Legal Dualism and Land Policy in Eastern and Southern Africa

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The Historical Background of Legal Dualism

Colonial regimes imported systems of common and statute law for their own purposes, operating them alongside existing systems of customary law. Customary law prevailed in some areas, while statute law and imported common law prevailed in others. This legal and tenure dualism tended to reinforce settler interests, simplify and strengthen the roles of traditional authorities, and suppress women's land rights. Since independence, different countries have pursued different policies, though the relegation of customary law to second-class status was usually maintained. Often, customary land administration arrangements have decayed without being replaced by satisfactory statutory arrangements.

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Initially, many newly independent governments believed that measures to nationalise land would sweep away the inequities of tenure dualism and create unified systems of land rights that would bring prosperity to peasants and the urban masses alike. A number of countries sought to create a single legal system that made statute and imported common law paramount. Others attempted to restrict tenure dualism through statist policies of nationalization and the conversion of freehold to leasehold.

But customary law and tenure proved tenacious, and few early reforms aimed at strengthening state control over customary land proved effective or durable. Though customary law may hardly be acknowledged in national legislation, it often continues to dominate real life, especially in the rural sector and among the poor and underprivileged.

A focus on the specifically legal aspects of the gap between theory and practice is not the most helpful way forward. It is more useful to ask what societies can do to bridge the divide between land tenure systems based on the imported concept of absolute private ownership and those based on more complex indigenous frameworks of nested individual and group rights.

Registration and Titling Programs

More gradualist approaches, some initiated in the colonial period, have focused on adjudication and titling as ways to extend the perceived benefits of secure individual tenure to rural people living under customary tenure regimes. However, registration and titling programs have not automatically unlocked economic growth. Instead, they have often disempowered vulnerable people, embroiled rural people and bureacrats in innumerable disputes, and tied down substantial state resources. Statutory registration of title has also served to weaken the land rights of women and tenants and downplay the status and role of women as users of land. Unmarried women, divorcees, and widows, who were ensured at least some user rights under traditional tenure systems, were particularly vulnerable. Further, land registration, designed for a sedentary mode of agriculture, marginalized pastoralists, who lost access to key land resources during droughts. After decades

of effort, titling approaches have covered only limited areas, adding evidence to the global lesson that rural titling often causes more problems than it solves.

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 idea that formalizing property rights would increase the supply of credit is unrealistic, judging from the failure of the land titling program 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. In addition, an efficient land market requires an adequately resourced and managed land administration, one free from corruption and rent seeking. Though an efficient land administration is not beyond the bounds of possibility in Africa, it seems a long way down the road, principally because governments do not have the administrative and technical capacity to unscramble the legal framework and 40 years of neglect of incremental reform.

What Is Needed

Rapidly growing urban populations are particularly vulnerable to land tenure and administration systems that still reflect the tenure dualism introduced by colonial regimes. In these areas, land reform may be required to regularize extralegal tenure and facilitate development. Governments may be reluctant to legitimize such extralegal practice, but they need to accept the continuing limitations of state policy and statute law and the ongoing significance of customary law and tenure.

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In an increasing number of countries, land policy proposals support the idea of legally strengthening the powers of local communities on customary land to manage their own land rights. However, decentralization of decision making to the local level is not a panacea. What is needed in the necessary legal reappraisal is to catch up with the tenure approaches and mechanisms that citizens have themselves devised in the face of legislative and institutional inertia or indifference.

More realistic policy approaches to tenure dualism are being gradually developed in eastern and southern Africa. Some countries have begun to embrace tenure dualism in imaginative ways, adjusting to and embracing customary tenure regimes rather then seeking to overthrow them. These evolutionary approaches recognize that statute law should allow customary law and tenure to continue in the ordinary lives of land users until they have specific reasons to convert their titles to new formats. When such need arises and is identified, the legal and institutional apparatus should be ready with appropriate forms of title and necessary support systems and procedures.

These proactive approaches to tenure dualism are more challenging than their less imaginative predecessors. They require the building of bridges between tenure regimes and legal systems, and they demand realism from policymakers and legislators about the capacity of African states to influence the evolution of tenure and administer their citizens' land affairs. They also require governments to recognize the continuing limitations of state policy and statute law and the ongoing significance of customary law and tenure in the land rights and transactions of their citizens. In so doing, African governments are invited to bring the social and institutional resources of customary systems to modern processes of national development.

Rather than changing daily practice on the ground, the formal character and structure of land rights must be altered to facilitate an evolutionary conversion. This means that clear and secure paths to more modern formats and modes must be provided. Though land tenure and administration may be integrated in a single statute law, tenure dualism needs to be recognized as a resource—not an obstacle—in the changing livelihoods of the poor.

Further reading:

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Christopher Tanner. 2002. Law-Making in an African Context: The 1997 Mozambican Land Law. FAO Legal Papers Online #26, March 2002. http://www.fao.org/Legal//Prs-OL/lpo26.pdf

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