Land Reform in Africa: A Reappraisal

Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #3 of 5

NOVEMBER | 2011

Liz Alden Wily*

Briefs on *Reviewing the Fate of Customary Tenure in Africa*

1. *Customary Land Tenure in the Modern World*
2. *Putting 20th-Century Land Policies in Perspective*
3. ***Land Reform in Africa: A Reappraisal***
4. *The Status of Customary Land Rights in Africa Today*
5. *The Global Land Rush: What It Means for Customary Rights*

RRI PARTNERS

This brief casts a critical eye over the land reform trend that has emerged in Sub-Saharan Africa since 1990. It finds that there has been much less change in tenure paradigms than anticipated and insufficient change in how land matters are governed. Most urban and rural poor in 2011 have no more security of tenure than they possessed in 1990. However, the most disappointing shortfall is in respect of lands which around a million rural communities in Africa traditionally own and use collectively. This directly affects the future of forests.

1 What is land reform?

'Land reform' has meant different things over the last century. Its main focus has been redistribution of farmland to remove landlessness and tenancy in feudal economies. More than 50 governments launched "land to the tiller" reforms between 1917 and 1970. Key avenues were the:

a. abolition of private ownership and the creation of state collectives (e.g. in Russia, China, Vietnam, and Cuba),

b. creation of citizen-owned collectives (e.g. in Honduras, Mexico, and El Salvador)

c. setting of ceilings on landholdings, with the redistribution of the surplus to the tenants and workers of landlords (e.g. in Egypt, Bangladesh, Nepal, and Afghanistan), and

d. abolition of absentee landlordism.[1]

Although 350 million households (mainly in China) gained land for the first time through redistributive farm reforms during this era, most initiatives were only half-heartedly implemented and/or did not have lasting effects. Reforms in East Asia, including those engineered by the American Army of Occupation in post-World War II Taiwan, Japan and Korea, were generally most successful. While communist regimes developed their land reforms autonomously, anti-feudal reforms in most other countries were promoted by the United Nations Development Programme, the Food and Agriculture Organization, and some bilateral aid agencies who considered rural landlessness, tied tenancy and absentee landlordism to be major impediments to agricultural growth.[2] A common constraint against full success was that politicians and officials were often the absentee landlords and lacked the political will to see reforms through. By the 1970s most states were abandoning or modifying redistributive land reform. *De-collectivization* was most dramatic in China and the USSR and its satellite republics such as Hungary and Romania. It also took place in Latin America. Reforms permitting *private land rights* were introduced widely, encouraged by the World Bank's commitment to a free market in land as a prerequisite to economic growth, as laid out in its 1975 Rural Sector Land Policy. By the 1980s, International Monetary Fund/World Bank structural adjustment programs were demanding the liberalization of land markets as a condition for loans

* Liz Alden Wily is an international land tenure specialist and a Rights and Resources Fellow.

to governments. This resulted in a surge of land concentration that undermined family farming, most notably in Latin America, and administered the *coup de grace* to redistributive land reform globally. It also caused much social distress and discontent.[3] Compensatory poverty-reduction strategies and market-assisted land reforms were introduced as palliatives.[4]

INTERNATIONAL ACTORS HAVE BEEN EXTREMELY INFLUENTIAL IN SHAPING LAND REFORMS UP UNTIL THE PRESENT

The path of land reform in Sub-Saharan Africa has been distinctive mainly for its lack of redistributive policies. Traditionally feudal and colonial-induced landlordism (such as in the *prazo* estates of Angola and Mozambique) existed but landlessness was considered by colonial and post-colonial administrations to be limited. Only **Egypt** (1962–69) and **Ethiopia** (1975) formally redistributed farmlands to eliminate highly exploitative tax, tribute, and labour relations.[5] *Collective farming* was also experimented with from the 1970s in Mozambique, Senegal, Somalia, Sudan, and Tanzania to make it easier for peasant farmers to adopt mechanization.

More broadly, Africa did not escape the exhortations of colonizers (now turned donors) and international agencies to privatize landholdings, and there was a flurry of new land registration laws in the 1970s. Land reform between 1960 and 1990 either meant **nationalization** (adopted mainly by socialist administrations), or more often, **privatization.** This was intended to eliminate "archaic" customary land tenure, and especially any vestige of holding lands in common, to prompt a market in land, liberated from any local social or collective responsibilities. Inevitably, privatization was most relevant to and targeted at farm and house plots, but in the process placed the existence of communal land assets like forests and pastures in jeopardy.

Kenya took the lead in launching privatization at scale through systematic individualization, titling, and registration, as first laid out in the pre-Independence Swynnerton Plan of 1954. Security of tenure was thereafter to be dependent on the promised sanctity of title deeds and the incorruptibility of remote government-held registers, not on community assurance. In the process of adjudication and registration, any collective property of the community was subdivided among richer households with the capacity to farm large areas, or vested in government authorities, which then proceeded to put these lands to other uses including selling to elites.[6]

Concurrent reforms in neighboring **Tanzania** nationalized expatriate estates, abolished freehold tenure, outlawed land sales, and, through the Ujamaa and then Villagization programs, aggregated hamlets to facilitate the provision of services to the peasantry. "All land belongs to government and individuals only have the right to use and occupy it" and "Tanzania is not for sale!" were popular slogans[7], reminiscent of colonial strictures on natives.[8] In the process of villagization, customary norms were not extinguished, but they were discounted; elected village governments, not chiefs, were to make land related decisions. The traditional boundaries of family homesteads gave way to street formations whereby houses could be near to services, and new farms were laid out next to each other to facilitate shared use of tractors. The main lasting effect was to significantly equalize landholdings (no family was permitted to be landless), to limit absentee farming (lands left unfarmed for some years were turned over to village governments for reallocation), and to make inroads into some of the less equitable traditions regarding land access by women.[9]

In **Senegal**, land reform in the 1960s also redefined country land tenure in the interests of nationalized African communalism. Cultivated lands were also placed under rural councils, but located at district not village level, and much more expansive areas of uncultivated lands were taken by central government ("pioneer

zones") to be made available for commercial farming, including cotton schemes. There were no physical relocations, but customary rights and traditional authority were also undermined as in Tanzania, although not entirely extinguished.[10]

Nationalization to one degree or another was in fact the norm in Sub-Saharan Africa during the first decades of independent regimes. In some cases this did not affect the existing private sector (those properties which were already under state-guaranteed entitlement) whose owners retained their rights intact (e.g. Namibia, Malawi). In others, freeholds were converted to leaseholds held from the state for terms up to 99 years (e.g. Tanzania as above, along with Sudan and Zambia). However the titled private landholding sector was with exceptions small,[11] so the main impact was upon rural majorities, those families and communities which owned land under customary norms. Nationalization meant that presidents or governments made themselves the ultimate owner of these lands, much as their colonial predecessors had done, and with limited restraints. These new landlords became noticeably more rapacious with each decade, helping themselves at will to their citizens' lands on grounds that such "public lands" were not legally owned by their occupants and users. Lands without farms were especially vulnerable to large-scale land takings for state projects or at the whim of presidents or senior politicians and officials, and often for private interest.[12] Tackling such abuses of state power would become one of the objectives of reforms after 1990.

2 What most distinguishes land reform after 1990?

Today, some form of land-tenure reform is under way in *around half* of the world's 207 independent nations. Almost all of these states have transitional and especially agrarian rather than industrial economies; that is, economies which rely upon land-based production rather than manufacturing or other industries for their GDP and where access to land is crucial to majority livelihood. The directives of national policies and laws therefore matter

a great deal, and notwithstanding the rapid urbanization occurring in most agrarian states at this time.[13]

Outside Africa, six trends have dominated land reformism since 1990:

a. Many reforms (e.g. in Thailand, Albania, Lithuania, and Croatia) focus only on improving *land administration*, with privatization retained as a target, and there is a tendency to sidestep issues of tenure.

b. There is continuing but partial or ambivalent *privatization* from decollectivization (e.g. in China, Vietnam, Armenia, Belarus, Uzbekistan, and Mongolia), especially relating to the ownership of formally traditional collective lands like forests and rangelands.

c. Reforms have been triggered as part of *post-conflict reconstruction* (e g. in Afghanistan, the Balkans, El Salvador, Timor-Leste, and Guatemala), reflecting the significant role of land-related injustice in causing civil wars.

d. New attention is being paid to *unregistered occupancy*, as witnessed in the expanded horizon of reformism to embrace the concerns of millions of untenured occupants ("squatters") in the world's multiplying cities.

e. *Rights-based reforms* have emerged, as demonstrated in reforms improving *indigenous rights* in Australia, New Zealand, Norway, and most widely in Latin America, where 18 states have changed their laws to acknowledge the existence and authority of indigenous people and bringing several hundred million hectares of native territories under native title.[14]

f. There has been a steady rise in *popular land-rights movements*, including transnational movements, again most prominently seen in the peasant agrarian movements of Latin America. The most influential movement has been *La Via Campesina*, which established regional and then global campaigns.[15]

Land reform has also strongly come onto the political and public agenda in **Sub-Saharan Africa.** As well as being driven by all or some of the above, reforms on the sub-continent are also driven by the following:

a. Sustained international agency pressure to bring land *more freely into the market place* and to make it *more freely available to foreign investors*. This was the initial impetus for state-led reforms in Mozambique, Tanzania, Uganda, and Zambia.[16]

b. Revitalized commitment to *privatization through the extension of statutory entitlement*, in the awareness that only tiny areas of each country (southern African states excepting) are subject to formal deeds or titles.

c. Local demand by urban and rural elites for greater privatization and for the *removal of limitations on land acquisition* (and upon speculation), as well as frustration with laborious and un-transparent transaction procedures.

d. The decision (perhaps due to donor coercion) to tackle the obviously *failing sanctity of title deeds* and near-inoperative land registries, and to root out corruption; explicit objectives of reforms in, for example, Ghana, Kenya, Lesotho, Malawi, Nigeria and Uganda.

e. Concern that current land-tenure and administration regimes are not dealing fairly or systematically with *rapidly multiplying small towns and expanding cities*, a motive of reformism in, for example, Angola, Ghana, and Liberia.

f. *Widespread political change* from 1990, resulting mainly in the adoption of multi-party politics and an uneven reach into the local-governance and judicial sectors.

g. A series of significant *civil conflicts and wars* in the region, the resolution of which prompted the inclusion of land reforms in post-conflict reconstruction strategies; this was the case in Angola, Burundi, Eritrea, Ethiopia, Liberia, Mozambique, Rwanda, Sierra Leone, and Sudan.

h. Widespread *constitutional reform* stemming from the above two factors, in the process opening the way for the reassessment of principles of property, with more popular input than was previously the case.

i. *Natural resource management reform*, arising mainly from environmental concerns expressed at the 1992 Rio Earth Summit that promoted decentralization, especially of the management of forests as a route to improved conservation. Nearly 20 Sub-Saharan African states adopted community forestry for this purpose in the 1990s (and possibly 25 states by 2011), although with widely differing impact upon forest tenure. Even where forests have not been made the property of communities, community forest management helps trigger demand for this.

j. *The end-game of residual colonialism* in Mozambique, Namibia, South Africa, and (from 1980) Zimbabwe;regime change overturned discriminatory landholding on the basis of race and put restitution on the land-reform agenda.

k. Along with, or as a consequence of, all the above, a gradual coming of age of *popular democratization*, decreasing tolerance of legal abuse and bureaucratic interference in local land occupancy, growing awareness of injustices in policies and laws—resulting in a slow but steady rise in rights-

based demands, often shaped by ethnic considerations (such as seen in Kenya in respect to ancestral lands and in the handling of immigrant settler land rights in Ghana and Côte d'Ivoire).

l. More recently, emerging *resentment of land losses* by rural communities where their customarily-held land is infringed or taken for commercial purposes, heightened by the surge in allocations of large areas to foreign and local investors since especially 2007.[17]

More steady pressures have also contributed to demand for changes in land policies and laws. Rural landlessness in Sub-Saharan Africa has risen almost to levels seen in feudal Asian economies in the 1960s and 1970s.[18] Research in Uganda shows that 84% of the poorest people continue to live in rural areas, mirrored elsewhere on the continent, and most affecting young males, a potent source of demands for change.[19]

3 How widespread is land reform in Africa?

Sub-Saharan Africa comprises 43 mainland states and eight island states (of which Madagascar is the largest).[20] At least 32 of these states (63%) have started land-reform processes since 1990. This does not mean that the processes are the same or even particularly reformist in practice. Nor does it mean that reforms are well advanced. Some are not much more than publicly-proclaimed intentions.

Nevertheless, this reformism suggests that land matters are a critical issue in the region. This is illustrated by the endorsement by the Heads of State of the African Union in July 2009 of the Framework and Principles for African Land Policy, a statement drafted by the Economic Commission of Africa. This statement affirms that reform is a prerequisite for poverty eradication and socio-economic growth and includes a pledge to prioritize land policy development and implementation processes in each country. It remains extraordinary and indicative

REFORMS HAVE BEEN DRIVEN BY CONTRADICTORY COMMERCIAL AND RIGHTS-BASED DEMANDS

however that customary land rights are not explicitly mentioned in this statement of intent, despite the fact that the vast majority of rural Africans possess land under customary norms. The statement does include an objective of ensuring that new land laws "provide for equitable access to land and related resources to landless and other vulnerable groups".

4 What process is being followed?

A review of the ways in which reforms evolved in the 1990s in 13 **Eastern and Southern African** countries[21] found the following:

a. The decision to reform was always *state-led* and donor-influenced.

b. The trigger to reform was always a single problem, such as the need for an urban land policy in Tanzania (1990); the need to find land for millions of displaced people and returnees in Rwanda (1997); post-liberation commitment to the restitution of white farms in Zimbabwe (1980, 1990, and 1992) and South Africa; declared dissatisfaction in 1988 with the continued existence of the feudal *mailo* tenancy regime in Uganda (established by the British in 1902); and political commitment to nationalise and redistribute rural holdings equitably in Eritrea (1992).

c. *Single-issue reformism did not last in any instance*, reviews as to needed action quickly making it essential to overhaul a wider range of subjects. The establishment of state-mandated commissions of inquiry became the commonest mode for this, none of which sat for less than a year (e.g. 1991–92 in Tanzania, 1990–95 in Mozambique, and 1996–99 in Malawi).

d. In the process, "national land reform" became more *broad-based*, covering land use, land administration, land tenure, land distribution, land conflict resolution, and land market and mortgage concerns.

e. In all but one case (Eritrea), *public opinion* was increasingly if often belatedly sought (e.g. Rwanda, Uganda, and Zambia), although this was usually on the basis of already-drafted state-formulated policies. In some cases, public participation took the form of sensitization about the meaning of new land laws (e.g. the famous Land Campaign in Mozambique in 1999 following the enactment of the Land Act, 1997, and its implementing regulations of 1998). *In no case was there pre-reform piloting of new strategies or approaches to land rights.*

OVER THE LAST DECADE PUBLIC CONSULTATION HAS BECOME A MAIN ROUTE OF LAND POLICY FORMULATION BUT LEAST SO IN CONGO BASIN STATES

Land reform in West African Francophone states during the 1990s was somewhat different. For example:

a. Reforms in Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, and Senegal emerged mainly through decentralization measures.

b. Concerns to more rigorously regulate *land use* were the main objective, including prompting formulation of pastoral codes in Burkina Faso, Mali, and Niger. This helped extend the vision of reform beyond the family farms of settled communities.

c. *Learning-by-doing* was integral to processes in Guinea, Côte d'Ivoire, Benin, and Burkina Faso, where the launching of the Rural Land Plans Programme from 1990 was designed to test how majority land interests could be best secured.[22]

While each country initiated its reforms independently, regional sharing became common from 2000. Many provisions in new national land policies and laws are borrowed from other countries. For example, the newest national land law, the Southern Sudan Land Act, 2009, borrows heavily from Ugandan and Tanzanian land laws, as well as draft legislation never adopted by Sudan (Khartoum). Civil society groups pressuring for reforms and donors calling regional meetings are main drivers of this sharing.

In both Anglophone and Francophone Africa, the approach to reform has also changed since 2000. A great deal more effort is being made towards public consultation, participatory decision-making, and piloting to test approaches. This is seen in Benin, Burkina Faso, Niger, and Mali; in the manner through which Kenya's 2009 land policy and 2010 national constitution were arrived at; and in the pledges of consultation and field research made by sitting Land Commissions such as in Liberia and Nigeria. Civil-society land advocacy groups have also become better organized and more demanding of their inclusion in policy formulation.

Many land laws have been amended within the first five years of enactment. One law has even been struck down as unconstitutional (May 2010). This is the Communal Land Reform Act, 2004 of **South Africa** designed to reform tenure in the former homelands affecting 16 million hectares and most rural South Africans. Women's groups initially brought complaints before the courts on grounds that women's interests were insufficiently provided for. Other groups were concerned that the law left too much scope for chiefs to proclaim themselves as owners rather than trustees of land. Government itself showed signs of tacitly supporting the demise of the law, possibly regretting over-generous provisions for communities to regulate and administer their land relations themselves. No replacement law has since been enacted, leaving 21 million South Africans in a situation which would be little better than under apartheid land laws were it not for the

extension of the Interim Protection of Informal Land Rights Act of 1996.

Main reasons for early amendments to new land laws are also telling. In **Uganda** commitment in the Land Act, 1998 to establish sub-district land and tribunal bodies was quickly downscaled due to the immense and previously uncalculated costs of setting up some five thousand new institutions. Ugandan women were also enraged by the failure of a crucial co-ownership clause, declaring spouses to be equitable owners of the prime family house and farm, to appear in the enactment despite its approval in parliament, and have repeatedly brought proposed amendments to members of parliament with still no success. *Mailo* tenants have also agitated for their status as tenants (as of 1998 only paying peppercorn rents) to be revoked to enable them to sell the land they or their forefathers have occupied, long before the British turned their ownership into tenancy to the Buganda King who had supported their conquest of the area. There have also been attempts to limit generous provisions affecting communal resources in Mozambique, Tanzania, and Uganda, countries noted for best practices in their 1990s laws.[23] Benin, Burkina Faso, and Senegal have all replaced laws enacted in the 1990s; in Senegal, a 2004 law has also been suspended pending the findings of a new land commission set up in 2006.

Thus, while more and more African countries take up the task of land reform, it is clearly a work in progress. With widening awareness it is also proving more difficult for politicians to marry popular demands with the privatization objectives of elite-driven administrations. Discussion and decision-making in the newer Land Commissions of the Gambia, Liberia, Nigeria, Senegal, and Sierra Leone and Mauritania are likely to be cautious and conservative than emerged from land commissions in the 1990s.

Meanwhile there has been tangible retrenchment or slow-down in commitments. The governments of Botswana, Swaziland, and Zambia have failed to finalize national land policies after many years of reports and debate. Ghana (1999) and Malawi (2002) produced national land policies with substantial reforms but have since not delivered the laws needed to instrumentalize these. Cameroon has recently declared that reforms will be made to the land laws of the 1970s but with no sign that this will alter the status of some 11 million customary land holders as no more than tolerated occupants and users of public lands controlled by the government.

On the other hand, there have been some positive surprises, such as the explicit commitment of Liberia to ensuring that majority customary rights are secured—a commitment backed by the recent issue of provisional procedures for accessing public lands which may favour community interests. Additionally, now that Liberians have been assured that customary ownership of forestlands will be respected (through the new Community Forest Rights Law, 2009) and with a pilot initiative laying down practical steps through which rural communities (referred to as "towns" after the American system) could secure communal title, the Land Commission may find it cannot escape re-introducing legal provision for rural persons including families and communities to be recognized as legal property owners. Another positive development is the expeditious manner in which the new state of Southern Sudan laid down its cogent Land Act, 2009, and draft National Land Policy, 2011, neither of which leave much doubt as to the supremacy of popular land rights—on paper at least. No steps have been taken to establish the local institutions needed to protect these rights.

Difficulties in applying new terms in land laws have also been experienced, and particularly where governments are required to put in place new institutional arrangements, or curtail their own powers. Local uptake by poor families or communities of improved opportunities has also been slow. One of the most adventurous new land laws is the Village Land Act, 1999 of **Tanzania**; this makes the elected governments of each of the 12,000+ rural communities the legal land manager, including powers to set up Village Land Registries, identify and register lands belonging to all

members of the community, as well as issuing title deeds to individuals or families for house and farm parcels. Fewer than 800 villages so far have taken steps towards this and only where donor-funded projects assist them to do so. Only around 300 of several thousand communities in Mozambique have established communal area rights under a 1997 law making such claims possible. Few local land commissions have been launched as planned in **Benin, Burkina Faso,** and **Mali**, where such commissions are charged with producing an inventory for every single land rights within the village land area, for local level recognition. In these cases, much of the work of assisting communities is carried out by non-governmental organizations and who are often the prime movers where developments have moved more quickly.[24]

The restitution of white-owned lands has also proved disappointing in **Namibia** and **South Africa** under World Bank-advised market-assisted norms. Less than three million hectares of the 26 million hectares earmarked for transfer from white to black farmers in South Africa had been achieved by 2009, and the figure is even lower in Namibia.[25]

To be fair, in some cases, incremental implementation of new provisions is deliberate, given the failure of states to meet deadlines they set for themselves for even core programmes. This has proved true, for example in the cases of **Angola, Namibia** and **Côte d'Ivoire** which all set deadlines for compulsory registration, necessarily extended once or now twice. There are exceptions to this slow pace; mainly seen in the mass farm titling initiatives operating in **Madagascar, Rwanda**, and especially **Ethiopia**, where millions of farm titles have been issued to smallholders since 2005.

5 New land law as the prime indicator of reform

The passing of laws says nothing about the content of those laws nor means that the public or officialdom is vigorously using their provisions. Nevertheless, the enactment of new land laws is indisputably the single most important marker of commitment to reforms. New constitutions are also playing pivotal roles by laying down new principles and obligating law makers to develop enabling instruments. This has been the process in Mozambique (1990), Uganda (1995), South Africa (1996), Kenya (2010), and Southern Sudan (2005, 2011). The status of legal reform in the local government and natural resources sectors also needs to be considered, given the importance of these as hand-maidens to land reform. Table 1 lists the status of new legislation in early 2011.

Table 2 provides a rough classification of progress in land reform as it affects rural majorities.

6 What is changing through land reforms?

The aims and scopes of new land policies and laws differ country to country. However these trends are discernible:

a. Land rights have become *a constitutional subject*, with sometimes entire chapters devoted to laying down principles. This embeds key elements of policy, provides a sturdy foundation for claims, and directs legislation.

b. Land as a *fungible commodity* is being promoted, and there is widespread removal of structures against the sale of customary/untitled lands.

c. *The right of foreigners to acquire land is being enhanced*, although mainly only as leaseholders—i.e. without the right to buy land in absolute title. Simplified procedures for foreign access are routinely entrenched in land laws, highlighting the importance given to this subject.

d. *Tenancy is subject to stronger regulation*, as are workers' rights on private farms.

e. Mechanisms for *land-dispute resolution* are devolving to committees and tribunals, with

TABLE 1 NEW CONSTITUTIONAL, LAND, LOCAL GOVERNMENT, AND FOREST LEGISLATION SINCE 1990

Country	Constitution	Local Government Laws	Land Laws	Forest Laws
Angola	1992	2007	1992, 2004	(draft)
Benin	1990	1997, 1999	2009	1993
Burkina Faso	1997	1996	2009	1997
CAR	1995		2009 Draft, 2009 Draft	2008
Chad	1996 (2005)	2002	2001	1994, 2002
Republic Congo	2002		2000, 2004, 2006, 2011	2000
Côte d'Ivoire	2000		1998	
Eritrea	1996	1996	1994, 1997	2006
Ethiopia	1995	1992	1997, 2005	1994
Ghana	1992	1993	(1993)	1998
Gambia	1997	2002, 2004	1990, 1991	1998
Guinea	1990		1992	1999
Kenya	2010	draft 2011	draft 2011	2005
Lesotho	1993	1997	2010	1999
Malawi	1994	1999	(2004)	1997
Mali	1992	1993, 1995,1999	1996, 2000,2006	1995
Madagascar	1992	1994	2005, 2006, 2007, 2008	1997, 2001
Mauritania	1991		2000, 2005	
Mauritius	2008	(2006, 2008)	1999 (2005), 2007	
Mozambique	1990	1997,2002	1997	1999
Namibia	1990	1992	2002	2001
Niger	1996	1993	1993, 1997	1999
Rwanda	2003	1999, 2000, 2006	2004	
Senegal	2001	1996	2004	1998
Sierra Leone	1991	2004	2003, 2004, 2005	
South Africa	1996	1997,2000, 2002	9 laws 1994–2004	1998
Southern Sudan	2005, bill 2011	2009	2009	draft 2009
Tanzania	under review	(1992, 1999)	1999, 2002, 2007	2002
Uganda	1995	1997	1998	2003
Zambia	1991	(1992)	1995	1999

Note: Parentheses indicate amendments to older laws. New land commissions are in place in Liberia and Nigeria to plan reforms. Chad's 2001 law establishes an observatory to review tenure and so, in itself, does not reform old laws. Note also that some blanks indicate a lack of information and others that no new law in place.

TABLE 2: STATUS OF LAND REFORMS, MID 2011

Legal Reforms Under Implementation	Legal Change with Limited Implementation	Commission Instituted, Policy in Place, or Minor Reforms Achieved without New Land Law	Reform Intentions Slowed or Halted Altogether	Uncertain or No Intention to Reform
Benin	Angola	Gambia	Botswana	Cameroon
Ethiopia	Burkina Faso	Ghana		Cape Verde
Madagascar	Eritrea	Guinea	Côte d'Ivoire	Chad
Mozambique	Guinea Bissau	Kenya	Democratic Republic of the Congo	Equatorial Guinea
Namibia	Lesotho	Liberia	Guinea	Gabon
Rwanda	Mali	Nigeria	Malawi	Guinea
South Africa	Niger	Senegal	Senegal	Seychelles
Tanzania	Southern Sudan	Sierra Leone	Sudan	Somalia
			Swaziland	Togo
			Zambia	Zimbabwe* Central African Republic

* Excepting in matters of restitution of white-owned farms to black Zimbabweans. A comprehensive policy affecting communal areas was devised in 1998 but never adopted.

recourse to formal courts as a secondary option; this is intended to limit the massive backlog of land cases in judicial systems in almost all African states.

f. *Legal pluralism is being promoted*, with customary law accepted as a legal source of decision-making and delivery of property rights, although in highly variable ways and with many constraints.

g. *Support for women's land rights is being entrenched in law,* some laws providing that husbands and wives co-own family property, thus protecting female rights at inheritance and widowhood.

h. *Public participation* is often made obligatory in future land-related policymaking.

i. The duties and powers of land administrations are being *decentralized*, although not always to the community level, or with primary authority.

j. *Landlordism by chiefs is being curtailed,* mainly through the creation of democratic land governance institutions at or nearer to community level, and in which chiefs are members or with which they are bound to work.

k. *Entitlement is being expanded* to enable the certification of customary rights in legally acknowledged ways, although often with less legal force than property rights provided through non-customary registration procedures.

l. *The formalization of rights* (statutory entitlement) is being simplified and localized and formal survey requirements are being replaced to better enable mass access at low cost. In many countries this opportunity is however still inferior to the force of rights secured through titling parcels as non-customary freehold or leasehold rights.

m. Reforms are making it more possible for *families, groups and communities* as well as individuals to formally record their land interests and hold titles for these.

n. It is becoming possible for lands other than farmed or settled parcels to be recorded *as (collectively) owned,* although this is still not widespread.

o. Customary rights *are now less corralled* within reserves and communal, tribal, or trust lands. Instead, reforms increasingly define customary tenure as a source of landholding, alongside other sources (i.e. introduced forms of tenure).

p. With exceptions (Eritrea, Ethiopia, and Rwanda), policies and laws *no longer aim to extinguish customary landholding.*

7 What best practices may be observed?

A limited number of reforms include some of the following changes affecting tenure security:

a. accepting longstanding squatter occupation in cities and towns as lawful occupancy and unable to be disturbed without compensation,

b. recognizing that rural customary tenure is *on a par* with statutory tenure as a route to established legal rights to land,

c. acknowledging of customary rights as *private property rights* to the extent that they have equivalent force and effect in law as rights acquired through introduced statutory norms such as freehold and leasehold,

d. providing in law for the recognition of customary landholding as due respect as private property *even where they are not formally certified or registered*,

e. providing, nevertheless, for the cheap, localized, and sustainable voluntary registration of rights within the context of community approval, to enable those who wish, *to double-lock their rights in approved registers,*

f. accepting customary *norms* as determinants of rights and transactions, as long as they do not negate natural justice or constitutional principles,

g. extending the acknowledgment of customary land as property *beyond farms and houses to cover collectively held customary resources such as forests, rangelands, and marshlands*,

h. making it explicit in law that state acquisition of customary lands for public purposes requires the payment of compensation *at the same levels and on the same terms* as the compulsory acquisition of statutorily registered private properties,

i. making it possible for lands already taken by the state, including national forest and wildlife reserves *to be restituted* to community ownership or other arrangements made to compensate the original owners,

j. *devolving authority over rural land relations* to elected community level bodies, local and central government agencies to provide technical assistance, oversight and recourse in the event of maladministration,

k. making *free, prior and informed consent* a prerequisite to acquisition by the state of customary lands of any kind, except in times of national emergency or for genuinely public service purpose,

l. outlawing discriminatory customary practices against women, disabled, orphans and immigrants,

m. structuring laws so that they are relevant to pastoral communities not just settled farming communities, and

n. removing the distinction between *possession* and *ownership* of land.

No single new land reform law provides for all the above. Those in Mozambique, Southern Sudan, Tanzania, and Uganda come closest[26], while those in Benin, Burkina Faso, Madagascar, Mali, and Namibia share somewhat fewer such attributes. Much older reforms in Ghana and Botswana also provide for some of the above attributes.

8 What is not changing?

Another way to assess current land reformism is to identify significant gaps affecting the status of majority rural land rights. Shortfalls are most common in the following:

a. Since 1990, only Uganda (and Kenya through its 2010 constitution) have done away with the outdated and corruptible distinction between ownership of the soil and ownership of rights to the soil. Although new laws generally emphasis the ultimate ownership of land by presidents as *trusteeship* only, this still leaves ample scope for state landlordism.

b. The notions of *terra nullius* meaning vacant and unowned lands, and the related notion of *wastelands* to cover lands which are not visibly occupied and used, still underlie the norms of many new land laws. This allows administrations to pretend that *customary lands are without owners* and that unfarmed lands like forests and rangelands are in particular so.

c. Related to the above, the definition of what constitutes "effective occupation" has not changed in many states, with the result that many uncultivated lands, including forests, rangelands, and marshlands, remain vulnerable to denial that they are owned by local communities.

d. Little policy or legal development has focused on protective actions at the crucial urban–rural interface, where so many unregistered customary land rights are lost to state and private-sector housing schemes and without compensation to customary owners.

e. Although a handful of best-practice cases are setting invaluable precedents, the majority of new reforms have ***not*** endowed customary interests with respect as private property rights, retaining the position that these are no more than occupation and use rights on government or un-owned public lands.

f. No changes have been made to the legal ownership of *local waters* (i.e. streams, ponds, and lakes), beachfronts, surface minerals, or marshlands, still deemed to be national or government property, thereby denying customary ownership of these traditional assets.[27]

g. Few land policies and laws explicitly enable the ownership of *protected areas* to be restored to communities (South Africa and Tanzania are exceptions).

h. While a number of laws improve the recognition of farms and houses as private properties as registrable without conversion to statutory forms of tenure, few laws extend this to acknowledgement of forests, rangelands, and marshlands as private (group-owned) properties and registrable as such.

i. Even where collective assets such as forests and rangelands *are* acknowledged as the communal property of rural communities, there has been insufficient development of legal constructs for this to become a common and fully accessible form of legal tenure, outside bureaucratic and costly mechanisms such as communal property associations.

j. Formal registration of land interests *remains the dominant route to tenure security*, even after a century of demonstrated difficulties in applying this at scale. Only one or two countries have established

that existing rights to land will be fully upheld *without certification or (the even more expensive and conversionary) registration.*

k. The interpretation of public purpose to allow the pursuit of significant private purposes under its aegis *has not been curtailed in a single case*, leaving the poor still vulnerable to involuntary land losses for purposes which are in reality designed to enable private commercial profit from the taking of their lands.

l. Many reforms have *not* tackled the contradiction between recognising customary rights and yet enabling the state to issue concessions for mining or timber harvesting without making communities shareholders of those developments or significant beneficiaries. .

m. Few laws have made it obligatory for the payment for lands taken for public purpose to be made *prior* to the land-taking, sustaining a situation in which most African governments owe millions of dollars in compensation to individuals and communities.

n. Devolutionary land authority and administration has *not* emerged as a flagship of African land reform. With exceptions, rural communities are still deprived of their customary and now democratic right to control, monitor, and administer local land relations. In most cases, crucial functions, including the legal registration of rights, remain with the state, decentralized at best to remote district or commune levels.

o. Only a few land laws have instituted measures to *outlaw land-grabbing* and undue rent-seeking by traditional authorities.

p. Despite rising rural landlessness and polarized farm sizes, few new laws have instituted measures to outlaw *absentee landlordism, land-hoarding, and speculation* or activate land ceilings for private landholding. On the contrary, promotion of large-scale agriculture by entrepreneurs, investors and mega-companies remains a main objective of mostreforms.

q. Women's land rights have improved in legal terms, but the same cannot be said for the special interests of pastoralists, hunter-gatherers, immigrant families, and former slave communities. Pastoralism and hunter-gathering are still not considered uses of land sufficient for establishing legal land rights.

r. Where customary landholding has been deemed a form of private land ownership, the proportion of the national land estate categorized as government/ state/public lands has declined sharply; for example, most of the land areas of Southern Sudan, Tanzania, and Uganda (as well as Botswana and Ghana over a much longer period) are now legally the private property of customary communities or their members. Because so many other land reforms retain the designation of *uncultivated lands* as without owners and unoccupied ('wastelands' or *terres sans maitres), the overall balance of state owned and community owned lands rights is little changed*. This is so even when farms and houses are recognised as private property because these areas constitute a tiny proportion of the total customary sector.

9 Conclusions

The glass half-full, glass half-empty picture presented above reflects the mixed outcomes of new land reformism thus far in Sub-Saharan Africa.

On the one hand, reforms in some countries are laying down important precedents that may focus the demands of less-well-served peoples. Reformism has also raised awareness of the injustices associated with the sustained use of colonial-introduced paradigms, and which render most of the population in African states still not lawful owners of their lands, only lawful occupants and users of national or government property.

On the other hand, the reforms made so far have proved to be less transformational than required to assure majority tenure security and to ensure that customary rights (or, in the case of urban populations, longstanding occupancy) cannot be unduly interfered with by the government of the day or associated elite private interests.

The crux of the disappointing results of reforms is the treatment of customary rights. It is still rarely the case that customary rights have been considered worthy of equitable legal respect as a *form of private property*—albeit one which, unlike statutory private property, may be subject to community-derived sanctions against absolute sale.

Nor have major inroads been made in removing the priority placed by governments on taking lands for private enterprise to support modernization. In all but a handful of states, it is still extremely easy to take land away from untitled and customary landholders for purposes that are, at most, only remotely in their interest/to their benefit. This may be so even when new land laws have been introduced under the banner of justice, suggesting that the content of laws is more a juggling of the status quo than radical surgery to remove longstanding ill-treatment and injustices that affect the majority.

10 What does this mean for forests?

The disappointing performance of reforms is reflected in the fate of forest tenure.

It will be evident from the foregoing that while change to customary tenure is a central subject of current reformism, it has been extended very unevenly to "wastelands" (as colonial law referred to them); those lands within community areas which are, by custom, owned and used collectively for purposes other than cultivation. With exceptions[28] most villagers in Sub-Saharan Africa are only lawful *users* of their forests. Ownership remains with the state or state agencies.

Nor has the surge in community-based forest management since 1990 made much difference to this dispossession. While 20–25 countries now have provisions for designating communities as lawful managers or co-managers of forests, such provisions extend to recognizing these communities as *owner-managers* in less than ten of those states. Even in best-practice cases, tenure does not always carry with it the normal rights of ownership.

In **Ghana**, for example, although customary forest ownership has long been recognized, enactments in the 1960s placed control over those properties into the hands of the state. Chiefs receive a share of revenue from forest exploitation controlled by the state, but other laws, including the 1992 constitution, do not oblige chiefs to share such revenue with members of the community.[29] In contrast, **Liberia** has recently (2006, 2009) enacted laws that acknowledge customary ownership and community rights to rental and other shares of revenue, as well as community rights to manage less expansive and valuable classes of forests. However, the state has no action plan to restitute National Forests to communities, even though most of these areas belong to communities and who were never paid when their rights were extinguished, and some of whom had acquired collective entitlement to these lands.

In virtually all other Sub-Saharan African states, reforms have not extended to the revocation of state appropriation of forests now declared to be national forest reserves or parks. Legal avenues for this are provided in South Africa and Tanzania but have only been activated in a couple of cases in South Africa. Instead, most new land and/or forest laws confirm existing reserves as government property (most recently in Southern Sudan in 2009).

Who owns forests is a matter of crucial importance to the future of forests. Globally, there is mounting evidence that forests managed by communities are better conserved than those managed by governments. Underwriting this management with acknowledged

ownership is crucial if communities are to have a stable and strong incentive to limit degradation and deforestation, and to prevent wilful reallocation of these lands to industrial farming interests. Community ownership does not obviate the creation of commercial concessions over forestlands, but does ensure that communities are, at the least, beneficiaries of such developments, and ideally, economic partners in viable commercial enterprise.

Endnotes

[1] A summary of 20th-century land reform is provided as Chapter 1 and Annex A of Alden Wily, Liz, Devendra Chapagain, and Shiva Sharma. 2008. *Land Reform in Nepal: Where is it Coming From and Where is it Going?* Kathmandu: Department for International Development, Nepal.

[2] El-Ghonemy, M. 2003. Land reform development challenges of 1963–2003 continue into the twenty-first century. *Land Reform* 2003/2. FAO: Rome.

[3] Akram-Lodhi, H., S. Borras, and C. Kay, eds. 2007. *Land, Poverty and Livelihoods in an Era of Neoliberal Globalization: Perspectives from Developing and Transition Countries*. London: Routledge.

[4] K. Deininger and H. Binswanger. 1999. The evolution of the World Bank's land policy: principles, experience and future challenges. *World Bank Research Observer* 1999 14(2):247–276; SAPRIN. 2002. *The Policy Roots of Economic Crisis and Poverty A Multi-Country Participatory Assessment of Structural Adjustment*. Washington, D.C.: SAPRIN Secretariat.

[5] Rahmato, D. 2009. Peasants and agrarian reforms: The unfinished quest for secure land rights in Ethiopia. In J. Ubink, A. Hoekema, and W. Assies, eds. *Legalising Land Rights*. Leiden: Leiden University Press.

[6] For Kenya see J. Bruce and S. Migot-Adholla, eds. 1994. *Searching for Land Tenure Security in Africa*. Washington, D.C.: The World Bank; Kanyinga, Karuti. 2009. Land distribution in Kenya. In *Agricultural Land Redistribution: Toward Greater Consensus*. Hans P. Binswanger-Mkhize, Camille Bourguignon, and Rogier van den Brink, eds. Washington, D.C.: The World Bank; and Hunt, D. 2005. Some outstanding issues in the debate on external promotion of land privatization. *Development Policy Review* 23(2).

[7] The philosophy was famously embedded in Julius Nyerere's 1967 *Arusha Declaration* and laws enacted in 1963, 1969, and 1975.

[8] See brief 2.

[9] Alden Wily, Liz. 1988. *The Political Economy of African Land Tenure A Case Study from Tanzania.* Development No. 2. Norwich: School of Development Studies, University of East Anglia.

[10] For Senegal's first land reform see Golen. 1994. Land tenure reform in the peanut basin of Senegal. In Bruce and Migot-Adholla 1994, as cited in endnote 6; and Hesseling, G. 2009. Land reform in Senegal: l'Histoire se repete? In J. Ubink et al. 2009, as cited in endnote 5.

[11] See brief 2.

[12] For example, it was under the regime of President Moi in Kenya (1978–2002) that millions of hectares of state and trust lands were reallocated by the president and his land commissioner for private purposes; see Kanyinga 2009, as cited in endnote 6.

[13] For multi-country perspectives see: Ghimire, K. and B. Moore. 2001. *Whose Land? Civil Society Perspectives on Land Reform and Rural Poverty Reduction*. Rome: International Fund for Agricultural Development: Rome; Rosset, P., R. Patel, and M. Courville, eds. 2006. *Promised Land Competing Visions of Agrarian Reform*. Oakland: Food First Books; Akram-Lodhi et al. 2007, as cited in endnote 3; and Binswanger-Mkhize et al. 2009, as cited in endnote 6.

[14] De Janvry, A., E. Sadoulet, and W. Wonford. 2002. *Land Reform in Latin America: Ten Lessons Towards a Contemporary Agenda*. Washington, D.C.: The World Bank; Rosset et al. 2006, as cited in endnote 13; Ortiga, R. 2004. *Models for Recognizing Indigenous Land Rights in Latin America*. Washington, D.C.: The World Bank Environment Department.

[15] Rosset et al. 2006, as cited in endnote 13; Borras, S., M. Edelman, and C. Kay, eds. 2009. *Transnational Agrarian Movements Confronting Globalization*. Hong Kong: Wiley-Blackwell.

[16] See Chapter 2(II) and Annex E in Alden Wily, Liz and S. Mbaya. 2001. *Land, People and Forests in Eastern and Southern Africa at the Beginning of the 21st Century*. Nairobi: IUCN.

[17] See brief 5.

[18] See brief 2.

[19] Ainembabazi, J. 2007. *Landlessness with the Vicious Cycle of Poverty in Ugandan Rural Farm Households: Why and How is it Born?* Research Series No. 49. Kampala: Economic Policy Research Centre.

[20] Sudan is included in the definition of Sub-Saharan Africa, and as two states, Sudan (north Sudan) and Southern Sudan.

[21] Alden Wily and Mbaya 2001. As cited in endnote 16.

[22] Lavigne Delville, Philippe. 2010. Competing Conceptions of Customary Land Rights Registration (rural Land Maps PFRs in Benin) Methodological, Policy and Polity Issues at http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/DevillePaper.pdf and Chaveau, Jean Philippe. 2003. *Rural Land Plans: Establishing Relevant Systems for Identifying and Recording Customary Rights*. Issue Paper No. 122. London: International Institute for Environment and Development; Chaveau, J-P., -P Colin, J-P Jacob, P. Lavaigne Delville, and P-Y Le Meur. 2006. *Changes in Land Access and Governance in West Africa: Markets, Social Mediations and Public Policies, Results of CLAIMS Research Project*. London: International Institute for Environment and Development.

[23] See brief 5.

[24] Lavigne Delville, 2010 as cited in endnote 22.

[25] Lahiff, Edward. 2010 Land Redistribution in South Africa: Progress to Date. Chapter 6 in Hans P. Binswanger-Mkhize et al. eds. As cited in endnote 6.

[26] See brief 4.

[27] The exception of South Africa needs note: the Minerals Resources Act came into force in 2002, removing private ownership of minerals and placing it in the hands of the state on behalf of the nation, but with the state then selling those rights.

[28] See brief 4.

[29] Alden Wily, Liz and Daniel Hammond 2001. Land Security and the Poor in Ghana: Is there a Way Forward? A Land Sector Scoping Study for the Overseas Development Administration, London http://www.oxfam.org.uk/resources/learning/landrights/west.html

---

The Rights and Resources Initiative (RRI) is a strategic coalition comprised of international, regional, and community organizations engaged in development, research and conservation to advance forest tenure, policy and market reforms globally.

The mission of the Rights and Resources Initiative is to support local communities' and indigenous peoples' struggles against poverty and marginalization by promoting greater global commitment and action towards policy, market and legal reforms that secure their rights to own, control, and benefit from natural resources, especially land and forests. RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, D.C. For more information, please visit www.rightsandresources.org.

This publication was made possible with the support of the Ford Foundation, Ministry of Foreign Affairs of Finland, Norwegian Agency for Development Cooperation, Swedish International Development Cooperation Agency, Swiss Agency for Development and Cooperation, and UK Department for International.Development. The views presented here are those of the authors and are not necessarily shared by the agencies that have generously supported this work, nor by all the Partners of the RRI coalition.