

LEGAL DUALISM AND LAND POLICY IN EASTERN & SOUTHERN AFRICA

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Summary

This paper identifies tenure dualism as a central issue for countries that seek to modernise their land systems as they pursue sustainable development. Outlining the tenure experience of various eastern and southern African countries during and since the colonial era, it first describes how colonial regimes instituted legal and tenure dualism as they reinforced settler interests and adopted minimalist approaches to land tenure and management by indigenous people. The roles of traditional authorities were simplified and strengthened. In the process women's land rights were typically suppressed. Independent governments' instinctive reaction to the tenure dualism bequeathed by departing colonial regimes was to suppress it through statist policies of nationalisation and the conversion of freehold to leasehold. But customary law and tenure proved tenacious, and few of these early reforms aimed at strengthening state control over customary land have proved effective or durable. Meanwhile, more gradualist approaches to address tenure dualism through registration and titling programmes have achieved relatively little. They have not automatically unlocked economic growth for the recipients of registered individual title. On the contrary, they have often disempowered many vulnerable people, stirred up innumerable costly disputes and tied down substantial state resources.

More recently, land related policy in eastern and southern Africa has begun to embrace tenure dualism in more proactive and imaginative ways. It has sought evolutionary approaches that allow customary law and practice to continue in land tenure and management, but provide clear and secure paths to more modern formats and modes as people identify the need for them. Sometimes these approaches involve changing nothing in daily practice on the ground, but altering the formal character and structure of land rights to facilitate this evolutionary conversion as individuals and groups come to find it necessary. While land tenure and administration are integrated in a single statute law, tenure dualism may be recognised as a resource rather than an obstacle in the changing livelihoods of the poor, with customary law and practice continuing to sustain land rights in many contexts. Part of the necessary legal reappraisal in eastern and southern Africa is to catch up with the tenure approaches and mechanisms that citizens have devised for themselves in the face of legislative and institutional inertia or indifference. Land reform may now be required to regularise extra-legal tenure, especially in urban and peri-urban areas, if it is to facilitate and accelerate development. Governments may be understandably reluctant to legitimise such extra-legal practice. But this is one of the ways in which they have to accept the continuing limitations of state policy and statute law, and the ongoing significance of customary law and tenure, in the 21st century land rights and transactions of their citizens. In many instances they need to work with tenure dualism rather than confront it.

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Introduction

How central is the concept of legal pluralism to the land tenure experience of eastern and southern Africa? To answer this question and guide our brief outline of that experience, we would first suggest that, for most of the purposes of this workshop, we can work with the concept of legal *dualism* rather than pluralism. The details of what constitutes a legal system, or how many legal systems there may be in the rich indigenous institutional heritage of contemporary African states, need not concern us here. The basic issue is that colonial powers imported systems of common and statute law for their own purposes, and operated them alongside the existing system(s) of customary law. Post colonial states initially maintained what we can more simply call this legal dualism. Customary law prevailed in some areas of independent African countries' geographical and social space. Statute law and the imported common law prevailed in others.

Since independence, different countries in eastern and southern Africa have pursued different policies with regard to this legal dualism. The colonial relegation of customary law to second-class status has usually been maintained, at least until recently. Constitutional developments in a number of countries have sought to create a single legal system in which statute and imported common law are paramount. Only recently have some countries formally recognised the integral role and equivalent status of customary law within such overarching legal frameworks.

In the real world of most African livelihoods, however, customary law has proved to be tenacious. Especially in rural areas, but often in towns too, customary law has been the dominant system in such fields as family relations, economic relations and – often spanning the two – land tenure. One of the most common themes at this workshop is certain to be the gulf between legal theory and this practical reality. Customary law may hardly be acknowledged in national legislation. But it often continues to dominate real life – especially in the rural sector and among the poor and under-privileged.

While it is essential for those of us involved in the practicalities of sustainable development to understand this legal dualism, a focus on the specifically legal aspects of the gap between theory and practice is not the most helpful way forward. As we recognise the key role of appropriate land tenure and land administration in sustainable development strategy, it is more operationally useful to focus on the *tenure* dualism that persists in so many countries, including those of eastern and southern Africa. In the background the shifting disposition of statute, common and customary law pervades the prospects for progress. In the foreground, the question is what societies should do to bridge the divide between land tenure systems based on the imported concept of absolute private ownership and systems based on more complex indigenous frameworks of nested individual and group rights. The notion of tenure *dualism* is, of course, an oversimplification; but in a brief overview (and even in a brief workshop), it is a valid shorthand for the basic challenge that confronts much of this continent.

This paper provides an overview of this dualism in land tenure arrangements as they have emerged in some of the countries of eastern and southern Africa. In view of the wide scope

of the topic and the necessary brevity of this paper, considerable simplification and generalisation are inevitable. We have not given much attention to countries in southern Africa with relatively large landowning white minorities, as they will have been taken into account elsewhere in this workshop. Furthermore, we have made little comment on land relations in Botswana in view of the important paper that follows, except to say that Botswana seems to have grappled relatively successfully with many of the land problems associated with legal dualism that have been experienced elsewhere.

Tenure Dualism: the Colonial Legacy

When nationalist movements and world opinion pressed for self determination, the ‘wind of change’ blew strongly, bringing independence to most British colonies and protectorates within some ten years, starting with Sudan in 1956 and followed by Ghana the following year. These countries obtained sovereignty under dual legal and tenurial arrangements. Received law regulated land rights on alienated land and customary law on land used and occupied by Africans.

During the rapid expansion of British influence in the first half of the 20th century the colonial administration had little alternative but to work at local level with the powers in existence. ‘Indirect rule’ was presented as a virtue, yet it arose from necessity. The British needed to extend their authority over the whole territory, at minimum cost to the colonial exchequer. In the subjugated territory, indirect rule posed a dilemma for nationalists. Without their leaders, the people would be devoid of leadership at a critical time. Yet if they cooperated, they would be sullied by their association with the colonial government.

The official position of the British was that customary land rights should be respected, including the traditional land administration responsibilities of local leaders. Thus tenure arrangements in most territories remained largely intact. Two significant exceptions north of the Limpopo were Zimbabwe and Kenya, where some of the best areas for arable or livestock farming were grabbed by white settlers. In administrative capitals, the best located urban land was taken for the ‘domestic’ needs of the colonial administration and for the residential use of Europeans and Asians engaged in commerce. Little urban land was set aside for the local population, who occupied customary land at the margins of cities.

Table 1 shows the percentage of territory alienated in eastern and southern Africa by 1957. Compared to some territories in southern Africa, the land taken elsewhere in the region was relatively small. Yet wherever land alienation occurred, on whatever scale, and no matter the circumstances, it resulted in deep-seated and long-lasting resentment among the indigenous people and continues to be a headache for independent governments in the 21st Century.

Land alienated to non Africans in Anglophone countries as a percentage of the total area of the territory in 1957 (Source: Hailey³)

Union of South Africa (now RSA)	89%
Southern Rhodesia (Zimbabwe)	49%
Swaziland	49%
Kenya	7%
Bechuanaland (Botswana)	6%
Nyasaland (Malawi)	5%
Northern Rhodesia (Zambia)	3%
Tanganyika (Tanzania)	0.9%
Uganda, Basutoland (Lesotho), Sudan	Less than 0.5%

Mid 20th century studies of customary land tenure reveal important variations in tenure arrangements between the different territories, reflecting the ethnic origin of the population and the prevailing system(s) of land use. One common characteristic is the importance of community control over the means of subsistence for security and continuity. These communal rights seemed to transcend those of individuals and their immediate relatives, a view which was not lost on the governments of the day. The legal opinion of the Privy Council⁴ that customary tenure admitted no individual property became a convenient tool of the colonial administration. It was held that the right to individual property under English Law did not extend to ‘usufructuary’ or ‘communal’ rights. Thus customary land was held in trust by the colonial power and designated ‘Crown Land’, ‘Native Reserve’ or ‘Trust Land’. African peasants were no more than tenants without any right independent of the will of the state to use and occupy the land.⁵

The role of chiefs in land administration has been a recurring issue, which has its roots in the colonial period. In his classic study, *The African Husbandman*, William Allan⁶ describes land tenure arrangements prevailing in customary areas of **Zambia** in the first half of the last century. The customary rules he describes are unexceptional. They will be recognised across the vast savannah areas of Africa. In Zambia, they still provide the basic framework of customary land law for the majority of farmers.⁷ Allan’s explanation draws on the work of Max Gluckman⁸ among the Bantu-speaking peoples of Central and Southern Africa who explained that chiefs did not allot the land directly to their subjects who used it. Rather, land was allocated to sub-chiefs who in turn allotted shares to village headmen. At the village level, the headman allotted land to heads of sub-sections or heads of families and they distributed land to their dependants. Gluckman refers to this aspect of

³ Lord Hailey, *An African Survey: A Study of Problems Arising in Africa South of the Sahara* Revised Edition, Oxford University Press, 1958

⁴ *Amodu Tijani v. The Secretary, Southern Nigeria [1921] 2 A.C. 399*

⁵ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, ACTS Press, Nairobi, 1991

⁶ William Allan, *The African Husbandman*, Oliver and Boyd, 1965.

⁷ Variations occur in some land-scarce areas where ‘estates of administration’ are vested in segments of clans or lineage; sometimes matrilineal lineages.

⁸ Max Gluckman, *The Economy of the Central Barotse Plain*. Rhodes Livingstone Papers, No 7, 1941; *Essays on Lozi Land and Royal Property*, Rhodes Livingstone Papers, No 10, 1943

the land tenure system as ‘estates of administration’. Shared ‘estates of cultivation’ belonged to a particular tribe. The same principle applied to traditional grazing. These rights did not depend on the discretion of the chief or headman. He was required to provide residential, arable and grazing land for all his subjects. A tribesman was entitled to land without giving anything for it, but he had a duty to protect and conserve it. Although the concept of individual absolute ownership was unknown, the rights to residential land were exclusive and permanent. The holder could protect his rights by civil action against any person, even the chief, except when land needed to be acquired in the public interest. In this case the chief would allocate an equivalent piece of land in compensation.

The Chief was said to possess a seigneurial (or feudal) right to communal property. He could transfer it or sell it for a public purpose, in accordance with the eminent domain ordinances, which called for acquisition of native lands upon payment of compensation extending only to ‘unextinguished improvements’. Compensation was limited to crops and structures erected on land, without regard to the potential value of the land to the individual, the family and future generations.

On attaining independence African governments have found it convenient to hold on to this legacy of the colonial system. Even in **Botswana**, which has a reputation for being more enlightened in these matters, it was not until 1992 that the Government recognised that compensation for customary land acquired for public purposes must be at market-related values if comparable alternative land were not available.

The low compensation for Tribal land is the result of policy, influenced by the mode of acquiring such land as well as the fact that the land is not held in absolute ownership. But this has now led us to the crisis that we find ourselves in, where excessive artificial intervention in the operation of market forces led to a collapse of tribal land administration....

The Government has considered the long term corrupting effects of excessive artificial suppression of Tribal land values and has decided in principle that Tribal land should be covered by both the Constitution and the Acquisition of Property Act to enable landholders to receive compensation commensurate with the value of the land as dictated by market forces. (pp 12-13).⁹

Any description of customary tenure arrangements, however brief, would be incomplete without reference to the rights of women in African traditional societies. The basic rule in patrilineal societies was that whereas men gained rights to land through their lineage or clan, women gained access only through their husbands, or, in the case of women without husbands, fathers or brothers. Men were obliged to allocate land to their wives, which they could use at their discretion. As they were usually responsible for providing food for the household, they tended to use it for this purpose which prevented them from growing crops for sale. This principle has survived in many situations. Indeed, changes observed in the past forty years in Sub-Saharan Africa reflect the marginalisation of women in development

⁹ Republic of Botswana *Land Problems in Mogoditshane and Other Peri-Urban Villages*, Government Paper No. 1 of 1992. Gaborone: Government Printer White Paper No. 1 of 1992

policy generally. Land policies have been typically blind to the gendered nature of property and its consequences. Consequently, women are losing out as a result of the process of 'development'. Furthermore, they do so from an already inferior position. Commercialisation of production and individualisation of tenure systems and formal titling schemes have all worked in the same direction; women's tenure rights have been - and are still being - eroded.

Customary law permitted tribesmen to transfer interests in residential land among themselves, but only with the consent of the chief. Although the concept of land sales may have been unknown, there was no rule forbidding payment for improvements. The free transfer of unimproved land was taken for granted. It was received free and was given free. But changes were occurring throughout the colonial period. Elizabeth Colson¹⁰, in her review of the impact of the colonial period on land tenure in Africa, states that, by the end, the situation had changed to one which had 'converted territory or domain into economic holdings and citizens into land-holders' (p.198). Commenting on a much quoted statement from West Africa that 'land belongs to a vast family of which many are dead, few are living and countless members unborn', she points out that descent groups have long permitted strangers to settle on their land and that members have long felt free to leave the ancestral estate, abandon the graves of their ancestors and exploit land elsewhere. Rental of customary land has a long tradition, both for subsistence production and for sale. For example, Deininger reminds us that unofficial rental markets have long been very active in West Africa, particularly in cocoa farming. In Ghana migrants received land on which they established cocoa and gave one third of the yield back to the original owners. By the 1960s, 95% of the cocoa land was cultivated by migrants who acquired land in this way, although they are now being pressed to return it.¹¹

Suppressing Tenure Dualism: the Early Post-independence Decades

Anglophone countries showed themselves to be remarkably inventive in devising new tenure systems after they had thrown off the colonial yoke. Changes were introduced which reflected the varying philosophies and aspirations of the political elite. The underlying objectives for reform were rarely explicit, but were commonly linked to a desire to suppress the tenure dualism that colonialism had created – for the supposedly related purposes of enhancing social justice and building the authority of fledgling states. Recurring motives seem to have been a distrust of the concept of private ownership (freehold and leasehold), impatience with interminable land disputes between neighbouring tribes, and reluctance to leave control over land allocation in the hands of traditional leaders. Some reforms aimed at tighter state control over the allocation and use of private land. Others were designed to reduce the powers of traditional leaders in favour of alternative forms of local government, more sympathetic to the political objectives of the party in power. Some countries looked to the Soviet Union and the Middle East where 'revolutionary governments' were introducing land reforms with the stated intention of increasing agricultural productivity. Others were

¹⁰ Elizabeth Colson, 'The Impact of the Colonial Period on the Definition of Land Rights', in Victor Turner, ed., *Colonialism in Africa 1870-1960, Volume 3: Profiles of Change: African Society and Colonial Rule* Cambridge University Press, 1971

¹¹ Klaus Deininger *Land Policies for Growth and Poverty Reduction*, World Bank and Oxford University Press, 2003

influenced by ideas about capital intensive agriculture which were integral to the international development discourse at the time.¹²

Land policy documents published in the 1960s were remarkably optimistic about what could be achieved by agrarian reform and land settlement on what had hitherto been customary land. In a series of radical laws between 1963 and 1966 **Tanzania** abolished freehold tenure and nationalised all land in the public interest. Thereafter Tanzania under the leadership of President Julius Nyerere embarked on a large-scale resettlement scheme under which some five million Tanzanians were relocated and settled in villages, planned by central government officials. This approach was strikingly continuous with colonial policies of the British in East Africa, especially ideas about mechanization and the economies of scale in agriculture, which spawned the disastrous groundnut scheme of Tanganyika soon after World War II, a dress rehearsal for massive villagization.

In **Uganda**, the Land Reform Decree of 1975 under President Idi Amin declared all land to be Public Land; made all *mailo* and other freehold land owners tenants of the state, and effectively worsened the position of customary landholders by permitting alienation of their land by the state without consent. The nationalisation of land created a great deal of uncertainty and tenure insecurity. By the late 1980s, problems had arisen from the parallel operation of various land tenure systems and confusion as to their status, especially in urban and densely populated rural areas.

Ambitious plans for transforming customary systems of land use were not limited to former British East Africa; for example, with the help of the UN, **Sudan** embarked on a national plan of mechanised farming and the sedentarization of nomads in 1964. This policy was facilitated by the *Titles to Land Ordinance* 1899, under which only riverine land that was continuously cultivated was considered private property. The land law excluded from registration the vast areas of semi desert and savannah used by nomadic people. These areas were classified as government owned: (i) subject to no right, and (ii) subject to usufruct rights of ‘tribes’. As elsewhere, usufruct rights were extinguished by government when it wished to lay hands on land for agricultural production schemes, both public and private. Nomadism was seen as a ‘sociological problem’ and a threat to sustainable land use and national security.¹³ In the Nile basin, extensive areas of traditional grazing land were ploughed up for large scale rain-fed sorghum production and for irrigated wheat, cotton and groundnuts, a programme which began before independence.¹⁴ In the western Sudan, fenced ranches were constructed across traditional migratory routes. Under the ‘socialist’ military government of President Numeiri in the 1970s, the positions of tribal sheikh and *nazir* were abolished, customary land was nationalised and ‘people’s councils’ set up to administer it. But, by the early 1980s, people’s local government in Darfur was bankrupt

¹² James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*, Yale University Press, 1998

¹³ Mirghani Maghoub, ‘Land Policy and Settlement in Sudan’ in *Land Policy in the Near East*, FAO, Rome, 1967

¹⁴ Martin Adams, ‘The Baggara Problem: Attempts at Modern Change in Southern Darfur and Southern Kordofan’, *Development and Change*, 13, 2, 259-289, 1982; Salah Shazali and Abdel Ghaffar M. Ahmed, ‘Pastoral land tenure and agricultural expansion: Sudan and the Horn of Africa’, DFID workshop on Land Rights and Sustainable Development in Sub Saharan Africa, Sunningdale, Berkshire 1999.

and confined to a few administrative centres. A succession of local conflicts erupted in the rural areas in the wake of drought and famine. The pastoral groups were pitted against the sedentary farmers in what became a bitter struggle for diminishing resources. The government could not intervene effectively, so people armed themselves.¹⁵

At independence in 1964, President Hastings Banda of **Malawi** lost no time in pursuing his objective of transforming agriculture with the enactment of land legislation which gave government wide powers over customary land, which was vested in perpetuity in the office of the President. Leases could be granted for up to 99 years. Further, customary land could be declared public to increase agricultural production. These laws drew on experience in Sudan, in particular the Gezira scheme adjudication, which in turn had imported customary tenure regulations from India.¹⁶ During the nearly three decades of his rule, Banda's attempts to create a powerful agricultural commodity exporting economy saw a massive expansion of leasehold within the 'estate sector'.

Zambia gained independence in 1963 under President Kaunda, who was sympathetic to developments taking place in Tanzania, which resonated with the principles of customary land law in Zambia. After all, customary land covered 95% of the country. Land belonged to the people. The individual's right to land was simply the right to use it. Land was not seen as a commodity to be alienated for private gain. UNIP adopted a socialist-leaning philosophy and Zambia became a one-party state in 1973. Only small-scale private property was permitted and large-scale enterprises - whether industrial, commercial, agricultural or financial - had to be undertaken either by the state or by institutions controlled by the state. Accordingly, the *Land (Conversion of Titles) Act 1975* completed and confirmed the land nationalisation programme by vesting all land in Zambia in the President, to be held by him in perpetuity on behalf of the people. The small area (ca. 4-5% of Zambia) of freehold land, held mostly by European commercial farmers, was converted into state leaseholds for 100 years and unutilised tracts of land were taken over by the state. Any form of transaction or dealing in land without the prior consent of the President was prohibited. All 'undeveloped land' was acquired by the central or local government, as were most forms of rented property. In exercise of his powers, the President was empowered to fix the maximum amount received, recovered or secured in any land transaction, provided that in fixing such amount, no regard was to be taken of the value of the land, only the developments on the land.

At a stroke of the President's pen, these programmes of land nationalisation sought to overturn the tenure dualism that eastern and southern African countries had inherited from their colonial experience. The reality was rather different. Indigenous and settler elites continued to enjoy strong individual property rights both in towns and in the countryside. The rural poor, and some of their urban counterparts, continued to operate customary tenure regimes, far from the effective reach of the new states' policies and institutions. Few of these early reforms aimed at strengthening state control over customary land have proved effective or durable. By the end of the 'cold war' most of these statist land policies had been abandoned. Customary tenure has not.

¹⁵ Alex de Waal (2004) 'Counter-Insurgency on the Cheap' *London Review of Books*, Vol. 26 No. 15, 5 August 2004

¹⁶ S. Rowton Simpson, *Land Law and Registration*, Cambridge University Press, 1976

Addressing Tenure Dualism: Attempts to Introduce an Official Land Market Regulated by Law

Both during and since the colonial period, there have been various more proactive attempts to address tenure dualism. For various combinations of political and economic reasons, some colonial and independent administrations have sought to modernise customary tenure by adjudicating land and registering titles. While colonial regimes saw this as a useful way to foster the emergence of compliant rural elites, both they and their independent successors also saw it as a way to accelerate the emergence of land markets, commercial lending to rural land owners and the concomitant investment and development in the agricultural sector. They sought, in other words, to speed up the evolution of land tenure from systems of group-based rights dominated by customary law to systems of individual title dominated by the received common and statute law¹⁷.

The earliest attempt to register land in ownership for Africans was in the kingdom of Buganda in **Uganda** in 1899, when half of the total land area of the kingdom was registered in the name of the Kabaka and about 4,000 other notables, for the purposes of reaching a political settlement. This arrangement disregarded the customary rights of those peasants using and occupying the land, a situation which was partially rectified by tenancy legislation some thirty years later. The *mailo*¹⁸ settlement with the Uganda elite resulted in African land having an exchange value and led to the development of an embryonic land market in African land in Uganda.

Some fifty years later in 1954, in neighbouring **Kenya**, a programme to consolidate scattered land fragments and register them as single family holdings was introduced into some of the Kikuyu lands, for example in Kiambu neighbouring Nairobi. The necessary legal instruments were consolidated into a complex bill by 1959.¹⁹ However, even at this stage, commentators were warning that it would be a grave error to assume that this could be used as a blue-print for an agrarian revolution in Africa.

Kenya, more than any other country in the region, has continued to promote the individualisation of tenure through the introduction of formal land titling in the former African reserves (now Trust Lands), on grounds of economic efficiency. The Department of Adjudication and Settlement continues to employ more people and absorb more funds than any other technical department in the Ministry of Lands and Housing. Questions were raised about the value of this dispute ridden activity in the 'Njonjo Report'²⁰ in 2003, but the process continues, partly because of the lack of any systematic management information which would challenge it. Government teams move from area to area, interviewing farmers, surveying boundaries, adjudicating disputes and registering the

¹⁷ Daniel Fitzpatrick, 'Best Practice' Options for the Legal Recognition of Customary Tenure', *Development and Change*, 36:3, 449-475, 2005.

¹⁸ It was registered in freehold *mailo* tenure, as it was allocated in fractions or multiples of square miles.

¹⁹ *Native Lands Registration Bill*, 1959

²⁰ *Report of the Commission of Inquiry into the Land Law System of Kenya, on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration*, November 2002, Nairobi, Government Printer ('the Njonjo Report')

results. Scattered holdings may be consolidated. Individuals or groups may be registered as owners. Thereafter any dealings in land are expected to take place through the register. The system was incorporated in a body of doctrine by Rowton Simpson²¹ which was transmitted through Anglophone Africa and the islands of the South Pacific in the 1960s.²²

The statutory registration of title has weakened the land rights of women and tenants and has increased intractable disputes over land.²³ The new form of tenure downplayed the status and role of women as the actual users of land. Particularly vulnerable were unmarried women, divorcees and widows, who had been ensured at least some user rights under traditional tenure systems. Furthermore, land registration, designed for a sedentary mode of agriculture, marginalized pastoralists, who lost access to key land resources during droughts. In Zambia, when accompanied by a corrupt land administration, adjudication and titling of communal land has had a lethal impact upon the livelihoods of the poor.²⁴ Conflicts often erupt in conjunction with land transfers, especially to outsiders.

Studies by the Land Tenure Center in the mid-1990s, principally in Kenya, but also in Senegal, Somalia and Uganda, failed to reveal a causal relationship between formal registration and investment in land improvements and on-farm productivity.²⁵ Where a significant relationship was found to exist between enhanced on-farm investment and formal land title, it was not necessarily causally linked. Farmers tended to register land parcels that benefited from comparatively high levels of investment. In other words, registration may not stimulate investment, but merely be positively related to it.²⁶ Diana Hunt's long-term observations of land titling in Eastern Kenya tend to confirm these findings. 'The outcomes [of land titling] provide unambiguous support for neither proponents nor opponents of externally promoted privatisation.'²⁷

The account of Kenya's preoccupation with the formalisation of customary land tenure through adjudication and registration has become almost a caricature. Little seems to have been written about the attempt to ameliorate negative impacts through the introduction of local 'Land Control Boards'. These were set up under the Land Control Act (Cap 302) in 1967 under which the Minister of Lands appoints members. The preamble to the Land Control Act states that the purpose is 'to control the transfer of Land in certain areas and for the purpose connected therewith'. It was enacted for the purpose of restricting and controlling the right to freely alienate land in agricultural areas by creating a local committee to vet all land transfers. It stemmed from the desire to protect citizens from the potential threats of the system of formal land registration introduced by the colonial

²¹ S. Rowton Simpson, *ibid*

²² Peter Larmour 'Policy Transfer and Reversal: Customary Land Registration from Africa to Melanesia' *Public Administration and Development*, 22, 151-161, 2002

²³ In Kenya, some 80,000 disputes are said to await resolution.

²⁴ Taylor Brown 'Contestation, Confusion and Corruption: Market-based land reform and local politics in Zambia', *Competing Jurisdictions: Settling Land Claims in Africa* Vrije Universiteit Amsterdam 24-27 September 2003.

²⁵ John Bruce *When should land rights be formalised? Issues in phasing of property system reforms*, Madison: Land Tenure Center, University of Wisconsin, 1966

²⁶ J-P. Platteau, 'The evolutionary theory of land rights as applied to sub-Saharan Africa: A critical assessment', *Development and Change*, 27, 1996

²⁷ Diana Hunt, *Agricultural Research and Extension Network* Newsletter No. 48, July 2003 London: ODI

government.²⁸ It was felt that formal legal rules should not be the only determinant of how the land market should operate. LCBs were expected to continue to uphold customary norms relating to land ownership where it was judged that they were appropriate.²⁹ Customary and received law were thus juxtaposed.

As Okoth-Ogendo explains, the idea of land control in the small farm areas was initially social. It was felt that the state had a duty to prevent the improvident from exercising their rights to their own detriment.³⁰ He describes two ways in which the LCBs exercise their discretion to deny approval for land transactions: (a) where family members have not approved the sale or subdivision; and (b) where the vendor cannot adequately demonstrate that the family has adequate alternate means of subsistence in the event of the transaction. Recent studies have shown that the attitudes of LCB members regarding charges and mortgages represent a changing set of values. In most cases, consent to mortgage property is granted. Government appointees and members take the view that the flow of credit to agriculture or investment in housing should be encouraged. However, the rationale for land control throughout the whole country has become more political than social and in 2003 the Minister cancelled all appointments, insisted that the system be depoliticised and that LCB members should undergo a training programme.

The debate over land titling and registration in rural areas has recently been revived by one about the benefits of formal documentation of property rights in informal urban settlements and of bringing poor people into the formal property market.³¹ De Soto argues that the basis of economic development in the West is the formal recording and registration of property rights. This underpins and facilitates other transactions, including bank loans, leading to the generation of 'surplus value'. The path to economic development thus lies in the formalisation of the property rights of the poor.

The counter argument, which applies to agricultural land under customary tenure in Africa (if not to peri urban and informal settlements), is that the primary and secondary land rights, communally held by poor households in sub-Saharan Africa, are not well suited to formal recording and registration and the issuance of negotiable bonds. In any case, the expectation that formalising property rights would increase the supply of credit is unrealistic, judging from the failure of the land titling programme in Kenya to unlock farm loans. Apart from the absence of title to mortgageable property, there are many other constraints to the supply of credit to poor farmers in remote rural areas. Further, as in the context of land titling, the operation of an efficient land market requires an adequately resourced and managed land administration, which is free from corruption and rent seeking. Efficient land administration is not beyond the bounds of possibility in Africa, but at present it seems a long way down the road, principally because of the inadequate

²⁸ S. Coldham, 'Land Control in Kenya', *Journal of African Law*, Volume 22, No 2, pp 91-111, 1978.

²⁹ Joel M. Ngugi 'Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration', *Michigan Journal of International Law*, 25, pp 467-527, 2004.

³⁰ H.W.O. Okoth-Ogendo, 'African Land Tenure Reform' in *Agriculture Development in Kenya: An Economic Assessment*, Judith Heyer *et al* editor, 1976.

³¹ Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Elsewhere* New York: Basic Books, 2000

administrative and technical capacity available to most governments to unscramble the legal framework and forty years of neglect of incremental reform.³²

Ngugi argues that assumptions about the benefits generated by schemes to introduce formal, secure property rights in developing countries should be appraised very carefully.³³ He draws three lessons from the experience of attempts to formalise property rights in Kenya:

- A misunderstanding of neo-classical assumptions and models regarding how markets work and the institutions necessary for their optimum functioning can lead to counter-productive legal frameworks;
- The failure to achieve the benefits originally anticipated could have been foreseen, given a better understanding of the institutions needed to shape economic opportunities and performance;
- Projects which aim to reform property arrangements can be captured by national elites, with perverse consequences.

Patrick McAuslan³⁴, in a cautionary note on a proposal to formally adjudicate and register all customary holdings in Lesotho, has observed that, even if there were a programme of titling all land via the Deeds Registration Act and the application thereafter of Roman-Dutch law to the registered leases, it would be years before all land would be registered. In Kenya, where land adjudication and registration started in 1956, there have been programmes of adjudication and registration ever since then and it has still not been completed. In England where land registration started in earnest in 1925, about 10% of land is still unregistered. In Sudan where a Land Registration and Settlement Act was enacted in 1925 most of the country is still unregistered. In Uganda, the Registration of Titles Act providing for land registration was passed in 1922; yet only about 12% of the land thus far has been brought under the Act.

Embracing Tenure Dualism: Recent Policy Developments

Recent policy developments suggest more proactive thinking by a number of eastern and southern African governments about how to address tenure dualism. They combine continuing efforts to facilitate the emergence of individual rights with a recognition that wholesale adjudication and registration of such rights in areas of communal tenure is not only unfeasible; but also creates conflict and impoverishes and disempowers many of the more vulnerable members of society. Instead, these approaches affirm and strengthen group title and land administration, while still clearing the way for people to strengthen and register their individual title if they so wish.

³² Botswana probably constitutes an exception: see Martin Adams, Faustin Kalabamu and Richard White, 'Land Tenure Policy and Practice in Botswana: Governance Lessons for Africa', *Austrian Journal of Development Studies*, XIX, 1, 2003, 55-74 (www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights)

³³ Joel M. Ngugi, *ibid*

³⁴ 'Comments on Discussions on the (Lesotho) Land Bill 15 August 2005', unpublished note by Patrick McAuslan.

Under colonial rule, with the exception of land alienated for government, settlers and other private purposes, day-to-day administration of so-called native reserves and/or Crown Land was in the hands of customary leaders and statutory trustees. At independence, Crown land became State land and the allocation functions of customary leaders were often revoked and subsumed by government structures, but in the eyes of local people, neither appointed officials nor elected councillors in remote offices could legitimately assume the powers of hereditary chiefs. In the void thereby created, land allocation has become a highly contested function with a growing gulf between legal principle and local practice. Tenure dualism was abolished by legislation, but persisted in reality.

Mozambique was in the vanguard with a more realistic embracing of tenure dualism. Rather than contemplate any measures to convert customary tenure to individual title of the kinds recognised by conventional statute law in most countries, Mozambique's 1997 Land Law has created a single form of title, the DUAT³⁵ or Land Use and Benefit Right. "While land cannot be bought, sold or mortgaged, the State attributes a single right to all land users, of whatever cultural, political or economic persuasion – the... DUAT"³⁶. The state retains radical title to all land in Mozambique. Individuals' customary tenure of land, under co-titling arrangements within DUATs held and administered by their local communities in accordance with customary law, has the same legal status as the title that commercial investors may secure if communities, or the state, transfer DUATs to them. "The local community concept integrates customary and public land administration into one single land management system"³⁷.

The **Uganda** Land Act of 1998 vested land in the citizens of Uganda, rather than the State, as it had previously done. It defined the different types of rights in land that may be held. It decreed that rights of customary ownership and lawful and *bona fide* occupancy would be recognised, even if not supported by a certificate of title. It set out the procedures that must be pursued in order to formalise both customary ownership rights on former public land and rights of occupancy on *mailo* land, through the acquisition of certificates of title. It also specified the procedures that must be followed in order to transform these rights into freehold tenure. Under the Act the procedures for the acquisition of land title and the resolution of disputes are not obligatory. In other words, no-one is compelled to acquire a land title to enjoy legitimate possession of the land.

Tanzania passed two basic land laws in 1999, the Land Act, No. 4 of 1999 and the Village Land Act, No 5, of 1999, which integrated most of the law relating to land tenure and removed old English land laws from the statute books. The latter conferred property rights on occupiers of customary land that were as good as the property rights conferred on those holding land under granted (statutory) rights of occupancy, and divested more powers to Village Councils; making them responsible for adjudicating, registering and titling all local holdings.

³⁵ *Direito de Uso e Aproveitamento*.

³⁶ Christopher Tanner, *Getting Access to Community Land – Case Studies from Mozambique*, Maputo: Legal and Judicial Training Centre, 2004, 1.

³⁷ *Ibid.*, 2.

In a recent review of some twenty African countries, Alden Wily finds that the results of efforts to revive decentralised land administration, including land dispute resolution, within the broader context of political decentralisation, have been encouraging, particularly in Francophone countries.³⁸ Land policy proposals emerging from an increasing number of countries support the idea of legally strengthening the powers of local communities on customary land to manage their own land rights. The most recent example is **Kenya** where the acclaimed consultative National Land Policy Formulation Process has come out strongly in support of this principle, in line with the proposals in the ‘Njonjo report’.³⁹ However, decentralisation of decision making to the local level is by no means a panacea. Cotula *et al*⁴⁰ review the institutional strengths and weaknesses of three models. (i.e. land specific bodies along Botswana land board lines; elected local government institutions, and customary authorities). No single approach was found to be without its problems and, in most cases, central, federal or provincial government continue to maintain significant control over local bodies.

South Africa has faced serious difficulties in its search for ways to decentralise land administration and embrace tenure dualism. After the installation of a democratic government in 1994, it was at first assumed - in line with the provisions of the new Constitution that all citizens should have equally secure tenure - that tenure dualism would have to be abolished. Individual modes of tenure would have to be extended to the former black reserves, where distorted forms of communal or customary rights had been sustained by the apartheid regime and had degenerated into widespread confusion and insecurity. Extended analysis and some test cases demonstrated the impracticality and likely injustice of a programme to adjudicate and register individual title, probably in the names of household heads. More subtle and organic solutions were developed instead. The Minister of Land Affairs would retain the radical title to land in the former reserves that had been arrogated to his office by the former regime. But, within this tenure shell, individuals would have secure ‘protected’ property rights, nested where appropriate within group rights and subject in those cases to group rules. The precise content of individual and group rights would be defined through local processes of consultation and decision. Individual and group rights could be registered if their holders wished, but all *de facto* rights in the former reserves would automatically become *de jure* protected rights when the new Communal Land Rights Bill was enacted. The proposed Bill would assure residents of these areas of the equally secure tenure that the Constitution required for them, but its approach to tenure dualism would be evolutionary rather than revolutionary.

In the event, however, South Africa embraced tenure dualism by different and less satisfactory means. Later policy gave more credence to the still powerfully expressed views of the traditional leaders. In the Communal Land Rights Act of 2004, government adopted a group titling procedure that transfers title to land in the former reserves to ‘communities’, “the confirmation or conversion of ‘old order rights’ to ‘new order rights’”, and registration

³⁸ Liz Alden Wily, *Governance and Land Relations: A Review of Decentralisation of Land Administration and Management in Africa*, London: IIED, 2003

³⁹ *Issues and Recommendations Report*, National Land Policy Secretariat, Ministry of Lands and Housing, Nairobi, August 2005 www.landpolicy.com

⁴⁰ Lorenzo Cotula, Camilla Toulmin and Ced Hesse *Land Tenure and Administration in Africa: Lessons of Experience and Emerging Issues*, London: IIED, 2004

of the latter as Deeds of Communal Land Right. Land administration is to be undertaken by land administration committees established by communities, which will be traditional councils wherever these exist⁴¹. These arrangements are likely to be far from democratic, given the proclivities of many traditional leaders. Numerous boundary disputes are envisaged in the huge task of adjudication that lies ahead. The legislation may now be challenged in the Constitutional Court, because, among other reasons, of the powers over land allocation granted to these unelected traditional leaders and the law's damaging impact on women's land rights. Cousins concludes that this is, 'in short, a flawed conception of African land rights, together with an inappropriate 'transfer of title' model, [which] means that the Constitutional requirement that existing land rights be secured is unlikely to be met by these laws'⁴².

Lesotho is the only country in eastern and southern Africa to have experienced no significant incursion of colonial settlers. It therefore does not display the degree of tenure dualism common in the rest of the region. The 1993 Constitution confirms the indigenous principle that the kingdom has maintained since its formation by Moshoeshe I in the early 19th century: all land is vested in the Basotho⁴³ nation, and the power to allocate rights in land is vested in the King in trust for the nation⁴⁴. Notably through the Land Act of 1979, however, forms of leasehold were introduced to facilitate commercial investment and development and to permit the development of a very limited market in urban residential land that could be mortgaged. A degree of tenure dualism thus developed between the poor majority of the population and the privileged minority who could afford to acquire urban or commercial leases.

Although its tenure dualism has been less marked than in other eastern and southern African countries, Lesotho has certainly experienced legal dualism, with customary and received systems of law existing side by side⁴⁵ and customary law guiding the governance of residential and agricultural land for the vast majority of the population in the rural areas. Nevertheless, in converting all existing rural residential rights to leases (which admittedly made little difference on the ground) and instituting a system of allocations by Land Committees⁴⁶ for all rural land use purposes, the 1979 Act formally placed all land tenure and administration under a single statute law. For good measure, like much other African legislation, it added that "where the customary law is inconsistent with this Act, this Act shall prevail"⁴⁷. While enshrining the dominance of statute law, the 1979 Act also established the civil service post of Commissioner of Lands with wide-ranging authority over land administration on behalf of the Minister (and, in turn, the King). But citizens' perception of customary law and its appropriate practice has continued to guide much rural decision-making in land administration and the arbitration of disputes over land – notably because of the continuing influence of chiefs in these matters.

⁴¹ Ben Cousins, 'Embeddedness' versus titling: key features of African land tenure and policy failure', paper presented to an International Conference on Property Law, University of Stellenbosch, 5 April 2005, 1.

⁴² *Ibid.*, 32.

⁴³ The Basotho are the people of Lesotho.

⁴⁴ The Constitution of Lesotho, sections 107-108. Maseru, Government Printer.

⁴⁵ Sebastian Poulter, 'Legal dualism in Lesotho', Morija Sesuto Book Depot, 1979.

⁴⁶ Later Village Development Councils.

⁴⁷ Land Act 1979, section 3. Maseru, Government Printer.

One of the key policy recommendations of a Land Policy Review Commission in 2000 was that land reform should promote the effective, efficient and economical operation of a land market in Lesotho. Another was that the gender discrimination inherent both in customary and statute land law be abolished. A Land Bill has since been drafted to replace the 1979 Land Act and is currently under review at high levels in government. Retaining the fundamental principles that all land is vested in the nation and that rights to land are granted by the King, the Bill abolishes gender discrimination in land tenure. It provides for the automatic conversion of all rural land allocations legally made or confirmed under the 1979 Act, as well as extra-legal allocations made by chiefs and public officers⁴⁸, into primary leases.

The poor have mainly had to use extra-legal means to obtain land in the towns during the recent rapid urbanisation of residence and livelihoods in Lesotho. Confronted with an inflexible, inaccessible and inefficient land administration system under the 1979 Act, the vast majority of citizens moving to the towns had no choice but to pay chiefs and/or officials for land allocations and documentation (often confirming officially illegal sales of arable land) that they were not legally authorised to provide. Government lacked both the will and the resources to oppose this rapid growth in extra-legal land transactions. Indeed, Lesotho owes much of its recent economic growth to the fact that such transactions occurred. As currently drafted, the new Bill would regularise all these informal rights, turning them into primary leases too. For those requiring greater clarity, more formal registration and the ability to borrow against their land rights, the Bill also creates a hierarchy of ‘demarcated’, ‘registrable’ and ‘qualified’ leases.

Under the Local Government Act of 1997 new local authorities (first elected in 2005) are responsible for land allocation and management. They should currently be administering the 1979 Land Act, but under the new Bill they would take over the allocation of leases under the supervision of the Commissioner of Lands. They would also have title, under primary leases, to ‘community use’ land, defined as “land available under customary law for use by the community for community purposes”⁴⁹. Lesotho would thus join those countries that are strengthening local communities’ land management rights.

Although Lesotho’s proposed Land Bill reinforces the integration of all forms of land tenure and administration under a single piece of statute law and creates a primary lease to replace the forms of customary tenure that the 1979 Act had termed ‘allocations’, it still defines the primary lease as “a holding and occupation of land under the provisions of customary law”. It defines ‘customary law’ as having the meaning ascribed to it by the Constitution, which unhelpfully says that “‘customary law’ means the customary law of Lesotho for the time being in force subject to any modification or other provision made in respect thereof by any Act of Parliament”⁵⁰. Earlier drafts of the Bill had proposed that Lesotho’s customary law should in future be considered to be the common law of the

⁴⁸ In the case of such extra-legal allocations, the new primary lease is for five years only, during which time the holder must go through a process of validation in order to apply for formal award of a full primary lease.

⁴⁹ Land Bill, Lesotho, section 54.

⁵⁰ The Constitution of Lesotho, section 154. Maseru, Government Printer.

Kingdom, instead of the Roman-Dutch common law that it has recognised since 1884. The government's legal draftsmen evidently balked at this.

Although analysts may still perceive persistent legal dualism in Lesotho's evolving land tenure, what matter more are the practical results that this Bill would have on land tenure and livelihoods there. The element of tenure dualism identified above would be removed. Most importantly for the rapidly growing numbers of citizens trying to build urban livelihoods, the Bill would thus regularise their extra-legally obtained land rights, stimulating residential and commercial development in the towns and facilitating the orderly development of a legal land market.

Not surprisingly, there are those in government who oppose this regularisation, on the grounds that it would reward the illegal activity that led to the current confused, unplanned and insecure tenure of so much urban and peri-urban land. Affronted by the Bill's apparent endorsement of people's perceived disdain for the formal procedures of the 1979 Act, they ignore the reality that most of those who needed (peri-) urban land had no chance of getting it through those procedures, and that government rarely tried to stop them. Indeed, when government did once take steps to evict a group of families and demolish their extra-legally established homes – some years after they had taken possession of the land - it lost the case that those families then brought against it.

Lesotho's new Land Bill aims to embrace the tenure dualism that has persisted in the country, rather than take radical steps to demolish it. It would allow customary modes of tenure to persist in the rural sector, while seamlessly converting them into modern primary leases. It would straighten the distorted modes of customary rights that the poor have obtained extra-legally in the (peri-)urban areas by changing them, too, into primary leases. The concepts of customary land law would continue to be acknowledged within the framework of a unitary, statute land law. However, at the time of writing, it is unclear whether the Bill will be put to Parliament in the form currently proposed.

Conclusions

In the late 20th century, most countries in eastern and southern Africa experienced rapid population growth, slow economic development and accelerating environmental degradation. In the process, Africa changed from a continent of land abundance to one of land scarcity. Unresolved conflicts over land and other natural resources increasingly undermine the capacity of poor people to produce food.⁵¹ The poor and vulnerable are rarely able to defend themselves against the strong-arm tactics of powerful land grabbers. In many cases, customary land administration arrangements have fallen away but have not been replaced by satisfactory statutory arrangements. Rapidly growing urban populations are particularly vulnerable to the inadequacies of land tenure and administration systems that still reflect the tenure dualism introduced by colonial regimes and ineffectively addressed by independent governments.

⁵¹ See Pauline E. Peters, 'The Limits of Negotiability: Security, Equity and Class Formation in Africa's Land Systems', in Kristine Juul and Christian Lund (Eds), *Negotiating Property in Africa*, Portsmouth, NH: Heinemann, 2002; Sara Berry, 'Debating the Land Question in Africa', *Comparative Studies in Society and History*, **44**, 4, 2002.

The persistence of these problems since eastern and southern African countries gained their independence has been due to unrealistic policy. At first, many governments believed that statist measures to nationalise land would sweep away the inequities of tenure dualism and create unified systems of land rights through which the peasants could prosper along with the urban masses. More gradualist approaches, some of which were initiated in the colonial period, focused on adjudication and titling as ways to extend the benefits of secure individual tenure to rural people living under customary tenure regimes. After decades of effort, such titling approaches have covered only limited areas, have embroiled rural people and bureaucrats in innumerable disputes, and have added eastern and southern African evidence to the global lesson that rural titling often causes more problems than it solves.

More realistic policy approaches to tenure dualism are gradually developing in this region. They recognise that confronting this dualism with laws to wipe it out is unlikely to work; and that just chipping away at it through titling programmes is a Sisyphean task. Instead, lateral thinking has led them to adjust and embrace customary tenure regimes rather than seek to overthrow them. They recognise that the statute law should allow customary law and customary tenure to continue in the ordinary lives of land users until they have specific reasons to convert their title to new formats compatible with modernising social and economic frameworks. When such need arises, the legal and institutional apparatus should be ready and waiting with the appropriate forms of title and the necessary support systems and procedures, such as survey and registration. As part of this more gradualist approach, it is often necessary for tenure reform to catch up with tenure reality on the ground, affirming and facilitating what citizens have already done to secure the rights they need to build modern livelihoods within legal and institutional frameworks that have failed to keep up with the pace of change.

These more proactive approaches to tenure dualism are in many ways more challenging than their less imaginative predecessors. They require the building of bridges between tenure regimes and legal systems. They demand realism from policy makers and legislators about the capacity of African states to influence the evolution of tenure and to administer their citizens' land affairs. They demand acceptance that customary land law and tenure will retain a role well into the 21st century in eastern and southern Africa. They invite governments to view tenure dualism as an opportunity as well as an obstacle, presenting the potential for them to draw on the social and institutional resources of customary systems in modern processes of national development.