Legal pluralism as a policy option: Is it desirable, is it doable?

by

Patrick McAuslan*

1. Introduction

Legal pluralism in relation to land exists in many countries in Africa. The basics are well known. Rather than rehearsing all the usual arguments for and against legal pluralism, the **first part of this paper** sets out instead what can be seen to be the preconditions for workable pluralism. The paper then goes on to address two much more substantial issues. **First**, to offer a slightly different analysis of the relationship between customary tenure and statutory tenure, which may help explain why - despite evidence that legal monism (a single, unified system) does not work - governments continue to try and introduce it and external forces (World Bank, the High Level Commission on Legal Empowerment of the Poor, various donors) have over the years offered prescriptions for 'modernising' land tenure which implicitly assume not merely the benefits of monism but of a homogenisation of national land laws, a sort of international monism. **Secondly**, the paper goes on to focus on an area of law very much neglected in discussions of pluralism and legal empowerment of the poor; the provision of secured credit via mortgages: can there be pluralism in this area of law or are we forced to accept monism here too?

However, before moving on to the preconditions for working legal pluralism, an absolutely fundamental point: we must disabuse ourselves of the notion that the issue of pluralism v monism with respect to land law in any state in Africa or elsewhere is an issue of land tenure. It is not. It is and always has been an issue of power; in Marx's famous formulation, a question of: who whom? Who has political power, and over whom is that political power exercised, in this case, with respect to land?

* Professor of Law Birkbeck College University of London; p.mcauslan@law.bbk.ac.uk

2. First steps in legal pluralism

In this section we address a fundamental question: where there is legal pluralism, what are the preconditions for ensuring its success? **Twelve precepts**, based on my experience as a researcher and practitioner (consultant land policy adviser and drafter of land laws), which I suggest are essential, are:

- **Equality of tenure and legal systems**

'Equality' here means that states must move right away from the colonial position that there is a hierarchy of laws in the legal system: at the top, the received law – common law, Roman-Dutch law, civil law, Sharī'a – and lower, much lower down the scale, customary law. In fact, there is one legal system with two co-equal sets of legal rules operating within that system: one system is not subordinate to the other.

- **Recognition and protection of communal and collective rights in land**

Most colonial legal systems and the Sharī'a did not accept that customary communal and collective interests in land gave rise to any rights enforceable by either individuals or communities. Such land was 'waste' and 'unoccupied' and as such available for distribution to individuals and companies willing and able to work it commercially. Recent scholarship (Wood, 2003) has shown very clearly how both the Dutch legal author Grotius and the English philosopher Locke, both writing in the 17th century, provided the theoretical underpinning for this approach to communally owned and used land, and so the legal and philosophical justification for European colonialism. However it is very clear that the philosophical and religious fundamentals of the Sharī'a adopt exactly the same approach to such land (Ziadeh, 1979). These approaches must be set aside, as must the misguided approach associated with 'the tragedy of the commons'. Communal ownership of land and natural resources must first be accepted and then built upon.

- **Building on and adapting *all* tenure systems to basic national goals**

This point follows from the first two: both sets of legal rules are of equal validity but both have to meet certain constitutional norms, possibly too international legal norms – gender equality, administrative justice, protection of private property rights (which include communal property rights). This may in practice mean that customary tenure has to make the more fundamental changes, but so too will the Sharī'a, and it would

be a mistake to assume that common, Roman-Dutch and civil law and practice are immune from the need to change, especially with respect to gender issues.

- **Provisions to opt from one system to another**

With a hierarchical approach to legal systems the basic assumption was and is that following what might be called a Maine-like approach, movement will be from customary to statutory or 'modern' tenure systems. This is the basis of most land adjudication and registration systems and is certainly the assumption behind the application of the Sharī'a to land tenure. However, with equality between systems, there must be freedom to opt for one or the other; there really is no reason why people should be forced down a one way street.

- **Use of customary and statutory alternative dispute resolution**

One of the foundations of a system of customary tenure is a customary approach to dispute settlement. Moving all land disputes to formal courts goes a long way towards undermining customary tenure; accepting and building on customary dispute settlement processes gives legitimacy and strength to customary tenure and helps reduce social tensions. It is clear, for instance in Sudan - and especially in the SPLM parts of the Transitional States of Blue Nile and Southern Kordofan, that using customary processes to iron out boundary disputes between tribal groups is a major factor in stabilising the peace process.

- **A judicial system empowered to fuse the systems in the long haul**

This point follows from what has been argued above. In too many judicial systems in African states, as customary tenure is not accorded full and equal recognition in the law, so the courts do not use it as a full part of the substantive law to be applied to settle land disputes. In civil law countries it is not part of the Code Civil so is not automatically applied by the courts; similarly where Sharī'a is the basic law (Layish and Warburg 2002). Few common law and Roman-Dutch law countries accord it equal status. The provisions in section 180 of Tanzania's Land Act are a useful model here:

> (1) Subject to the provisions of the Constitution and this Act, the law to be applied by the courts in implementing, interpreting and applying this Act and determining disputes about land arising under this or any other written law shall be:-

(a) the customary laws of Tanzania; and

(b) the substance of the common law and the doctrines of equity as applied from time to time in such other countries of the Commonwealth as appear to the courts to be relevant to the circumstances of Tanzania.

(3) 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.

- **Local level land administration including land rights registration**

Customary tenure and law are essentially local. It follows that acceptance of legal pluralism involves acceptance of local land administration and acceptance that within constitutional and other fundamental parameters, local decisions about land may or will differ between each other. There is nothing to worry about in that. Furthermore, it ban strongly argued that the Tanzanian and Ugandan approach of local level recordation of land rights and transactions is the way forward. The centralised land registration systems of Kenya, Tanzania and Uganda are by-words for inefficiency, corruption and inaccuracy; local deeds registration systems have a much greater chance of being kept up to the mark by local knowledge and publicity.

- **In land adjudication, record and protect all customary interests**

One of the worst features of, for example, Sudanese and Kenyan land adjudication processes is the way they failed to record customary interests in land which had no parallel in the common law or Sharī'a and therefore could not be transmogrified into rights in these other systems. As has been shown by much research, women in particular have lost out by cultural and legal failures to protect customary rights. There is nothing objectionable about adjudication and registration *per se* as the basis for moving rights and interests in land from a customary to a statutory system, but it must be a properly comprehensive process that does not sacrifice third party and derivative interests in land.

- **Recognise urban 'customary' tenure in informal settlements**

Even in those countries that have accepted a pluralist tenure and land law system in rural areas there is a reluctance to extend that same approach to urban areas. For

example, in Tanzania village land administration is provided for in the law; whilst in urban areas it is assumed that statutory law applies. Yet where as in Dar es Salaam and Nairobi (and most other large cities in Africa) the urban majority live in informal settlements, it is flying in the face of reality not to accept that they have their own land tenure rules – usually an amalgam of customary and statutory systems – and dispute settlement mechanisms and as in rural areas, to build on these rather than try to replace them with an alien law. Therefore land regularisation schemes and urban land adjudication should start from the premise that what people are using to determine who has what and how disputes are settled is 'law', conferring rights on residents and others. Local recordation systems can be developed in urban areas as in villages.

- **Participatory community planning, not top-down master planning**

This precept follows logically from the previous one. Residents in informal settlements are here to stay. A planning law and system that is based on master plans forcing people into planned urban strait-jackets is still far too prevalent in African cities as many commentators have noted. Operation Murambatsvina in Zimbabwe may have been a particularly gross example of urban planning carried out "in an indiscriminate and unjustified manner with indifference to human suffering and in repeated cases with disregard to several provisions of national and international legal frameworks" to quote the report of the UN Special Envoy Mrs Anna Tibaijuka (2005), but it is not unique in African urban planning. To take just one example, from Dar es Salaam, where a participative system of planning was introduced under an UN-Habitat Sustainable Cities Programme in 1992, two Tanzanian commentators writing in 1999 noted:

> The custodians of Land-Use Planning as practised within the legislative framework of the 1956 Town and Country Planning Ordinance have argued that the Environmental Management Strategy for Dar se Salaam…did not constitute the planning output of the Sustainable Development Project…it would miss their required long-term (10 – 20 year) land-use plan…that is not dissimilar to the earlier city master plans…These practitioners comprising the law enforcers in town and country planning from both central and local government have regarded the EMS process…to be wasteful in terms of both time and other resources and thereby an interference with their routines…for instance the ongoing unilateral action of the Dar es Salaam City Council to demolish kiosks used by informal sector operators in the name of law enforcement…The position of this group of practitioners is anti-EPM since that position discourages partnership and participation amongst the city stakeholders…So in Dar es Salaam land use planners apply (at any cost)

> various law-enforcement instruments to fight humble operators of informal-sector income generating and housing activities.(Halla and Majani 1999).

These 'colonial' attitudes to the urban majority have to change and urban land law needs to adopt the pluralist perspective.

- **Clear rules for public and private transactions and actions**

A pluralist system of land law need not be, indeed must not be, a confusing system of land law. Under the old, hierarchical system officials were given wide discretionary powers to push people around who were occupying land under customary tenure and deprive them of their land unjustly. Land transactions were based on old laws neither known nor often available to the majority. Under a pluralist system (as well as under a monist system, of course,) the powers and duties of public officials must be clearly delineated, exercised in a transparent and accountable manner and properly regulated. The rules relating to land transactions must be set out clearly and made available for all in languages that the people generally understand. This will increase efficiency. Fundamental equitable principles applicable to market transactions such as a ban on unconscionable conduct, activities and actions must be an integral part of the law and mechanisms for enforcement must be provided. Political involvement in land management and decisions about land transactions should be minimised; it is unrealistic to try to prevent it altogether.

- **Bringing formal market institutions on board**

Creating a pluralist system of land law is only a start to a more effective, efficient and equitable system of land management. Officials must be educated or re-educated to accept an end to telling people what to do and becoming instead the advisers and facilitators of lay people making the decisions. Planners must work with people and not resort to the bulldozer to get their way. Private sector institutions such as banks and building societies and professions such as surveyors and lawyers must adapt their working practices and approaches to cater to more than just the minority who operate in the statutory system. In some respects this will be the biggest challenge to make a pluralist system work. Hence the consideration of the law and market for mortgages in the third part of this paper.

3. Why is monism still attempted?

Now to turn to the second issue; why do states continue to adopt a monist approach to land tenure and land law? Just consider the record. Where there has been a conscious attempt to impose a unified law the evidence shows that it has almost sigularly failed. We may just note some examples over the last 50 years: land titling in Kenya starting in the 50's; villagisation in Tanzania in the 70's and 80's; Sudan and the imposition of Sharī'a from the mid 80's – a major factor in the civil war between North and South (Johnson, 2004); Niger in the mid to late 90's (Lund, 1998, Kelley 2002); Eritrea in the 90's (Gebremedhin, 2004); Lesotho in the late 70's (Franklin, 1995) and possibly again in the 2000's (LPRC, 2000); the question is: why this constant lemming-like rush to the precipice of failure?

To provide a possible answer we have to go back in history. The history of the spread of land law - or at any rate the common law of land, which I know best - throughout the world (but from what I have learned of civil law and Sharī'a, I do not think the picture for those two systems is any different) – is that land law was used as a if not the principal tool of imperial penetration by a colonising power into a foreign land. This approach to the use of land law goes back in the common law world to the conquest of England by William I – the assertion through force of arms of *imperium* over England, that is sovereignty over England – which was assumed to mean as well *dominium* or absolute ownership of the land of England. From there came the development of the common law notion of estates in the land: the monarch owns the land; her subjects own estates in the land.

This fundamental feudal notion that *imperium* over a country carried with it *dominium* over the lands within that country was the basis for the development of arguments by lawyers in the Foreign Office in the 18th and 19th centuries that the acquisition of jurisdiction – not sovereignty – over foreign territory where there was no clearly identifiable sovereign carried with it the right to deal with 'waste' and unoccupied land and the definition of waste and unoccupied land was remarkably broad and flexible. (Ghai and McAuslan 1970). *A fortiori* where sovereignty was claimed, as in Australia. As the sovereign owned the land and could dispose of it, so the sovereign could and did determine what law should apply to the land: the common law of England. Other laws could apply, but only if they passed the test of being "in accord with justice and morality" or with "natural justice, equity and good conscience"; phrases which ensured that customary laws were always judged and applied through the prism of the common law.

So powers over land in Anglophone African dependencies were acquired by the British colonial authorities as an act of government and the allocation, management and planning of land was retained as an act of government by the same. As has been amply demonstrated by numerous scholars, the scope, development and use of customary law and so by extension customary tenure and its management by traditional authorities was also determined by political and governmental factors, and not by land management factors. On the surface it may have looked like there were two separate legal systems in operation with respect to land – the customary and the statutory; in legal reality, there was just one system: the statutory, a part of which was something called 'customary'. Uganda is probably the purest example of this: under the Crown Lands Ordinance of 1903 most Ugandans *occupied* their land under customary tenure but they *held* their land as tenants at will of the Crown, who could be and sometimes were moved from the land by the colonial authorities with little ceremony and less compensation.

This, then, was the approach to land law which newly independent governments inherited at the time of independence: that power over land is inseparable from power over the state. For a whole raft of reasons most governments either continued or stepped up the process of controlling land and moving towards a monist land law. A few of these reasons may be noted:

- As with the colonial authorities, so the new governments and elites desired to control and allocate to and for their benefit the major resource of the state: land. This remains a very powerful factor in land administration.
- A belief that a unified legal system was a precondition of a unified nation state. Nowhere was there more diversity than land la, so nowhere was there a greater need to abolish customary law than with respect to land. For example, Tanzania constantly tried to abolish customary land tenure during the heyday of the villagisation policy, and the introduction of Sharī'a by the Sudanese Government in 1983 was motivated by similar thinking as well as a desire to exert greater control over land for reasons noted above.
- External advice was to move towards individual tenure based on received law rather than continue with customary tenure. The hugely influential Report of the East African Royal Commission (1955) argued for this, and these arguments were taken over and propagated by early World Bank reports on economic development for newly independent states in Africa in the 1960s.

- All these lines of thinking and action continue today. In the 1990s countries as diverse as Niger and Eritrea have enacted new land codes which are national in scope, confer greater powers on the government and aimed to do away with customary land tenure. The Land Policy Review Commission of Lesotho in its report of September 2000 recommended a unitary land system of leasehold and freehold tenure and that the customary land tenure system "be abolished forthwith".
- International external advice may have recently moderated the stridency of its championing of individualised registered land tenure but the message from the World Bank, the HLC and, for instance, the African Growth and Opportunity Act of the US continues to point in that direction. Similarly, too, with the private sector agencies in the business of providing secured loans.
- As noted above, disregard of urban 'customary' land tenure is still the norm rather than the exception. Regularisation of informal settlements is seen as the opportunity to substitute formal statutory title and law for 'chaos' and 'illegality'. There is still a touching if misguided belief in the efficacy of Master Plans to bring about the development of the city beautiful. That and the bulldozer.

Behind all these actions, laws and policies lies, I believe, the fundamental notion already alluded to: that rights in land derive from the nation state and, whereas a matter of history the current state has succeeded to the colonially created geographical area of Africa which is now called 'Tanzania', 'Lesotho', 'Niger', etc, then whatever had happened in the pre-colonial past is now history and cannot be resurrected and used to justify customary rights to land, which may seem to contradict national interests (as defined by the ruling – and typically land owning – elites).

Now this approach to land rights is itself history. The seminal judicial decisions of the Australian High Court in *Mabo v Queensland* (1992) and *Wik v Queensland* (1996) have altered forever and I believe in all states with customary tenure in Africa the approach to indigenous land rights held under customary tenure which assumed that *imperium* – acquisition of a country – automatically carried with it *dominium* – acquisition of the land in the country, on the grounds that it was *res nullius* – land without an owner. Those two cases decided that Aboriginal customary rights to the land survived the British colonial annexation of Australia in the late 18th century and could only be held to have been extinguished by a clear action by the government; i.e. the grant of land to a settler in freehold.

In the words of Mr Justice Brennan, (2 judges agreeing with his judgement):

> 2. On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
> 3. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.
> 4. Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.

However, provided an Aboriginal community could show that it existed at the time of annexation, that it occupied the land in contention at the time of the case and that the connection between the community and the land had never been severed, then the existence of their title would be recognised. In the case of *Wik*, where pastoral leases were in question – leases which cover truly vast areas of Australia – the High Court decided that if the pastoral leases had been granted in freehold, native title would have been extinguished but since the grants had been statutory, the terms of each grant had to be examined to see if those terms added up to extinguishment of native title. The leading Canadian case of *Delgamuukw and Others v British Columbia and Others* (1997) dealing with the rights of First Nations ('Indians'), Inuits and Metis followed the same general approach.

This approach to indigenous title was followed in the South African case of *Richtersveld v Alexkor* (2003), where the Constitutional Court of South Africa affirmed the decision of the Supreme Court of Appeal that:

> 1. The Richtersveld community was in exclusive possession of the whole of the Richtersveld, including the subject land, prior to annexation by the British Crown in 1847.
> 2. The Richtersveld community's rights to the land (including precious stones and minerals) were akin to those held under common law ownership. These rights constituted a 'customary law interest' and consequently a 'right in land' as defined in the Act [providing for restitution of land taken as a result of past discriminatory legislation].

> 3. These rights survived the annexation and the LCC [Land Claims Court] erred in finding that the community had lost its rights because it was insufficiently civilised to be recognised.

It did not matter that the Richtersveld community were hunter/gatherers and so did not occupy all of their land all the time. The Supreme Court of Appeal referred to the decision of the Judicial Committee of the Privy Council (the supreme court of appeal in the former British Empire) in *Amodu Tijani v The Secretary, Southern Nigeria* (1921), which held that "a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners" and followed both that decision and *Mabo* and *Delgamuukw,* as well as referring to international legal judgements which have adopted the same approach.

Now even allowing for the fact that the factual and legal background to the current issue of customary land rights in many states in Anglophone Africa are different to the situation in Australia and South Africa, there are some fundamental points from the *Mabo*, *Wik* and *Richtersveld* approach which accord with customary international law and some UN conventions on these issues. First, the original customary rights of the indigenous inhabitants of the State do not just disappear because no notice is taken of them by the government of the day. Second, they do they disappear because a law has been enacted which disregards them. They are only extinguished if a clear legal or factual act has been taken by the government which demonstrates beyond any doubt that other rights in the land have superseded them; for instance, a grant of land in freehold or its equivalent; i.e. mailo tenure in Uganda. Third, the state's acquisition of a radical title to land does not extinguish customary title; that acquisition is acquisition by virtue of sovereignty, not by virtue of property.

Furthermore, even successor states can be in no better legal position than their colonial forebears. Thus, while it is open to any state specifically and clearly to abolish customary tenure and or to create rights in land which are inconsistent with the continuation of rights to land under customary tenure, to do so will involve the payment of compensation or land in lieu of the loss of land or rights in the land, since they were rights which pre-existed the foundation of the state. In retrospect we can see that this was the fundamental basis of the Tanzanian Court of Appeal decision in *A-G v Akonaay* (1994), which 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 that, in any case, all land was vested in the President of the Republic and therefore that there was no legal basis for the court to require payment of unexhausted improvements when land under customary tenure was taken away

from people. As the Chief Justice 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." 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. The decision of the High Court in Lesotho in *Moletsane v Attorney General* (2004) with respect to the demolition of houses in informal settlement proceeded on the same basis; that people living in such property have property rights which cannot be ignored.

Customary tenure then is *and always has been* one of the foundational elements of the land law of all states in Africa. It is not an add-on to the received law; the strict legal position is in fact the reverse; received or imposed law – common law, civil law, Roman-Dutch law – is the add-on: it is therefore that law which should be adapted and adjusted to the indigenous law, not vice versa. It is therefore, paradoxically, preciesly the proponents of the received law that should be most concerned to advance the case for legal pluralism.

4. Mortgages and legal pluralism

This, then, is a good way into the last issue to be addressed by this paper: mortgage law. The gravamen of the de Soto case on property rights is that there is a need to adapt and adjust land laws and practices in countries in Africa to 'unlock' the huge amount of 'dead capital' that exists with respect to property rights in Africa. In other words, if land were to be titled, it would then be available to be used as security to access loans and the loans could be used to develop the land and so increase wealth generally throughout the continent. Now leaving aside the many problematic theoretical, ideological and socio-legal issues involved in the de Soto analysis – these have been amply discussed elsewhere – I want to focus on the very down-to-earth matter of the law that would be needed to turn de Soto's ideas into reality: mortgage law. What does legal pluralism have to say about mortgage law, or rather, can mortgage law and legal pluralism live together; and if not, is there - whatever the fine words - really a place for legal pluralism in the brave new world offered to us by the HLC?

It has to be said right away that all the evidence shows that loans on the security of land titles, the classic mortgage - at least in the common law world in Africa, but my understanding of civil law mortgages is that they are no different - will only be offered by private sector banks, building societies and similar bodies on the strength

of a title which is (a) registered (b) individually owned or at most jointly owned by spouses and (c) governed by received and not customary law. Where houses are concerned one must add (d) built to what might be called Western as opposed African traditional specifications. Furthermore, whereas in many countries in the developed world governments and occasionally courts have intervened to temper the strictness of the rules governing default by mortgagors to require mortgagees to give temporary relief to mortgagors - especially mortgagors of family homes - these same banks etc resist very strongly any such equitable relief being provided for by law by governments in Africa and in this respect, they are assisted to adopt such a hard line by International Financial Institutions such as the World Bank.

A case study from Tanzania is instructive here. The Land Act 1999 was brought into force in May 2001. From very early on in its life some of the banks in Tanzania took exception to the new law on mortgages provided for by the Act. They objected to the abolition of foreclosure and 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. In fact no or very few new powers of intervention were being 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 wished to move, via small loans taken out for short periods, to growing cash crops. Ditto for small jua kali business people and people wanting small revolving loans for improving their homes. Second, small mortgages were a facility; 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 was 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 the small mortgage facility was clearly a potential money-spinner for the banks.

The banks pursued their objection with the World Bank. An official in the World Bank consulted the author on the matter. The author wrote a memorandum in May 2002 for that official in which he 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 with respect to mortgages other than small mortgages and the remedies for small mortgages followed the model of other countries (e.g. residential mortgages were often given special protection).

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."[1] A Financial

[1] Tanzania: land reform needed for agricultural investment. 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 probably a thing of 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 the TBA) understood what the underlying law of mortgages of Tanzania was or how the new law fitted into and made use of that law.

Sector Assessment 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.[2]

The Government of Tanzania agreed to revise the new law. The Attorney-General took the lead[3] 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[4], 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 additions introduced in 1970 and 1973.

What is most significant is that while small mortgages have been abolished, restrictions on mortgagees taking enforcement actions against defaulting mortgagors have been increased; enforcement actions against all defaulting mortgagors of residential, agricultural and pastoral property must first go to court. This reform will benefit all those with regular mortgages – the urban middle and upper classes while it is the less well off who will lose out by the reforms. Discussions with banks suggested that they had not fully understood the effect of the reforms but also

[2] Financial Sector Assessment Report (2003) para. 6. (World Bank, Washington DC). 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.
[3] It was put to the author that the A-G 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.
[4] Law Commission (1994) *A New Property Law Act: Report No. 29* (Wellington)

confirmed that they would not contemplate lending on any other than a title registered under the Land Registration Act, a decision which would reduce the scope of their lending to less than 10% of the land in Tanzania.

A recent special feature in the September 2005 edition of Business *in Africa* highlighted de Soto's message and clearly bought into it. The assumption behind the very informative and useful articles in this feature was not just that land held in customary tenure would not be adequate security but that land owned by governments would not be adequate security:

> The problem is essentially that very little property in Africa is available in clearly identified and titled individual freehold. Outside South Africa, Namibia and Zimbabwe, most land – probably over 95% – is essentially state-owned. It is either commonage, under traditional management, or available only a limited-period (for example 99 year) leasehold. Neither makes for an effective market. (Christianson (2005), 24)

The point in the last sentence is complete nonsense.[5] But it is symptomatic of the attitude of banks including the World Bank to lending on real estate in Africa: customary rights however well protected and secured don't count; non-registered titles or titles registered in traditional civil law systems via Land Books and Land Courts however well secured don't count; only titles registered in what might be called the Anglo-Australian system (or in the case of South African banks, the South African deeds registration system) are acceptable security and then only when a mortgage law has no limitations on the mortgagee's power to take possession and sell the property of a mortgagor in default.

5. Conclusion

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

[5] Most urban development in the UK in the 19th century was private and based on 99 year leases as was property development in colonial Hong Kong. The same banks that won't look at 'limited rights' in Africa can't pour enough money into property development in China where land rights are less than 99 years, contract enforcement is distinctly weak and political issues on land holding are at least as overt as in many countries in Africa.

work with or on some cases particularly in the private financial sector even to begin to understand the strengths of customary tenure. Where governments in Africa need to make changes is in their procedures and processes; as the World Bank's survey *Doing Business in 2005* clearly shows, it is this rather than in any pluralist system of land tenure that inhibits investment in land. Until this issue is tackled, and more creative mortgage systems and laws are developed or adapted from other countries and applied to countries in Africa, using land as security and an engine of wealth creation in Africa will continue to be problematic. It is therefore not customary tenure but what may be referred to as 'customary' conservative state bureaucracy and private mortgage practices and attitudes which need fundamental reform. The HLC should focus as much on the second as it does on the first.

References

Peter Butt, Robert Eagleson and Patricia Lane, (2001) *Mabo, Wik and Native Title* 4th edition (The Federation Press, NSW)

David Christianson, (2005) Property: Africa's Hidden Treasure Trove; and Can Property Spur Growth, *Business in Africa,* Sept 2005, 22 – 26; 27 –29.

East Africa Royal Commission (1955) *Report* (HMSO, Cmd 9475, London)

Charles E. Ehrlich, (2005) Aboriginal Land Rights: The Effect of Common Law Decisions in Canada and Australia on International Law, *New England International and Comparative Law Annual*, <http://www.nesl.edu/annual/index.htm>

Daniel Fitzpatrick (2005) 'Best Practice' Options for the Legal Recognition of Customary Tenure, *Development and Change*, Vol. 36, 449 – 475.

Anita Shanta Franklin (1995) *Land Law in Lesotho* (Avebury, Aldershot)

Yohannes Gebremadhin, (2004) *The Challenges of a Society in Transition: Legal Developments in Eritrea*, (The Red Sea Press, Asmara).

Y.P. Ghai and J.P.W.B. McAuslan, (1970) *Public Law and Political Change in Kenya* (Oxford UP, Nairobi).

Francis Halla and Bituro Majani (1999) The Environmental Planning and Management Process and the Conflict over Outputs in Dar es Salaam, *HABITAT International*, Vol. 23, 339 – 350.

Douglas H. Johnson (2004) *The Root Causes of Sudan's Civil Wars* (James Currey, Oxford)

Thomas Kelley, (2002) Squeezing Parakeets into Pigeon Holes: The Effects of Globalisation and State Legal Reform in Niger on Indigenous Zarma Law, *International Law and Politics*, Vol. 34, 635 – 710.

Peter Lamour, (2002) Policy Transfer and Reversal: Customary Land Registration from Africa to Melanesia, *Public Administration and Development*, Vol.22, 151 – 161.

Aharon Layish and Gabriel Warburg, (2002) *The Reinstatement of Islamic Law in Sudan under Numayri* (Brill, Leiden)

Kingdom of Lesotho, (2000) *Report of the Land Policy Review Commission* (Government Printer, Maseru)

Christian Lund, (1998) *Law, Power and Politics in Niger: Land Struggles and the Rural Code* (Lit Verlag, Hamburg)

Patrick McAuslan (2003) *Bringing the Law Back In: Essays in Land, Law and Development* (Ashgate, Aldershot)

Anna Kajumulo Tibaijuka (2005) *Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special envoy on Human Settlements in Zimbabwe* (UN, New York).

Jennifer A. Widner, (2001) *Building the Rule of Law* (W.W. Norton, New York)

Ellen Meiksins Wood, (2003) *Empire of Capital*, (Verso, London)

Farhat J. Ziadeh, (1979) *Property Law in the Arab World* (Graham and Trotman, London)