

Legal Pluralism as a Policy Option: Is it Desirable? Is it Doable?

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The use of land as security and an engine of wealth creation in Africa will continue to be problematic until more creative mortgage systems and laws are applied.

Essential Preconditions for Workable Pluralism

- There is one legal system with two coequal sets of legal rules—received law and customary law—and the judicial system is empowered to fuse the systems over the long term. This equality means that communal and collective rights in land are recognized and protected, and people can choose one equal tenure and legal system over another. There is also local-level land administration and registration, where all customary interests are recorded and protected in land adjudication and customary as well as statutory alternative dispute resolution processes can be used. In addition, pluralist tenure and land law extend to urban areas, along with land regularization schemes and urban land adjudication.
- Legal systems are in concert with basic national goals, and all legal rules are adapted to meet constitutional (and perhaps international) norms relating to gender equality, administrative justice, and protection of private and communal property rights.
- Participatory community planning replaces top-down master planning. Formal market institutions are on board, and officials are advisers and facilitators of lay people who make the decisions. The powers and duties of public officials are delineated, regulated, and exercised transparently and accountably. There are clear rules for actions and transactions, as well as mechanisms for enforcement.

Pluralist Approaches, Now and in Future

Though African countries are increasingly adopting a pluralist approach and have ceased attempts to abolish customary tenure, governments, international financial institutions, and the private sector outside Africa are reluctant to try to work with or even to begin to understand its strengths. But seminal judicial decisions in Australia, Canada, and South Africa have recognized that the original, customary rights of indigenous inhabitants do not disappear because no notice is taken of them by the government of the day. These customary rights are only extinguished by clear legal or factual governmental acts—such as a grant of land in freehold—that demonstrate beyond any doubt that these rights have been superseded by other rights in the land.

While any state can specifically abolish customary tenure or create rights inconsistent with the continuation of rights to land under customary tenure, doing so requires payment of compensation or land, since these rights predated the existence of the state. Customary tenure is—and always has been—one of the foundational elements of the land laws of all states in Africa. It is not an add-on to received law; indeed, received or imposed law is the add-on. Received law thus needs to be adapted and adjusted to indigenous law, not vice versa, and proponents of received law should be advancing the case for legal pluralism.

Monism, Pluralism, and Mortgage Law

Despite considerable evidence that legal monism—a single, unified system—does not work, external forces such as the World Bank and various donors have offered prescriptions for “modernizing” land tenure that implicitly assume benefits accruing from monism and the homogenization of national land laws. The view of the World Bank and commercial banks is that customary land rights—however well protected and secured—don’t count,

and titles registered in traditional civil law systems via land books and land courts—however well secured—don't count. Only registered titles that are individually owned or jointly owned by a spouse and governed by received law are acceptable security for loans by private-sector banks and building societies. In addition, banks and international financial institutions have very strongly resisted attempts by African governments to provide by law the kind of relief offered in the developed world that tempers the strictness of rules governing default by mortgagors, especially mortgagors of family homes.

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A case study in Tanzania illustrates this point. Its 2001 land law relating to mortgages sparked opposition by local banks, who were supported by the World Bank. They objected to provisions that abolished foreclosure and those that apparently granted powers to the courts to reopen mortgages that were prima facie oppressive, illegal, or discriminatory. They also objected to provisions relating to time limits for bank actions to be taken, court injunctions to prevent actions for possession and sale for “non-meritorious” reasons, and the concept of “small mortgages,” or small loans taken out for short periods. Faced with this opposition, the Government of Tanzania revised the new law and abolished small mortgages. The reform will benefit those with regular mortgages—the urban middle and upper classes—but the less well off will lose out. Banks in Tanzania now do not contemplate lending on anything other than a title registered under the Land Registration Act, which reduces the scope of their lending to less than 10 percent of the land in the country.

The use of land as security and an engine of wealth creation in Africa will continue to be problematic until more creative mortgage systems and laws are applied. Where governments in Africa need to make changes is in their procedures and processes; it is this, rather than in any pluralist system of land tenure, that inhibits investment in land. It is therefore not “customary tenure” but “customary conservative state bureaucracy” and private mortgage practices and attitudes that need fundamental reform.

Further reading:

Patrick McAuslan. 2003. *Bringing the Law Back In: Essays on Land, Law and Development* Aldershot: Ashgate.

McAuslan, P. 1998. Making Law Work: Restructuring Land Relations in Africa. *Development and Change* 29: 525-552.

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