defined in the Land Act. Private land refers to land lawfully held, managed and used by an individual or other entity under statutory tenure. A National Land Commission was to be established as a constitutional body. Amongst its functions were to be those to:

a Hold title to and manage public land on behalf of the State;
b Establish and maintain a register of all public, private and community land in the country;
c Ensure the realization of the multiple values of land, namely, economic productivity, equity, environmental sustainability and conservation of national heritage;

2 Ibid., para. 29.

d Exercise the powers of compulsory acquisition and development control on behalf of the State and local authorities or governments.

Within two years of its establishment, it was to initiate the process of formulating necessary legal and administrative reforms to facilitate timely implementation of the NLP including resolution of historical land injustices.

Hardly a single aspect of current land policies and practices was left out of the reforming zeal of the NLP. Historic land injustices going back to 1895, the date of the declaration of the East African Protectorate are to be investigated and righted. Land adjudication and consolidation are to be completed. Laws dealing with inheritance and the matrimonial home are to be reformed. Major changes are to be introduced into the management and use of community land. A far greater degree of land use planning at both rural and urban levels is foreshadowed, and development control, defined as 'the power of the State to regulate property rights in urban and rural land, [which] is derived from the State's responsibility to ensure that the use of land promotes the public interest' is to be tightened up. Land acquisition is to be reviewed. A large number of matters requiring special intervention, usually by legislation, are set out: women's land rights, youth, children, indigenous communities, hunters and gatherers, IDPs, pastoralists, the problems of coastal land tenure. Besides the National Land Commission (NLC), District Land Boards and Community Land Boards are to be established and empowered. Special land tribunals and courts are to be created. A new Land Registration Act will be enacted; the Survey Act revised to facilitate GIS; land settlement procedures and definition of landless for these purposes will be put into the clearly mammoth Land Act which in this matter will be based on principles of redistribution and restitution. Illegal and irregular land allocations and transactions will be reviewed and possibly cancelled.

Amongst all these proposals for reform, which imply a very different kind of land management system in Kenya, one principle stands out. In the words of the NLP:[3]

> The development of vibrant land markets is hindered by inadequate information, political interference, bureaucratic inefficiencies, corruption, speculation, insecure and unclear land tenure arrangements, and the absence of innovative market mechanisms such as real estate investment trusts and community land trusts. The emergence of new land markets including rental markets should be encouraged. These new land markets have the potential to facilitate better access to land.

3 Paragraphs 164, 165.

In order to enhance the efficiency of land markets, the Government shall:

a Decentralise land registries;
b Facilitate allocation of serviced land for investment purposes;
c Facilitate and promote land market operations particularly in community land;
d Encourage the development of new land markets by, among other things, providing better information about land transactions; and
e Regulate land markets to ensure efficiency, equity and sustainability.

So every other proposed reform will be developed within the framework of a land market which is specifically to be extended into community land.

Many donors had a role in the development of this policy but USAID in particular was very involved producing a detailed and in places critical review of the draft policy of 2007 in 2008 which was updated in 2009.[4] Attention was drawn to the overly agrarian thrust of the policy and its relative neglect of the need to address urban issues. Considerable scepticism was shown to the policies of rural resettlement and restitution which were (and still are) lacking in any detail. Attention was drawn to where draft NLP proposals might conflict with USAID policies and programmes and possibly interfere with the operation of the land market.[5] It was suggested that USAID might like to engage in dialogue with those involved in developing the NLP to try and effect changes.

It is not known whether the 'dialogue' took place. There are no significant changes between the 2007 draft NLP and *Sessional Paper No.3* or, at least none on those matters which the USAID document had expressed concern about. On two matters I would very much agree with the USAID criticisms. First, the inadequacy of the policies on informal urban development which rate only three paragraphs out of 272 and where there is considerable ambivalence about a positive approach to the regularisation and upgrading of

4 USAID (2009) *Kenya Land Policy: Analysis and Recommendations*, Nairobi. The publication was produced for review by the United States Agency for International Development. It was prepared by ARD, Inc. The principal author was John Bruce, an ex-Senior Counsel in the Environmentally and Socially Sustainable Development and International Law Unit of the Legal Vice-Presidency of the World Bank.

5 Some of the suggestions for changes put one in mind of the remark of the former American Assistant Secretary of State Hank Cohen quoted in Mullins, C. (2011) *Decline and Fall*, London, Profile Books as saying of US policy in Africa: 'We want to see human rights, democracy and free markets. But if you get the last one right, we give you a discount on the other two', 269.

informal settlements.[6] Second, the USAID report queries the cost of the proposals and whether sufficient attention has been paid to that issue. The author draws attention to the underestimation of the costs of implementing land reform laws in Tanzania and Uganda (the same point may be made with respect to Mozambique) and notes that costs of land law reform are regularly underestimated.

The NLP states that the costs are estimated to be Kshs 9.6 billion (approximately £70m) over six years, much of which will come from 'effective implementation of the proposed land sector reforms [which] will more than double the Ministry's annual collection of revenue currently estimated to be Kshs. 6.0 billion'.[7] This seems to be very optimistic and also assumes that all the reforms will proceed smoothly, which is even more optimistic not to say naïve. There is scarcely any proposed reform which will not affect some vested interest both within the land bureaucracy and amongst politicians and such people will fight very strongly to protect their interests and benefits. Fifty years of a land administration culture which consistently put the interests of the political and administrative elites above those of any other groups in society and indeed often above any obligation to comply with the law is not going to be swept aside by 50 pages of land policy. A further self-inflicted problem is that there is no attempt at any prioritisation of proposals and recommendations in the NLP. All apparently are equally important and urgent which is a recipe for later arguments on how and with what to proceed.

The NLP was approved in mid 2009 and published as a sessional paper in August 2009. The first test of the commitment of the government to the NLP was not long in coming. In January 2010 the African Commission on Human and Peoples' Rights delivered its decision in the *Endorois* case.[8] Rhodri Williams's blog on the Terra Nullius website[9] provides a good summary of the facts of the case:

> The Endorois people were evicted from their traditional lands near Lake Bogoria in central Kenya in the 1970s, relocated to an area unsuitable for their pastoral way of life and granted only sporadic access to sites central to their spiritual beliefs. In the wake of the eviction, promises to provide compensation and a share of the proceeds from the nature reserve established on the Endorois' traditional lands were broken.

6 NLP, paras. 209–211.

7 Ibid., para. 272.

8 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.*

9 Williams, R.C. (2010) 'The African Commission "Endorois Case" – Toward a Global Doctrine of Customary Tenure?' Terra Nullius website posted on 17 February 2010.

The Endorois attempted over the next 25 to 30 years to gain some compensation from the Kenyan government. They were met with consistent obstruction and dismissal from both the executive and the judiciary. Their case was finally taken up by a non-governmatal organisation (NGO) and submitted to the African Convention on Human and Peoples' Rights (ACHPR). That body too met with nothing but obstruction and a cavalier approach to their attempts to obtain information from the Kenyan government that clearly was not prepared to co-operate with the Commission and did everything possible to delay the Commission's coming to a decision. In its decision, the African Commission found violations of the rights to freedom of religion, property, health, culture, religion and natural resources under the ACHPR:

> The African Commission recommends that the Respondent State:
>
> a Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land.
> b Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
> c Pay adequate compensation to the community for all the loss suffered.
> d Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.
> e Grant registration to the Endorois Welfare Committee.
> f Engage in dialogue with the Complainants for the effective implementation of these recommendations.
> g Report on the implementation of these recommendations within three months from the date of notification.

Over three years have gone by since that recommendation was handed down. To take steps to comply with the recommendations would have been four-square within the principles and detailed recommendations of the NLP. Attempts have been made to try to get the government to respond positively to the ACHPR but, as of October 2012, the only response from the government has been to offer discretionary rights of access to the Endorois to their ancestral lands.[10] While it is far too early to conclude that the NLP has been fatally wounded, it is not a good omen that so clear a failure to apply the

10 Information derived from an interview with Caria Clarke, Legal Cases Officer, Minority Rights Group International by an LLM student on my Globalisation of Land Markets and Land Law course at Birkbeck College during the preparation of her course essay in April 2012 on an analysis of Kenya's land law reform. This was an excellent essay and I am most grateful to her for allowing me to draw on it for this chapter.

fundamental principles of the NLP has occurred so soon after its approval by the government.[11]

We may now turn to the land chapter of the Constitution which can be dealt with quite quickly since much of it follows the NLP. Chapter 5 of the Constitution contains the following articles:

60 – *Principles of land policy.*
This article summarises the key principles from the NLP already quoted.
61 – *Classification of land.*
This article states that:
All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.
62 – *Public land.*
Explains the meaning of the term following the NLP.
63 – *Community land.*
Explains the meaning of the term following the NLP (this is discussed in more detail below).
64 – *Private land.*
Explains the meaning of the term following the NLP.
65 – *Landholding by non-citizens.*
Limits landholding by non-citizens to 99-year leases. This changes the law which had previously allowed non-citizens to own freehold land. This was foreshadowed by the NLP.
66 – *Regulation of land use and property.*
This article provides that:
The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.
67 – *National Land Commission.*
This article establishes the NLC and sets out its functions as was foreshadowed in the NLP.
68 – *Legislation on land.*
This article is worth quoting in full:
Parliament shall—

a revise, consolidate and rationalise existing land laws;
b revise sectoral land use laws in accordance with the principles set out in Article 60 (1); and

11 Lynch, G. (2012) 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the Endorois', 111 *African Affairs,* 24–45 for thorough review of the case. The author too draws attention to the failure of the government to make any response to the opinion, after an initial statement by the Minister of Lands that it had 'no option but to implement the African Commission's recommendations'; 41.

c enact legislation—

i to prescribe minimum and maximum land holding acreages in respect of private land;
ii to regulate the manner in which any land may be converted from one category to another;
iii to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;
iv to protect, conserve and provide access to all public land;
v to enable the review of all grants or dispositions of public land to establish their propriety or legality;
vi to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land; and
vii to provide for any other matter necessary to give effect to the provisions of this Chapter.

This major legislative programme must in accordance with article 261(1) and the Fifth Schedule of the Constitution be enacted by Parliament within 18 months of the coming into effect of the Constitution. With the greatest possible respect to the drafters of the Constitution, this was a totally unrealistic timetable and in accordance with article 261(2) of the Constitution, the National Assembly exercised its powers in early 2012, which must be by a two-thirds majority, to extend the time limit by a period of 60 days. The total time limit may not be for more than one year.

Even that is a very short time to *enact*, that is to draft, consult, revise in the light of consultation, debate and amend in the National Assembly and in the Senate and pass the many detailed and lengthy laws involved in giving effect to article 68. It is clear that the drafters of the Constitution did not consult or check the records to see how long it took to enact the Land Law of Mozambique in 1997, the Land Act of Uganda in 1998 and the Land Act and Village Land Act of Tanzania in 1999. In the case of the last two countries, there were many complaints – not justified in my view if one compares the consultations that took place on those land laws compared to the usual lack of consultation on most laws in those countries – that the legislation had been rushed through the legislature with inadequate time for public input.[12] In the event, the

12 In Tanzania, three and three-quarter years elapsed between approval of the NPL and enactment of the Land Act and Village Land Act. In Uganda only two years elapsed between the first sitting of Parliament under the 1996 Constitution and the enactment of the Land Act but that short period was mandated by the Constitution and land law reform had been discussed with draft bills to examine quite often in the preceding 10 years. Further afield, it is worth noting that the Malaysian National Land Code took seven years

National Assembly, after what could only have been cursory examination of three major land laws, approved all three in late April 2012: the National Land Commission Act; the Land Act; and the Registered Land Act. The focus of this chapter will be on the Land Act.

One aspect of the National Land Commission Act which it is worth noting is clause 21 which provides that:

> The Cabinet Secretary, on the recommendation of the Commission, shall within one year of its appointment, make rules for the conduct of investigations into historical land injustices as provided for in Article 67(2)(e) of the Constitution.
>
> 2 The rules made under subsection (1) shall, among other things, provide for the right of any person to lodge a complaint with the Commission.
> 3 The Commission shall make its recommendations for appropriate action and such recommendation shall include:—
>
> a recommendation to Parliament and the President regarding the enactment of any necessary legislation;
> b the taking of any necessary legal proceedings either by the Commission itself or other public authority; or
> c the settlement of any particular dispute through alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution; or
> d the award of compensation to such victim as the Commission may deem just, taking into account, among other things, the economic circumstances of the victim and the financial sustainability of any type of compensation.

Article 67 of the Constitution sets out the many functions of the NLC. Yet within one year of its commencement, it has to start the extremely complex

of work from 1956 until it was enacted in 1963. In New Zealand, the Law Commission published *A New Property Law Act: Report No. 29* providing for an updated and codified land law in 1994; the Property Law Act, an expanded version of that report, was enacted in 2007. In England and Wales, the process of developing and enacting a new Land Registration Act took five years from 1997 to 2002. The process of creating the five Property Acts which came into operation on 1 January 1926 took 11 years to complete although four or five years should be deducted from that period owing to the intervention of the First World War. In Ireland, the Land and Conveyancing Reform Act 2009 was the product of several reports of the Irish Law Commission going back to 2004. Only in Trinidad and Tobago did a major land law reform programme go from start to finish in the short time of three years – 1978–1981 and the six acts which were the outcome of that reform programme *have never been brought into operation*.

and potentially divisive and time consuming task of investigating and arriving at conclusions on historical land injustices going back over 115 years. The South African equivalent – restitution of land rights – had a cut-off date of 1913, 81 years before the enactment of the specialist Commission on Restitution of Land Rights by the Restitution of Land Rights Act 1994. Again, it seems there was a failure to learn lessons from other countries on the continent that had faced similar problems.[13]

There was understandable euphoria when the referendum approved the new Constitution of Kenya and again when the Constitution was brought into effect in August 2010. There was similar joy when the NLP was approved by the National Assembly and *Sessional Paper No.3* was published in August 2009. But there is a very great mismatch between: (a) the policies contained in the NLP and the provisions of chapter 5 of the Constitution; (b) the timescale by which all the necessary policies have to be translated into enacted legislation; and (c) the resources available to implement the policies and the laws. As the NLC notes in its very first paragraph 'Land is critical to the economic, social, and cultural development of Kenya. Land . . . issues remain politically sensitive and culturally complex.' It is very regrettable that the provisions of the NLP and the Constitution have made it unnecessarily difficult to grapple with these critical matters.

11.1 The Land Act 2012

The Land Act is a strange mish-mash of a law. Part I deals with some general matters in clauses 1–7; the law then combines public law land in Parts II and III, clauses 8–36; community land in Part IV, clause 37, private land law in Parts V, VI and IX, clauses 38–120 and 149–162 – overwhelmingly land transactions law although part V is called management and administration of private land and Part VI co-tenancies and partition – a part which also embraces leases and mortgages – law on compulsory acquisition of land, Part VII clauses 121–147, and Part VIII; settlement programmes clause 148. It follows no clear order; land acquisition law coming in the middle of the law on private land transactions. The confused structure of the law is mirrored by the content which is seriously deficient in several respects. I will deal with three important aspects of the law; the powers of the Cabinet Secretary and the role of the NLC with respect to public land; the new provisions on private land transactions; and the chapter of compulsory acquisition of land.

The law starts off with repeating the principles of land policy set out in article 60(1) of the Constitution but very little of the content of the law seems

13 For a detailed discussion and comparison of the Kenyan land reform with the South Africa land reforms, see Wachira, G.M. (2011) *Vindicating Indigenous Peoples' Rights in Kenya*, LLD thesis, Faculty of Law, University of Pretoria.

to have been developed so as to implement these principles. Clause 5 provides for freehold, leasehold and customary land rights (provided these last rights conform to the constitution) as recognised forms of land tenure but then also includes co-tenancy as a separate head of tenure which it is not. The side-note to clause 6 states that it deals with land management and administration institutions but in fact it deals only with the very extensive functions of the Cabinet Secretary in relation to land management.

This official is empowered to:

a develop policies on land, upon the recommendation of the Commission;
b coordinate county physical planning;
c facilitate the implementation of land policy and reforms;
d coordinate the management of the National Spatial Data Infrastructure;
e set standards of service in the land sector;
f regulate service providers and professionals, including physical planners, surveyors, valuers, estate agents, and other land-related professionals, to ensure quality control;
g monitor and evaluate land sector performance;
h coordinate and oversee the statutory bodies under the land sector . . .

Two points may be made on this extensive list. First, it is odd that these functions are vested in the senior official in the Ministry and not the Minister – the political head of the Ministry and the person who one would normally expect to be responsible to Parliament for all these functions. How is the Minister to be called to account when he or she has no statutory responsibility for these matters and furthermore appears to have no role in calling the Cabinet Secretary to account? What is the role of the Minister? Second, given the history of abuses of official power over land in Kenya, it seems extraordinary that such vast powers are vested in one official with no requirement in the law for any scheme of delegation of functions or any provisions for the accountability of that official or for any openness to be an integral part of the exercise of those functions by that official.

Parts II and III dealing with the management of public land vests the powers to manage public land in the NLC (the Commission). The powers vested in the Commission are extensive. They include the prescribing of guidelines for the management of public lands by all public agencies and statutory bodies in actual occupation of public land;[14] the allocation of public land, the setting aside of public land for conservation purposes and for investment, the reservation of public land for public purposes; the vesting of 'the care, control and management of any reserved land with a statutory body, public corporation or a public agency' subject to such conditions as the

14 In developing these guidelines, the Commission must comply with the provision of section 10(3) of the Constitution. There is no section 10(3).

Commission determines; the conferring on a management body of the power to grant leases and licences[15] of public land.

In all these matters the Commission is acting on behalf of the national and county governments but neither in this law nor in the National Land Commission Act are there any provisions for consultations, negotiations, or discussions with, or review in the light of views expressed by, county governments or indeed the national government before the Commission exercises any of its panoply of powers. Between them these two laws set the NLC above any other branch of government in Kenya. Now, again, given the record of land management in Kenya since the beginning of Kenya as a separate political entity – and let it not be thought that partial, unfair and oppressive land management only began at independence[16] – one is bound to be very concerned at this level of legally unregulated and uncontrolled power given to the NLC. The assumption seems to be that if enough care in taken in selecting the membership of the NLC, it will operate in a fair and open manner. That is a very dangerous assumption to make. Either in the Land Act or the National Land Commission Act, there needs to be much more extensive provisions for participation by county governments in the exercise of the powers of the NLC and for checks and balances on those powers. The provisions on notices that the NLC are required to issue before making any allocation of public land are essentially 'passive' participation and so completely inadequate: there are no provisions for any organisation or any person to which or to whom a notice is given to make any comment or objection to the proposed allocation. The present arrangements do not comply with the principles set out in the NLP which state that the Government *shall* 'establish participatory and accountable mechanisms for the allocation, development and disposal of public land by the NLC'.[17]

Turning to the powers of management bodies, there are some very unclear provisions in the Act. Under section 16, the management body in which the care of reserved public land has been vested by the Commission may of its own motion or at the request of the Commission, prepare and submit to the Commission a development plan for the management of the land and:

> If a management body submits a plan to the Commission under subsection (1) and the Commission approves that plan and notifies the

15 Licences are rather oddly defined in the Bill, 'a permission given by the Commission that permits the licensee to occupy, or use, or do some act in relation to the land comprised in the land or the lease which would otherwise be a trespass . . .' Does this mean that the normal use of the word in common law land law (which still applies in Kenya) is no longer operative? What is now the term to be used to describe e.g. the interest of a lodger or a person occupying a seat in a football stadium?

16 Ghai and McAuslan, op. cit., chapter 3 for the colonial record.

17 NLC, para. 61(f).

> management body of that fact, the management body may develop, manage, and use the public land concerned in accordance with the plan as approved or subsequently varied as the case may be.
>
> Notwithstanding the provisions of this section, the Commission shall, in considering an application under this section, comply with the relevant law relating to development control.

It seems distinctly odd that the management body has a discretion whether to follow the plan that it has prepared and which the Commission has approved. Even odder is the provision which follows that one: nowhere in section 16 is there any mention of development control or any indication that the Commission has any powers to consider an application for . . . what? In the following section which is headed 'Revocation of management orders' the following appears:

> The preparation and implementation of development plans under this Act shall be in accordance with the physical planning regulations and any other relevant law.

The physical planning regulations are presumably a reference to the Physical Planning Act 1996 but even with this (misplaced) provision (which should have been in section 16) the matter is still unclear. Who is empowered to make decisions about applications to develop land under a management plan? And would 'any other relevant law' include the provisions of Part V and the 3rd schedule of the Urban Areas and Cities Act 2011 which provide for a very different approach to plan-making than that provided for in the 1996 Act?

There is a worrying degree of lack of regulation on and confusion about the powers of the Commission under the Act. Since it is the central institution of public land management in the country and the one in which both enormous powers and enormous faith has been placed to manage land in accordance with the principles set out in the Constitution, it must be said that there is a potential 'black hole' in the future management of public land in Kenya as it is provided for in the Act.

Turning to the provisions on private land, a fundamental issue must be discussed. These provisions are largely copied from the Tanzanian Land Act 1999. They duplicate the Indian Transfer of Property Act (ITPA) 1882 which has been a part of the law of Kenya for over 100 years and is not repealed by the new Land Act. There may be a case for a more modern legal framework to regulate land transactions but it is pertinent to ask what investigations were made and what consultations took place with relevant professional bodies and associations before the decision was made to duplicate the ITPA with a set of provisions based on the Tanzanian Land Act.

I should declare an interest here. I was the principal drafter of the Tanzanian law so I naturally consider that the parts dealing with land transactions are

quite good. They were however geared to providing a law for the developing land market in Tanzania which had been officially accepted by the Tanzanian National Land Policy of 1995 and were replacing the uncodified English land law of 1922 which had hitherto applied to non-customary land tenure – the statutory rights of occupancy which is the basic private law interest in land in Tanzania.

It is relevant here to note the sources used as guides in the drafting process in Tanzania. They were:

- the Malaysian National Land Code, 1965. This is the Code of Land Law which has been in operation during the last 45 years of spectacular economic growth in Malaysia. The Code makes extensive use of standard forms, contained in Schedule 1 of the Code, which reduces the costs and complexity of dealings in land. This feature is a central part of the Tanzanian Act;
- a report of the New Zealand Law Commission entitled: *A New Property Law Act*: Report No. 29 in 1994 which deals with many of the matters of substantive land law which needed to be provided for in a 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' – which still survived in New Zealand and to restate others in a modern clearer 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';
- some aspects of the then Kenyan land law particularly the Registered Land Act;
- some recent reports from the English Law Commission particularly the reports and a draft Bill on mortgages.

At the end of the day however it was made absolutely clear that at all times, when considering what use to make of sections and clauses from these models, the issue was: is this apt for Tanzanian circumstances; can it be adapted to suit Tanzanian circumstances? Where the models were not suitable or relevant, they were not used and provisions original and unique to Tanzania were developed.

The situation facing Kenya is very different. There is a well developed land market, albeit one marred by inefficiency, political partisanship and corruption. There is a statutory code of land law albeit one based on English land law as it was in the early 1880s – more or less similar in fact to Tanzania's pre-Land Act land law but which had been amended and updated from time to time. There is a *Kenyan* National Land Policy which contains explicit policies which need to be reflected in any new land laws. Clearly then the issue in creating a new land transaction law for Kenya should be: what is the mischief

which needs to be addressed by a new set of rules on land transactions; what is relevant and apt for Kenya in the light of the new Constitution, the new National Land Policy, and the new institutions being created to manage land in Kenya. There is no indication that any such exercise as occurred in Tanzania has taken place in Kenya over the development of these provisions. It is significant that there is no suggestion in the report of the Njonjo Commission that the ITPA should be replaced.[18] Even more oddly, the Land Act does not repeal the ITPA's application to Kenya and the relationship between the new law and the old law is not spelt out. This can only lead to confusion in the future.

Turning now to Part VII, the law on compulsory acquisition of land, it is not clear why provisions dealing with this matter have been incorporated into the Land Act. Within the common law world, laws on land acquisition are usually separate from other laws dealing with land since the law deals with the exceptional powers granted to government to take the citizens' land away from them against their will. More important here is that the NLP expressly states that the Government *shall* 'establish compulsory acquisition criteria, processes and procedures that are efficient, transparent and accountable'.[19] Yet what is in the Land Act is more or less the same legal framework as the Land Acquisition Act (LAA) stigmatised in the NLP as being 'either abused or not adhered to'.[20] In one or two important respects, the provisions in the Land Act are less beneficial to the land owner than those in the LAA.

The FAO Land Tenure Study on compulsory acquisition of land,[21] an up-to-date summary of best practice, states:

> Legislation should establish the situation when a person can appeal. There are generally three types of appeal: against the purposes of the project and the designation of land to be taken – a challenge that the project does not serve any of the public purposes for which compulsory acquisition is allowed; against the procedures used to implement compulsory acquisition; improper notices; unreasonable haste, bad faith in negotiating compensation; and against the compensation value.

However, neither in the old law nor in these provisions are there any opportunities to contest or challenge the necessity for land acquisition per se or the

18 Arguably, the Commission was at fault here. Ojienda explains the deficiencies of the continued use of the ITPA and he was a consultant to the Commission. Ojienda, T. (2008) *Conveyancing Principles and Practice*, Nairobi, LawAfrica, 23–24.

19 NLC, para. 47(c).

20 Ibid., para. 46.

21 Keith, S., McAuslan, P., Knight, R., Lindsay, J., Munro-Faure, P. and Palmer, D. (2009) *Compulsory Acquisition of Land and Compensation*, Rome, FAO Land Tenure Studies 10 paras. 5.5–5.10.

necessity for the amount or the specific parcel of land being acquired yet it is precisely at the point where land is to be acquired that abuses can most easily take place. Nor is there any consideration given to the acquisition of land held under customary tenure (community land under the NLP), despite the clear statement in the NLP that the law on compulsory acquisition will be reviewed to align it with the new categories of land ownership under the land policy. Here too, the Commission is subject to no effective regulation on the exercise of its functions. Nor are the provisions on the payment of compensation any better. While the LAA sets out in a schedule the principles on which compensation is to be determined, so the principles are part of the Act, in the Land Act the Commission is empowered to make rules regulating the assessment of just compensation so that these can be changed quite easily. No requirement exists for any consultation to take place before such rules are made. Overall then, Part VII of the Land Act is seriously deficient and does not meet the principles of the NLP. It should be removed and replaced by a separate land acquisition law which complies with the NLP and generally recognised best practices.

11.2 Community land

A Community Land Bill was published in the *Kenya Gazette* in mid-2011. It was severely and rightly criticised as totally failing to comply with the NLP or the Constitution.[22] It was withdrawn and in view of the fact that a law to provide for community land did not have to be enacted over the same constitutional timescale as the other laws dealing with land, a process of consultation was announced with the aim of producing a draft Community Land Bill in early 2013. This section of this chapter will discuss the Community Land Rights Recognition Model (CLRR), a paper produced by the Ministry of Lands in July 2012 which appears likely to form the basis of a new Community Land Bill.

To understand the evolution of community land it is necessary to go back to the principles enunciated by the Njonjo Commission in 2002. That body set out a series of policy principles which should be contained in legislation to govern 'the commons'. Two such policy principles of high relevance here were:

> such land [is] to be held in terms of a legal regime based on customary law principles which provide effective and equitable land rights security for all holders, occupiers and users without discrimination;

22 'This document concludes that the initial draft Community Land Bill deviates substantially from the requirements and intent of the Constitution and the NLP in critical areas or does not adequately incorporate the mandates of these seminal documents.' USAID (2012) Legal Review of the Draft Legislation Enabling Recognition of Community Land Rights in Kenya, Kenya Secure Project, Nairobi, iv.

> such land to be administered by District Land Authorities in accordance with principles of responsible and sustainable management founded on customary laws that do not discriminate against women, the broad principles of which should be codified . . .[23]

These principles did not find a place in the NLP. The NLP noted that 'the county councils which are the trustees of Trust Land [the land which became community land under the Constitution] have in many cases disposed of trust land irregularly and illegally'. The policy proposed that to secure community land, the Government should document and map existing forms of community tenure in consultation with affected groups and lay out in a 'Land Act' a clear framework and procedures for:

- recognition, protection and registration of community rights to land taking account of multiple interests of all land users including women;
- governing the grant to, and regulation of, rights of use of and community transactions in community land using participatory processes;
- provide for accountability of groups, individuals and bodies entrusted with the management of community land; and
- community participation in the allocation, development and disposal of community land.

The extent of community land can be judged by the terms of section 63 of the Constitution:

1 Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
2 Community land consists of— (*a*) land lawfully registered in the name of group representatives under the provisions of any law; (*b*) land lawfully transferred to a specific community by any process of law; (*c*) any other land declared to be community land by an Act of Parliament; and (*d*) land that is— (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2).
3 Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.
4 Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent

23 Op. cit., 48, 49.

> of the rights of members of each community individually and collectively.

The CLRR is a document setting out a proposed process for the recognition of community land rights. It has been developed by the Ministry in conjunction with a firm of American consultants funded by USAID. It claims to be based on the specific experience in the recognition and delimitation of community lands in Ghana, Liberia, Mozambique, Nigeria, Uganda, Sierra Leone, Sudan and elsewhere. The objectives of the CLRR Model are:

> To secure land and resource rights of indigenous communities by developing a new process for the recognition, protection and registration of community rights to land and land based resources.
>
> To actualise the new classification of community land given under article 63 of the Constitution and facilitate vesting of such land to communities to hold on the basis of ethnicity, culture, or similar community of interest as the case may be.
>
> To set principles and ideas that will inform the design of law and institutions envisaged by the Constitution and National Land Policy for securing community land rights under community land tenure; and
>
> To create awareness among key stakeholders towards the implementation of the Constitution and National Land Policy with regards to protection of community land rights.[24]

To this end the CLRR proposes a six-stage process of activities:

> Demand for community land rights recognition when the public is informed of the opportunity to secure community land via the CLRR process.
>
> Community Engagement when the community is engaged in the process of taking inventory of their land and resource rights.
>
> Recording of Community land claims and governance rules where the community's land claims are recorded.
>
> Demarcation: the actual physical demarcation of community boundaries is undertaken with the participation of the community.
>
> Validation and Finalization: all documents and maps are reviewed and agreed upon by the community and relevant government agencies.
>
> Issuance of Title; a Certificate of Title of Community Land Ownership is conferred to the community land-holding entity.[25]

24 Republic of Kenya Ministry of Lands (2012) Community Land Rights Recognition Model, Nairobi, 6.

25 Ibid., 4.

The CLRR is advanced as a major break-through in protecting and registering community land rights. It is certainly the case that no such system has ever existed in Kenya since all previous approaches to the registration of customary tenure were either directed at individualising such tenure or providing for group ranches for pastoralists. But reading the document carefully, it does not appear to be significantly different in its essentials to the provisions of the Village Land Act 1999 of Tanzania with respect to the adjudication and registration of village land and the provisions of the Land Act 1998 of Uganda and regulations made under the Act with respect to the creation of certificates of customary ownership. Indeed the Village Land Act of Tanzania provides for greater responsibilities to be vested in village councils and the village adjudication committees than appears to be envisaged for communities under the CLRR.

In fact, it is not at all clear what community institutions will actually undertake activities or be in control of the processes. The CLRR refers rather vaguely to 'knowledgeable and credible community representatives . . . to clarify and confirm boundaries' with ADR to be used to sort out disputes with contested decisions being referred to the Environment and Land Court, whether after ADR has been tried or as an alternative to ADR is not made clear. There is also to be 'community-wide brainstorming and recording of existing and new land use/natural resource management rules' with 'the community' adopting the final rules by a consensus vote. What does that mean? While recognising that this is a model and not a draft Bill, it has been finalised and is to be tried out in four communities in Lamu[26] so one would expect more specifics in the model.

It is also of concern that in the stage of finalisation and validation, the 'community-validated' 'technical file (sketch maps, survey plan, governance rules and regulations, land and natural resource management plan etc)' will be sent to 'relevant government resource agencies [to] conduct technical review of entire community file'.[27] This is extremely vague as is the term 'feedback from government agencies' which might lead to 'any necessary amendments made [to the community's technical file] to bring into compliance with relevant laws/policies'. This might seem to suggest that there will

26 Republic of Kenya Ministry of Lands (2012) Community Land Rights Recognition Model Launching, http://www.savelamu.org/community-lands, 19 September. See too USAID Land Tenure and Property Rights Portal (2012) 'Kenya Government Endorses New Method for Recognizing Community Land Rights Through its Kenya SECURE Project', USAID, in co-operation with the Kenya Ministry of Lands, recently developed the CLRR Model, a process for providing legal registration of land held by communities under customary law. This is the first recognition of land owned as a result of customary usage in Kenya and will promote investment, better natural resource management and, in some parts of the country, reduce land grabbing, http://www.usaid.gov/info_technology/xweb/contracts.html.

27 Ibid., 11.

be no effective governmental input into the process of development by local communities of their rules and regulations or their land use plan during the development of the process which appears to be rather unlikely. What it does show, however, is that the central government wants to reserve to itself a significant input into the management processes of community land and will achieve this by vesting powers in county governments to operate a general oversight on the management of community land.

A section of the CLRR Model deals with challenges to recognising community land rights. Apparently, political manipulations by elites, exploitation of vulnerable members of the community by elites, conflicts between neighbouring communities, resistance to change from beneficiaries of unprotected community land, vested interests from people outside the designated community land will all be lessened or eliminated by adoption of the Model. This seems a very optimistic not to say naïve assumption and is a classic example of Rawlsian transcendental-institutionalism – the search for and belief in the perfectly just institution as a solution to complex political problems as opposed to Sen's approach of realisation-focused comparisons of justice which focus on actual realisations of justice in the societies involved, rather than only on institutions and rules. Actual realisations will be much more important in relation to the management of community land in Kenya than perfect institutions. More to the point, and perhaps the key to the whole exercise, particularly given the provenance of the CLRR – a USAID-funded initiative carried out by US consultants is that:

> Formally recognising community land rights allows communities to participate effectively in the land market and assures genuine investment opportunities for the creation of wealth and benefit sharing amongst the community.[28]

This then will be the concern of the 'government agencies' when they conduct a technical review of the entire community technical file: that the community rules and regulations, natural resource management and land use plans do not inhibit the operation of the land market which as was noted earlier is a fundamental driving force of the NLP.

Focusing principally on formal documents – the NLP, the Constitution, the new Acts, the CLRR – my conclusion is that there is an air of unreality about the whole land law reform process. The initial land law reform programme of the National Land Commission Act, the Land Act and the Registered Land Act was rushed through the National Assembly despite the best endeavours of various NGOs and community-based organisa-

28 Ibid., 13.

tions (CBOs) to draw attention to the many deficiencies in the Bills. In part the rush was caused by the unrealistic timetable for the enactment of these new laws set out in the Constitution but in part it must be put down to the lack of interest and commitment on the part of Ministers and Members of Parliament to grapple with the intricacies and implications of the new laws. They in effect washed their hands of the new legal framework for land management in Kenya and left it to the Cabinet Secretary of the ministry responsible for lands to implement the laws as he or she sees fit. It remains to be seen whether this approach will be adopted in relation to the community land legislation. As at October 2012, the auguries are not propitious.[29]

A much more depressing assessment of the reform programme written when only the NLP and the provisions of the Constitution were in operation but looking in much greater depth at the political background to the reform process is provided by Boone[30] and by way of conclusion to this chapter, her assessment may be considered. She sets out in great detail the history of the politics of land in Kenya with special reference to the Rift Valley, from colonial times onwards the most contested area of land in the country. She highlights the constant violence over land allocations, dispossessions and reallocations, since independence as first Kenyatta, then Moi, then Kibaki used land to reward supporters or buy support in the Rift, and also to acquire vast amounts of land for themselves and their political cronies. The violence following the elections of 2007 was not unique although probably more planned than other violence since independence. She spells out the politics of the creation of the NLP over a period of some five years and the general surprise when it was agreed to in 2009. Given this background, her opening comments and her conclusions may be given in her own words:

> The land provisions of Kenya's 2010 constitution call for the establishment of a new National Land Board answerable to Parliament, and the enactment of sweeping parliamentary legislation to enact a National Land Policy that is based on principles of justice and equity. It is

29 In August 2012, an Evictions and Resettlement Procedures Bill was published in the *Kenya Gazette*. It was the product of Kituo Cha Sheria – the Centre for Legal Empowerment. Its long title indicated its scope: an Act of Parliament to set out appropriate procedures applicable to forced evictions; to provide protection, prevention and redress against forced eviction for all persons occupying land including squatters and unlawful occupiers; and to provide for matters incidental and connected therewith. It seems very unlikely that it will be enacted.

30 Boone, C. (2012) 'Land Conflict and Distributive Politics in Kenya', 55(1) *African Studies Review*, 75–103.

heartening to view this as a clear advance over the highly politicized and often demonstrably corrupt land regime that has prevailed since the early 1960s (if not before) . . . Yet even if all or most Kenyans would benefit in the long run from clean implementation of democratically chosen land laws, there is reason to believe that in the near future, at least, highly politicized land conflict will continue.

This is because land politics in Kenya is first and foremost a redistributive game that creates winners and losers. Given the intensely redistributive potential of the impending changes in Kenya's land regime, and indeed of the downward shift in the locus of control over land allocation (through devolution of authority to county governments), there is no guarantee that citizens will be able to coordinate a land-law reform strategy that improves the individual lot of each, or even most common people, divided as they are into state-nurtured ethnic factions, in order to deflect attention away from the burning questions of class privilege and betrayal of the public trust . . .

'Broad consensus' around Kenya's new Land Policy may thus be more apparent than real. Denying the president arbitrary powers to give and take land is surely a step forward, but this does not mean that land-allocation will be depoliticized. Instead, the reform raises questions of who will control land in the president's stead and what rules or principles will guide land distribution and redistribution . . . [S]hould the National Land Board and the new county councils make land available to all citizens, following the principle that 'Kenyans have the right to live anywhere'? Or should they safeguard the birthright of indigenous communities? Does economic development move forward with the expansion of private property, or should community lands be sheltered from the market? Should land ill-gotten in the past, but subsequently 'laundered through the market,' be reappropriated by the state? And if lands allocated illegally are to be reappropriated by the state, shall the dispossessed include both Kenyatta-era and Moi-era beneficiaries, and the poorest and most vulnerable of the forest squatters as well as Kenya's politically connected land barons? Shall new injustices be created in order to rectify the old? Kenya's NLP and the land provisions in the new constitution seem to have opened up a Pandora's Box of land issues having to do with state allocation of land rights. The review and reconsideration of past land allocations now has legal footing, but this does not diminish the specter of redistributive conflict that this *fuite en avant* seems to invoke . . .

As of late 2011, a legal framework for implementing the national land policy was in the works. It remains to be seen whether this effort, in the context of the other reforms linked to the new constitution, can shift the dynamics and direction of land politics by channeling conflict into new

> institutions and political fora. The legitimacy of the state itself, and its foundations in the rule of law, are at stake.[31]

As I have suggested, the new legal framework, referred to by Boone, has all the deficiencies of the NLP and the Constitution summarised in Boone[32] – ill thought out, naïve, impractical, and with far too much unregulated power located at the centre.

31 Ibid., 76, 94–95.

32 Ibid., 93, summarising Bruce, J. (2009) 'Kenya Land Policy: Analysis and Recommendations'. Report prepared for the United States Agency for International Development. Kenya USAID.

Chapter 12

Urban planning law reform: a regional overview

12.1 The colonial legacy

The evolution of private land law and land markets discussed hitherto has looked at individual countries because, although based on broadly similar colonial approaches and attitudes, the actual land laws took account of the different economic and social situations in each country. The development of urban planning laws on one hand or using English legal terminology, town and country planning laws on the other hand at least with respect to five of the countries in the region covered by this book were based on the same colonial legal and town planning approaches, resulted in very similar colonial town planning laws and, as will be shown in this chapter have continued to influence the evolution and reform of those urban planning laws into the era of reform. It makes sense therefore to adopt a regional rather than so many national perspectives to a discussion of the evolution and reform of urban planning laws over the last 50 years. The emphasis in this chapter however will be on the Anglophone urban planning law of KTUZ with post-1990 developments in Mozambique and Rwanda discussed by way of contrast to these four countries.[1]

It is necessary too to spend more time on the colonial background to these laws than was the case with the land laws discussed in earlier chapters. This

1 Rwanda withdrew its proposed new Urban Planning and Building Control Law from the legislature in June 2011 citing concerns by MPs with the content. However, it approved a National Land Use and Development Master Plan in February 2011, which according to the Director General of the National Land Centre will be implemented in three phases: 'the first one will be merging the district land usage policy together with the District development plan to form an Integrated Development Plan for the district. The second phase will be the urban development plan while the third phase will be the action area plan.' What law governs these plans and the processes of their preparation and approval is not clear. The draft Bill is discussed below.

Somaliland's Urban Land Management Law combines both land tenure and land use matters in the same Law and has been discussed in the chapter on Somaliland. However, the basic ideological framework of the law is similar to the laws to be discussed in this chapter.

is quite simply because unlike the laws applicable to land tenure which for the most part applied in rural areas and did not significantly change the spaces of those rural areas, laws applicable to urban spaces – town and country planning laws, public health laws, housing laws especially those dealing with such matters as slum clearance and urban renewal – did precisely aim to influence and shape that urban space and although, as we will see, were not always successful in achieving what they set out to do, did have some effect on the urban spaces to which they were applied which has lived on. The shape, the structures, the social and economic configurations of the capitals or principal urban areas of the states of East Africa – Dar es Salaam, Hargeisa, Kampala, Kigali, Maputo, Nairobi, Zanzibar – were created, laid down or heavily influenced by their colonial experience and the colonial laws that applied to them and these resultant physical and built up spaces, although now vastly expanded and changed, continue, as I will try to show, to exert an influence on the content and style of the laws that apply to them now. In this respect, then, colonial legal history matters.

Colonial town planning, that is town planning based on laws introduced by colonial authorities from the metropole as opposed to indigenous or traditional town planning, has a considerable history. To focus on the British experience, planned urban renewal and redevelopment was taking place in some of the major Indian cities often under the aegis of an Improvement Trust, the statutory powers for which were based on the English Housing for the Working Classes Act 1890 before the end of the 19th century. The first such trust was set up by the City of Bombay Improvement Act 1898, which substituted appointed officials for elected councillors as the managers for urban renewal. This approach to urban planning made its entry into Africa via the Lagos Town Planning Ordinance of 1929 which provided the legal backing for the Lagos Executive Development Board which was to carry out the duties of re-planning, improvement and development in Lagos.[2]

From the perspective of this chapter, this Indian precedent is of considerable importance for it highlights two matters; first, urban planning was not, in the eyes of the colonial power, safe in the hands of elected local authorities. Planning law and practice was seen as a matter for 'non-political' experts introducing 'objective' standards of health and safety in order to 'improve' local urban areas which local people either could not or would not manage properly. As we will see, this strain of colonial approaches to urban planning is still alive and well in Eastern Africa today.

The historical legacy of town planning laws and practices in Africa must be referred to so as to understand the evolution over the last 50 years. The overt driving force was segregation. In East Africa, town planning operated

2 This was not the first town planning law in Anglophone Africa. The first was the Town Planning Decree 1925 of Zanzibar which was, however, never fully brought into operation.

initially through public health laws which provided the formal raison d'être for segregation. Thus, Professor Simpson, a major protagonist of urban racial segregation throughout East Africa in the early years of the 20th century and the principal begetter of town planning in Kenya and Uganda and author of reports on public health and planning in Zanzibar and Kenya wrote in a report on Nairobi in 1913 that:

> In the interests of each community and of the healthiness of the locality and country, it is absolutely essential that in every town and trade centre there should be well-defined and separate quarters for Europeans, Asiatics and Africans . . .[3]

He repeated the same advice to Uganda where, in 1915, he became Kampala's first town planner. McMaster[4] writing on district towns in Uganda notes that Simpson recommended ethnic town zoning with intervening green belts. It was no doubt in order to implement that policy that in Hoima and Masindi, the towns' anti-malarial vote was spent on the upkeep of the golf course which provided a clear 'green belt' which separated the European from the non-European parts of those towns.

In 1923, the then British Government published a White Paper, *Indians in Kenya*, which prohibited separation of the races in towns by means of legislative enactments. Werlin,[5] writing of Nairobi, comments that the same effect was achieved by means of restrictive covenants and McMaster[6] writing of district towns in Uganda states that the White Paper made little difference because Crown land leases and building standards regulations could operate effectively to the same end. In each case then, officials on the spot used their powers under existing laws to circumvent the policies announced in the UK.

Thus, the formal absence of town and country planning legislation *eo nomine* in East Africa did not inhibit, may indeed have facilitated, segregated urban development by allowing it to be justified on public health grounds and smuggled in via a variety of legal devices. Indeed, several master plans were made for towns in countries in East Africa in the 1920s which were clearly designed to be implemented but which were entirely unsupported by any town and country planning laws.[7] In each case, it is worth noting, spurious

3 Werlin, H.H. (1974) *Governing an African City, a case study of Nairobi*, London, Holmes and Meier, 53.

4 McMaster, D.N. (1973) 'The Colonial District Town in Uganda', in Beckinsale, E.P. and Houston, J.M. (eds) *Urbanisation and its Problems*, Oxford, Blackwell, 24.

5 Op. cit., 53.

6 Op. cit., 24.

7 Incredible though it may seem, Bissell describes how Lanchester's plan for Zanzibar produced in 1922 was never published. 'Six hundred official copies had been printed in

justifications for segregation were wont to be put forward: it was in the interests of the native or the Indian as well and it was not really a segregation of races but a segregation of 'social standards'. How easy was it then to deal with the problems of 'the neighbours from hell'; just build a golf course between them and you.

The notion of social segregation was addressed centrally in those terms in the *Nairobi Master Plan for a Colonial Capital*, prepared by a team of three planners from South Africa between 1945 and 1946 who exhibited some rather muddled thinking in trying desperately not to call a spade a spade.[8]

12.2 The colonial diaspora of British town and country planning law

The starting point in law for the history of post-war colonial town planning is the Colonial Development and Welfare Act 1945, which provided £120 million over a period of ten years for development and welfare in the colonies. Now this was not the first such act, although it is always pointed to as the beginning of a new approach to colonial administration. The first Colonial Development and Welfare Act was in 1940 where it replaced the Colonial Development Acts which provided money solely for agricultural and industrial development. The 1940 Act provided the first impetus towards spending on social improvements which included slum clearance and the extensive replanning of urban areas but the sums of money provided for those purposes were minuscule. The importance of the 1945 Act was that it provided significant sums of money and indirectly stimulated and encouraged town planning in the colonies. Colonies were required to draw up co-ordinated development plans for capital works and bids for Colonial and Development Welfare (CDW) money and exchequer loans. These capital works included a good deal of urban expenditure: hospitals, roads, housing and schools. Such co-ordinated development plans for urban expenditure clearly implied the need for some kind of urban development plan.

It was not surprising then that the Colonial Office turned to consider the question of town planning. A Colonial Housing and Town Planning Advisory

London in the 1920s but they were all stamped "strictly confidential" and closely guarded. In Zanzibar, the plan continued to be shrouded in secrecy well into the 1940s . . .' The Zanzibar authorities instructed the Crown Agents to destroy most copies of the plan in 1936. Bissell, W.C. (2011) *Urban Design, Chaos, and Colonial Power in Zanzibar*, Bloomington, Indiana University Press, 254, 255. Little did I know when I purchased a copy of the plan from the Zanzibar government printers in 1962 that I was taking possession of so subversive a document.

8 Thornton White, L.W., Silberman, L. and Anderson, P.R. (1948) *Nairobi: Master Plan for a Colonial Capital*, A Report prepared of the Municipal Council of Nairobi, London, HMSO. For the details, McAuslan, P., op. cit. (2003), chapter 5.

Panel was set up and advised both the Colonial Office and different colonies on housing and town planning matters. The Colonial Office developed a model town and country planning law which drew on both the 1932 and the 1947 Acts. We find then starting in the late 1940s, the promulgation of town and country planning ordinances in African countries, nearly all of them having the same general shape and content.

Each territory to be sure varied the basic law to suit its own particular circumstances – Tanganyika's Ordinance, promulgated in 1956, was not the same as Somaliland's, promulgated in 1947, or Uganda's, promulgated in 1951, being much more detailed in every matter, which was perhaps a reflection of what had been learned from the operation of those earlier laws – but more likely was a reflection of the very dominant personality of the chief town planner of Tanganyika.

In arguing for the introduction of town planning into the colonies, officials in the Colonial Office acted and gave advice on the basis that town and country planning was an essential part of a positive programme of public sector-led urban development which would have as its overall objective the betterment of the lives of the inhabitants of the cities within the colonies. This was, after all, what town and country planning was thought to be about in the UK where until the mid to late 1950s, most urban development was, similarly, public sector led, and the development control aspect of town and country planning – the control of private development – was of less importance. It followed too that a legal framework for town and country planning should be based on that which was generally thought to be the most advanced and successful in the developed world, namely the UK system. The leading town planning lawyer of that era, Desmond Heap, was certainly of that opinion and reacted rather vigorously to suggestions that town planning laws of the colonies should deviate from the British model. Town planning then was seen in positive terms; a definite public good.

By the early 1960s as countries in Africa became independent, an English-style planning law had become a part of many countries' modernisation package. Older approaches to town planning were assumed to have been left behind as they had been in the UK itself. The new independent governments and the new elected urban local authorities could, it was thought, now address the problems of the majority of the urban population armed with the requisite planning tools.

What, however, was thought to be appropriate in the colonial offices of the metropolitan powers was interpreted very differently in the colonies themselves. Two key and complementary perspectives may be discussed. First, the revisionist analyses of modern urban scholars of colonial planning who view colonial approaches to urban planning in Africa in a distinctly jaundiced light pointing out how the aim was always to regulate and control the African urban under-class, but that this aim was, despite enormous and costly efforts to achieve it, almost uniformly unsuccessful.

An excellent summary of this line of recent scholarship is contained in Myers's *Verandahs of Power*[9] which considers in detail, inter alia, the colonial planning of Nairobi and Zanzibar. He explains his basic position thus:

> I use themes taken from Timothy Mitchell's concept of *enframing* as a means of explaining how British colonialism and then its inheritor states worked with the physical form of cities to reshape societies. To Mitchell,[10] colonialist enframing was centred on the codification and maintenance of a visible hierarchy of spatial order, of container and contained.
>
> I document three spatial strategies of enframing . . . These strategies are in abstract language (a) the making of a segmented plan to replace African 'orders without frameworks'; (b) the creation of distinctions between 'inside' and 'outside' at various spatial scales and (c) the objectification of space via provision of points of observation and places of surveillance.[11] The first of these involved altering African 'orders without frameworks' in terms of settlement design to an order reducible to a segmented plan. Racial segregation was inherent within this orderly segmentation . . . Second, colonialism in British Africa aimed to create a fixed distinction between inside and outside in domestic architecture thereby codifying neighbourhood, family and gender relations in a manner distinct from African systems of domestic order . . . Third, the segmented plan of settlement forms under colonial rule provided a place from which the individual could observe or survey the city, as a means of abstracting and objectifying the built environment . . . Each of these strategies . . . became part of colonialism's effort to separate 'container' (the colonising power) and 'contained' (the African community).
>
> Like the planning mechanisms of most African cities today, the enframing system of control that colonial states developed in Africa was anything but 'perfect' . . . Analysis of colonial and postcolonial states generally brings to light the inability of the apparatus to accomplish its goals, even in the most mundane legal and juridical components of them. African states, whether colonial or postcolonial, have consistently been

9 Myers, G.A. (2003) *Verandahs of Power: Colonialism and Space in Urban Africa*, Syracuse, Syracuse University Press. The other cities he examines are Lusaka and Lilongwe (in the Banda era) and the attempted re-planning of independent Zanzibar by the Revolutionary government. The common themes were two colonial officials, Eric Dutton and Ajit Singh, the former of whom was involved in the planning and urban management of Nairobi, Lusaka and Zanzibar, the latter of whom worked closely with Dutton in Zanzibar and then in Lilongwe, taking many of Dutton's ideas with him. See too Myers, G.A. (2011) *African Cities:* Alternative Visions of Urban Theory and Practice, London, Zed Books.

10 Mitchell, T. (1988) *Colonising Egypt*, Cambridge, Cambridge University Press.

11 Myers, (2003), op. cit., xii.

> undone in trying to use planning and building control to implant their ideological maps onto cities, or to combat what Robinson[12] calls 'the persistence of disorder'. Why does enframing so often become unframed or get reframed?[13]

The extent to which Myers's analysis holds true for the urban planning laws created in the era of reform and an attempt to answer the question he poses will be considered after the reform laws have been briefly set out and commented on.

Second, Mabogunje's seminal article on postcolonial planning in Africa[14] provides an essential 'internal' socio-political explanation of and backdrop to the colonial legal framework as this brief extract shows:

> The post-colonial states . . . inherited many of the poorly formed structures and social relations of the colonial economy which they further compound by preoccupations and ideological orientations at variance with the basic logic of their capitalist inheritance . . .
>
> Even during colonial times, access to state power becomes critical for the struggle for urban land in which not only the urban poor but also traditional landowners lose out while the class of civil servants, native authority officials and their allies secure choice locations in the city, enhancing their capacity for accumulating significant power and wealth. Planning schemes proliferated after World War II as a result of significant changes in the conception of the imperial role in colonial development entailed in the Colonial Development and Welfare Acts for the British colonial territories and the FIDES or Fund for Economic and Social Development, established in 1946 for French African colonies.
>
> Planning schemes included measures to clear slums from valuable central districts of the city, to develop new suburbs, or even to establish completely new towns. A slum clearance scheme in Central Lagos, Nigeria involved the resettlement of about 200,000 people from a central location in which squalor became 'an affront to the dignity of the future capital' of an independent country. Organized protests by the residents were ruthlessly repressed, especially as they had no citywide support . . . In urban planning terms such selective schemes, due to the divergent orientation of the social formation, have hardly changed in post-colonial Africa. Although many cities now have master plans . . . the legislative

12 Robinson, J. (1990) "'A Perfect System of Control"? State Power and "Native Locations" in South Africa', 8 *Environment and Planning D: Society and Space*, 135–162, 148.

13 Myers, (2003), op. cit., 8, 9.

14 Mabogunje, A.L. (1990) 'Urban Planning and the Post-Colonial State in Africa: A Research Overview', 33 *African Studies Review*, 121–203.

> instrument under which they function and their basic operational strategy remain largely that of planning schemes and planning proposals. However, since political independence there is a growing class bias in the development of African cities. The former European reservations in all countries of Africa . . . have been taken over by the new political, bureaucratic, and business elite who have maintained or improved their high standards of housing while the majority of the urban population continue to inhabit squalid, over-crowded, and poorly serviced shantytowns or bidonvilles . . .
>
> In most countries of Africa, political independence saw the loss of juridical integrity of most urban centres . . . in the case of Lagos, the Lagos Local Government Law of 1959 was passed which, among other things, strengthened federal powers to suspend the town council if it was not performing satisfactorily. A later amendment further empowered the Minister of Lagos Affairs to give directives to the town council, a right that was tantamount to a veto of council decisions. Similarly, after independence in Swaziland, the urban local government was co-opted to become an agent of centralized authority with the consequent loss of autonomy and ability to control development . . . This centralising tendency was also noticeable in francophone Africa.
>
> Instead of the process of urbanisation in most African cities being guided and directed by European juridical and institutional traditions, the reality in most countries is of urban systems overwhelmed and transformed by the attitude and usages of the mass of relatively low-income migrants who have flocked into the cities since the attainment of political independence. These new urbanites have attempted in various informal ways to solve their problems of accommodation and employment within the cities on their own terms . . .

Mabogunje and others have pointed out that in the early 1970s, the World Bank turned its attention to urban development issues in Africa and elsewhere, and new forms of planning – focusing on economic issues rather than physical master plans – began to make their appearance. But in most countries, the legal framework remained unchanged or where it did change – e.g. in Zimbabwe in the 1970s – the new legal forms of urban planning were based on the reforms introduced into the British system in the late 1960s. In some cases, e.g. Lesotho in 1980, the new Town and Country Planning Act was a variant of the earlier colonial models of some 30 years ago. It was only in the era of reform, in the case of urban planning laws from the mid-1990s onwards, that new legal frameworks have been created. The extent to which they are new as opposed to variants on the old colonial laws will be considered hereafter.

12.3 Urban planning and law in Tanzania 1961–1990[15]

A more detailed review of urban planning and law in Tanzania in the first 30 years of independence will show how colonial attitudes persisted into independence. In 1961, the Town and Country Planning Ordinance was five years old. It had been applied to areas in Dar es Salaam and four other towns by 1961. Under the Ordinance, within the areas to which it had been applied, an Area Planning Committee prepared a general planning scheme and submitted it to the Minister for his approval. After the scheme had been approved and published, all development in the area to which it related was required to conform to the provisions of the scheme. In order to enable the scheme to be carried out, the Ordinance provided for land within the area to be acquired compulsorily.

In 1961, Dar es Salaam was very clearly in practice divided into African, Asian and European areas. The African areas lay behind Mnazi Mmoja, an open space where many political rallies took place in the run up to independence, in Kariakoo,[16] Ilala and beyond. The Asian area commenced in front of Mnazi Mmoja and was the commercial centre of Dar es Salaam together with Asian residential areas. The Asian residential areas extended to Upanga, a mile or so from the commercial centre.[17] Then came Selander Bridge. Beyond the bridge lay Oyster Bay, the low-density area where the European administrators, professionals and higher class commercial persons – bankers, industrialists, lawyers, doctors, accountants, the new university academics, etc. – lived. The facilities and infrastructure of the three areas reflected the priorities of those who made the decisions about who got what.

When the independence movement – the Tanganyika African National Union (TANU) – took power in 1960, they announced that one of their early priorities would be to reverse the flow of urban investment and begin a process of investing in the African areas of Dar es Salaam. As a sign that they meant business, they built the new Party Headquarters on Lumumba Street, the street that divided Kariokoo from the Mnazi Mmoja and the Asian areas of the city. TANU overstretched itself financially in building its headquarters

15 Drawn from McAuslan, P. (2007) 'Law and the Poor: The Case of Dar es Salaam', in Philippopoulos-Mihalopoulos, A. (ed.) *Law and the City*, London, Routledge Cavendish.

16 This is a phonetic spelling of Carrier Corps, the military porters of the 1914–1918 war that were stationed in that area of Dar es Salaam. For a superb discussion of the effect of the war on the region, Paice, E. (2007) *Tip and Run: The Untold Tragedy of the Great War in Africa*, London, Phoenix.

17 In addition to Selander Bridge, a golf course was laid out between Upanga and the road leading to Oyster Bay which was another effective barrier between the Asian and European areas of the city. In colonial times Asians could not be members of the golf club and so could not walk across the land.

and willingly leased the building to the new University College of Dar es Salaam which commenced with a faculty of law to serve all East Africa and took its first students in September 1961. I had been appointed a lecturer in the new faculty and on my arrival in Dar in September, was also asked to become the warden of the new College. The 14 students and I lived and worked in the TANU building during our first year; as good an introduction to urban life in an African city as one could ever hope for.[18]

Fifty years on, the original urban structure of Dar es Salaam remains very much what it was in 1961. Kariakoo and behind are still overwhelmingly African although now built up; the commercial centre of the city still has many Asian traders who continue to live in Upanga; the centre has spread and now accommodates several large office blocks for insurance companies, lawyers' offices, embassies, various parastatal headquarters. Oyster Bay has changed significantly; now African politicians, administrators, business people and professionals have joined the expatriate community of aid officials, embassy staff, long-term consultants and expatriate business people in an Oyster Bay which now also has some upmarket hotels, shopping centres, restaurants and slipways for yachts. The area round and beyond the University of Dar es Salaam some 10 miles out of town is now also very much a middle class area with a large South African-dominated shopping mall.

In 1976, I organised and took part in a conference on Urban Legal Problems in Eastern Africa. I wrote then:

> What can be said of the introduction of the Town and Country Planning Acts into these countries. Let it be assumed that the introduction was well meant: that it was genuinely believed that this legislation was a *sine qua non* of orderly urban development and was entirely value-free; nonetheless the mind boggles at the naivety of these beliefs. The introduction of development plans provided an even better opportunity than existed under public health regulations to entrench racial segregation under the guise of low density, and high density residential areas; open spaces; market areas and commercial zones . . . Nor has the influence of this legislation ceased at independence . . .[19]

Tanzania provided an excellent illustration of this continuation of colonial style planning under a colonial style planning law. A National Capital Master Plan produced for Dar es Salaam by Canadian consultants in the early 1970s

18 The following year we all moved to a Salvation Army encampment at Mgulani. That was not so pleasant.

19 McAuslan, P. (1978) 'Law, Housing and the City in Africa', in Kanyeihamba, G.W. and McAuslan, P. (eds) *Urban Legal Problems in Eastern Africa*, Uppsala, Scandinavian Institute of African Affairs, 20.

proposed the following policies for the urban majority – already a decade after independence, the urban majority were 'illegal':

> The removal of existing settlements that are in embryo and likely to be *tomorrow's problems* [italics added].
>
> The removal of existing areas that conflict with the Master Plan, particularly in the first stages of implementation.
>
> The employment of a staff of enforcement officers who actually ensure that squatters are moved from the land and are resettled in accordance with a pre-determined residential layout in other areas.
>
> No compensation should be given for the costs of resettlement and disturbance of squatters where it is proven that illegal development has taken place after an appointed day since the coming into force of new controlling legislation which should be enacted as soon as possible.[20]

Such policies would not have been suggested if planners and politicians had not been of the same mind on the matter. Fortunately the lack of funds prevented these socially regressive policies from being carried out but the philosophy behind them – that the urban majority are 'in the way' of the development of the city beautiful and must be made to conform to 'The Plan' is still very much alive in parts of the Tanzanian Government.[21]

The Master Plan of the 1970s was developed in the heyday of Tanzania's socialist era, when top-down central policies to guide and if necessary compel the country and its citizenry into better times was the norm. But 25 years on, when I was involved as a consultant in advising on the reorganisation of local government in Dar es Salaam, nothing had changed on the urban planning front.[22] This was despite the fact that major and fundamental changes had taken place at the international level with respect to policies about urban planning and development and at the national level with respect to land tenure. It is to these policies that we must now turn for not only do they represent a thorough and transformational approach to urban planning offered to cities and governments the world over but they are a product of UN-Habitat, the UN agency charged with developing policies, programmes and practices to deal with the challenges of rapid urban development and which is based in the heart of the region. One might suppose then that such new approaches to urban planning laws would find their way into any reforms to such laws in the era of land law reform within the region.

20 Ibid., 23.

21 The same Canadian planning firm was chosen to prepare the Master Plan for the new capital of Dodoma in the mid-1970s. It was the same type of plan. See McAuslan, (2003), chapter 7 for a discussion of that plan.

22 For details, see McAuslan, (2007), 'Law and the Poor', op. cit.

12.4 The Habitat Agenda and the follow-up: a new approach to urban planning

The Istanbul Declaration on Human Settlements and the Habitat Agenda adopted at the UN City Summit in Istanbul in 1996 are in the eyes of international lawyers, examples of 'soft' international law which give rise to what might be called quasi-legal obligations which cannot however be enforced by any international law enforcement agency. Nevertheless, by agreeing to these documents, all governments represented at that Summit put themselves under an obligation – part legal, part moral – to begin the process of reviewing their policies, laws and practices to bring them into line with the principles enshrined in the Declaration and the Agenda. It is essential therefore to set out the principal provisions of both the Declaration and the Agenda relating to urban planning so that the international legal benchmarks against which we may judge the regional urban planning law reforms are clear.

The Habitat Agenda is in three parts: Goals and Principles, Commitments, and the Global Plan of Action (GPA). Under Commitments, Governments commit themselves to:

> Providing legal security of tenure and equal access to land to all people, including women and those living in poverty . . .
>
> Ensuring transparent, comprehensive and accessible systems in transferring land rights and legal security of tenure.
>
> Protecting all people from and providing legal protection and redress for forced evictions that are contrary to law, taking human rights into consideration and when evictions are unavoidable, ensuring, as appropriate, that alternative suitable solutions are provided.

Turning to the GPA, the Commitments are fleshed out in a series of specific actions based on the strategy of 'enablement, transparency and participation' which will in turn assist governments to establish, inter alia, legislative frameworks to enable the achievement of adequate shelter for all. A range of actions are proposed for ensuring access to land and security of tenure which are stated to be 'strategic prerequisites for the provision of adequate shelter for all and for the development of sustainable human settlements . . .' While recognising the existence of different systems of land tenure and national laws, Governments are advised that:

> The failure to adopt, at all levels, appropriate rural and urban land policies and land management practices remains a primary cause of inequity and poverty. (para. 75)

Thirty-two specific actions are then proposed in respect of land. The following may be highlighted:

> recognise and legitimise the diversity of land delivery mechanisms;
>
> consider the adoption of innovative instruments for the efficient and sustainable assembly and delivery of land, including, where appropriate, land readjustment and consolidation;
>
> develop appropriate cadastral systems and streamline land registration procedures in order to facilitate the regularisation of informal settlements, where appropriate, and simplify land transactions;
>
> develop land codes and legal frameworks that define the nature of land and real property and the rights that are formally recognised;
>
> review restrictive, exclusionary and costly legal and regulatory processes, planning systems, standards and development regulations;
>
> adopt an enabling legal and regulatory framework based on an enhanced knowledge, understanding and acceptance of existing practices and land delivery mechanisms so as to stimulate partnerships with the private business and community sectors, specifying recognised types of land tenure and prescribing procedures for the regularisation of tenure, where needed;
>
> provide institutional support, accountability and transparency of land management, and accurate information on land ownership, land transactions and current and planned land use;
>
> explore innovative arrangements to enhance security of tenure, other than full legalisation which may be too costly and time-consuming in certain situations . . .

Political and community enablement comes through in Section D of the GPA dealing with capacity-building and institutional development. Paragraph 178 asserts:

> An enabling strategy, capacity-building and institutional development should aim at empowering all interested parties, particularly local authorities, the private sector, the cooperative sector, trade unions, non-governmental organizations, and community-based organizations to enable them to play an effective role in shelter and human-settlements planning and management.

Paragraph 180, setting out actions to be taken, recommends that:

> Governments, at the appropriate levels should review and revise as appropriate legislation to increase local autonomy and participation in decision-making . . . and encourage the participation of the inhabitants in decision-making regarding their cities, neighbourhoods or dwellings.

Paragraph 182, setting out actions to be taken to encourage and support participation, civic engagement and *the fulfilment of governmental responsibilities* (my italics) urges Governments and local authorities to put into effect at appropriate levels:

> institutional and legal frameworks that facilitate and enable the broad-based participation of all people and their community organizations in decision-making and in the implementation and monitoring of human settlement strategies, policies and programmes.

Four other actions from the heading 'Popular participation and civic engagement' may be noted as these have a very direct bearing on the development and implementation of land management in accordance with the principles and actions set out above:

> facilitate the legal recognition of organised communities and their consolidation;
>
> provide access to effective judicial and administrative channels for affected individuals and groups so that they can challenge or seek redress from decisions and actions that are socially and environmentally harmful or violate human rights . . .;
>
> broaden the procedural right of individuals and civil society organisations to take legal action on behalf of affected communities or groups that do not have the resources or skills to take action themselves;
>
> facilitate access to decision-making and planning structures and legal services by people living in poverty and other low-income groups through the provision of such facilities as legal aid and free legal advice centres.

If one were to sum up the principal message of these provisions, it is that while a strategy of enablement is to be the preferred mechanism for providing access to land and ensuring security of tenure, the role of governments does not stop there. Governments must also direct their attention to considerations of equity in the operation of land markets and to this end, government at all levels and civil society must be involved in working with the disadvantaged and the poor, removing obstacles to their obtaining land, developing

innovative mechanisms, instruments and institutions to assist such persons to obtain access to land and security of tenure via the market, and governments must desist from actions which penalise such persons and lessen their opportunities to obtain and hold on to land.

The Habitat Agenda was the start of a process of developing new approaches to urban planning and urban governance to which some reference must be made since it is important to provide a rounded picture of what was on offer to governments in the region when they began their programmes of urban planning law reform.[23] The Habitat Agenda was followed up by two Habitat campaigns – the Global Campaign for Secure Tenure and the Global Campaign on Urban Governance which focused attention on the need for adopting pro-poor and participatory approaches to urban policy-making, planning and governance. A new international institutional arrangement was established – the Cities Alliance, a coming together of UN-Habitat, the World Bank and major bilateral donors to urban development which in effect superseded the Urban Management Programme but built on its participatory approaches to urban governance and policy making with the development of the City Development Strategy (CDS), described by the Cities Alliance in 2001 as:

> An action plan for equitable growth in cities, developed and sustained through participation, to improve the quality of life for all citizens . . .[24]

In 2006, the Cities Alliance produced a *Guide to City Development Strategies: Improving Urban Performance* whose central message was:

> That it is incumbent on all cities to become much more proactive in shaping and directing the future growth and development of their territories . . . [g]iven that democratic cultures and institutions are not very well developed or effective, the core idea of a CDS being a co-created process and product is also significant. Lastly, the insistence that the strategy must explicitly address the imperatives of poverty reduction and environmental health represents a significant challenge for most local governments, which tend to prioritise the needs of elites and middle classes . . .
>
> CDSs are spreading like wildfire across cities in the global South . . .[25]

Thus, the decade following the City Summit, a new approach, combining both policies and practices on urban planning and governance was developed

23 Pieterse, E. (2008) *City Futures*, London, Zed Books, chapters 3 and 4 for an incisive review of post-Habitat Agenda developments on which I have drawn for this brief survey.

24 Ibid., 71.

25 Ibid., 73, 74.

and had begun to be extensively used in the cities of the South. So there were two clear models of urban planning laws in existence in Eastern Africa; the colonial models, still the operative laws in all the countries in the region which may be seen as the traditional approach; and the Habitat/Cities Alliance model which in terms of what was happening on the ground may be seen as a distinctly transformative model. We may turn now to consider the reforms to urban planning laws which took place from the mid-1990s onwards. In looking at the laws, I shall concentrate on who plans, how plans are made with special reference to public involvement and to a limited extent, on the substance of planning; what were plans meant to cover. These issues will provide the basis for some conclusions about the new laws.

12.5 Urban planning laws in the era of reform

12.5.1 Kenya

Kenya has two contradictory planning laws: one pre the new Constitution; one post the new Constitution. Since they are both operative, both must be discussed. The chief characteristic and principal thrust of the Physical Planning Act 1996, a law of 54 sections and four Schedules, is that planning is a technical professional matter which should be undertaken by professional planners and administrators only. Not merely do the general public and CBOs have no role in the making of plans; even local councillors are completely excluded from the process. It is as if the ideas, standard for the last 40 years or so, about planning being a people-centred activity in which people should be closely involved in the planning of their own urban spaces had never existed. Even the notion that planning had something to do with social issues, a fundamental principle of Geddes and Lanchester, renowned colonial planners from the 1920s, does not find a place in this law. In the six pages of densely and small-printed Schedules setting out the contents of physical development plans, the words 'people', 'consultation', 'enabling', 'transparency' and concepts such as the rights of the people, all key elements of the Habitat Agenda, are nowhere to be found. The word 'social' only appears once under 'population and economic base' which includes '(iv) peri-urban slum settlements and problems they pose' (sic) a section which ends '(viii) other social aspects including education, recreation areas and other public purpose land uses'. To the extent that there is any model which the law follows, it is unquestionably the British colonial model planning law of the 1950s.

Under the 1996 Act, planning is undertaken by the Director of Planning and the Director may make regional physical development plans and local physical development plans. After preparing a plan, the Director shall notify the local authority whose area is affected by the plan 'to make representation in respect of the plan' and the notice shall also invite any interested person to make representations against or objections to the plan. The Director may accommodate or decline to accommodate such representations or objections.

A person, called a petitioner – a give away that – who is aggrieved by a decision of the Director may appeal to a Physical Planning Liaison Committee which may be a national, a district or a municipal physical planning liaison committee but at whatever level they exist, these committees are composed entirely of officials – 16 or 17 of them – together with – presumably this is seen as a big concession – a 'registered physical planner in private practice duly appointed by the Minister on the advice of the Physical Planners Registration Board'. Appeals can grind their way up from a district or municipal committee to the national committee and then to the High Court. Plans may not be altered 'in any manner' without the prior written authorisation of the Director. On the approval of a plan 'no development shall take place on any land unless it is in conformity with the approved plan'.

Local authorities operate the system of development control and enforcement but they are bound by any relevant regional or local physical development plan and appeals from their decisions to refuse any application for development or to enforce planning control are routed to and through the relevant liaison committee. Equally where an application involves a matter of major public policy, that application must be referred to the relevant liaison committee.

It is not just the absence of any recognition of the social and participative aspects of planning that is so striking about the Kenyan Act; it is the air of complete unreality about the law. By the time the law was enacted, Kenya had been a political entity of just over 100 years. For much of that time, there had been constant efforts to regulate by law the growth and development of urban areas in the country with a singular lack of success. The vast majority of urban inhabitants were and always had been technically illegal as they had neither permission to develop the land they lived on nor permission to erect the houses they lived in. A recent survey of urban planning in Nairobi sums up the position in that city thus:

> In Nairobi, planning was characterised simultaneously by its inefficiency and paradoxically, by a tradition of coercive measures. The majority of Kenyans were relegated to unsanitary and cramped 'popular quarters', as an indirect effect of planning and were living in deplorable conditions. Their dwellings were erected with a bare minimum of materials and the poorest did not even have that. It isn't so much that colonial planning standards were flawed; it was the political set-up that was flawed . . . In the context of political competition for land in Kenya, the existing planning tools do not hold against the market, they are corrupted to benefit powerful people . . .[26]

26 Médard, C. (2010) 'City Planning in Nairobi: the stakes, the people, the sidetracking', in Rodriguez-Torres, D. (ed.) *Nairobi Today: The Paradox of a Fragmented City*, Dar es Salaam, Mkukina Nyota Publishers Ltd, 25–60, 57–58.

The Act was strongly criticised by the Njonjo Commission as imposing a heavy financial burden on land owners; introducing bureaucratic and expensive bottlenecks on all land dealings; creating operational conflicts within the Ministry of Lands and between the Ministry and local authorities; and not providing adequate publicity to enable affected parties to object to proposals contained in plans.[27]

The NLP although not explicitly referring to this criticism stated that:

> National, regional, urban, peri-urban, spontaneous settlements planning principles and guidelines will be formulated and implemented in a transparent, accountable, sustainable, comprehensive and participatory manner . . .[28]

which gave an indication that the Act would be an early candidate for a thorough revision to bring it into line with the new people-friendly and transparent land policies but so far the Act has been unchanged. Indeed it is clear that, if anything, the NLP and its authors saw the problems of urban planning as that the government had too little and not too much power over people:

> Problems associated with development control include weak and inadequate institutional capacity and lack of harmony among the principal statutes that govern planning and enforcement. In addition, outdated planning standards and regulations, the absence of a coordinating framework between and amongst the public sector agencies and the private sector aggravate the situation. Consequently, there is a disconnect between plan preparation, implementation and development control.
>
> To ensure that land use plans are applied as tools for effective land use management, the Government shall facilitate the following:
>
> a Review of relevant legislations to harmonize the governance structures, decision-making processes, planning standards and regulations;
> b Enhancement of institutional and human resource capacity of the Local Authorities; and
> c Provision of a framework for coordinated approach to enforcement of planning decisions amongst the various planning authorities and the citizenry.[29]

27 Njonjo Commission (2002) op. cit., Interim Report, 41.
28 NLP, op. cit., vi.
29 Paragraph 123, 124, NLP, 28.

This is a far cry from the policy principles for managing the urbanisation process set out in the Njonjo Commission[30] which included:

> The need to empower the disadvantaged groups to access decent environmentally acceptable and affordable shelter . . .
>
> The need to create an enabling environment for urban development through the establishment of transparent, accountable, sustainable, comprehensive and participatory governance structures and decision making processes . . .
>
> Promote participatory involvement by all stakeholders in land use planning.

It is also a far cry from the CDS model which the Njonjo Commission was much closer to.

I have already commented on the lack of any proper consideration of urban land and planning issues in the NLP and the ambivalence of references to dealing with slums and squatter settlement: these paragraphs provide the explanation for this. One can understand the Moi regime's enactment of the 1996 Act: President Moi was no fan of cities, of democracy and certainly not of participation by the people in their own future. But it was worrying that a land policy which was being sold as a fresh people-centred start in Kenya should appear to adopt the old authoritarian and colonial approach to urban land issues.

The Act of 1996 has now been supplemented by the Urban Areas and Cities Act 2011 which is a very peculiar law combining a more participative approach to urban planning with a totally non-democratic approach to urban governance. Urban areas are classified as cities, large municipalities, medium and small municipalities. Governance and management of these urban areas is divorced from any democratic elected element. In the case of the first two urban areas, a council of eleven persons is appointed by and answerable to the county executive committee, of which at least five persons shall be appointed to represent professional associations, the private sector, the informal sector and NGOs in the area. In the case of the small and medium municipalities an oversight committee of the same categories of eleven persons is appointed by and answerable to the county executive committee.[31] The day-to-day management of all these urban areas is exercised by appointed officials.

30 Njonjo, C.M. (Chairman) (2002) *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration*, Nairobi, Republic of Kenya, 67, 69.

31 The interpretation section does not contain any definition of an oversight committee so the difference between a council and such a committee is not spelt out. Presumably an oversight committee although composed of the same categories of persons as a council will have a lesser role in the governance and management of their areas than a council will. Ironically, one of the functions of these appointed councils, is to 'promote democratic govenance'.

Amongst the functions of these appointed councils is to:

> Formulate and implement a master plan for the urban and physical planning, infrastructure development and provision of essential services including, but not limited to, provision of water, sanitation, healthcare, education, housing, transport, disaster management systems and facilities for safe environment;
>
> exercise control over land use, land sub-division, land development and zoning by public and private sectors for any purpose, including agriculture, industry, commerce, markets, shopping and other employment centres, residential, recreation, parks, entertainment, passenger transport, freight and transit stations within the framework of the spatial and master plans for the city or municipality;
>
> ensure the integrated development planning for the area under its jurisdiction . . .

Section 11 of the Act states that there shall be:

> institutionalised active participation by its residents in the management of the urban area and city affairs . . .

and in pursuit of this principle, Schedule 2 to the Act provides inter alia that:

> residents of a city or urban area have the right to—
>
> contribute to the decision-making processes of the city or urban area by submitting written or oral presentations or complaints to a board or town committee through the city or municipal manager or town administrator; and
>
> A city or urban area shall develop a system of governance that encourages participation by residents in its affairs, and shall for that purpose—(a) create appropriate conditions for participation in (i) the preparation, implementation and review of the integrated development plan . . .[32]

It is not just the processes of urban governance and urban planning which are transformed by the Act. The substance of planning is being transformed as well. Whereas under the Act of 1996 planning is very much about physical developments, under the 2011 Act, an integrated urban area or city development plan shall reflect the urban authority's:

32 Schedule 2, paras. 1(1)(a), 2(1)(a).

a . . . vision for the long term development of the city or urban area with special emphasis on the authority's most critical development needs;
b an assessment of the existing level of development in the city or urban area, including an identification of communities which do not have access to basic services;
c the determination of any affirmative action measures to be applied for inclusion of communities referred to [above] to access funds from the equalization funds;
d the [authority's] development priorities and objectives during its term in office, including its economic development objectives, community needs and its determination on the affirmative action in relation to the marginalised groups access to services . . .[33]

Once an integrated development plan has been adopted, the urban authority is required to inform the public of that fact and make copies and summaries of the plan available to the public. This approach to urban planning is foursquare in line with the approach of the CDS.

The philosophy of the Act of 2011 with respect to citizen participation in planning is totally opposed to the philosophy of the Act of 1996. It represents a sea change in the approach to urban planning and urban planning law in Eastern Africa. It makes all the more strange the lack of any democratic input into the general governance of urban areas which the Act as a whole provides for. This conflict of ideological approaches to urban governance – participation by the citizen but only to appointed persons who owe no accountability to those citizens – will likely give rise to conflicts on the ground in the future.

12.5.2 Tanzania

Turning now to the new Tanzanian planning laws, these are the Land Use Planning Act (LUPA) and the Urban Planning Act (UPA), both 2007, with a combined total of 148 sections and 11 Schedules. In terms of the language of public participation, the involvement of the private and popular sectors, the need for equity in access to land resources, the Tanzanian laws are in advance of the Kenya's 1996 Act but nowhere near its 2011 approach to planning. The models at least in the opening sections of the laws are clearly the Land Act and the Village Land Act 1999 which set out the principles and objectives of the laws and imposed a duty on the Minister to ensure that the principles are carried out, in the case of the 2007 laws, in all plans at all levels of government. This is a very welcome approach to urban

33 Section 39.

planning at least on paper and appears to represent a departure from the planning-by-the-bulldozer approach of the late 1990s.[34]

Where the Tanzanian laws are deficient, however, is that they reproduce what might be termed the besetting sin of Tanzanian governments since independence; the belief in the omnipotence of government; government's ability to plan and execute plans and the people's duty to comply with the plans. Every level of government is required to plan and not just to make *a* plan but lots of plans. For instance a village council shall prepare a village land use plan and, in respect of resources shared with other villages, prepare jointly with those other villages a village resource management sector plan. A village land use plan shall include a plan for minor settlements. A National Land Use Planning Commission (NLUPC) is established headed by a Director-General[35] which has a comprehensive role in ensuring all land use planning authorities are and remain up to the mark and acts also as the national land use planning authority which will make a national land use plan. Under LUPA planning authorities are village councils, district councils, and such body or organ which the Minister may declare to be a planning authority or joint planning authority. No limitation is placed on the Minister's power here. A village council shall brief a Ward Development Committee (WDC) on land use planning.[36]

In a truly awesome provision[37] which would cause concern to a fully staffed planning department in a small local authority in most countries in the North, the district council as a district land use planning authority:

> shall in consultation with all relevant stakeholders
>
> a prepare district land use framework plans incorporating relevant aspects of plans prepared under relevant urban planning law that includes:
>
> i small islands;
> ii coastlines and beaches;

34 For a discussion of this, see McAuslan, (2007), op. cit.

35 Urban planning is headed up by a Director of Planning who is however 'the principal adviser to the Minister on land use planning', s 6 UPA. The NLUPC is an independent body in the sense that the Minister is not empowered to give it directions. However, it is the same Minister who has the responsibility to ensure that the principles and objectives of LUPA are incorporated into all plans and that the principles of UPA are incorporated into all urban plans. One can foresee a certain amount of tension between the Director and the Director-General.

36 There may be a bit of a problem here. Under s 7 UPA, 'where the establishment . . . or the expansion of the boundaries of a local government urban authority engulfs villages, such villages shall be deregistered . . .' If a village is deregistered, it's a bit difficult to see how a village council can then brief a WDC on land use planning. Given the wide definition of 'land use planning' in LUPA, one would need a very erudite village council and WDC to participate in such a briefing session.

37 Section 21(2) LUPA.

iii planning for vertical development;
iv urban boundaries

b ensure co-ordination and systematic physical development at the district level;
c ensure inter-sectoral co-ordination; and
d co-ordinate village land use plans.

Under the UPA, every city council, municipal council, town council and township council is a planning authority in its area of jurisdiction. The plans will include general planning schemes[38] and detailed planning schemes.[39] These planning schemes may take the form of action area plans, subject plans, advisory or zonal plans and part development plans. When it comes to the details of the plans, there is much to be commended, however unrealistic some to it may prove to be. Planning authorities shall ensure that planning incorporates gender perspectives and vulnerable groups; designate areas for urban agriculture; promote individual home ownership. Great stress is laid on vertical and opposed to horizontal growth. At least with urban planning authorities, every such authority shall employ a qualified town planner. No such requirement is imposed on planning authorities under LUPA.

Real efforts are made to incorporate elements of public involvement in the planning process. First, it should be stressed that the planning authorities are elected local authorities, not appointed officials. With respect to a general planning scheme, the planning authority shall pass a resolution for the preparation of a general planning scheme and submit it to a meeting of all relevant stakeholders including public and private institutions, CBOs and NGOs. In the event of a positive resolution passed by the meeting, the planning authority shall make the general planning scheme. Once it is made, it must be published and the planning authority shall conduct a public hearing in the area on the scheme. Detailed planning schemes must be demand driven although quite what that means in practice is not spelt out. The process of public meetings and public hearings however apply to the making of detailed planning schemes. This is admittedly a very far cry from any attempt at the type of 'broad-based participation of all people and their community organizations in decision-making' urged by Habitat's GPA but it does at least recognise as a matter of law that the people and their organisations as stakeholders have a role in planning. The sting in the tail, however, is that 'an approved

38 The purpose of a general planning scheme is to coordinate sustainable development of the area to which it relates in order to promote health, safety, good order, amenity, convenience and general welfare of such area as well as efficiency and economy in the process of such development, s 9 UPA.

39 The objective of every detailed planning scheme shall be to coordinate all development activities, to control the use and development of land including intensive use of urban land and, in particular, vertical and compact urban development, s 16 UPA.

detailed planning scheme shall have the force of law and may be enforced by a court of competent jurisdiction'.[40]

The provisions for participation in LUPA are slightly different. In the preparation of the national land use framework plan, the Commission shall consult extensively with other planning authorities and present a draft of the plan to a meeting of all national stakeholders for discussion and revision. With both a regional land use framework plan and a district land use framework plan, the national (at the regional level) and the district planning authority at the district level shall ensure that all stakeholders are fully involved in the process and shall present a draft of the plan to a meeting of stakeholders for discussion and revision. Interestingly, it is only with respect to village planning, that anything resembling 'broad based participation of all people' is required. The village planning authorities must ensure that all stakeholders in the village are fully involved in the planning process and a draft of the plan must be presented for discussion at a meeting of all stakeholders. There are Guidelines for Participatory Village Land Use Planning which have been in existence for some time and any village land use plan has to be approved by the Village Assembly – a meeting of all the villagers. If a Village Assembly declines to approve a plan, that seems to be an end to that plan.

Enough has been set out to show the enormous institutional and administrative superstructure of land use and urban planning that has been created in Tanzania. And I have left out the provisions dealing with compensation and betterment under UPA which in practice will be almost impossible to apply. To what end? Is it in any way realistic to suppose that there will be, in the foreseeable future, the capacity to implement all this planning? There seems to have been no assessment of what it is hoped to achieve by so much planning, whether it is necessary or affordable or whether there is a demand by people generally for it. Furthermore, this system of planning makes a nonsense of the promise of community participation provided for by the Citywide Action Plan for Upgrading Unplanned and Unserviced Settlements in Dar es Salaam.[41]

40 Section 18 UPA. Quite how a court will enforce a detailed planning scheme is not spelt out.

41 A partnership between UN-Habitat, Dar es Salaam local authorities and Cities Alliance. The Action Plan was published by UN-Habitat in 2010. It stresses community participation and involvement through the establishment of community planning teams located at the level of the *Mtaa*, the sub-Ward. The sub-committees' roles are to plan and supervise upgrading activities, create public awareness, collect charges and manage routine operation and maintenance. Policies and planning are conducted at a higher level by the Steering Committee and the Technical Committee which are composed overwhelmingly of officials. The charts set out in the Action Plan are very traditional, with officialdom at the top of the chart and communities at the bottom. The President in his inaugural speech launching the process of developing the Action Plan spoke in traditional terms: 'We are all witnesses to how some of our people and some city, municipal and town authorities are ignoring planning and urban zoning regulations. If we do not contain this trend, our urban

What then is the possible explanation for this immense legal superstructure of planning? I think one possible and plausible explanation is this. Villagisation involved, as has been shown in Chapter 4, an attempt to exert a detailed, albeit for the most part an alegal and often illegal, control over the lives and land uses of the peasants with the colonial town and country planning laws providing the legal basis for similar controls over the urban poor. Villagisation as a means of administrative and political control over land and lives has been discredited and the Land Act and especially the Village Land Act have created the legal framework for a looser, more flexible and more user-friendly approach to land management. LUPA and UPA are quite simply attempts to recreate the former pre Land Act and Village Land Act approach to land management: detailed and comprehensive planning and control of rural and urban land use and indirectly of lives. This time round such a system is based on law and the law makes genuine attempts to involve people in the process of planning – the criticisms of villagisation have struck home – but at the end of the day, the system is one which provides for detailed planning and control of land use, both urban and rural.

This whole approach to planning and land use control flies in the face not just of the detailed precepts of the Habitat Agenda but of broad notions of democratic governance and the democratic operation of land management. The broad notions are that people are to be facilitated and encouraged to make sensible and responsible decisions about land and their use of it but are to have a fairly wide measure of freedom to manage their own land resources individually and collectively. It is neither possible nor practicable nor, almost certainly, equitable to try and plan every last detail of an individual's or a community's land use from the top – from a National Land Use Planning Commission or even, in the case of a village, from a Village Council making a village land use plan. The same applies to development control and the legal enforcement of a plan through the courts. It is significant that nowhere in either Act is there any recognition or mention of the continued relevance of customary systems of land management in villages or of what might be called urban customary systems developed amongst the urban poor in towns and cities. People live their lives and settle most of their disputes over land under and by these systems and to try and replace them by a comprehensive statutory system of land use planning and management which is what these laws are trying to do is a huge waste of human and financial

areas will become jungles of unplanned unregulated and poorly serviced concrete structures.' The President called on all local authorities to put their efforts together to ensure that the city is planned and that it develops in an orderly fashion; 25. The notion of 'jungles of unplanned and unregulated urban areas' calls to mind the notion of 'enframing' used by Myers to explain colonial systems of planning: 'colonialist enframing was centered on the codification and maintenance of a visible hierarchy of spatial order, of container and contained'. Myers, (2003), op. cit., 7–11.

resources and does nothing to add to, indeed detracts from democratic governance.

My conclusions on the Tanzanian planning system based on an analysis of the new laws are supported by the detailed and fascinating case study of planning in Moshi provided by Nnkya[42] who sums up his work as follows:

> This book provides a detailed account of how the Tanzanian planning system was put to work in the management of urban spatial change with a view to showing what underpins the ineffectiveness of planning . . . the account takes the reader across a rugged terrain of power struggles between actors in the planning system and residents whose right to participate in the decision-making process is denied while their land tenure rights, economic and cultural interests in land are disregarded by planning. The results are far-reaching disputes that pervade the land development process over years . . . Despite this response, where planning is brought to bear, it adversely affects the means of livelihoods, prompts insecurity of tenure and investments in land, strains relationships between the local authority and communities and contributes to loss of confidence and trust in the local authority and government in general . . .
>
> What emerges from this case story is that unmanaged urban spatial change which characterises urban places in this country is a result of undemocratic planning practice; disregard of residents' rights . . . [it] is also a consequence of technocratic, unlawful and corrupt practices characterised by lack of transparency and accountability in the planning system . . .

Nnkya was writing of the pre-reform planning system but as shown above nothing in the new laws provides for a different approach to planning.

12.5.3 Uganda

The Uganda Physical Planning Act 2010, an Act of 61 sections and nine Schedules is clearly modelled on the Kenyan Act of 1996. Like the Kenyan Act, it is based on the fundamental principle that planning is a technical matter which only persons in official positions or with relevant professional qualifications should be empowered to undertake. There is, oddly, only one exception to this approach: local physical planning committees are sub-county councils which consist of councillors. Apart from that exception, local councillors and the ordinary citizen are permitted to make

42 Nnkya, T.J. (2008) *Why Planning Does Not Work? Land Use Planning and Residents' Rights in Tanzania*, Dar es Salaam, Mkukina Nyota Publishers Ltd, 6, 9.

representations on plans made by the professionals which may or may not have any effect on a draft plan but nowhere in the law is there any Habitat-like participative role for the non-professional. Like Tanzania, however, the Act creates a plethora of plans.

The Act establishes a National Physical Planning Board (NPPB) consisting of nine persons appointed by the Minister and in making appointments, the Minister shall take into account gender equity and appropriate technical qualifications. What might be appropriate technical qualifications may be gauged by the composition of the district, urban and local physical planning committees which consist of planners, surveyors, engineers, education, community development, medical, environmental and natural resource officers, all clerks of urban and town councils within a district and as in Kenya, one planner in private practice. Oddly, an architect is not a member of a district physical planning committee but is of an urban physical planning committee.

The NPPB has a central role in the planning process. Without attempting to provide the full list of its statutory functions, we may note that the Board advises the Minister on planning matters; it causes physical development plans to be prepared at national, regional, district, urban and sub-county levels by the district, urban and local physical development committees; it hears appeals from persons aggrieved by decisions of local physical planning committees; it determines and resolves physical planning matters referred to it by physical planning committees; it approves regional, urban and district development plans (how these two roles are to be reconciled with the role of hearing appeals from physical planning committees is not addressed); and exercises general supervisory powers over all lower planning committees. The secretary of the Board is the head of the national physical planning department, an entity that is not defined in the Act so the relationship between it and the Board is not clear. The secretary is responsible for the preparation of all national, district and local physical development plans.

Below the NPPB, there are district, urban and local physical planning committees which are responsible for the preparation of district, urban and local physical plans, dealing with development applications and hearing and determining appeals from lower order planning officers and planning committees. Local physical planning committees however which are sub-county councils are given a wide role: apart from initiating local physical development plans and recommending such plans to the district physical planning committee for its consideration and approval, they also have an important role in implementing structure plans (not defined or provided for in the Act apart from this section), detailed plans and action area plans.[43]

43 Section 25 of the Act appears to create a rather mysterious district urban and sub-county physical committee which shall cause to be prepared a district urban physical development plan. This does not appear anywhere else in the Act.

Turning now to physical development plans, these are national physical development plans, regional physical development plans, district physical development plans, urban physical development plans and local physical development plans. 'Every physical development plan shall conform to a physical development plan made by a higher body.' Without going into laborious and mind-numbing detail, all these plans concentrate on physical development issues; maps, plans, allocation of resources; location of physical developments. Overall every district, urban and local physical development plan:

> shall have for its general purpose orderly, co-ordinated, harmonious and progressive development of the area to which it relates in order to promote health, safety, order, amenity, convenience and general welfare of all its inhabitants as well as efficiency and economy in the process of development and improvement of communication.[44]

There is no overt reference to the need to address social issues or to tackle the challenges of informal urban settlements. Implicitly however the references to orderly development and to safety and order and the complete lack of any specific reference to tackling informal settlements in the 5th Schedule to the Act which sets out the details of what should be addressed in district, urban and local physical development plans indicate that the conception of physical planning does not accommodate the urban poor.

There is no realistic public involvement or participation in plan preparation. The arrangements for public input are taken straight from the colonial model planning laws. Once plans have been prepared the committee publishes a notice in the *Kenya Gazette* and in any other form it deems expedient as to when and where the public may inspect the draft plan and make representations on and objections to the draft plan. Objections, etc. can be made via an 'open hearing' but what that is and how it operates is not explained in the Act and all the provisions for dealing with objections, etc. assume that they will be in writing and will be dealt with in writing. Where an objection or representation is rejected, the person aggrieved may appeal to a higher committee, the Board or a court.

It comes as no surprise that the new planning law is as it is. There is a very strong belief amongst land-related professionals in Uganda that they and they alone are qualified to handle land matters and those without the appropriate qualifications should not be allowed to interfere in such important matters. This attitude was very clearly demonstrated with respect to the project to assist in the implementation of the Land Act 1998 in which I was involved, where the central government officials in the Ministry of Water, Lands and

44 5th Schedule, para. 1.

the Environment (MWLE) bitterly resented the official brought in from another Ministry to manage the project as she had no 'proper' qualifications to do so and set out to get rid of her and sabotage the project while she was there. This they ultimately succeeded in doing and ensured that one of their 'own' was made project manager. They resented even a junior Minister in the Ministry from taking an active interest in the project, although he had in his former life been an agricultural officer and therefore had a fair knowledge of rural land issues but he did not have the necessary paper qualifications to become involved in land management.[45] In one notorious occasion, a senior official shouted at the Minister and told him he had no business being at a meeting of the management committee of the project. In such circumstances, it is quite a concession to permit members of the public the opportunity to comment on a plan.

As with the Tanzanian planning laws, so here. There seems to have been an attempt, via the Physical Planning Act, to claw back from lay people the powers over land that the Land Act 1998 had given them. It was not so much that there was disapproval of a greater recognition of land markets that the land laws of the 1990s had provided for in Tanzania and Uganda as that those laws had taken powers away from the officials of central government and conferred them on 'unqualified' persons. The new planning laws provide an opportunity to restore the appropriate and proper status quo.

12.5.4 Zanzibar

Zanzibar published a 109-clause draft Bill for an Urban and Rural Development and Planning Act in 2008 but had not taken it forward to enactment as at mid-2012. It is nonetheless worth considering as it is very much in the mould of the four Acts discussed above.[46] There are elements of the Tanzanian UPA to be found in the Bill in the setting out of the principles which should govern the implementation of the Bill (the principles are themselves drawn from the Tanzanian Act) but the predominant feature of the Kenyan and Ugandan Acts of vesting planning functions in officials is reproduced in this Bill. Only the outlines of the Bill will be set out here.

The Minister is the ultimate authority for making decisions on the development of land under the Act and as such he is responsible for the framing and implementation of comprehensive policies with respect to the use and development of all land in Zanzibar and shall in the framing and implementation of policy have regard to the need to promote consistency. To assist the Minister, an Urban and Regional Development Planning Department is

45 For the full detail of the operation of the DFID land project, see McAuslan, (2003), op. cit., chapter 14.

46 The English version of the Bill is full of misprints, gaps and words clearly left out so it is in places to some extent guesswork as to what the Bill is driving at.

established headed by a Director who is responsible for collaborating and co-ordinating with the Minister on all the decisions involving the development of land and other matters covered by the Act.

A hierarchy of planning authorities and plans are established by the Bill. Every city council, municipal council, town council and township authority shall each become a planning authority in respect of its area of jurisdiction. Planning committees are established within each council which are the highest decision-making bodies on planning matters in Zanzibar. Although not phrased very clearly this presumably means that the committees are the highest decision-making body on planning within their areas of jurisdiction. At the centre there is a National Land Planning Committee, chaired by a Director of Planning, a secretary appointed by the Director with the other six members coming from subordinate committees. This Committee is to have a central role in the management and approval of plans made by subordinate committees.

Turning to the making of plans, the National Committee is to prepare and thereafter keep under review a development plan for the whole of Zanzibar; and the committees at different levels are to prepare and thereafter keep under review such other development plans for such areas and on such subject matters as will in their opinion assist in the efficient and equitable planning and management of the land in Zanzibar. Once a plan prepared by a local authority is given provisional approval by a planning committee the Bill requires that it is placed before and considered by the local community.[47] How this consideration will take place is not spelt out but the local community does get to vote on the plan and can reject it. If it is rejected twice then the plan cannot be re-considered for at least six months. This apparent democratic element in plan-making is rather undermined by the provision that the Minister may, after submitting the plan to the Policy and Advisory Board of the Ministry (yet another Ministry body) and with the Board's agreement, adopt the development plan prepared by the local authority, notwithstanding that the plan has not been approved by the local community.

An adopted development plan has to be approved by the Revolutionary Council (the Zanzibar cabinet) but before that can take place the Minister must publish the plan and provide an opportunity to any person or body to make representations on the plan. If these are not withdrawn, the Minister must appoint one or more persons to hold a public inquiry into the objections and representations and after the report on same has been submitted to the Minister, he shall publish the report and in turn submit it to the Revolutionary Council and the Policy and Advisory Board so they may reconsider the plan. An approved development plan shall be 'the principal consideration to be

47 A note attached to this clause states '(This needs further development – it is to ensure that there is real decentralization, but the terms need to be defined with precision – it means the constituency not the people who prepared the plan – distinction must be made).'

taken into account in all decisions to be taken under this Act by the Minister, the Director, by all planning authorities, and by all other authorities having control of or jurisdiction over land in respect of any proposal to develop that land',[48] a significant variant on the other three Acts considered above, all of which confer a legal status on an approved plan which has to be complied with.[49]

The record of urban planning in Zanzibar is dismal. From the outset of the Protectorate in 1890, colonial officials were constantly developing grandiose plans and schemes to re-order the city, none of which were implemented. The colonial town plans of Lanchester (1922) and Kendall (1958) were never implemented; the Lanchester plan indeed was never declared and published as stipulated by the Town Planning Decree 1925 so it had no legal basis. Kendall's plan was no sooner finished than many of its proposals were thrown out by the colonial authorities as financially preposterous. However, as Bissell shows, colonial officials did not bother themselves with legal niceties; the Lanchester plan was kept secret but was used as the basis of decisions to deny Zanzibaris permission to repair or rebuild their huts; in this way, the huts could then be demolished and cleared without the inconvenience of paying any compensation. Officials knew what they were doing: even when the Attorney-General or other lawyers pointed out that powers were being exercised without any legal authority, officials continued to ignore the law. The Town and Country Planning Decree of 1955 was passed over the objections of the unofficial members of the Legislative Council. To quote Bissell:[50]

> It was mainly drawn from the British Town and Country Planning Act 1947 with supplements from Zanzibar, Kenya, Rhodesia, and Nigeria . . . The mechanisms it required for planning were overdetermined and unwieldy, causing problems from the very outset.

Under the Decree, Kendall's plan was gazetted but no consideration was given to its cost. It followed the pattern of other plans and to quote Bissell:[51]

> Kendall's vision for the city was not at odds with all that had gone before. Indeed it was the logical culmination and ultimate expression of years of effort – a failure produced, as it were, almost by design.

48 Clause 49.

49 Clauses 52–109 deal with development control and to anyone familiar with the British system of development control, there is much that is recognisable in these provisions. Indeed the provisions on development control are much more detailed and 'English' than those in the Kenyan Physical Planning Act, the Tanzanian Urban Planning Act and the Ugandan Physical Planning Act.

50 Bissell, op. cit., 305.

51 Ibid., 309.

The colonial approach to planning and the colonial laws have been continued into the revolutionary era. There have been four major plans since the revolution of 1964: the East German plan of 1968, the Chinese plan of 1982, the UN Habitat 'integrated strategy' for Stone Town of 1982 and the Aga Khan conservation plan of 1992. To quote the last mentioned plan:

> The laws controlling town planning, building controls, land use, new development, and urban services are largely those introduced by the British administration in the 1920s and later updated in the 1950s.[52]

Bissell sums up the effect of the postcolonial planning efforts:[53]

> Postcolonial planning has only served to sharpen and intensify the distinctions between the two sides of the city. There are separate local bodies administering the two sides of the city, the Baraza la Mji and the Stone Town Conservation and Development Authority . . .
>
> As during the colonial period, planning has been used to advance elite interests, deepening geographic and class inequalities. Western conservationists emphasise the need to rehabilitate Stone Town as an emblem of the cultural heritage of Zanzibaris. But mass tourism and a booming property market have served to drive working-class and poorer Zanzibaris from the heart of their 'culture' because they can no longer afford to live anywhere near Stone Town or the inner areas of Ng'ambo . . . Postcolonial plans, like their predecessors, have failed even as they work to sow legal confusion, enlarge the bureaucracy, exacerbate inequitable distribution of resources, frustrate popular demands for democracy and extend a peculiarly modernist mystique: faith in Western development expertise and the power of planning itself.

But with all this he reports a certain nostalgia for the colonial past when it was thought that improvement and development had actually taken place and that the old plans were sound. In these circumstances, it should not occasion too much surprise that a new legal framework for planning and especially for development control proposes to follow the British model. After all, it has been the (theoretical) legal basis for planning in Zanzibar since 1925.

12.5.5 Mozambique

The approach to urban planning law in Mozambique is very different to the Anglophone countries considered hitherto. Whereas they have developed

52 Aga Khan Trust for Culture (1996), 109.
53 Bissell, op. cit., 332, 333.

separate urban planning laws, following in this respect the British colonial model, which deal exclusively with plans, development control and enforcement, the Mozambique approach has been to derive urban planning laws from the basic Land Law of 1997 and create regulations that deal both with planning and development *and* aspects of the urban private land market: the allocation of land, the permitted uses of land including the modalities of transfer of land use rights. In keeping with the thrust of this chapter, however, I will focus solely on urban planning law.[54]

To quote a UN-Habitat report:

> Policy and law on land use planning was developed through a participatory process at provincial, regional and national levels. The policy recognises existing occupiers and communities of land as the most important element in any intervention of ordering or planning of land use . . . It defines the type of plans, the responsible bodies and the means of approval of the plans. It also establishes a public right of information, participation and objection . . . Under various municipal laws, municipalities are empowered to . . . prepare and approve general and detailed land use plans, urban development programmes and land development schemes, in collaboration with relevant central government bodies.

The legal framework for these urban planning arrangements is provided for by the Mozambique Land Regulation of 2006 entitled the Regulation on Urban Soil, that term being defined as 'every area comprehended within the perimeter of the legally established municipalities, villages and settlements'.[55] Article 4 provides for land use plans which are 'strategic, informative or normative documents essentially aimed at producing socially useful territorial spaces or parcels based on the principles and guidelines of territorial land use. A land use plan has a regulatory nature'.

Land use plans are of three kinds: Urban Structure Plan, General and Partial Urbanisation Plan, and Detailed Plan. The first type of plan establishes the space organisation of the entire territory of the municipality, considering current occupancy, the infrastructures and existing social equipment and implements their integration in the structure of the regional space. The second type of plan is an instrument of territorial management in the local sphere that establishes the structure and describes the urban soil considering the balance among many urban uses and functions, paying special attention to the zones of spontaneous occupancy as a social-spatial basis for the making of the plan. The third type of plan defines in detail the occupancy of any specific area of the urban centre by establishing the concept of urban

54 These provisions are arts 1–20 of the regulations. They are very general.
55 Article 1.

space, providing for land uses and general conditions of buildings, traffic patterns and infrastructure provision.[56]

State and Local Government Agencies[57] make the plans which must be approved by city councils and district governments. The making of plans must be preceded by inquiries of 'local entities' but if such local entities do not respond to the inquiry within 45 days, this non-response will be taken to mean that such local entities have no objections whatsoever concerning plans, programmes or projects as proposed in the plan. A technical team is appointed by the State and Local Government Agencies which is in charge of informing the public of the objectives of the investigation, compiling information about existing occupants, receiving and processing complaints and making the report of its investigation. Community leaders must participate with the technical team informing occupants about the investigation and dealing with complaints. The technical team produce a preliminary report which must be accompanied by the opinions and observations of the local community leaders. This report is submitted to the local state agency with jurisdiction in the town or village for approval but prior to any approval, the agency may give a hearing to complainants, local community leaders, the technical team and others whom it thinks useful to hear. Once all opinions have been received, the State and Local Government Agency shall undertake a process of public participation presenting the plan to local communities. The plan is then presented for approval to the City Council or district government, and once approved at that level, it is submitted for ratification to the Minister, and then officially published. Thereafter, State and Local Government Agencies are obliged 'to promote or accomplish the urbanisation process in those areas comprehended by the approved detailed plans'.[58]

Although the legal provisions are very much less detailed and specific than the Anglophone Acts, there are some commonalities. The public authorities make plans using a 'technical team' to do so. The people and their community leaders are empowered to react to plans via complaints and observations but do not appear to have an active role as co-participants in the making of plans. There are requirements for the 'presentation' of plans to the public and the public can comment on the plans that might be altered in the light of the public's views. Public agencies then implement the plans.

The major differences are the continued lack of municipal capacity, a lack of clarity around responsibilities for management of urban space and

56 Article 5.

57 According to art. 1, this term means 'City Councils, district governments, governmental agencies'.

58 Article 1 defines urbanisation as meaning 'transformation of the soil by providing it with infrastructures, equipment and constructions that ensure the physical settlement of populations in conditions to benefit from increasing level and quality services of health, education, road traffic, sewage systems, commerce and leisure, among others'.

land, and overall, to quote a recent report on the strategic planning in Mozambique:

> For a variety of reasons, including the fact that municipalities are relatively new, and that there has been a concentration on rural development, the role of municipalities is not well understood and municipalities are underrepresented within National Policy Frameworks. Strategic planning for urban development is relatively recent and not always regarded as a priority . . . There is no overarching local development plan in Mozambique which coordinates and integrates strategic planning, implementation and service delivery . . . Increased participatory governance, which draws the involvement of multiple stakeholders including civil society, needs to be deepened . . . Effective spatial planning requires maps and cadastre systems that are underdeveloped in many municipalities . . .[59]

12.5.6 Rwanda

Like Zanzibar, Rwanda published a draft Law Relating to Land Use and Development Planning (LRLUDP) in 2010. However, the Government withdrew the Bill from Parliament in June 2011 citing concerns by MPs with the content. However, it had approved a National Land Use and Development Master Plan in February 2011 which according to the Director General of the National Land Centre will be implemented in three phases: 'the first one will be merging the district land usage policy together with the District development plan to form an Integrated Development Plan for the district. The second phase will be the urban development plan while the third phase will be the action area plan'. It is not clear what legal provisions governed these arrangements, but on the assumption that the draft law will be re-introduced more or less in the same form as it was, the withdrawn version will be briefly discussed here.

It is a very short law which deals only in generalities. Article 1 of the law sets out its fourfold purpose of ensuring a transparent co-ordination of national land use and development planning; ensuring fundamental principles of ecological balance between land use and development and biodiversity; promoting the social welfare of the population and ensuring access for all Rwandans to participation in a transparent decision-making process. Article 3 sets out the fundamental principles of the law which stress much the same concerns as the fourfold purpose of the law: sustainable economic, social and environmental development; participation; planning to minimize the

59 Kitchen, F. (2010) 'Reflections from Africa: Mozambique and South Africa United Cities and Local Governments', *Policy Paper on urban strategic planning; Local leaders preparing for the future of our cities*, Mexico City, 20–22.

need for land and other natural resources consumed by development prioritising higher density development and limiting urban sprawl.

Article 4 provides for the enactment of the Rwanda Land Use and Development Master Plan (RLUDMP) which gives effect to guided and regulated national land use and development planning. Thereafter all plans are to be prepared based on the RLUDMP and all government organs are required to follow the RLUDMP. This is provided for in articles 6–8 of the draft law. The use of any land can only be changed from its planned use with the approval of the responsible authority and the Minister is to set guidelines on how changes in land use may be provided for. The Minister again has to be involved in any proposed deviation from a binding designation in the RLUDMP. When considering any applications for change of land use, the principles of the law and the RLUDMP and all other plans must be considered but a responsible authority may deviate from the criteria if:

> there may result considerable land use and development planning gain through such deviation and this must be provable by the authority.[60]

No indication is given in the law as to the scope or meaning of the concept of planning gain; a term very much a part of English planning law and practice.

Several articles stress the central role of the Minister in the planning process and article 16 emphasises this by providing that the Minister shall supervise the implementation of the fundamental principles of the law by organs of the state and the progress of all relevant planning authorities in the implementation of the RLUDMP. What exactly the Minister will be supervising is not clear for the law has absolutely no details on the processes of planning, on the content of plans, on the enforcement of plans or on how the public will be involved in either processes or developing the content of the plans. It is understandable that MPs should be concerned about the content of the Bill since it was proposing to give the Minister great powers over all local authorities with respect to planning and land use development with no limitations on those powers. In this respect this is the least transparent and accountable planning law in the region.

12.6 Conclusion

The overall conclusion then from this survey of the development of urban planning laws within Eastern Africa during the era of reform is as sombre as it is clear: all the countries with the semi-exception of the Urban Areas and Cities Act of Kenya – semi-exception as a citizen participative approach to urban planning has been bolted on to a thoroughly undemocratic urban governance system – which have either enacted or published urban planning laws have ignored and rejected the transformational approach of UN-Habitat –

60 Article 13, LRLUDP.

transformational in a fairly modest manner it must be said and which was not particularly original or path-breaking when it was agreed to at the City Summit in 1996 – in favour of the traditional authoritarian model of the colonial era where planners and other officials made the plans and the people were the objects of the plans. In a partial defence of colonial planners, it may be said that such an approach to urban planning was the norm in many metropolitan countries in the 1930s and 1940s.[61] There is, however, overwhelming evidence from a multiplicity of sources – academic books and papers, official reports and practical results – that this top-down type of planning is totally ineffective in an African urban context. Worse in fact than ineffective for its existence over the years has been a major contributory factor to the type of cities that have developed within the region: small enclaves of upper income urban development – gated housing developments, shopping malls, hospitals, schools, etc., the usual paraphernalia of Western-type cities with some planning and reasonable infrastructure – with the overwhelming majority of urban residents living in informal, technically illegal, unplanned developments with a paucity of public infrastructure. Bissell succinctly and accurately summed up this type of planning as it operates in Zanzibar but his summary applies just as well to all other planning systems in the region: 'As during the colonial period, planning has been used to advance elite interests, deepening geographic and class inequalities.'[62] So one reason for the continuation of colonial style planning laws is that they benefit the urban elites who make the laws and are desirous of ensuring that the type of urban development that is facilitated by such laws continues.

But the matter cannot be left there. Faced with the undeniable failure of the type of urban planning which has been tried and has failed again and again, one must try to arrive at some conclusions on why there is such a marked reluctance to change and try a different approach. Myers adopts the concept of 'enframing' as a way of explaining the type of urban planning that was used in colonial times – meaning the desire of the colonial powers to control, confine, contain and change the 'disorderly lifestyles' of the African urban population through systems of regulation and supervision. A leitmotif of all colonial planning laws was the concept of 'order', carried over into the planning laws of the era of reform. I think it is this concept more than enframing which lies at the heart of the planning laws created by the colonial powers and taken over and maintained by post-colonial governments.

I would go further. Behind any arguments about enframing lies, in my view, a deeper concern; the fear of the urban mob and the urban riot.[63] This

61 Fainstein, S.S. (2010) *The Just City*, Ithaca, Cornell University Press, 23–24.

62 Bissell, op. cit., 333.

63 Hobsbawm, E.J. (2005) 'Cities and Insurrections', 1 *Global Urban Development*, 1–8; Harvey, D. (2012) *Rebel Cities: from the Right to the City to the Urban Revolution*, London, Verso, 3–25.

fear was translated into town planning in the colonies, particularly India after the Indian Mutiny, the most vivid demonstration of what can happen if the mob is not contained. The most important colonial development in Indian cities was the military cantonment, the substantial military base placed, usually, between the 'native' city and the colonial city or near to the native city so as to be on hand to quell riots.

Cantonments were replaced by green belts and golf courses in most African cities and towns but the intention was the same: the separation of the African urban mob from the European elite.[64] Now this fear of the mob, of the urban poor, has remained a leitmotif of urban governance in Eastern Africa. The almost universal dislike of the informal sector, the sporadic sweeping away of informal commercial structures, the removal of hawkers, their designation as vagrants,[65] the harassment of informal transport systems; the assumption that unauthorised urban settlements are full of thieves, prostitutes and illegal activities; the overzealous use of force by the police when confronted by large numbers of the urban poor all testify to this.

Amongst the tools available to urban governors to contain the mob was the planning system and its battery of sanctions and powers to keep the urban poor at a distance and, as it were, off balance by denying them any lawful abode in the city. This is why there continues to be resistance to attempts to develop and introduce inclusive planning systems and planning laws which emphasise public involvement and regularisation. It is not just that this would be to accept the continuation of the 'slum'; it involves a totally new approach to planning; one that sees the people as partners with rights and not as a threat to be kept under control. That is the message of the modest transformational planning urged on governments by the Habitat Agenda; and it is the rejection of that message that the maintenance of the traditional colonial approach to urban planning represents.

64 An excellent example of a late colonial concern about the deleterious effects that the juxtaposition of Africans and Europeans in the city would have on Europeans is provided in Myers, (2011), op. cit., where he quotes Lusaka's district commissioner in 1957 on the 'five political effects of the squatter problem' which Myers (quite fairly) summarises as being, in the district commissioner's view, 'corrupted culture, irresponsibility, agitation, racial revenge, opposition to the rule of law' which Myers then goes on to point out that there was never any evidence to support such an analysis; 32.

65 One of the most ridiculous examples of this approach was in Dar es Salaam where shortly after President Nyerere inveighed that 'if we do not disturb loiterers, they will disturb us', the government changed its approach and invited those in the informal sector to 'come out of hiding'. As Tripp remarked, there was an element of absurdity in the notion that 95% of the population of Dar es Salaam should come out of hiding. Tripp, A.M. (1997) *Changing the Rules: The Politics of Liberalization and the Urban Informal Economy in Tanzania*, Berkeley, University of California Press, 141, 145; McAuslan, (2007), op. cit.

Chapter 13

Gender and land law reform[1]

The issue of gender is both straightforward and complex. Straightforward because the issue can be simply stated: the need to make a reality of the constantly repeated mantra that there should be no discrimination with respect to access to, occupation and use of, and transactions with land between men and women. Complex because the social, religious and political implications of bringing about that reality raise more concerns and generate more opposition (usually but not always covert) than any other issue discussed in this book. This chapter will focus on work I have undertaken on legislating on women's rights to land in Rwanda, Tanzania and Uganda as part of the land law reform programmes in those countries. Before discussing those case studies, however, a broader overview of the issue may be given.

13.1 The international dimension

There is a rare unanimity on the gender issue at the international level. All UN agencies, all IFIs, all donors speak with one voice: gender equality with respect to rights to land must become the norm and is an essential part of any programme of land reform in Africa. The need to address gender issues has become more pressing in the light of the HIV/AIDS epidemic. The extent of the problem is being constantly highlighted by senior officials of international agencies:

> In practically all of Africa, customary land laws discriminate against women, and generally, the political will to protect women, land and property rights and interests is not there . . . Governments have tended

1 This chapter is based on revised and updated versions of the relevant section of McAuslan, (2006), op. cit., 23–30; and McAuslan, P. (2010) Personal reflections on drafting laws to improve women's access to land: is there a magic wand?' 4 *Journal of Eastern African Studies*, 114.

> to pay lip service to women, land and property rights, but in practice, most women have to fend for themselves.[2]
>
> In Africa, women constitute 70% of the agricultural labour force and 90% of the labour for collecting firewood and water. They are largely rural dwellers . . . The majority of these women . . . do not own or control land and other natural resources. Indeed, many of them only gain access to land through a male relative. This means that women in Africa cannot participate and contribute adequately to development . . . Yet if women, who comprise more than 50% of Africa's population lose out on development, African families lose and indeed the continent loses.[3]

The UN Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW) ratified by most countries in Africa in some cases as much as 20 or more years ago specifically mandated State Parties to take all appropriate measures to eliminate discrimination against women in rural areas and in particular to ensure such women the right:

> To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes . . .

In the mid-1990s, the FAO reported that only 5% of the resources provided through extension services in Africa are available to women.

The World Bank is in no doubt that:

> Legal recognition of women's ability to have independent rights to land is thus a necessary, though by no means sufficient, first step towards increasing their control of assets.[4]

One might suppose that with this impressive weight of opinion favouring effective and meaningful action at the international level, some such action would have been forthcoming. It has not been and in an impressive and hard hitting paper, Nyamu-Musembi[5] spells out why. Examining rule of law programmes funded by the international aid community led by the World Bank and USAID in particular, she makes the point that the overwhelming

2 Tibaijuka, A. (2004), Executive Director, UN-Habitat, opening address IIED/NRI/RAS Conference on 'Land in Africa: Market Asset or Secure Livelihood? London.

3 Janneh, A. (2006) UN Under-Secretary-General and Executive Secretary of ECA, Opening Statement, 'Land Policy in Africa: a framework of action to secure land rights, enhance productivity, and secure livelihoods', AUC-ADB-ECA Consultative Workshop, Addis Ababa.

4 Deininger, K. (2003) *Land Policies for Growth and Poverty Reduction*, Washington, D.C., a co-publication of the World Bank and Oxford University Press, 59.

5 Nyamu-Musembi, C. (2006) 'Ruling Out Gender Equity? The Post-Cold War Rule of Law Agenda in Sub-Saharan Africa 27 *Third World Quarlerly 1193*.

emphasis of the programmes has been in creating a suitable legal and institutional environment for the market to function better. She states:

> The picture that emerges from this overview suggests that the prospects for achieving social justice and equity (including gender equity) through legal and institutional reforms are bleak, since the reforms have not been driven by a concern for social justice, let alone gender equity. The key regional financial institution, the African Development Bank, makes no reference to legal discrimination on the basis of gender, or to using law to challenge discriminatory exclusion of women.
>
> The World Bank's lending for the law and justice sector has not paid attention to gender equality. Such attention is to be found only in the Bank's research work . . .
>
> One crucial observation made by gender justice advocates is that official discussion of gender and land tenure is often disconnected from discussion of broader processes of economic restructuring, for instance those affecting the financial services industry. Yet women's ability to access credit is connected to their ability to demonstrate secure interests in valuable land that they can put up as collateral. Financial sector reforms have not been co-ordinated with reform of land and family laws, yet from a gender analysis perspective the connection is obvious.
>
> The overall climate in which the reforms are being promoted threatens to delegitimize the pursuit of any goals seen as incompatible with the core agenda of creating efficiently functioning legal institutions for the market . . . in the absence of explicit commitment to social justice and redistribution, there have been few gains for gender equality . . .

Words and actions then are completely disconnected. With so little real commitment to reform by the international community (as opposed to fine words in international policy and discussion documents) it is not to be wondered that there has been some considerable ambivalence to reform (as opposed to fine words in national policy documents) by national governments.

What is striking too is the almost total absence of any attempt to integrate the discussion of gender issues in pan-African collections of essays and papers on land issues. Gender remains a ghetto subject in international academic discussions on land in Africa much as it does in practice. A review of nine collections of essays on land issues in Africa published between 1996 and 2011 showed that of 86 essays in these collections, only two essays considered gender issues, and this despite the fact that several collections were part edited by women and covered every conceivable other issue on land.[6] During

6 Benjaminsen, T.A. and Lund, C. (eds) (2003) *Securing Land Rights in Africa*, London, Frank Cass; Juul, K. and Lund, C. (eds) (2002) *Negotiating Property in Africa*, Portsmouth, NH, Heinemann; Amanor, K.S. and Moyo, S. (eds) (2008) *Land & Sustainable Development in Africa*,

this same period there were three collections of essays devoted solely to women's land rights and part of a journal on Eastern African issues given over to Securing Women's Rights published.[7]

13.2 The national dimension

In considering the international dimension, it was noted that there is now unanimity within the international community on the importance of addressing the gender issue in land relations. It would however be a mistake to assume that this is a long-standing commitment. In the early years of international involvement with land issues, the international community adopted the colonial position of ignoring women's rights in land as did national governments. Not one of the three World Bank reports on the Economic Development of Tanganyika (1961), Kenya (1962) and Uganda (1962) has any reference to women or gender issues. Unofficial though it was, Christodoulou's *The Unpromised Land*[8] derived, in his own words, from a lifetime's experience working in agrarian reform with FAO and other UN agencies, has two references to women's role but neither touch on land rights. Even as late as 1998, Delville's survey of land tenure[9] focusing on Francophone West Africa and aiming to assist African policy-makers and aid agencies had no specific section or discussion on gender issues.

London, Zed Books; Colin, J.-P. and Woodhouse, P. (eds) (2010) 'Interpreting Land Markets in Africa', 80 *Africa* (special issue); Moyo, S. and Yeros, P. (eds) (2005) *Reclaiming the Land*, London, Zed Books (five essays on Africa in the book but there were no essays on gender issues from the Asian or Latin American section either); Huggins, C. and Clover, J. (eds) (2005) *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*, Pretoria Leach, M. and Mearns, R. (eds) (1996) *The Lie of the Land: Challenging Received Wisdom on the African Environment*, Oxford, James Currey; Toulmin, C. and Quan, J. (eds) (2000) *Evolving Land Rights, Policy and Tenure in Africa*: one essay on women's land rights; Holden, S.T., Otsika, K. and Place, F.M. (eds) (2009) *The Emergence of Land Markets in Africa: Impacts on Poverty, Equity and Efficiency*, Washington D.C., Resources for the Future: one essay on gender.

Urbanists are no better: Durand-Lasserve, A. and Royston, L. (eds) (2002) *Holding Their Own: Secure Tenure for the Urban Poor in Developing Countries*, London, Earthscan, contains 16 essays, five of which are on South Africa but none of the essays in the volume addresses the specific tenure problems of urban women; Payne, G. (ed.) (2002) *Land, Rights and Innovation: Improving Tenure Security for the Urban Poor*, London, ITDG Publishing: 15 essays, of which five are on African countries but none of the essays in the volume addresses gender issues.

7 Razavi, S. (ed.) (2003) *Agrarian Change, Gender and Land Rights*, Oxford, Blackwell Publishing (three out of eight essays on Africa); Wanyeki, L.M. (ed.) (2003) *Women and Land in Africa: Culture, Religion and Realizing Women's Rights*, London, Zed Books; Englert, B. and Daley, E. (eds) (2008) *Women's Land Rights & Privatization in Eastern Africa*, Woodbridge, James Currey; Daley, E. and Englert, B. (eds) (2010) 4(1) *Journal of Eastern African Studies*, 91–199 (special issue on women's land rights in Eastern Africa).

8 Christodoulou, D. (1990) *The Unpromised Land; Agrarian Reform and Conflict Worldwide*, London, Zed Books.

9 Delville, P.L. (1998) *Rural land tenure, renewable resources and development in Africa*, Ministère des Affaires Étrangères – Coopération et Francophone, Paris.

It is not therefore surprising that neither national governments nor national discussions considered gender issues when addressing land reform questions in the early years of independence. Obol-Ochola's edited volume *Land Law Reform in East Africa*[10] contains no papers on gender issues. Even as late as 1996, two major studies of national land issues completely neglected the gender factor: Van Zyl, Kirsten and Binswanger's *Agricultural Land Reform in South Africa: Policies, Markets and Mechanisms*,[11] a 621-page volume of 25 papers contained just one-third of a page on 'the inclusion of women'! Juma and Ojwang's *In Land We Trust: Environment, Private Property and Constitutional Change*,[12] a 462-page volume of 14 papers and hailed as a landmark in the development of new environmental policy and a book which 'policy-makers and scholars can only ignore at their peril' did not even manage that much.

It is fair to say that the gender issue on land matters at the national level only became of official concern in the mid to late 1990s. The UN Fourth World Conference on Women in Beijing in 1995 was a key factor here as were the many new constitutions in Africa in the early to mid-1990s which specifically outlawed gender discrimination. It is therefore worthy of note and commendation that in the era of land reform, governments have produced policies and laws on land reform which have included sections on women's land and property rights outlawing discrimination, requiring spousal consent to transactions on land, providing for co-ownership of land used for livelihood purposes, and specifically including a percentage or a specific number of women on land administration bodies. Furthermore, this has been backed up in some cases by new laws on succession and inheritance – in many respects the key to increasing the opportunities for women to own land in their own right – and on the property rights of women on divorce.

As will be discussed in the next part of this section of the chapter, there is still a large gap between the text of a law and practice on the ground (and even the text of a law has had to be fought for in some cases) but credit must be given to the fact that as the World Bank's report on land tenure in 2003 noted on this issue, the important first step of law reform has been taken in some countries. Action must follow up the passage of the laws but it is worth bearing in mind that governments are still coming to terms with attempting to overturn over a century of neglect and downright opposition to women's rights to land. They must do more but they start from a very unpropitious base and as noted above, they have not received much practical support from the international community.

10 (1969) Kampala, Milton Obote Foundation.

11 (1996) Cape Town, Oxford University Press.

12 Nairobi, Initiatives Publisher. The book focuses on legal and governance aspects of land management in Kenya. Okoth-Ogendo made the remark quoted in the text. Goran Hyden too was effusive in his praise for the book calling it an 'excellent piece of interdisciplinary research that brings to the national level issues that have been discussed largely in international forums . . .' (lx).

Before turning to discuss case studies on drafting laws to tackle the gender issue, a brief summary of the situation on gender issues on land in Mozambique may be given. What follows is my summary of a very detailed report on the situation in that country:[13]

> In 1995 a new Land Policy was approved by the Council of Ministers. Among the fundamental principles, stated in article 17 was a guarantee of the right to access to and use of the land by women.
>
> A consultative process was organised to discuss the draft land law, and in this period the issue of women's land rights gained increasing attention. The national Women's Forum – *Forum Mulher* supported the initiative to secure land rights for women independent of the customary systems of land tenure in their region. In these debates, the need to secure women's land rights (basically women's rights to access land) was also used as one of the key arguments against privatisation of land.
>
> In 1996 a National Conference on Land Issues was organised with participation from government, civil society and international organisations. The various initiatives to secure women's land rights were presented at this conference. A concrete suggestion which emerged was that the law should include an explicit reference to the non-discriminatory principle in the Constitution, stating clearly that customary rights could not be invoked to justify discriminatory practices. This resulted in a change in the legal text, with Article 12 stating that land rights are acquired inter alia through occupation by individuals and by the local communities, according to those customary rules and practices that do not contradict the Constitution.
>
> The 1997 Land Law clearly states that men *and* women shall have equal rights to land. Similarly, the principle of non-discrimination applies with regard to formal individual titles, where the Law (Article 13) says that 'Individuals, men and women, who are members of a local community, can apply for individualised titles, after division of the respective community areas of land'.
>
> The Mozambican PRSP, the *Programa de Acção para a Redução da Pobreza Absoluta* (PARPA) [Action Plan for the Reduction of Absolute Poverty] points out six fundamental areas of action. 'Agriculture and rural development' is one of these programme areas, with 'management of agricultural land' singled out as one component. The main objectives under this component are

13 Ikdahl, I., Hellum, A., Kaarhus, R., Benjaminsen, T.A. and Kameri-Mbote, P. (2005) *Human rights, formalisation and women's land rights in southern and eastern Africa*, Studies in Women's Law No. 57, Institute of Women's Law, University of Oslo. Revised version of Noragric Report No. 26, Norwegian University of Life Sciences, 47–58 (Mozambique case study).

Contribute to the sustainable use of land and ensure the timely access to citizens and investors (also increasing the capacity of the family sector to consolidate and increase their agricultural activities).

The principal measures to be undertaken are to:

- Organise the national land register
- Simplify the process of land adjudication
- Strengthen and equip, with both material and personnel, the institutions responsible for managing and granting land concessions
- Together with other institutions, inform peasants of their rights regarding land, including consultations with the communities.

To a considerable degree, these measures refer to implementation of the Land Law. In contrast to the Law itself, however, women's land rights are not explicitly mentioned in relation to land management in the PARPA. Nor are women's productive activities brought up under the general programme area of 'agriculture and rural development'. Here 'gender mainstreaming' seems to have resulted in minimal attention to women's land rights and women's roles in agricultural production, even if the existence of gender inequalities in the Mozambican society is recognised at a more general level.

While the Land Campaign was still active, a small group of institutions and individuals took the initiative to organise a number of seminars on land tenure issues in Maputo. This group looked into *gender relations* and 'how these impact upon and are affected by . . . access, use, control and benefit from land and related agricultural resources'. According to this group, more research-based knowledge on women's *actual strategies* to access, use and control land was needed in order to understand how rural women both respond to and overcome the constraints they face in their daily lives. One of these issues is the need to question the assumption in current land policies that the law, implemented by the State, can and will guarantee equal rights and improved living standards for rural women. It is clear that women have legal rights regarding access to and control of land, but the *de facto* situation is much more complex. The capacity of the judicial system to guarantee the rights stated through statutory law cannot be taken for granted.

An important issue in the debate on the Land Law has also been local variation, with regard to principles, adaptations and the context-dependent practices of customary rights. The Law does, to a certain degree, recognise customary norms and rights, and even where it does not, customary law will in practice continue to shape people's relations with land. The ways in which customary law interacts with statutory law will necessarily have implications for women's land rights.

On the basis of available information five distinct customary systems have been distinguished; regulating access, use and control of land in contemporary Mozambique. In the provinces north of the Zambezi river, a changing and fairly heterogeneous system originally based on *matrilineal* succession and inheritance still provides a framework for access to land, decisions regarding marriages, and rights to land through inheritance. At the local level, these matrilineal systems can provide very high degrees of flexibility and adaptability.

Allocation and control over land may to a great extent be the domain of men, even in matrilineal societies. Men's relative power and control over resources does, however, seem to become stronger where cash crops are important sources of income. Since colonial times, state authorities furthermore seem to have been unable – or unwilling – to grasp the role of female power structures in matrilineal groups. A critical point in the current changes and adaptive processes within traditionally matrilineal groups are in fact the forms of authority and power presented and recognised by the state in interactions between local communities and representatives of state institutions. These problems and challenges include the processes and institutions involved in implementing the 1997 Land Law.

In the southern provinces, a system based on *patrilineal* succession and inheritance dominates, and women's rights to land are secondary rights. Access to land and rights to land use will for women primarily be achieved through marriage and investments of labour in cultivating land where the married couple settles (traditionally on the husband's family or lineage land). Since women's land rights are seen as secondary rights (achieved rather than ascribed) within this system, women's ability to assert their rights is likely to be both contextually dependent and negotiable.

Community-based research over the last years has also indicated that local land systems are enormously more diverse than existing academic formulations allow. In part, this diversity has been exemplified in rural women contesting men's claim to power, asserting women's authority in land management and food production. Land rights, especially in rural societies, are closely related to livelihoods. Women's rights to livelihood have at the local level often been seen as 'indirect' (or secondary) rights to land; and as such they have usually required negotiation, and the consent of men. Land rights that individuals can claim as members of families, lineages or communities can in part be formalised as *property rights*. How to secure the traditional (and informal) rights to livelihood is a challenge that must be addressed when formalisation in the form of property rights to land is gaining momentum through the implementation of the new Land Law.

> With the enactment of the new Family Law, the legal framework for women's equal rights to land in Mozambique is basically in place. In practice, however, structural, cultural and material constraints are still likely to limit women's access and control of land and other resources. The current legislation is a type of hybrid, through its recognition of both customary and statutory rights. Still, there is a lack of knowledge on how the present multiple and hybrid laws and practices actually impact on women's rights to and access to land. The current focus on facilitating market mechanisms in the field of land rights does not adequately take into account concerns and questions related to ways women actually access land, for example, through inheritance.
>
> Crucial issues in the future will be how women's interests are represented in the local and national reconstruction of 'customary rules and practices', and the actual participation of women in the implementation of the Land Law; but also to what extent women will in practice be able to claim the formal rights defined in the legislation.

The conclusion that implementation of a land law which makes a real effort to address the issue of gender and provides for equality of access to land for both men and women is one which as we will now see from the case studies I have been involved in is a common theme within the region.

13.3 A case study of legislative reform on gender land issues

I have been involved in drafting and advising on drafting laws on aspects of land tenure, land use, land transactions and natural resource management in several countries within the Eastern Africa region – Rwanda, Somaliland, Tanzania and Uganda. This part of this chapter provides an opportunity to review the efforts made to draft provisions to improve women's access to land during this period, the obstacles that lay in the way and what, in retrospect, could have been done differently. I focus on three countries where I have been involved over the past 14 years – Rwanda, Tanzania and Uganda.[14]

13.4 Preliminary and underlying legal issues

At the outset, some basic legal points must be established. First, it is necessary to be clear about the scope of the subject. The issue of women's access to land covers a very wide range of situations. Access might come about via *an allocation of land by a public authority*, for example in a land reform programme.

14 I have also been involved in land policy and law reform in Somaliland but the issue of women's rights to land has not yet featured in policy discussions.

Other possibilities include *a land adjudication decision* taken in a tenure reform programme; or as the result of *the operation of law*, such as deemed joint ownership consequent upon a marriage; or *a judicial decision* setting aside a discriminatory land transaction or ordering the transfer of land or a house to settle a debt or as part of a divorce settlement; or *in the market* via a lease or a sale; or *a gift* inter vivos; or through *inheritance*. With inheritance, there might be inheritance via a will or through the operation of law consequent upon an intestacy or without any reference to a will, or with no will as happens automatically with inheritance under customary law.

Second, we must consider the issue of women losing land or being deprived of land. More likely than not this will be either from informal pressures to give up land or the use of force to deprive women of land which as a matter of law they are entitled to. The problems surrounding consent to a transaction will be discussed in relation to Rwanda, Tanzania and Uganda below, but here consent does not come into it. Laws already exist on both issues: undue influence on the first; trespass or assault on the second. The problem is application and enforcement.

The third preliminary legal point is the plurality of legal systems in all countries in the Eastern African region, which further complicates matters. Some means of access might be available under statutory, Islamic and customary law. Equally, some of these means of access might be forbidden by any one of these systems of law. Often in a country with plural systems of law, one system might allow access while another might forbid or limit it. Over and above all systems, there is the content and role of the Constitution. Does that trump all other laws? Not necessarily, if a Constitution does not outlaw gender discrimination.

13.5 Commencing legal drafting

Drafting laws to improve women's access to land and limiting or preventing women's 'de-access' to land is therefore by no means a straightforward technical operation. It is the practical translation of what might have been a bitterly fought policy dispute into rules which, once in force, are meant to be observed. How can this be achieved? What sanctions should apply in what circumstances? How much should be made optional and how much required?

13.6 Constitutions as the basis for legal drafting

I shall endeavour to approach the discussion of these preliminary and underlying legal issues as I would the drafting process. Logically, one starts off with the Constitution. Focusing on the three countries in the region where I have been involved in drafting laws on land tenure – Rwanda, Tanzania and Uganda – there are three very different sets of provisions on the rights of women. Rwanda's Constitution provides in article 9 that the State commits

itself to conform to certain fundamental principles, one of which is the equality of all Rwandans and between men and women 'reflected by ensuring that women are granted at least 30 per cent of posts in decision making organs'.[15] In article 11 the Constitution says that 'Discrimination of whatever kind based on, inter alia . . . sex . . . or any other form of discrimination is prohibited and punishable by law'. Article 29 provides that 'every person has a right to private property . . .' Article 185 establishes a Gender Monitoring Office whose functions include 'monitoring compliance with gender indicators of the programme for ensuring gender equality . . .' There can be little doubt of the constitutional commitment to gender equality in Rwanda which made drafting laws on land tenure with specific references to women's rights that much easier.

In Tanzania, the Constitution is somewhat ambiguous on gender equality and women's rights. Section 12 states that 'all human beings are . . . all equal'. Section 13 states that all persons are entitled without discrimination to protection and equality before the law. However, the section's definition of 'discriminate' makes no mention of gender as a ground of forbidden discrimination. Moreover, neither that nor any other section of the Constitution excludes from the scope of forbidden discrimination any rules of customary law.

Section 24 of the Tanzanian Constitution provides that 'subject to the provisions of the relevant laws of the land every person is entitled to own property . . .' The 'subject to' provision is often used in constitutional law but is a vague expression. Relevant laws of the land cannot contradict the Constitution, so while in Tanzania a law permitting compulsory acquisition of land would be constitutional as long as it applied to all landowners, thus meeting section 12, a law which discriminated against women owning land would not comply with section 12 so would be unconstitutional. The failure to include gender discrimination in section 13 does not, in other words, legitimise gender discrimination.

Uganda goes further than either Rwanda or Tanzania in its provisions on the rights of women. Section 33 of the Constitution provides that women 'shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities . . . Women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom . . . Laws [and] customs . . . which are against the . . . welfare or interests of women . . . are prohibited by this Constitution.' Unlike both the other Constitutions noted here, Uganda's has a specific chapter on land and environment but there is no provision in that chapter on women's rights to land.

15 Since there is no equivalent provision for men, there seems nothing to stop 'decision making organs' consisting 100% of women.

It must be emphasised nonetheless that a Constitution is just the starting point for legal drafting. Constitutions rarely mandate that a specific law must be enacted, though Uganda's Constitution did with respect to the Land Act 1998 which was required to be enacted within two years of the first sitting of Parliament under the 1995 Constitution; that is by 30 June 1998. For a draftsperson, it is therefore a kind of fall-back position: 'I can't do that because the constitution doesn't allow it' rather than 'I must do that because the constitution says I must'. Thus, in practice, constitutions do not always get you very far, though Uganda's was of considerable moment as will be explained further below. Much more important in terms of official documents are any specific policy documents relating to land. Here there were some very interesting contrasts in the three countries I am concentrating on.

13.7 Rwanda – clarifying the issues

Rwanda had a detailed and comprehensive land policy which dealt both with the inadequate land laws and the unfavourable land tenure system to women in 'Chapter 3: Land Issues'. On the first issue, the conclusion of the policy was that '. . . The laws relating to land are scattered and obsolete. They must be updated and compiled into one law which is applicable to all land users in Rwanda.'[16]

On women's land rights, the policy summarised the norms and practices of customary law with particular reference to inheritance as: 'land ownership is the prerogative of men and land rights are inherited from father to son. The girls were therefore excluded from inheritance of family land'.[17] Reference was made to the inheritance law enacted in 1999 which stated that 'all legitimate children under civil law shall inherit equally without any discrimination between male children and female children'[18] and that 'the land law should take into account this clause with regard to land inheritance'.[19]

Moving to general principles, principle 02 of the land policy stated that: 'According to the constitutional principle of equality of all citizens, all Rwandans enjoy the same rights of access to land without any discrimination whatsoever.' The explanation of this principle referred explicitly and exclusively to women not being excluded from the process of land access, land acquisition and land control and inheritance of family land. On law, the policy stated that: 'One unified law will define accurately the rights and obligations of title deed holders.'[20] The policy had earlier on made quite explicit that customary tenure was obsolete, does not offer any economic

16 Rwanda Ministry of Lands, Environment, Forests, Water and Mines, op. cit., 16.
17 Rwanda Ministry of Lands, Environment, Forests, Water and Mines, op. cit., 16.
18 Article. 50, Matrimonial Regimes, Liberalities and Succession Law 1999.
19 NLP, para. 3.5.
20 NLP, para. 5.10.2.

advantage to the tenants or the state and was to be replaced by written law and registered title of a long lease of up to 99 years.

In pursuance of the NLP, an OLL was enacted in 2005 which set out the general principles which were to apply to all land in Rwanda and made plain that the law was to herald a major programme of land tenure reform, not least being that customary tenure would be replaced by statute law.[21] The OLL stated in article 4 that 'any discrimination either based on sex or origin in matters relating to ownership or possession of rights over the land is prohibited. The wife and the husband have equal rights over the land.'[22]

It was assumed that the OLL would be fleshed out by a series of secondary laws which would specify how the general principles would be implemented in practice. My role in a DFID Project to Support Phase 1 of the Land Reform Process for Rwanda, which involved assisting the Government in its implementation of the OLL and the furtherance of the programme of land tenure reform, was to suggest the series of laws needed to operationalise the OLL and draft some of the most essential ones. However, this was not at all easy. Many of the provisions of the OLL were by no means clear, especially those on the specific nature of the rights being created by the OLL. With respect to women's rights, although the OLL is explicit on the banning of discrimination, other provisions of the OLL and other laws, in particular the laws dealing with marriage, made the practical application of the OLL with respect to women's rights very problematic. The key issues are discussed here.

21 Although the OLL does not expressly state that customary tenure is being replaced by statute, the clear implications of art. 5 are that this is to be the case: 'Any person or association with legal personality that owns land either through custom, or who acquired it from competent authorities or who purchased it are allowed to own it on long term lease in conformity with provisions of this organic law.' This seems to be saying that ownership of land under customary tenure is to be replaced by a lease of land under the OLL. See too art. 201 of the Constitution which states 'unwritten customary law remains applicable *as long as it has not been replaced by written laws . . .*' (italics added). Replacement does not have to be express. In practice, as with any other country in Africa that has tried to legislate the replacement of customary tenure with statutory tenure, this provision will be largely ignored on the ground but will lead over the course of time to confusion, hardship and injustice as customary 'owners' are displaced by those more knowledgeable about and adept at using statutory systems to acquire land.

22 References to the OLL in this article are to the English version of it. The Kinyarwanda version of the law uses the terms 'man' and 'woman' which are significantly different. Under art. 5 of the Constitution, the national language is Kinyarwanda but the official languages are Kinyarwanda, French and English. There is no indication either in the Constitution or the OLL which official language takes precedence if there is a conflict of meaning between them. This would seem to imply that all official languages have the same status. On a matter such as this, this will cause difficulties in the future. For an example of how such matters could be resolved see art. 240 of the Constitution of the Republic of South Africa: 'In the event of an inconsistency between different texts of the Constitution, the English text prevails.' South Africa has 11 official languages.

The OLL contains some important articles on consent to transactions by family members but confines consents: (a) to joint owners; and (b) with respect to spouses, those spouses who are legally married. Thus article 35 provides 'Final transfer of rights on land like sale, donation or exchange by a representative of the family requires the prior consent of all other members of the family who are joint owners of such rights'. There are several concerns here. First, if a family member is a joint owner/lessee of land, then that family member would be a party to any transaction *by virtue of their joint ownership*. Their signatures would have to be on any document of transfer. If consent was to have any usefulness, it needed to apply to family members particularly spouses *who are not joint owners of land*. If article 35 of the OLL is taken to be definitive, that is, that it and it alone deals with the question of consent, then to make the consent provision useful would have required an amendment to the OLL to provide that spouses who were not joint owners were required to sign any document of transfer of rights in land. If, on the other hand, article 35 could be read as illustrative or non-exclusive, that is, as only dealing with joint owners leaving 'space' for other situations, then a Presidential decree could require that a spouse who is not a joint owner must be told of the proposed transaction and its implications and must give an informed consent to the transaction. There was no guidance as to which reading was correct. This is of considerable relevance with respect to spouses married in a regime of separation of property under the Succession Law where if a restrictive interpretation of article 35 is adopted, those spouses without land, usually women, might lose out in the event of the spouse with property rights undertaking some transaction with land without seeking the consent of the landless spouse. In any event, even with spouses, it was necessary to provide for an informed consent to be given to a transaction.

The second concern was the reference to a spouse who is legally married. If, as one had to assume was the case, this concept was the same as in the Matrimonial Regimes, Liberalities and Succession Law of 1999, then, as has been pointed out by Rose, a huge number of 'illegal' marriages and therefore 'illegal' spouses are left out of the protection of the law.[23] This assumption must be taken to be correct since the Law of 1999 was following the Constitution which states in article 26 that only monogamous marriage between a man and a woman is recognized. Ansoms and Holvoet draw attention to the vulnerability of 'illegal wives' with respect to the inheritance of land and the failure of the OLL to provide any answers to situations where non-legal marriages are involved. As noted above, the OLL in article 4

23 Rose, op. cit., 243; Ansoms, A. and Holvoet, N. (2008) 'Women and Land Arrangements in Rwanda' – a Gender-based Analysis of Access to Natural Resources in a Context of Extreme Resource Scarcity and Societal Disruption in Englert and Daley, op. cit. 138–157 at 142–144.

specifically bans any discrimination based on sex relating to ownership and possession of rights over land and then goes on to state in the English language version of the law 'The wife and the husband have equal rights over the land.' This version of the law raises a host of problems many of which are important policy issues about marriage and the family as well as about land rights which are not appropriate to discuss in this chapter other than to note that such ambiguities, gaps and confusions in the OLL made the task of drafting legislation to flesh out the principles of the law and provide for their implementation in practice much more difficult. The minimum was for me to assume that the OLL was stating that husband and wife are to be joint leaseholders of any land under the new legal regime introduced by the Law but that left many issues unresolved not least whether this initial assumption would be borne out by later developments.

Finally, the OLL was very deficient in key provisions on women's rights to acquire land. Three gaps were that, first, stated percentages of women as members of land commissions and other bodies dealing with land management and dispute settlement, provided for in general terms in the Constitution should have been given more detail in the law so as to ensure its effective implementation. Second, both as a matter of general administrative procedures to limit open-ended discretions and to direct decision making along the appropriate lines, there should have been specific criteria within the law requiring decision-makers to have special regard to the rights, needs and capabilities of women especially widows and single mothers to obtain and retain land for their and their families' livelihoods. Third, as a support to and in addition to the provisions on consent, there was a need to ensure that transactions in land by a male spouse or male members of a family where consent was not involved were not designed to, or likely to have the effect of, depriving a female spouse or female member of a family of land which, but for the proposed transaction, she would have been entitled to – that is, that transactions are not entered into for no other reason than to try and get round the law preventing discrimination against women's rights to land.

The overriding problem with approaching the legal drafting in Rwanda was the extent to which the OLL was in a sense a constitutional law for land, so that secondary laws and Presidential and Ministerial decrees could not extend the scope of the Law. This was not a matter that was ever resolved while I was working in Rwanda. But the underlying point is that broad general statements in constitutions, national policy documents and organic laws are only the first step in providing a statutory legal framework for improving women's access to land in African states. Two key matters are: first, without more detailed laws setting out how the principles are to be applied the general principles will remain dormant; and, second, lack of recognition that replacing customary law with statutory law will not prevent customary law from still operating on the ground, and that statute has to recognise that

and make provision for it, will lead inexorably (as it has in Kenya) to a divorce between the law in the books and the law on the ground.[24]

13.8 Tanzania[25] – a highly politicized context

Turning now to Tanzania, it too had an NLP on which its major land laws were based.[26] The NLP had clear statements on women's access to land with, however, two considerable stings in their tail:

> 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.[27]
>
> Ownership of land between husband and wife shall not be subject to legislation.[28]

To exclude from any law reform inheritance and land rights between husband and wife is to exclude the two major areas of land rights, the reform of which would be most likely to benefit women. These paragraphs in the NLP were thus criticised in the National Assembly for not going far enough. The statement on inheritance was criticised by the Tanzanian Women Lawyers' Association. The problem with the second paragraph cited was that it was clearly written from ignorance: there had 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.

When I came to begin the legal drafting process in Tanzania, I commenced by preparing an issues and options paper setting out what I considered might be the content of a new law to implement the NLP. I indicated that while the NLP was necessarily the primary source of policy on this, the Presidential

24 Migot-Adholla et al., op. cit.; Kibwana, 'Efficacy of State Intervention'.

25 I discussed my approach to drafting the land laws of Tanzania in McAuslan, (2003) *Bringing the Law Back In*, op. cit., 245–274. The chapter was based on an article of the same name which appeared in (1998) *Development and Change*, 525–552. This section concentrates principally on the issue of women's rights and takes account of publications consequent to 2003.

26 Tsikata, op. cit., 149–183, is an excellent, thorough, even-handed and informative piece on the reform process. My main criticism of it is that it does not relate the criticisms of the contents of the statutes to the policies contained in the NLP: the statutes endeavoured to give effect to the policies of the NLP.

27 United Republic of Tanzania (1995) *National Land Policy*, Dar es Salaam, para. 4.2.6.

28 Ibid., para. 4.2.6.

Commission on Land Matters was also a major source which would be used. I was swiftly called to account on this by the Permanent Secretary in the Ministry. The NLP was *the* policy document I should use; it had taken what the Government considered was most useful from the Presidential Commission: the Commission's report could therefore only be used when there was an obvious lacuna in the NLP.[29]

On women's rights, the NLP went further than the Commission, the latter being somewhat less than reformative. The Commission basically shied away from addressing gender issues on the grounds that they were not part of the Commission's terms of reference (itself a notable omission) and in any event involved succession questions more than land law questions. To the extent that the Commission did address the issues, it argued against using statutory reforms to bring about changes in the law and for an evolutionary approach, with customary law being nudged in the right direction. The chair of the Commission Issa Shivji,[30] argued that it was better to integrate the gender question within the larger issue of land tenure reform and that women would benefit from moving general traditions in a democratic direction from below rather than imposing change from above.

Both the Commission's and Shivji's approach were criticised by women's groups, with Anna Tibaijuka,[31] for instance, arguing that the Commission was opting for the status quo on gender relations while calling for extremely radical proposals on other aspects of land tenure reform (which were, incidentally, to be 'imposed from above' by statutory reform). A study commissioned by the Ministry of Community Development, Women's Affairs and Children specifically to collect the views of communities on gender issues found that women were enthusiastic about the possibility of land titling, and about obtaining full land rights; they preferred using statutory courts which could hand down binding decisions as opposed to using traditional dispute settlement bodies and they argued for equal representation on decision-making and adjudication bodies. Shivji's defence of the Commission was that the one woman on the Commission (out of nine members) was not the most active member of the Commission in supporting women's rights and that the women arguing for women's rights were 'urban based middle class women' who did not understand village level production systems where women did

29 There was a history of bad blood between the Commission and the Ministry. The Ministry's view was that it was the constitutionally mandated advisor to the President and Cabinet on land and the Report of the Presidential Commission would have to go through it to the President. The Commission thought otherwise: as it had been appointed by the President, it had to report direct to the President.

30 Shivji, I. G. (1998), *Not yet democracy: reforming land tenure in Tanzania*, Dar es Salaam, IIED/Hakiardhi 83–92.

31 She became the Executive Director, UN-Habitat, 2000–2010.

not control the fruits of their labour and that the real problem was not lack of ownership of land but lack of land.[32]

The NLP, as we have seen, made only some general statements about women's rights to land but there was no flesh on the bones, unlike the position in Rwanda where there was much more detail on women's rights. I was therefore relatively free to develop a set of legislative proposals to give some substance to the principles enunciated by the NLP. I addressed both procedural and substantive issues. I 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 *Mabaraza* – 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 Bill agreed to these proposals without much enthusiasm. The second workshop approved them sub silento. Thereafter, women's groups waged a vigorous and quite successful campaign to build on these provisions and were on balance quite satisfied with the provisions that were ultimately enacted in the Land Act 1999 and the Village Land Act 1999.[33]

Looking back on my efforts in Tanzania from a decade and a half on, I would say that the principal conclusion to be drawn is the wide discretion which a draftsperson has in drafting a law where the policy documents on which the law is to be based are very broad and general. The Ministry made little or no effort to rewrite those parts of the draft laws dealing with women's land rights. Whether a draftsperson should have such a wide discretion is very much open to debate: it is not unreasonable to suppose that had a team headed

32 Shivji, (1998) op.cit., 86. The Presidential Commission was composed entirely of urban-based academics, party officials, MPs and civil servants. It seems fair to point out the clear implications of Shivji's comments: viz, that he and his male urban-based colleagues on the Commission had an insight into rural women's land rights which urban-based women did not, a rather unlikely state of affairs. Perhaps the best comment to make about the Commission's position on women's land rights was that collectively they knew little about them, did not commission or take account of any existing research on the subject and that had they done so, they would have discovered a wide variety of positions and views of women on land reflecting different economic and social circumstances in different parts of the country. See in particular, Ikdahl, I. (2008) '"Go Home and Clear the Conflict": Human rights perspectives on gender and land in Tanzania', in Englert and Daley, op. cit., 40–60.

33 Tsikata, op. cit., 173–177. I was personally thanked in somewhat effusive terms for my efforts by the leader of one of the major women's rights groups in Tanzania when I met her by chance at a conference on housing rights in Geneva in 1999. I was also told by the then Commissioner of Lands – a woman – that women's groups told her that they had been seriously misled by an NGO about the content of the draft land laws and women's rights; when the correct situation was pointed out to them, they saw how far the Bills had gone towards their concerns.

by Shivji been in charge of drafting the new land laws, women's rights would not have featured to the extent they did. One could also make the same point about the Commissioner of Lands who went out of her way to explain to women how far the laws were going in advancing their rights. At the end of the day, however, the laws provided no more than a base from which women could work for further advances: it was not and could never be a substitute for action on political, social and economic fronts to improve women's rights to land.

13.9 Uganda – technical and legal challenges

We come now to Uganda; in some respects, the most interesting of the three case studies.[34] I was involved in drafting the Land Act 1998 in May 1998 and returned to Uganda in March 1999 to take up the DFID-funded position of Senior Technical Adviser to the Land Act Implementation Unit (LAIU) of the Ministry of Water, Lands and Environment. I had not had any part in the saga of the 'lost amendment' of the Land Act – the non-enactment of a crucial amendment to the Land Bill which would have greatly increased women's rights to land and which was moved during its passage through the National Assembly but did not appear in the published version of the Land Act.

There is no agreement on the remembrance of what happened to this amendment. Most women MPs claim the amendment was passed but in the final hectic hours of debate[35] the amendment somehow slipped through the net and when the Bill received presidential assent on 2 July – deadline day – and was thereupon published, the amendment was not in the Act. The Speaker (who became Speaker during the course of the Bill's progress through Parliament, having previously been the Minister for Lands who started the Bill through Parliament) was sympathetic to the women's concern and made plain that if it could be shown that the amendment had indeed been passed he would certify to the First Parliamentary Counsel that a mistake had been made and a corrigendum would be published incorporating the amendment into the Act. The Chairman of the Committee who played a key role in getting the Act through Parliament also made plain his support for the amendment and his willingness to ensure that, if necessary, time would be found formally to pass what had already been agreed to. The problem was that there seemed to be no firm evidence that the amendment had been formally moved let alone passed. At the crucial period of the debate, the proposer of the amendment was not in the chamber, having left for another

34 McAuslan,(2003), *Bringing the Law Back In*, op. cit., chapters 12 and 13 for a full discussion of my work on the Land Act 1998 in Uganda. This chapter just discusses the issue of women's rights to land.

35 MPs were kept in the chamber at nights and during the last weekend of June 1998 to ensure the passage of the Bill by the end of June, a time mandated by the Constitution.

engagement, and it was not clear whether the actual amendment had therefore ever been formally moved.

Another version of events is that the amendment was not formally moved because the Cabinet had not formally indicated its acceptance of it, which was necessary before any such amendment could be moved at that juncture. A third version is that the women's caucus was indeed stitched up by the male MPs who did not like the amendment and made sure by various underhand means that it did not appear in the published version of the Act. The proposer of the amendment, at a meeting I attended in January 2000, admitted that she was responsible for the failure of the amendment to get through Parliament as, owing to her ignorance of Parliamentary procedures, she was not in the chamber to formally move the amendment in the final stages of the enactment of the law through the National Assembly.

I became involved in trying to draft a subsequent amendment to the Act dealing with women's rights to land during my work in the LAIU. I had meetings with the relevant Minister – the proposer of the original amendment who had later been appointed a Minister – and with members of various organisations pressing for the reinstatement of the original amendment. A key issue was whether the amendment should provide that spouses should be joint tenants or tenants in common of the family home. My commentary on the proposed amendment that was finally agreed succinctly sets out the difference between these two types of tenancy under leasehold ownership and its importance:

> Clause 17 is a new section 40A which provides for the rights of spouses in respect of the family home and land used for sustenance or as the principal source of income. The thrust of the 'Matembe' amendment [the name of the proposer of the lost amendment] is adhered to but it is fleshed out to deal with some of the implications. The spouses are presumed to be owners in common rather than joint owners. The principal difference is that owners in common can deal with their separate parts without affecting the other partner's share whereas in joint ownership there is a risk that one partner can deal with the whole property in the absence of the other partner and thereby affect the whole property.

A joint tenancy would facilitate a male partner going behind the back of his female partner to deal with all the family home and land while a tenancy in common would only give each partner a half share in the family home and land and so put a potential buyer or lender of monies on notice to check whether both partners had consented to a transaction.

At the time of the passage of the Land Bill through the National Assembly, the Ugandan President had been very supportive of the amendment to enhance women's rights to land. However, a year later he had changed his position 180 degrees. In mid-1999, he announced that Uganda's social and

economic stability would be threatened if any such amendment were introduced. It was to be relegated to be dealt with in a domestic relations law. Ultimately an amendment to improve spouses' rights to land was introduced and enacted in the Land (Amendment) Act 2004 as section 39 of the Land Act. It provided inter alia in subsection (4) for spousal consent and that where a consent as required by the section has not been obtained for a transaction, then even an innocent purchaser for value would lose out: the transaction was void and the only remedy for the purchaser was to claim any money back from the person who obtained that money without providing the necessary consents. This rule violated one of the fundamental rules of the common law that the purchaser of goods or land in good faith and for value in the open market gets a good title even if the seller had no lawful authority to sell. The remedy of the injured party is against the dishonest seller, not the innocent buyer. The provision was unsurprisingly not popular with commercial organisations.

In 2006 I became involved in a project to draft a new mortgage law for Uganda. When dealing with spousal consent to mortgages of the family home and land, I based my draft on the revised Tanzanian mortgage provisions that had repeated the provisions I had drafted in 1999: they had, after all, been adopted by a City of London firm rewriting the mortgage law to be more friendly to banks, as described above in Chapter 8. Banks in Uganda, however, took the opportunity to argue very strongly against any such provisions and particularly against the new section 39(4) of the amended Land Act. They said that without changes to the provisions, they would find it difficult to provide loans for homeownership. Women's groups defended the provision on the ground that a stand had to be taken against transactions which disadvantaged women, even at the expense of the smooth operation of the land market. I proposed some changes to the section to attempt to maintain its thrust without all the disadvantages but the law was not proceeded with, despite all sides agreeing that a law replacing a Mortgage Act dating from President Amin's time was long overdue.

It was not only the land market that was likely to be disturbed by the amendments to the Land Act of 2004. While in Uganda, I visited an official in the Ministry of Lands to try to find out how the new provisions on consent were working. She told me of a distressing story of one woman who had not consented to a proposed transaction; a week later she came to the office again to withdraw her objection to the transaction. It was clear that she had been the victim of domestic violence and was not going to make any complaint about the assault.[36] And that is just the issue of consent. There are other areas

36 It is worth pointing out that one of the most fraught areas of land law in the UK which has given rise to countless cases going all the way to the House of Lords (formerly the supreme court in the UK) is the question of consent and undue influence with respect to loans taken out by one spouse either behind the back of the other spouse or with the other spouse

where legal provisions that were strongly argued for were being reconsidered by women's groups. Take joint tenancy – advocated by women's groups in contrast to my recommendation for tenancy in common described above. I was informed shortly after I left Uganda in 2000 that some urban middle class women were having second thoughts about joint tenancy: they were acquiring property for shops, second houses to rent, etc. They were beginning to wonder whether it was such a good idea that the fruits of all their hard work and effort should have to be shared with their spouses who were not perhaps quite so hard-working.

Tripp[37] shows too that women in Uganda are adopting individual as well as collective strategies to assert their claims to land. They are buying land in their own name and are willing to challenge customary practices that deny them rights to land in both formal courts (which they prefer to less formal elected local council courts) and in local level land management associations. Tripp sums up the position thus:

> Women's purchase of land, obtaining titles to land, taking claims to courts and organized collective protest around legislation . . . demonstrate that the movement to resist customary practices is not only one of urban elite women . . . Feminist lawyers and women's rights activists espouse a rights-based approach around land which also resonates deeply with the most basic concerns of rural women . . . The women's movement is articulating a vision of land tenure and gender relations that challenge the fantasy that customary arrangements can adequately protect the welfare of women in the way that they are once said to have done.

This is in many ways very similar to the position which women's groups are taking in Tanzania.

13.10 Learning the lessons of experience

Looking back on my experiences over a decade and a half in the three countries discussed here, what lessons can be learned; what mistakes did I make as a legal draftsperson and what could have been done differently?

allegedly pressured into consenting. Banks naturally resisted any attempt to impose obligations on them to ensure genuine spousal consent and the 'solution' the courts in the UK have come up with is to impose such an obligation on solicitors to the parties and then for the most part avert their eyes from whether solicitors are providing genuinely independent and informed advice. In both the draft regulations to Tanzania's revised mortgage law and in the Mortgage Bill in Uganda I wrote in some provisions to try and ensure the consent had to be an informed consent and both spouses should take independent advice on the proposed loan.

37 Tripp, A.M. (2004) 'Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda', 7 *African Studies Quarterly*, 1–19.

13.10.1 Working with women and women's organisations

With hindsight, I see that in carrying out my work I did not do enough to ensure that women and women's groups were closely involved in the process of drafting. My support group in Tanzania was all male; they were all good lawyers but it was not a gender balanced group. I worked closely with women's groups and specific women lawyers in Uganda on the Land Act and when I was the chief technical adviser to the LAIU in the Ministry; my work was the better for that. However, I did not have any such close contact when drafting the Mortgage Bill and women at the workshop on the draft were critical of the Bill's lack of understanding of the case for the revised section 39 of the Land Act. In Rwanda, one of my counterparts was a woman lawyer but she lacked experience in land law and the English language, while I lacked ability in her main languages, which disadvantaged both of us. This problem of language is made all the more acute since Rwanda is moving towards the common law system and legal drafting in English, and away from the Belgian francophone civil law system. This is both a decision of the Rwandan Government and also a condition of joining the East African Community. The language of drafting and the style of drafting are very different in the common law and civil law systems and this will add to the difficulties of translating the general principles of the OLL into specific legal provisions.[38]

13.10.2 Tackling succession and land together

The biggest problem in the whole debate about statutory reform and women's rights to land is over succession. As a matter of what might be called textbook law, land law and wills and succession are two different subjects and are usually kept apart in drafting laws. I adhered to that practice and, whatever the drafting conventions which could support such a decision, it was in retrospect a mistake not to push far harder for a new succession law alongside a new land law.

In the real world of women's rights to land, what happens on the death of a spouse may well undo all the good of a land law designed to further women's rights to land via market processes.[39] It is no accident that Tanzania has never acted on a report from its Law Reform Commission on Succession Law published *before* the whole land law reform process got under way in the

38 Van Erp, S. (2002) 'A Comparative Analysis of Mortgage Law', in Jordan, M.E.S. and Gambaro, A. (eds) *Land Law in Comparative Perspective*, The Hague, Kluwer Law International, 69–86 esp. 78–84.

39 Coldham, S. (1978) 'The Effect of Registration of Title upon Customary Land Rights in Kenya', 22 *Journal of African Law*, 91–111; Guyer, J. (1987) *Women and the State in Africa: Marriage Law, Inheritance and Resettlement*, Working Papers in African Studies No. 129, Boston, MA, African Studies Centre, Boston University.

mid-1990s. Uganda has also had problems with a succession law. Rwanda was correct in dealing with the succession issue early on in the life of the new post-Genocide government and, while there are difficulties in the implementation of the succession law in Rwanda, at least it is now the law, whereas no such law exists in Tanzania or Uganda.

One further related matter of which both Uganda and Tanzania have been very conscious but which is of less concern in Rwanda, is the position of their Muslim communities. Shari'ah has clear rules on succession of women to land which discriminate against women and the dilemma of how to handle a religion-based law which mandates discrimination against women has not yet been resolved in either country.

13.10.3 Procedural and practical realities

I also think I was too optimistic on some of the procedural rules that I wrote into the law. There were several problems with this. First, writing in percentages of women who would be required to be part of committees, commissions, etc. did not take account of whether there would be women willing and available to sit on such bodies. How can women be persuaded to put themselves forward for office? Drafting a law cannot do that. There was too ready an assumption that women were eager and available to come forward and that their spouses would not object to their doing so. That might be so in urban areas, but perhaps less so in rural areas. It is clearly impractical to legislate to compel husbands to allow wives to sit on committees.

Second, there was another problem associated with getting women to commit to some involvement with public duties. It is easy enough to provide, for example, for not less than 35% of any land board, committee, local court, etc. to be composed of women and not less than 35% to be composed of men. But does every meeting of a land board have to have that percentage in attendance or it becomes inquorate? Can you legislate to prevent meetings being held at times which it is known will be inconvenient for women, as has happened in Uganda, to sidestep provisions requiring women to be on local committees dealing with land? These are areas where the law is not self-enforcing and I did not provide any mechanisms to ensure that some higher body would have the duty to ensure implementation of the law. Rwanda, with its constitutional provision for a Gender Monitoring Office with the functions of monitoring compliance with gender indicators of the programme for ensuring gender equality, scores over both Tanzania and Uganda in this regard. Such an office is likely to be better at ensuring compliance with laws designed to further women's rights to land than setting up appeal mechanisms to courts, or even special land courts or tribunals which both Tanzania and Uganda have, as it can adopt a proactive role, whereas appeals are reactive, slow, expensive to the appellants and by no means certain of success.

13.10.4 Conclusion – moving towards best practice

Tsikata, in some judicious criticism of the Tanzanian Presidential Commission on Land Matters' attitude to statutory reform as being contrary to democratic principle and rights, has some wise words on the subject which I am happy to adopt here:

> The right to one's cultural practices is being pitched against the right not to have one's livelihood threatened by discriminatory practices in the name of culture and tradition. The right to participate in decision-making on all issues that affect one's life, i.e. the bottom-up approach is pitched here against the right to have democracy in substance as well as in form . . . To ask women to wait until customary practices have themselves evolved through contest within their societies is to deny them a level playing field, and that is discriminatory . . . It would seem, then, that the question that is posed for any statutory intervention, whether it is to divest the State of radical title or reform discriminatory customary law rules, is how to bring statutory law closer to ordinary people and how to encourage its implementation in a democratic and equitable manner.[40]

I would strongly agree with Tsikata's criticism of Shivji's rejection of the use of legislation to at least start the process of bringing about change with respect to women's rights to land. It is, however, a fallacy to assume that legal drafting can provide a magic wand to ensure women's rights to land. New laws are certainly an important part of a process of policy implementation and public education. But without changed social attitudes, new laws will be difficult to implement, however well drafted they may be. Laws have to be followed up with vigorous programmes of public education and awareness: this cannot be left to NGOs and civil society. Governments have to commit as well.

Within Eastern Africa, the three countries discussed in this part of this chapter have a better record than most other countries in the region with respect to legislating to advance women's rights to land. There is also a better official acceptance of the case for women's rights to land. But practice both at the official level at the centre and in the field lags behind law and official rhetoric and, apart from Rwanda, there is no specific gender-advancement programme to implement the laws. The vast majority of the citizens of all the countries in the region occupy, use and transact land under customary tenure regardless of whatever official statutory law might say, and statutory law therefore has a very limited application in practice to customary law. For this reason, however much statutory law is enacted and however aggressively it is enforced, the conclusion must be that full equality in practice with respect to

40 Tsikata, op. cit., 179–180.

rights to land between men and women in Eastern Africa will still take many years to achieve. That said, a start has been made via more progressive legislation in the four countries discussed here and that would not have occurred if their governments had not permitted it. This suggests that there are positive signs of change that can and hopefully in times to come will be built on by society at large, and which can also be learned from by other countries in the region now undergoing similar processes of land reform.

These three cases and the Mozambique study highlight a central dilemma that the gender issue in land relations raises. There is a now a very clear move at the national and social levels, supported to some extent at the international level for a return to the customary; to recognise that customary tenure has considerable strengths; that it has been misguided and counter-productive to advancing equitable and productive land relations to try to abolish customary tenure and replace it with statutory tenure based on European land laws and attitudes to land. The way forward is to build on customary tenure, not replace it.

But African feminist lawyers and women's groups are generally out of step with this approach. Their starting point is that:

> the 'customary' considered as social institutions, as social relations and as discourses are sites where, on the whole, men have more power than women . . . It is precisely the inequalities in power relations in rural societies played out in a modern context that are the mechanism by which women lose claims to land as individualised proprietorship evolves . . . This implies that rural customary tenure cannot be left to muddle along without widening the gap between men's and women's land access. It is necessary self-consciously to manage change to produce greater gender justice with respect to resource allocation for rural women.[41]

In other words, the state needs to step in and via legislation bring about the changes that the customary alone will not. But as we have seen 'the tenets of the formal discourses of law and legality such as formal equality and individual rights do not sit easily within customary practices that are embedded in social relations'. To introduce these principles and the formal mechanisms to apply them will be to go down the very road that both governments and donors are now forsaking. Tripp, however, argues that the fact that women are prepared to go against mainstream development practitioners and agencies regarding customary practices and challenge those practices shows how seriously they regard them as impediments to their advancement.

41 Whitehead and Tsikata, 98.

Against this old-new approach, Whitehead and Tsikata point out:

> Women in Africa have many reasons to be disillusioned with the state. Many have a history of resisting women's demands and there is a poor record on women's participation in government and in politics at national and local levels. The main holders of national power do not need to use the language of custom to undermine gender justice and women's claims . . .

It seems then that whichever way women's rightists go, they will be met by resistance. Whether they work through the customary or the statutory, they will be met by claims that they are undermining the social basis of the law and society and should in effect accept their lot. Alternatively they are enjoined to work towards the general democratisation of society on the basis that this will, in some not very clearly specified way, lead to their greater emancipation with respect to land rights. They may be forgiven for being sceptical about such advice as it costs the advisers nothing and postpones any real change in land relations indefinitely. It is the conclusion of Whitehead and Tsikata:

> . . . the dangers we have identified in the turn to the customary suggest that we cannot turn our backs on the state as a source of equity for women in relation to land issues . . . Rural African women will not find it easier to make claims within a climate of anti-state discourse. It is true that . . . women find it difficult to get justice in male-dominated states, but the answer is democratic reform and state accountability . . . not a flight into the customary. At a more detailed level, women's land claims need to be based on a nuanced and highly sensitive set of policy discourses and policy instruments – ones which reflect the social embeddedness of land claims, the frequent gender inequality in such relations and the rights to livelihood of African women.[42]

13.11 Conclusions

What the foregoing discussion has shown is that there are three interlinked ways towards addressing the issue of gender in land relations: the first is for women to use existing customary systems and institutions, both collectively and individually, to obtain access to land and the rights to hold on to the land so acquired that those systems and institutions already provide in theory but do not always concede in practice unless pressure in the form of women's groups push them to do so. A fair number of case studies show that this is a strategy that can bring positive results but they are spotty, difficult to

42 Ibid., 103.

generalise from and would leave the vast majority of women in their present disadvantageous position for the foreseeable future, with consequent disadvantages to society as a whole.

The second approach is to use the state. This involves using the formal processes of law reform. There are increasing numbers of models of legal provisions which can be adapted for use in different states and for different situations. Many states have begun to go down this route via changes to their Constitutions outlawing gender discrimination so that this is not an approach of which it can be said with any degree of sincerity that this would undermine the social basis of the state. Furthermore there are numerous international conventions dealing with women's rights – soft international law – that states have signed up to. To argue that states should now meet both their national and their international obligations cannot be seen as being particularly radical, unrealistic or urban-centred.

This has developed now into an approach that sees gender land relations as a human rights-based matter and as one requiring states to adopt wide-ranging reforms to education, legal and economic systems and governance systems. Land law reform, co-ownership e.g., this approach argues, is just the first step; without wide publicity for the law, the re-education of traditional leaders, affirmative action on women's land rights, reform of other laws such as succession law, family law, mortgage and credit law and specific national monitoring and implementation bodies, women's land *rights* will remain unapplied. No state has yet gone that far though several states have taken some of those steps. Is there though anything in these proposals which would be likely to undermine society or harm the economy as some leaders have suggested?

The third approach is to use the market; to purchase or rent land; to register a title in one's own name, to borrow money if need be to get started. Evidence from Uganda shows that this is a tactic that women are increasingly turning to. The evidence from other countries, Tanzania and Kenya for instance, shows that women there are willing to go down this route. By using the market, women escape both the restrictions of the customary and the antipathy of governments to reform. But note that in the case of Kenya, even where married women have bought land with their own money, the land is registered in the name of their husband.

There does not appear to be any single or simple solution to the issue of women's property and land rights. The evidence suggests unfortunately that, without constant pressure from women themselves, neither governments nor the customary nor the international community will turn fine words into practical actions. Given that there is no dispute on the facts – that 'women constitute 70% of the agricultural labour force, that the majority of these women . . . do not own or control land and other natural resources and that if women, who comprise more than 50% of Africa's population lose out on development, African families lose and indeed the continent loses', it is a sad commentary on the triumph of prejudice over principle.

Chapter 14

Transformational, traditional or political: an overview of the reforms

We turn now to see if some kind of collective sense or perspective of all these programmes of national reforms can be developed. In the Introduction, I set out key elements both of land-related concepts of justice – spatial justice and the just city – and the fundamental difference between Rawls's and Sen's approach to justice which I suggested was important for any assessment of the justice of the reform programme to be considered in this book. I explained the distinction between the transformative and the traditional approaches to reform which mirrored Fainstein's use of the distinction between nonreforms reforms and transformative reforms which I intended to use in developing an assessment of the justice of the changes in the land laws over the last 50 years and I will not repeat that framework here.

Before turning to the issue of the justice of the reforms, it is necessary to expand on the political dimension to reform which was also briefly noted in the Introduction. Two important contributions to a discussion of the political dimension to land reform are those of Manji and Boone[1] and it is important to discuss them as they are adopting rather different approaches to the issue and provide a possible alternative approach to understanding the reforms to the one to be offered here.

Manji adopts what I would call an outside perspective; Boone an inside perspective. What I mean by this is that Manji is principally concerned to discuss the outside influences brought to bear on land reform programmes – the influences of donors, of IFIs, of foreign consultants, and contrast these with the influences of national persons and organisations, Ministries, legislatures, NGOs, individuals, etc. She contrasts the agenda of the international community led by the World Bank and implemented by various international experts and consultants which is to formalise, privatise and individualise land relations and develop a land market in countries in Africa with the continuing

1 Manji, op. cit.; Boone, op. cit., 75–103 Both these publications concentrate on land tenure reform and do not grapple with urban land use planning law reform of which there has been an equivalent amount of law reform certainly in Eastern Africa during the era of land law reform.

reality of the African social solidarity of land relations championed by national NGOs, women's groups, African academic commentators which is slowly being pushed aside by the dominance of international pressures. Her book does not examine in any detail the content of the new laws being introduced into the countries under examination: the book focuses on how they were introduced.

Boone on the other hand looks at the actual reform programmes that have taken or are taking place in a variety of countries and extrapolates from these diverse programmes to suggest that three approaches to land reform predominate and these are replacing the earlier immediate post-colonial approaches to land management which bolstered two different types of rural local government. She puts her arguments thus:[2]

> We can distinguish the [earlier] resulting land regimes, or processes, in terms of two basic types. Under the first type, African governments used their powers and prerogatives to uphold the land tenure regimes established under colonial rule which confirmed the rights of individuals to have access to land for houses and farming in localities where local authorities – who were sanctioned by the state – would recognise the individual or family as indigenous to that locality . . .
>
> Under the second type of land regime, governments used the powers of the modern state to challenge the pre-existing rights, land management processes and land-allocation authorities by standing behind and enforcing the land claims of 'whoever farms the land' . . .
>
> In the last decade, many African governments have sought to reform land law to address questions of poverty, equity, restitution for past expropriations, investment and innovation in agriculture and/or sustainability . . .
>
> Tenure reform has implications for long-standing and unsettled issues having to do with citizenship, community, social inequality and political authority. This helps explain why domestic pressures for land law reform are coming to a head in many African countries that are transitioning to more democratic forms of rule, or that have experienced recent regime change.
>
> Here we contrast three land reform strategies or visions of land reform that constitute poles in the policy debate: (1) reinforce community rights; (2) promote private property rights; (3) institutionalize user rights.

Boone refers to 19 states in her article of which five are discussed in this book – Kenya, Tanzania (mainland), Uganda, Mozambique and Rwanda – and five are West African Francophone. The countries discussed are a mixture

2 Boone, op. cit., 563, 564, 568, 569, 570.

of those which have enacted new land laws (12) and those, which on the basis of developing land policies, are presumed to be moving towards new land laws (seven).

Boone makes plain that her tripartite approach to land law reform is one of ideal types; not all countries neatly slot into one or other of the models. However, using the models does inevitably tend to impose, however unwittingly, a particular mode of analysis on national land reform which might not have been in the minds of the national reformers. So while recognising the importance of her insight into the need to be aware of the internal politics of land law reform, and the usefulness of her analysis, in trying to give an overall perspective to land law reform in the countries the subject of this book, I prefer to work from what appears to have occurred on the ground and deduce conclusions from that. Perhaps this is the difference between the common lawyer and the political scientist.[3]

Having made that point, I will now proceed to my own generalisations. Looking at the land law reform in the countries that have been surveyed in this book, the following characteristics stand out. The first is that, however dressed up and hedged about with controls and regulations, all the reforms embrace and facilitate the development and operation of a modern statute law-based land market from revolutionary Zanzibar to ultra market-friendly modernising Rwanda. This, it has to be said, chimes in with a long-standing position that I have espoused in my writing for over a decade[4] that there is a push from the international community to bring about a homogenisation of national land laws based on the Anglo-American legal model to facilitate an international land market. I did not set out in this book to 'prove' this theory; I did not know what to expect when I started out on the book but now standing back, the evidence is overwhelming. The World Bank has, quite simply, won; land markets are the preferred official national approach to land management. Where there have been attempts to temper the rigours of the market as with mortgage law in Tanzania, the full weight of the World Bank and the international community has been brought to bear to 'correct' the aberrant departure from pristine market principles. In these circumstances it is significant that some of the land reforms proposed by Kenya's NLP which do suggest departures from an unfettered land market seem to have been watered down by the new laws enacted in 2012 to implement the land chapter in the new Constitution. Alongside the land market is a continued commitment to title

3 I also think that Boone's analysis places great weight on the land law reforms in Francophone West Africa which for their own internal political reasons were concerned to distinguish between foreigners and autochthonons and this has perhaps unduly influenced her analysis.

4 The first time I advanced that thesis was in a paper '"From Greenland's Icy Mountains, From India's Coral Strand" The Globalisation of Land Markets and its Impact on National Land Law', given at a conference on Urban Law in Belo Horizonte, Brazil in 2001.

registration and the individualisation of tenure, seen as an essential component of such a market.

Second, and as a corollary of the first characteristic, I would suggest that the writing is on the wall for customary tenure having a long-term and equal role in land relations in the nations under review. It may have been specifically upgraded in the land reform laws of Mozambique, Tanzania and Uganda and in Kenya's community land provisions in its new Constitution but in all cases this upgrading is in a way tempered by the possibility of the registration of customary tenure rights. Registration, i.e. the formal statutory recognition of customary rights is, au fond, incompatible with customary tenure in the same way that the registration of title in e.g. England and Wales is bringing about a fundamental change in the nature of common law freehold tenure in those countries. Registration of customary tenure is a way station on the road, which will be long and strewn with challenges and difficulties to the development of a national common land law as is mandated in Tanzania's Land Act. The principal difference between the countries under review on this matter is on the one hand, Rwanda and to some extent Zanzibar and urban Somaliland which are attempting to abolish customary tenure and the rest which continue to recognise customary tenure but don't really provide any protection against the inroads of statutory tenure – perhaps because, in reality as opposed to theory, there is none.

I am not suggesting that customary tenure will disappear in the next decade or so – it will continue to govern relations in rural areas between persons occupying and using the land for some considerable time to come but in terms of the direction of movement, the pressures from the outside – the 'advice' of the international community, the foreign acquisition of agricultural land – and pressures from the inside – elite acquisition of land held for customary tenure, the continued central government involvement in land administration – and in both cases pressure for gender equality – it really has no champions to assert its continued and long-term relevance.

The third characteristic is perhaps more controversial. Going through the land reform laws of the countries under review, a common theme has been the maintenance or even increase of central government control. Nearly all the laws provide or promise devolution of land management functions to lower level bodies – districts, villages, counties, etc. – but there are very clear limits to devolved powers. This has been the subject of continuous criticism of the Tanzanian reforms but the critics have perhaps been too unwilling to recognise that there has always been a belief in that country of the virtues of strong central control over land issues however unrealistic in practice such attempts at central control have been and still are. The Land Act and to some extent Village Land Act are continuances of an old tradition. Similarly, the desire to regulate the practice of estate agency in Tanzania is very much the desire to assert central control over a quintessential and rather messy land market operation.

Rwanda too although enthusiastically embracing the market, has in practice written into the OLL sufficient powers for central government to ensure that what may be called the 'hidden agenda' of land law reform can be achieved. The Government of Uganda's clashes with Buganda over land is probably the best example there is in all these countries of the limits to devolution of power, highlighted in Boone's article which draws attention to the central government's concern that conceding Buganda's claims to administer its 'own' land 'would come at the expense of the central state and the principle of national citizenship'.[5] Mozambique, as sympathetic commentators have highlighted, is turning away from devolved power and reasserting old-style central control over communities and their land rights. Somaliland too is trying to balance devolution of powers over land with the maintenance of central control over key elements of land policy and management and the failure to resolve this dilemma is holding up the development of a national land policy. In this matter as well, Kenya's NLP faced both ways with a surprising amount of central government powers being provided for in future policies and the outcome of future battles between central and local powers over land still to be resolved. In this characteristic then, it may be suggested that a strong element of path dependency is present: old colonial habits of centralised control if not their laws live on into the 21st century.

The fourth characteristic is one noted by the USAID review of the draft NLP of Kenya but generalisable for all the countries. The policies and the new land laws do not really address urban land issues, Tanzania's Land Act being the exception here, though ignored in practice. The new land laws address rural land matters and are as much concerned with issues of rural local government as with issues of rural land tenure. Now at one level, this is perfectly understandable; the majority of the populations in all the countries under review live in rural areas and farm the land; their tenure interests need to be addressed. But urbanisation poses formidable problems and all countries have significant areas of informal 'illegal' settlements in their capital cities and other major urban centres. The trend here too is increasing urbanisation. It would be understandable if the new urban planning laws which all countries under review have enacted during this same era of land law reform had dealt with the matter but they have not.

This leads on to the fifth characteristic: with one semi-exception – Kenya's Urban Areas and Cities Act 2011 that is as yet untested – the new urban planning laws which replace a variety of colonial and neo-colonial planning laws are remarkable for their top-down bureaucratic approach to urban planning which is quite at variance with the community-orientated participative urban planning and the regularisation of informal settlements espoused by the international community as represented by UN-Habitat, the UN agency

5 Boone, op. cit., 572.

located at the heart of the region in Nairobi. Nowhere in fact is there a greater gap between the ideas and approaches of the international community as represented by UN-Habitat and the Cities Alliance and what might be termed modernist thinking than with respect to the functions and operations of urban planning. Within the region, there is no public writing or public thinking about the 'just city', the 'right to the city' or how to develop a democratic city in which all citizens regardless of their social class or economic or tenure status have an equal role in the planning and management of the city.[6] Myers has drawn attention to the rapid growth of gated communities in cities in Africa and the deepening divide between the urban poor and the urban elites. Pieterse has called for a commitment to a radical democracy in cities in the South arguing that 'the scope for grounded, radical but necessarily incremental transformation [in such cities] in vast'[7] but there is no sign of that or any willingness to move in any such direction within the region. Equally, while much writing about the urban problematique in Africa calls attention to the deleterious effects of the neo-liberal economic policies imposed by the IFIs and the donors on states in Africa, there is absolutely nothing to suggest that the new urban planning laws owed anything to the presumed need to comply with those policies. Here too, path dependency reigns supreme and for the same reason as of old: at best an unwillingness to accept that the urban poor have any right to the city; at worst, a fear of the dangers of the urban mob.

Can we make any judgement about whether the reforms enacted during the era of reform are transformative or traditional/nonreformist? Transformative reforms are those where 'social justice affects and shapes the property regime; conversely, recognition of the need for social reform implies acceptance of the justification for reform of the property regime'.[8] In terms of spatial justice, the issue is one of distribution: 'the fair and equitable distribution in space of socially valued resources and the opportunities to use them'.[9] It is clear that for van der Walt, transformational land law reform based on social justice is

6 There is considerable debate amongst South African urbanists on the relevance of 'Northern' theories to Southern, particularly African cities. See for a very sceptical approach, Watson, V. (2002) 'The Usefulness of Normative Planning Theories in the Context of Sub-Saharan Africa', 1 *Planning Theory*, 27–52; and for an approach that argues for their relevance, Parnell, S. and Pieterse, E. (2010) 'The Right to the City; Institutional Imperatives of a Developmental State', 34 *International Journal of Urban and Regional Research*, 146–162. Watson takes particular exception to Fainstein's use of Amsterdam as an example of the just city as showing the irrelevance of the just city approach to cities in Africa but in her book, *The Just City*, op. cit., Fainstein discusses the general principles of the just city and these general principles are as applicable to cities in Africa as elsewhere.

7 Pieterse, op. cit., 176.

8 van der Walt, op. cit., 21.

9 Soja, (2008), op. cit., 3.

concerned with redressing the balance between the property and land haves and have-nots. Similarly, with Soja and spatial justice. Has any such fundamental social reform or redistribution been set in train by any of the land reform laws discussed in this book? In terms of property *rights*, it could be argued that the new land laws of Mozambique, Tanzania and Uganda, especially Uganda, have wrought a transformation: customary tenure can now be better protected by law in all those countries. In terms of rights to land for, and the redistribution of land to, the land-poor and landless, the early Zanzibari land reform laws and the Mozambique land laws have tried to provide for such situation but in Zanzibar, the revolutionary laws have been replaced by more orthodox neo-liberal land laws (though without taking back land from those who obtained land in the early years of the revolution) and in Mozambique, the practical administration of the new laws is hindering their social justice realisation. Transformation in the van de Waltian sense is not part of Rwanda's OLL – rather the reverse in practice as we have noted – and the jury is still out on Somaliland and Kenya though it will require a transformation of revolutionary proportions to make social justice the cornerstone of the implementation of the new land laws in Kenya.

Traditional reforms or nonreformist reforms are reforms which accept the continuance of the basic colonial land legal systems but make some changes at the margins to those systems. As Boone comments and this book has shown, this was certainly the pre-reform era approach to land law reform within the region with the exception of Zanzibar. But are there still elements of the traditional in reform era land law reform? The answer has to be 'yes' in relation to central government control of land management and a corresponding continuing ambivalence, to put it no higher, of entrusting land management to local authorities and the rural peasantry. One could also argue that if, as I have shown earlier, the drive to individualise land tenure, introduce land markets and begin the process of replacing customary tenure with statutory tenure can be traced back to the recommendations of the East African Royal Commission of 1955, which were taken over and continued by the World Bank, these policies and the laws to provide for their implementation too are traditional rather than transformative. The paradoxical conclusion then may be that judged on a macro-reform basis, that is overall long-term outcomes, the post-1990 land law reforms are traditional, but if the details are looked at on a micro-reform basis, there are elements of the transformational written into the reform laws.

To discuss the reforms in terms of transformational and traditional does assume that issues of tenure change, redistribution and reform were uppermost in the minds of governments when they set out on the path of reform. Looking back on my involvement in the processes of land law reform in Tanzania, Zanzibar, Uganda, Rwanda (though a bit peripherally there) and Somaliland, I would argue that there has been in all cases a mixture of motives, ideas, beliefs, hopes and expectations on the part of public officials,

politicians and others when they have embarked on a land law reform exercise and by no means all of this variety of concerns focus on tenure issues. It would be naïve to suppose that politicians and public officials were not highly conscious of issues of power – their power – with respect to any reforms that might reduce their power – this was brought home to me in my work in Uganda in 1999–2000 – but it would be correspondingly wrong to assume that that was their only concern. I think order, regularity and predictability – archetypical concerns of the bureaucrat and to some extent the lawyer – have also been very important in land law reform and it is these concerns as much as any others that have determined the final shape and content of the laws and have limited the enthusiasm or commitment by the centre to the devolution of power to local authorities and local communities.

Nor can we ignore the influence of the donors. In every case study in this book they have been apparent and sometimes played a major role. A US academic lawyer was a key player in Zanzibar's law reform: he would not have been acting as a lone ranger. USAID has been a key player in Mozambique's, Rwanda's and Kenya's land law reform. The UK's DFID was involved in Tanzania, Uganda and Rwanda and in the early stages of the development of the Kenyan NLP. Would the Tanzanian Land Act and Village Land Act have taken the form and content that they did if I had not been involved? I can think of at least one person in Tanzania who would argue that they would and should have been very different. As the example of the Tanzanian mortgage law 'reform' shows, the World Bank has been willing to throw its weight about in an aggressive fashion at the national level. Nor should the UN agencies be left out of this catalogue of external inputs: the FAO has been very involved in Mozambique's land law reform and UN-Habitat is involved with Somaliland's land law reform. These agencies have their own policies and approaches to land law reform and these form part of the dialogue with states when land law reform is being undertaken.[10]

It is this very wide mixture of inputs into land law reform which causes me to be sceptical of Boone's approach – that reform can be understood as falling into one of three models. I incline more to Manji's analysis – that reform has been in the interests of national elites and the international community, neither of which have been particularly interested in redistribution of land (except, in the case of elites, to themselves[11]), which in some respects is

10 This has been brought home to me with respect to an FAO mission I was involved in to develop an Agricultural Land Law for Cambodia. The FAO has been very concerned to ensure that its approaches to land law reform which take account of international human rights law and UN conventions and resolutions on such matters as the rights of women and the rights of indigenous people are taken into account in the drafting process and reflected in the draft law.

11 In the case of Kenya, as Boone, (2012), op. cit., shows, there was redistribution at the outset of independence in the sense that say Soja or van der Walt would understand and use

not a particularly original thesis. It has been ever thus in land law reform in Africa.

A final general point must be made in this overview: implementation of the new laws costs money and requires committed, honest and dedicated public servants, politicians and members of civil society. A lack of money is hindering implementation of the laws in Mozambique,[12] Tanzania,[13] Uganda[14] and on and off in Zanzibar. I suspect a lack of money or an unwillingness to provide the money will hinder the implementation of the new laws in Kenya. Rwanda seems to be able to obtain sufficient money from donors and Somaliland too may well be properly provided for by donors. Lack of money puts implementation at the mercy of donors; it will be their priorities rather than national priorities which will determine what moves forward and what gets left behind. Paradoxically, lack of donor financial input to assist in the implementation of the new old urban planning laws may be what will prevent them from being applied and so from worsening the lives of the urban poor in the cities and towns of the region.

The evidence has also shown that there is considerable ambivalence about some aspects of reforms amongst those in all countries whose role it is to implement the laws. I experienced this in Uganda; Knight reports it from Mozambique; political problems have slowed down implementation in Zanzibar. The problem in Tanzania seems, alas, to be one of the elite more or less putting the laws on one side to facilitate land grabbing by themselves and foreign investors.[15] Kenya might enact major land law reform but existing vested interests will not give up their land and controls over land easily.[16] Only in Rwanda does it appear that there are no obstacles to implementing land law reform but as some commentators have pointed out, reforms are benefiting the elite who devised them and are implementing them. So the

the term of redistribution from the European settler haves to African smallholder have-nots, but thereafter there have been successive bouts of redistribution from one ethnic group to another particularly in the Rift Valley.

12 Knight, op. cit.

13 Pedersen, R. (2010) *Tanzania's Land Law Reform: The Implementation Challenge,* DIIS Working Paper 10, Copenhagen, Danish Institute of International Studies.

14 Chapter 7.

15 Jon Lindsay notes the distinct lack of commitment on the part of the governments in Mozambique and Tanzania to implement the laws providing protection for customary rights holders in those two countries and puts that down to local populations being unaware of the content of such laws or how to apply them. But if governments do not adopt programmes to inform the citizenry of laws that may benefit them or do not provide the money or personnel to implement the laws, the citizenry are very limited in what they can do. Lindsay, J. (2011) 'The Policy, Legal and Institutional Framework', in Deininger, K. and Byerlee, D. (eds) *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?* Washington D.C., World Bank, 95–127, 102.

16 Boone, (2012), op. cit.

practical and transformational effectiveness of all the land law reforms is very much open to question.

14.1 The future

As the second decade of the 21st century gets under way, probably the major land issue confronting governments and citizens in the region is that of foreign direct investment in agricultural land – more usually referred to as land grabbing.[17] Although this book is about the past 50 years of land law reform, it is worth commenting briefly on the land reform laws and the phenomenon of land grabbing. An Oxfam workshop on land grabbing in the region covering Tanzania, Kenya, Uganda, Rwanda, Burundi and Sudan took place in 2010.[18] Some of its findings are a good way into the issues:

> Land grabbing has happened in all the countries present and the most affected are rural small farmers and pastoralists who depend on land for their livelihoods. Many hectares of land have been grabbed even in countries with less land like Rwanda and Burundi, leaving many people landless, homeless and with increasingly poor livelihoods.
>
> Key actors involved in land grabbing include:
>
> - Companies with interest in bio-fuel production particularly in Tanzania and Rwanda.
> - Companies with interest in commercial timber and carbon trade.
> - Companies with interest in the tourism sector i.e. game ranching, excursion areas, hunting blocks, and campsites.
> - Companies with interest in agriculture i.e. crop cultivation, salt extraction, and horticulture mainly for export purposes.
> - Government leaders, international companies, and influential people grabbing land for speculation purposes.
>
> Case studies were shared from all countries represented. We heard cases of land grabbing for bio-fuel, timber and carbon trading in Tanzania; grabbing of public beaches and coastal areas by private companies in

17 Pearce, F. (2012) *The Landgrabbers: The New Fight over Who Owns the Planet*, London, Transworld Publishers; Cotula, L., Vermeulen, S., Leonard, R. and Keeley, J. (2009) *Land grab or development opportunity? Agricultural investment and international land deals in Africa*, Rome, FAO, IIED and IFAD; Cotula, L. (2011) *Land deals in Africa: What is in the contracts*, London, IIED; Zoomers, A. (2010) 'Globalisation and the foreignisation of space; seven processes driving the current global land grab', 37 *The Journal of Peasant Studies*, 429–447.

18 Oxfam (2010) *Report on the Regional Land Grabbing Workshop*, Nairobi, 10–11 June, 3, 5. See too Kanchika, T. (2010) *Land grabbing in Africa: A review of the impacts and possible policy responses*, London, Oxfam International.

Kenya; land grabbing by military officials in Sudan; land grabbing by local and international companies supported by the government in Uganda and Rwanda; and land grabbing by government officials and politicians in Burundi.

A number of common issues emerged from the case studies; first, is that there are loopholes in customary laws, national land policies and other legislation; second, the community lacks knowledge and empowerment to deal with land grabbing; and third, the government plays a significant role in facilitating the land grabbing.

Governments were identified as the major land grabbers in the region. This is because land acquisition processes involve government officials who in most cases are corrupt and work in favor of the investor, using their influence to acquire land for investors. Also government institutions such as District Councils, investment centers and other private sector promotion institutions, supposedly working to alleviate poverty, have grabbed land from the people, claiming it to be for 'public interest' and 'development' even though the terms are vaguely defined in the laws.

What we must be aware of is that the land deals are on a massive scale. In Mozambique, almost 5 million ha were applied for by agro-fuel investors in 2007; for the same purpose in Tanzania between 20,000 and 30,000 ha were being applied for. 'In November 2008 the Kenyan President leased 40,000 ha of high potential land in the Tana river delta to the government of Qatar so that Qatar may use it to produce horticultural products for Qatar'.[19] Uganda too is involved in land grabbing from peasant farmers for oil palm developments in total disregard of their rights under the Constitution and the Land Act 1998.[20]

Several important points must be noted from these cases; first, governments, far from ensuring that laws that provide for protection of small-holder peasant farmers from external land grabbing are observed, are ignoring those laws and, second, are using their land acquisition powers under the law to lead the way in land grabbing. Third, land acquisition laws in all the states within the region are woefully inadequate and are still based on colonial models, allowing little opportunity for objection to acquisition or challenge to the compensation awarded or not as is sometimes the case. These laws are in fact an excellent example of elites more than happy to utilise colonial laws and practices to

19 Fian International (2010) *Land Grabbing in Kenya and Mozambique: A report on two research missions – and a human rights analysis of land grabbing*, FIAN International Secretariat, Heidelberg, Germany.

20 Friends of the Earth Uganda (2012) *Land, life and justice. How land grabbing in Uganda is affecting the environment, livelihoods and food sovereignty of communities*, Kampala. Published in April, this is one of the few public documents specifically referring to justice with respect to land rights in the region.

facilitate action which might technically be legal but is clearly extremely disadvantageous to the poor. Where the laws are deliberately constructed to make it difficult to take land from the peasants as is the case with the Village Land Act in Tanzania, the government has indicated that it intends to amend the law to make it easier to take village land from villagers.

What is also significant is that while the World Bank in general supports the easing of restrictions on foreign investment in land and indirectly encourages this via its annual Doing Business reports[21] which rate countries on 10 criteria on how easy it is for entrepreneurs to set up a local business, it has also published a careful and even-handed report on how to set about acquiring land for investment:

> A good policy, legal and institutional framework can minimise risks and maximise benefits from large-scale investment involving land and related natural resources . . . But a good framework will also require adherence to social and environmental standards. A broad consensus exists that, to do so, it needs to facilitate recognition of rights, ensure voluntary land transfers, promote openness and broad access to relevant information, be technically and economically viable and in line with national strategies, and comply with minimum standards of environmental and social sustainability.[22]

The East African examples noted here are conspicuous by their total disregard of these principles of what might be regarded as just land management. Nor once again can there be any suggestion that the dictates of IFI-imposed neo-liberal economic reform leave governments with no alternative but to disregard the most basic elements of fair administration when dealing with their citizens' rights to land. The depressing conclusion of the evolution of land grabbing in the countries under review is that here too as in so much of land law reform and its application, path dependency – the polite term for the continuation of the colonial attitude of elites to peasants that they, the elites, must overcome the 'destructive conservatism of the people' and generate the drastic agrarian reform needed and that it is permissible to use force if need be to achieve that – has been the driving force behind reform. The optimistic hopes which I and others involved in the land law reform process in the 1990s harboured have not been realised and the trend seems to be against their being realised.

Pieterse has argued for what he terms 'radical incrementalism'[23] in relation to reforms in urban governance including urban land management in the

21 World Bank Doing Business (2012) *Doing Business in a More Transparent World*, Washington D.C., IFC, World Bank.

22 Lindsay, op. cit., 95.

23 Pieterse, op. cit., 172.

cities of the South. I disagree. With respect to land issues at least in Sub-Saharan Africa, what is needed is the equivalent of an Arab Spring, peaceful if possible as in Tunisia but if necessary, with force as in Egypt – both countries, it is worth noting, on the African continent. It is worth recalling the words of Barrington Moore:[24]

> For a Western scholar to say a good word on behalf of revolutionary radicalism is not easy because it runs counter to deeply grooved mental reflexes. The assumption that gradual and piecemeal reform has demonstrated its superiority over violent revolution as a way to advance human freedom is so pervasive that even to question such an assumption seems strange . . . I should like to draw attention . . . to what the evidence from the comparative history of modernization may tell us about this issue. As I have reluctantly come to read the evidence, the costs of moderation have been at least as atrocious as those of revolution, perhaps a great deal more . . . As long as powerful vested interests oppose changes that lead towards a less oppressive world, no commitment to a free society can dispense with some conception of revolutionary coercion . . .

There can be no doubt that with respect to land issues in Eastern Africa – indeed in Africa as a whole – powerful vested interests oppose change that could lead to a less oppressive world and these interests are overwhelmingly internal and national, though for the most part supported by the international community. It is also the case that radical and at times violent land reform in Zimbabwe[25] and in Brazil[26] to mention just two countries where struggles over land and the people's right to land and livelihoods which went outside the law have achieved more for the poor and landless than strictly following legality in those countries achieved. By all means try the path of radical

24 Moore, B. (1966) *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*, Boston, Beacon Press, 505, 508. See too, Harvey, D. (2012) *Rebel Cities: From the Right to the City to the Urban Revolution*, London, Verso, especially Section II: Rebel Cities: 'The struggle that has broken out – that of the People versus the Party of Wall Street – is crucial to our collective future. The struggle is global as well as local in nature . . . It embraces the agitators in Tahrir square who recognize that the fall of Mubarak (like the end of Pinochet's dictatorship) was but the first step in an emancipatory struggle to break free from money power. It includes the *indignados* in Spain, the striking workers in Greece, the militant opposition emerging all around the world from London to Durban, Buenos Aires, Shenzhen and Mumbai . . . The system is not only broken and exposed, but incapable of any response other than repression. So we, the people, have no option but to struggle for the collective right to decide how that system shall be reconstructed . . .', 164; and Soja, op. cit., especially Prologue, vii–xvii.

25 Scoones, I., Marongwe, N., Mavedzenge, B., Mahenehene, J., Murimbarimba, F. and Sukume, C. (2010) *Zimbabwe's Land Reform; Myths and Reality*, Woodbridge, James Currey.

26 Meszaros, G. (2013) *Social Movements, Law and the Politics of Land Reform*, London, Routledge.

incrementalism but as Barrington Moore advises us, we cannot dispense with some conception of revolutionary coercion and to achieve both the just city and the just countryside with respect to rights to land in the countries reviewed in this book, something a good deal more revolutionary than incrementalism will be needed.

Appendix: Principal land laws enacted in states since 1961

Countries and year of independence → years↓	*Kenya 1963*	*Mozambique 1975*	*Rwanda 1962*	*Somaliland 1960* *Joined with Somalia five days later* *Referendum voted to separate from Somalia and re-establish separate state of Somaliland, May 1991*	*Tanzania 1961*	*Uganda 1962*	*Zanzibar 1963* *Joined with Tanzania in 1964 but has retained separate system of land laws*
1961 Basic corpus of laws existing in states as at this date	customary laws; common law and equity as on 12/8/1897; Indian Transfer of Property Act 1882; Indian Land Acquisition Act 1894 + Ords: Crown Lands 1915; Land Titles 1908; Registration of Titles 1919; Native Lands Trust 1938; Land Control 1944; Land Registration (Special Areas) 1959 Land Control (Special Areas) 1959; Development and Use of Land (Planning) Regulations 1961	customary laws; civil code; statutes. Law of May 1901; all land which did not constitute private property in accordance with Portuguese law was state domain and available to the African population; Decree of 1918: reservation of certain areas for exclusive use of natives. 1955 Native Statute for Angola and Mozambique, article 38: 'Natives who live in tribal organisations are guaranteed, in conjunction, the use and development, in the traditional manner, of lands necessary for their villages, their crops and for the pasture of their cattle.' Decree 43 894 of 1961: Regulation Regarding the Occupation and Grant of Land in the Overseas Provinces	customary laws; civil code; Codes et lois du Congo Belge 1886 applied 1927 ('vacant land' the property of the state) registered land law; 1960: administrative decree suspended *igikingi* land tenure system and vested decisions over pasturelands in the sous-chefferie and later in hands of communal authorities	xeer; common law and equity as at 16/3/1900; 'No comprehensive land legislation was enacted before independence by either administration';[1] Town Planning Ordinance 1947	customary law; English land law as at 1/1/1922; Ords: Registration of Documents, 1921; Land (Law of Property and Conveyancing), 1922; Land 1923; Land Registration 1953; Town and Country Planning, 1956; Land Regulations 1948	customary law; common law and equity as at 11/8/1902; Indian Land Acquisition Act 1894; Ords: Crown Lands 1903; Crown Lands (Declaration) 1922; Registration of Titles 1924; Busuulu and Envujjo Law 1927	customary law; Islamic law; common law and equity as on 7/7/1897; Decrees: Land Acquisition 1909; Transfer of Property 1911; Wakf Property, 1916, 1923, 1946; Registration of Documents Decree 1919; Public Land, 1921 and 1951; Alienation of Land 1934; Land Protection (Debts Settlement) 1938; Town and Country Planning 1955

1 A. Hoben (1988) 'The Political Economy of Land Tenure in Somalia', in Downs, R.E. and Reyna, S.P., *Land and Society in Contemporary Africa,* Hanover, University Press of New England, 192–220, 201

1962	Registered Land Ordinance	Constitution: recognised Belgian land tenure regulations: lands occupied by the original inhabitants were to remain in their possession. All unoccupied lands including all marshlands belonged to the state.		Public Lands Ordinance	
1963			Freehold Titles (Conversion) and Government Leases Act; Rights of Occupancy (Development Conditions) Act		
1964			Range Development and Management Act	Town and Country Planning Act	Confiscation of Immoveable Properties Decree
1965			Nyarubanja Tenure (Enfranchisement) Act; Land Tenure (Village Settlements) Act; Land (Settlement of Disputes) Act	Land Acquisition Act	

(Continued)

(Continued)

1966				Rural Farmlands (Acquisition and Regrant) Act		Land (Distribution) Decree
1967	Land Control Act	Decree 47 486 of Overseas Ministry of Portugal: defined the mechanism for the legalisation of illegal (unauthorised) occupation of land; Decree-Law 47 611: Urban Real Property Code		Land Acquisition Act		
1968	Land Acquisition Act; Land Planning Act; Land Consolidation Act; Land Adjudication Act; Land (Group Representatives) Act			Urban Leaseholds (Acquisition and Regrant) Act		
1969				Government Leaseholds (Conversion to Rights of Occupancy) Act	Public Lands Act	Government Land Decree
1970		Decree-Law No. 576: authorises and regulates expropriation of land for urban planning and expansion				
1971						
1972						
1973		Law No.6 (Overseas Land Law): attributes to Overseas Provincial Government exclusive control of vacant land	Civil Code (over 250 articles dealing with property)	Rural Lands (Planning and Utilisation) Act		

1974					Mortgage Decree
1975	Constitution		Agricultural Land Law (nationalisation of land; allocation of land by state)	Villages, Ujamaa Villages (Registration, Designation and Administration) Act	Land Reform Decree (abolition of special land regime in Buganda)
1976	Decree-Law No. 5: nationalised all real property not occupied by the actual owner; shareholdings of non-residents in corporate owners of buildings; all apartment buildings	New Law provided that all lands not appropriated according to written law belonged to the state. Lands subject to customary law, or rights of occupation granted legally, could not be sold without prior permission from the Minister responsible for lands and after the communal council had expressed an opinion on the transaction			
1977					

(Continued)

(Continued)

1978				
1979		Land Law (nationalisation of all land; villagisation policies)		
1980				Commission for the Administration of Wakf and Trust Property Decree
1981				
1982				
1983				
1984			National Land Use Planning Commission Act	
1985				
1986				
1987				
1988				
1989				Commission for Land and Environment Act
1990	Land Disputes Tribunals Act	Constitution reaffirmed State's ownership and control of the use and benefit of land		Land Adjudication Act; Registered Land Act
1991				
1992			Regulation of Land Tenure (Establishment of Villages) Act	Land Tenure Act
1993				

1994							Land Tribunals Act; Land Transfer Act
1995		Land Policy			National Land Policy		
1996	Physical Planning Act					Constitution with chapter on land providing for holders of land under customary tenure to be owners of the land	
1997		Land Law (protection of land rights of local communities; promotion of investment between local communities and commercial investors)		Constitution: land is public property owned by the nation			
1998						Land Act	
1999				Agricultural Land Ownership Law	Land Act; Village Land Act		
2000							
2001				Land Management Law	Land Regulations		
2002							
2003			Constitution: no specific provisions on land				

(Continued)

(Continued)

2004					Land (Amendment) Act	Land (Amendment) Act	
2005			Land Policy; Organic Land Law; Organic Law Governing the Organisation of Settlements				
2006							
2007		Town Planning Law	Expropriation Law		Land Use Planning Act; Urban Planning Act		
2008				Urban Land Management Law	Unit Titles Act; Mortgage Financing (Special Provisions) Act		Property Tax Act
2009	National Land Policy						
2010	Chapter 5 of the Constitution: Land and Environment					Land (Amendment) Act; Physical Planning Act	Condominium Act
2011	Urban Areas and Cities Act						
2012	National Land Commission Act; Land Act; Registered Land Act						

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