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# LAND DISPUTE RESOLUTION AND THE RIGHT TO DEVELOPMENT IN AFRICA\*

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## SUMMARY

The United Nations Declaration on the Right to Development supports equality of opportunity in access to basic natural resources. This article explores the legacy of past colonial interventions, particularly in sub-Saharan Africa under the British dual mandate policy associated with Lugard, in creating tensions between private, public and customary land tenure in Africa, which have given rise to conflicts and disputes over land. Soft law and policy agendas from international development agencies have changed substantially in the present century, including the Sustainable Development Goals (SDGs) and the New Urban Agenda agreed at the Habitat III conference in 2016, with UN Habitat's Global Land Tools Network promoting innovative practices such as land readjustment and participatory mapping, as well as reform of urban planning laws. With land disputes notorious for creating complex and lengthy legal proceedings, some African states have applied alternative dispute resolution (ADR) mechanisms as a potentially quicker and cheaper option than approaching the courts. The article examines different land and property tribunals in the United Kingdom and sub-Saharan Africa, especially involving traditional authorities on customary land. It applies concepts of historic institutionalism, path dependency and isomorphism to the subject and proposes improvements to land and property tribunals.

## 1. INTRODUCTION

The British role here is to bring to the country all the gains of civilisation by applied science (whether in the development of material resources, or the eradication of disease, etc.), with as little interference as possible with Native customs and modes of thought.<sup>1</sup>



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1 Lugard 1922:9. See also Mamdani 1996.

A century ago, Lugard, the former Governor-General of Britain's colony of Nigeria, expressed the essence of his policy of the "dual mandate", which came to be applied to other British African colonies. The inherent contradictions are still being experienced in Africa's many disputes and conflicts over land and natural resources. Over twenty different types of such disputes have been identified: urban evictions, displacements for foreign investments, ethnic antagonisms, culture clashes between farmers and pastoralists, resistance to natural resource exploitation, and tensions between indigenes and "strangers".<sup>2</sup> In 2019, the United Nations (UN) Secretary-General identified war or post-war conflicts in 15 of the 55 member states of the African Union.<sup>3</sup> The continent's development prospects depend upon how its states can manage such land disputes, linked as they are to rapid population growth, poverty and mass unemployment.

This article explores the legacy of past colonial interventions in creating tensions between private, public and customary land tenure in Africa, and the emerging issues of law and policy for the land sector in the 21<sup>st</sup> century. It then investigates the potential of alternative dispute resolution (ADR) processes as alternatives in the form of land and property tribunals. The relevant experience of the United Kingdom (UK) with a variety of such tribunals is examined, as well as recent examples in sub-Saharan Africa, particularly involving traditional authorities and customary land tenure.

Social science scholarship from outside the legal academy offers helpful theoretical insights on these issues. First, historic institutionalism tracks sequences of social, political and economic change across time that influence institutional and political structures, and can illuminate the structures of law and governance in colonial Africa that have survived into the present over the extended period of the "long twentieth century".<sup>4</sup>

A second concept is isomorphism: the similarity of processes or structures of one entity to those of another, resulting from imitation or independent development under similar constraints. While originating in mathematics and sociology, the concept can be applied to institutions through evolutionary theory. Isomorphic mimicry is where animals show features of other animals so as to appear more dangerous than they actually are, and so enhance their survival chances, while coercive isomorphism refers to enforced similarity of form through external pressures, but without the associated functions. These concepts help show how African state institutions may assume forms advocated by international actors and propagated through global cultural processes, so that they may mimic the forms but not necessarily undertake the necessary functions in reality. A land-planning authority, for example, may have the relevant legal and organisational forms such as plan-making and development management, yet not function effectively, so that corrupt practices subvert its mandate.<sup>5</sup>

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2 Wehrmann 2008, and Kalabamu 2009:337-345.

3 United Nations 2019.

4 Mahoney & Thelen (eds) 2010.

5 DiMaggio & Powell 198:137-160; Pritchett & De Weijer 2011.

A third concept is path dependence. Decision-making draws upon past decisions and knowledge trajectories, but these inhibit future adaptability. In other words, decisions are limited by past decisions, even though the circumstances may no longer be relevant, which perpetuates inefficiencies through such generic drivers as lock-in and self-reinforcement. Attempts at reform of African land laws may reflect these factors in, for instance, local government and town planning.<sup>6</sup>

Finally, recent critical legal geography theory has widened the traditional model of property as a tradable commodity, with absolute and exclusive private ownership, into relational approaches that allow the interests of “non-owners”, especially collective or communal. In development discourses, customary land tenure and traditional authorities that have been assumed are withering away under the driving forces of modernity promoted by international agencies, yet they continue to support collective or communal rights.<sup>7</sup>

## 2. COLONIAL LEGACIES OF LAND TENURE INSECURITY

Indicators of tenure insecurity suggest that roughly one-fifth of those surveyed (a higher proportion among tenants than owners) fear losing their homes in the next 5 years; uncertainty which inhibits investment and improvement.<sup>8</sup> Systems of control and exclusion inherited from colonial rule allow powerful vested interests to maintain land-ownership inequalities, and prefer an environment of insecure land rights, and corrupt land allocation favouring those with political connections.<sup>9</sup> In Africa, the much debated ‘land question’ usually refers to the exclusion of the vast majority of the population from access to land, to the benefit of a White settler minority, post-colonial elites or foreign investors. This makes land policy and law reform an intensely complex technical and highly political process, especially when attempting to redress historic inequalities in land ownership.

Art. 22 of the African Charter on Human and Peoples’ Rights (hereafter “the Banjul Charter”), adopted in 1981, was the first international human rights instrument to recognise a right to development as a discrete and collective right. It is now also included in the mandates of some UN institutions and the constitutions of African states that have committed themselves to act separately and jointly as duty bearers for the realisation of that right. The preamble to the UN Declaration (1986) defines development as

a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.<sup>10</sup>

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6 Sorensen 2014:12-22; Berrisford 2011:229-245.

7 Graham 2010; Van Wagner 2017:522-541.

8 Global Land Tool Network 2011 *passim*.

9 Boone 2014; Onoma 2010.

10 United Nations 1986.

Land is the basic resource, upon which physical acts of development necessarily take place, and the right to development, therefore, depends on how land is secured, used and managed. Indeed, in their town planning laws, the vast majority of the former British African colonies defined “development” in physical terms: “building, engineering and other operations in, on, over or under land, or the making of any material change in the use of any building or other land”.<sup>11</sup> The state is responsible for managing the conversion of land to urban uses in order to give confidence to investors and developers; planning regulations support sustainable urban development, define development rights, create building and planning codes, and prescribe preferred land uses.<sup>12</sup>

The AU’s Land Policy Guidelines emphasise that they are neither a normative framework binding upon member states, nor a draft land policy for adoption by them, nor instructions for specific country situations. Yet the same document uses some highly prescriptive language such as “the overwhelming presence of the state in land matters must change”.<sup>13</sup> AU member states have often been reluctant to follow those guidelines, or to implement relevant judgments of the African Court on Human and Peoples’ Rights. The AU Land Declaration recognises the diversity and complexity of African land tenure, which is usually divided between customary, state and private land. Kenya, for example, in its new *Constitution* adopted in 2010, vested all the national territory in the people of Kenya collectively, and provides for three separate land-tenure systems (public, private and community), which are to have equal status.<sup>14</sup> In reality, these 3 regimes are often in contestation, as can be noted if they are considered severally against the history of past European colonial interventions.

## 2.1 Customary tenure

The European colonial powers that divided most of Africa among them in the 19<sup>th</sup> century asserted an evolutionary theory of land rights, with customary tenure a vestige of the past. It was supposedly bound for extinction in an inevitable historical process towards a greater concentration of rights in the individual and a corresponding loss of control by the community as a whole.<sup>15</sup> Yet an estimated two-thirds of Africa’s usable land area remains under customary tenure (the highest proportion in the world). A distinctive African culture of land was identified, under which land was not only a means of production or something to possess, but an intrinsic part of Africans’ social, economic, political and spiritual being, and a vital component of cultural identity.<sup>16</sup> Customary land can be viewed as preserving local community values, fulfilling an important welfare function, serving as a reservoir of cheap, unserviced land in peri-urban areas, and acting as a defence against the penetrative forces of globalisation and capitalism.

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11 Home 1993:397-410.

12 UN-Habitat 2019.

13 African Union Commission 2009:sec. 2.1.

14 Kenya *Constitution* 2010:chap. 5.

15 Platteau 1996:29-86.

16 Home 2013:403-419.

In practice, the colonial powers preferred to leave customary tenure undisturbed, except for practices it judged “repugnant” to its norms of legal culture, or unless it needed to intervene in furthering its economic and political interests. One result is a remoteness of government from the realities of people’s lives “on the ground”. African peoples speak several hundred languages, and yet a handful of official languages of European origin still dominate in the courts and the documents of international law and policies. Integrating plural and informal property rights into one unified system under state control – converting oral into written, informal into formal, local into national – is not a process that is uniformly benign, neutral, or free from exploitation. The situation has become more complicated since the UN Declaration on the Rights of Indigenous Peoples (1987) and the judgments of the African Court in the *Endorois* and *Ogiek* land claims against the government of Kenya.<sup>17</sup>

## 2.2 State or public land

Imported colonial land laws and regulations sought to distinguish separate respective realms of colonisers and colonised, particularly in White settler colonies. The colonial power could determine that land was vacant, and under the *terra nullius* principle could claim it for itself (in British colonies as “crown land”), and then grant, sell or lease it to White settlers and bodies such as mines or railways. The British dual mandate policy introduced a strategy of separate racial development most famously articulated in apartheid South Africa. Towns were European creations, where land was claimed by the state and then subdivided and leased out – but rarely to Africans. Outside the towns and White settler lands, “native reserves” or “tribal trust lands” were demarcated, but these could be taken (or “set aside”), and customary tenure extinguished. When required by the state for what it designated as some public purpose such as mining, forestry or wildlife, Africans were evicted without consultation or adequate compensation.

Paying lip service to safeguards of due process represented an example of isomorphic mimicry, and post-independence states continued with forced evictions of their citizens, whether in informal settlements in urban areas for redevelopment, or the transfer of rural farmland to large-scale foreign investors for biofuel, agriculture and forestry. Recommendations about better governance may advocate protection of small farmers, cost-benefit assessments, and respect for human rights of communities, but were often ignored by governments.<sup>18</sup> Post-colonial states may ostensibly support a more equitable “pro-poor” distribution of land, but ignore it when it suits their interests, allowing forced evictions of people from land, which occur frequently in Africa and globally. Many land deals failed to become operational, with foreign investors deterred by high transaction costs, difficulties in doing business, and volatile institutional arrangements, which subsequently caused attention to shift towards combating corruption in the land sector.<sup>19</sup>

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17 Home & Kabata 2018:1-22.

18 UN-Habitat 2007.

19 Cotula *et al* 2019.

### 2.3 Private property

The right to property is guaranteed under the Banjul Charter and the new constitutions of post-independence African states, and under the evolutionary theory of land rights is considered the highest form of right. Hernando de Soto achieved global status for arguing that transparent and enforceable property rights guaranteed by the state can solve global poverty and act as a trigger for economic growth.<sup>20</sup> The World Bank supports large-scale land titling, yet only a small proportion of African land is titled, and population growth means that many Africans live in informal settlements classed as illegal in the eyes of the state. The policy agenda deplores inequalities of wealth, raising issues of development land release for affordable housing, and community ownership or management of land and buildings.

## 3. 21<sup>ST</sup> CENTURY LAW AND POLICY ISSUES

Policy agendas coming from international and African continent-wide agencies have changed substantially in the 21<sup>st</sup> century and continue to do so. Eight Millennium Development Goals were agreed in 2000 for achievement by the year 2015,<sup>21</sup> and have been expanded and superseded by 17 Sustainable Development Goals (SDGs) in the 2030 UN Agenda for Sustainable Development. Five of the 17 goals (1, 2, 5, 11 and 15) refer specifically to land in sustainable development, while Indicator 1.4.2 tracks progress in strengthening tenure security.<sup>22</sup> The goals embrace such aims as state sovereignty under the rule of law, gender equality and expanded human rights, development-oriented economic policies, and expansive environmental policies. States may have signed up to them, but there is a risk of isomorphic mimicry – adopting the goals without necessarily performing them.

Particularly relevant to the argument in this article are SDGs 11, 16 and 17, as discussed below. Over the past decade, the African Land Policy Centre (ALPC), a joint programme by the AU Commission, African Development Bank and United Nations Economic Commission for Africa (UNECA), has worked towards implementing the AU Land Declaration, publishing several reports supported by other international agencies, which provide templates that states may apply in their policies, institutional forms and functions.<sup>23</sup>

After decades of concentrating on food and agriculture in rural areas, the attention of international agency policymakers now also focuses on urban areas, following SDG 11 and the New Urban Agenda agreed at the Habitat III conference in 2016.<sup>24</sup> Through its Global Land Tool Network (GLTN)

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20 Allen 2000; de Soto 2000; Home & Lim 2004.

21 The eight Millennium Development Goals (MDG's) were: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria, and other diseases; ensure environmental sustainability; and develop a global partnership for development.

22 Global Land Tool Network 2019a.

23 African Union Commission 2012.

24 UN-Habitat 2017a.

and Urban Legislation Unit, UN-Habitat has promoted innovative urban planning tools such as land readjustment and participatory mapping. Land readjustment, originally associated with consolidation of rural farm holdings but applicable in urban situations, is a method of pooling land ownerships to enable planned urban extensions and densification. Already applied in many countries, it creates, within the pooled area, opportunities to plan and finance better physical infrastructure, public space and other amenities. Participatory and Inclusive Land Readjustment (PILaR), promoted by UN-Habitat's GLTN, seeks to expand the land-readjustment model by adding more inclusive negotiation processes, so that costs and benefits may be better shared among landowners and other stakeholders such as renters and informal occupiers; it potentially offers an intermediate and less confrontational approach than the alternative of compulsory expropriation.<sup>25</sup> Another "land tool" with potential is participatory mapping, sometimes called "counter-mapping" or "cadastral politics". This uses local oral history and traditions to allow local communities to participate in land governance, creating an evidential record of land uses by groups previously unrecognised by state institutions, and allowing them to assert their occupancy claims.<sup>26</sup>

SDG 17 ("Multi-stakeholder partnerships to mobilize and share knowledge") is important for the land sector, because it supports public, public-private and civil society partnerships, as well as the production, management and transfer of new knowledge. With secure property title as the foundation for much finance in neo-liberal market economies, it requires professionals in land: surveyors to delimit the land, valuers to appraise it for mortgage purposes, and planners to frame development standards, all with professional associations and networks. Academic and professional networks and journals can create and share relevant knowledge and experience, for example the Network of Excellence for Land Governance in Africa (NELGA) and the UK-based African Union Law Research Network. Recently founded African academic journals deal with land policy, real estate and planning, and sustainable development law. Empirical research can examine land-governance mechanisms and techniques, and the experience of different countries with land reform can be drawn upon through comparative studies. The New Urban Agenda and other international agreements urge meaningful participation in decision-making, planning and follow-up processes; yet African governments have often challenged human rights advocates on legal grounds of admissibility – *locus standi* – and lack of exhaustion of local remedies, and non-governmental organisations (NGOs) have petitioned the AU about the "shrinking of the civic society space" in many African countries.<sup>27</sup>

The new SDGs include goal 16 on the rule of law (the preceding MDG having nothing similar), which aims to strengthen justiciable and enforceable court processes. Goal 16 is also relevant to growing the "civic space" needed to achieve better access to land and justice. Since disputes within (and indeed, between) states often relate to land, exacerbated by climate change

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25 UN-Habitat 2016b; UN-Habitat 2019.

26 Panek 2015:18-30.

27 Institute for Human Rights and Development in Africa 2017.

and environmental issues, they are notorious for creating complex and interminable legal proceedings.<sup>28</sup> ADR falls within the scope of goal 16. The Pinheiro Principles support rights to housing and property restitution being “determined by an independent, impartial tribunal”.<sup>29</sup> Countries’ law-making systems are too diverse, their urban challenges particular and their political contexts too varied. The concept of legal centralism is that law should be uniform for all persons and administered by a single set of state institutions, but the African reality, in part a consequence of its colonial experience, is legal pluralism, and, for most of its people, the state is either irrelevant or an interference in their daily lives. In this context, alternative mechanisms for land dispute resolution are becoming more important.

#### 4. TRIBUNALS AS ALTERNATIVE LAND DISPUTE RESOLUTION

Tribunals are a hybrid form of judicial administration alongside the main court system, supposedly quicker and cheaper. The word “tribunal”, deriving from the magistrates of the ancient Roman republic, implies a judicial (or quasi-judicial) body less formal than a court, where the rules of evidence and procedure may be more flexibly applied, and whose presiding officers may be neither judges nor magistrates.<sup>30</sup> Tribunals come in many forms, and in land, housing and property may determine disputes *inter partes* (between private parties, over boundaries, for example, leasehold valuations and landlord/tenant relations) and disputes between citizens and state (over expropriation compensation claims, planning and enforcement appeals against local planning authorities, for instance). They address largely factual rather than legal issues and involve non-legally qualified members with relevant expert knowledge in the decision-making process.

They are usually held near the location where the dispute arises, and their relatively informal procedures make them more accessible and acceptable to the public. They may use local languages rather than the official language of the courts; they can help inform local communities about their rights and obligations (for example, in matters of gender equality), and connect with customary land tenure, taking account of oral traditions and shared communal values. Their openness as a court of record (not closed and private as with arbitration and mediation processes) means that decisions are in the public domain, showing the reasoning behind the decision. The emphasis is on fair and impartial processes, “putting things right” and learning from outcomes.

##### 4.1 Land and property tribunals in the UK

The experience of the UK with land and property tribunals has much potential relevance to Africa, without wishing to encourage isomorphic mimicry. This section can only summarise some of the complexities, without wishing to encourage isomorphic mimicry in African circumstances, and the

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28 Derman *et al* 2007; Evers *et al* 2005.

29 Pinheiro 2007.

30 Wraith & Hutchesson 1973.

considerations that led to the creation of a new Property Chamber in the Tribunal Service for England and Wales in 2013.

The UK is one of the more crowded countries in the European Union (EU), with consequent pressures upon land. Deficiencies in the land-tenure system (notably tithes, copyholds and enclosures) rendered the country less able to support its growing population and industrialisation. Trends in land tenure have, over the past century, included the replacement of feudal tenure with a system of freehold and leasehold in the law reforms of 1922-1925, the huge growth of home ownership alongside the survival of concentrated landownership in large estates, a decline in landownership by public authorities, and the growth of forms of communal ownership.<sup>31</sup>

Dispute resolution outside full judicial process can be dated back at least to Tudor reforms with administrative courts, the Star Chamber, and the Court of Augmentations. Tribunals also grew out of local informal arbitration practices in the 18<sup>th</sup> and 19<sup>th</sup> centuries, responding to the growing complexity of industrial society. As state intervention in society grew in the 20<sup>th</sup> century, tribunals became involved in such areas as welfare benefits, employment, asylum and immigration, as well as housing, planning and land matters. They have been called “a hybrid species of dispute-resolution body hovering somewhat uncertainly between the judicature and the executive”.<sup>32</sup> A review in the 1950s established the so-called “Franks principles” of independence, coherence and user-friendliness, with the European Convention on Human Rights providing a benchmark against which decisions could be tested.

Following the Leggatt report, a separate Tribunals Service was created for England and Wales in 2007, operating alongside the courts as an agency of the Ministry of Justice and adjudicating more cases than the courts.<sup>33</sup> The complexity of land, property and housing issues, with a patchwork of jurisdictions, confusing overlaps of jurisdiction between courts and tribunals, as well as between tribunals, persuaded Leggatt in 2002 to refer eight different tribunals operating in the area to the Law Commission for a comprehensive solution. The result was the creation, in 2013, of a new Property Chamber, taking account of three deep-rooted precepts of the law – the protection of private property, the right to a fair and impartial trial, and an open and accessible process.

The largest (by number of cases) of the three tribunals in the new Property Chamber was the Residential Property Tribunal, which combined three previous tribunals for leasehold valuation and rent assessment. It determined disputes between landlords and tenants in private rented housing. There remains jurisdictional overlap with county and even criminal courts in applications for possession, tenants’ complaints about disrepair and landlord harassment, the level of rent, and rights to housing benefit.

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31 Home 2009:103-108.

32 Stebbings 2006:273; Roebuck *et al* 2019.

33 Leggatt 2001.

The second of the three Property Chamber tribunals, the Land Registration division, dealt with disputed first registrations of title, adverse possession claims, and rectification of the register, often involving the examination and interpretation of conveyancing documents dating back over many years. Compared with Africa, the dominance of state-guaranteed private property title is striking. In 2019, the England and Wales Land Registry reported that registered land covered 86.6 per cent of the land area (13.1 million hectares) with an estimated 25.5 million separate titles, worth £7 trillion and with over £1 trillion of debt secured on them. The Land Registry claimed to facilitate one of the most active property and mortgage markets in the world (26.3 million transactions in 2013/2014). Disputes were relatively few, with the Land Registration division dealing with approximately 1,200 cases in 2013/2014, compared with over 100,000 first registrations completed (2018/2019). Formerly, the Chief Land Registrar decided such disputes, but the potential for conflict of interest meant that a review recommended a process independent of Land Registry. Cases of corrupt title transfers are very few compared with the land sector in Africa, as frequently reported in the press.<sup>34</sup>

The smallest of the three Property Chamber divisions, the Agricultural Land division, dealt with disputes between agricultural tenants and landlords, drainage disputes between neighbours, and certificates of bad husbandry. Its cases have been declining because of changes in the law, while ownership of agricultural land has become more concentrated.

The workload of the three Property Chamber tribunals is, however, dwarfed in case numbers by that of two other land-related bodies, the Planning Inspectorate and the Valuation Tribunal. The Planning Inspectorate acts in a quasi-judicial capacity on behalf of the Secretary of State as an executive agency of central government and its inspectors make recommendations to Ministers or take decisions on their behalf.<sup>35</sup> Its caseload is varied: planning and enforcement appeals (to which over half of its resources are devoted), approval of local development plans, and cases involving listed buildings, tree preservation, purchase notices, footpaths, advertisements, rights of way, costs claims, large-scale infrastructure proposals, and sites of community value. Some 46 Acts govern town and country planning, with another 20 relating in part; the primary law dating from 1947 had 114 sections and 11 schedules, and grew by 2015 to 4 Acts, 479 sections and 26 schedules.<sup>36</sup> The other big tribunal, the Valuation Tribunal, makes decisions relating to local government finance on non-domestic rates, council tax, old rates, and drainage rates, and has 22 separate legislative sources of jurisdiction.

Another form of tribunal relates to common land, which is the approximate equivalent of customary land in Africa, but in the UK is a residual category covering a few per cent of its land area. Local authorities maintain statutory registers of common land and town or village greens, and the Commons Commissioners settle disputed entries, and determine the ownership of

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34 Land Registry of England and Wales Annual Report and Accounts 2018/19 HC2259.

35 Wraith & Lamb 1971:180-89.

36 Lecture by Charles Mynors QC at Statute Law Society, London 8 June 2015.

unclaimed common land and greens, verifying the nature and history of communal activities.

Finally, a separate body, the Lands Tribunal, originally created in 1949, has jurisdiction of both first instance and appeals from Property Chamber tribunals. It deals with legally and factually complex cases, often involving large sums of money, particularly compulsory purchase and compensation. As a court of record with status broadly equivalent to the High Court, its members are both legally qualified and experienced in land valuation.

Novel and technical regulations governed procedure in these tribunals. A diverse body of decision-makers, including non-lawyers from professionals in land and valuation, had to possess specialist knowledge, because the rules for implementation were not those of the common law. Multi-member panels determined cases with a mixture of paper presentations and oral hearings. Most of the disputes were over fact and interpretation of policy rather than principle or law, and proceedings used independent investigation to supplement the adversarial presentation of a case. Published inspector's reports included the reasoning processes behind the decision.

## 4.2 Land tribunals in Africa

The use of land tribunals as ADR mechanisms is increasing in African countries. Traditional dispute resolution, facilitated by credible and respected community members, aims not only to settle conflicts, but also to restore harmonious relationships between disputants and perhaps with neighbouring communities. Where the final verdict was supported by the community, not causing shame to disputants, implementation and enforcement are more easily achieved. In addition, the dispute would be settled locally, close to the land in question, and usually in the language of the local community rather than the official language of some former "colonial master".

Despite the high expectations surrounding the establishment of ADR structures in various sub-Saharan African countries, few have performed satisfactorily for various reasons: inadequate resourcing, poorly defined mandates, corruption, or lack of legitimacy. Successful ADR seems to have followed traditional dispute-resolution practices and prevailing societal norms and values. However, these may not be compatible with human rights law, particularly the AU Land Declaration on equitable access to land and related resources, including for youth and other landless and vulnerable groups, and women. Post-apartheid South Africa created new land claims courts to redistribute and reconstitute lands taken under racially discriminatory laws, intended to help those prejudiced by the old regime – the urban and rural poor, farm workers, labour tenants and emergent farmers – but their judgments have not prevented land redistribution to the vast majority of the African population from remaining a politically contentious issue.

The ADR mechanisms, if they are to be locally acceptable, should preferably be conducted in local languages, including the relevant land policies and laws. Decision-making bodies should adopt a flexible approach to types of evidence

and proportional representation of women. The interaction between central, local and traditional authorities needs the valuation of land, assessment of compensation and issues of natural resources to recognise pre-existing land rights. In these areas, much ADR seems to have failed.

#### 4.2.1 Colonial approaches

In general, the European colonial powers left customary law and traditional land adjudication practices largely undisturbed. In Lesotho, for instance, which escaped absorption into South Africa in the 19<sup>th</sup> century and became (as the British protectorate of Basutoland) an early example of British indirect rule policy, the British commissioner's reports were used as a handbook of customary laws, with some land customs being outlawed if considered "repugnant" to British legal conceptions. One such was the chiefs' practice of "eating up" (seizing goods and livestock and turning disobedient people out of their home and land).

You must know that you have no authority to turn people away from their own places ... Recollect that you are under the Queen's Government where the least of Her Subjects are entitled to the same justice as the Highest.<sup>37</sup>

While deemed repugnant, the practice of "eating up" was dissimilar to that of the crown and mediaeval overlords in England, which only came to be restrained when royal powers were restricted, and private property freed of feudal obligations. Another practice discouraged, but similar to mediaeval British practice was *letsema* (forced labour on chiefs' land, intended for the benefit of widows and the poor, but where the produce sometimes sold for the chief's benefit). The British High Commissioner for Basutoland, appointed in the 1880s, acted as a higher court and was also willing to intervene to adjudicate changes in local land boundaries:

Moshesh [the previous ruler] is dead, and his boundary lines are dead too, and thus I rub them out. Here he drew his foot rapidly along the ground several times, as if effacing a mark. Now, I am going to make a boundary, and let any man try to rub it out at his peril.<sup>38</sup>

The British colonial administration, notably in Northern Nigeria (another testing ground for Lugardian dual mandate policy), maintained an ADR process in urban areas to keep certain kinds of land dispute separate from both the colonial and the indigenous courts.<sup>39</sup> Thus, non-indigenous groups in the cities of Kano and elsewhere, living in Sabon Gari (strangers' quarters), kept separate by Lugardian dual mandate or indirect policy from the local population, had a special court, its court president from the Gold Coast, and the other members representing Yoruba, Hausa, Nupe and Igbo ethnic groups – all "strangers" to the society of Northern Nigeria. It applied a hybrid legal order: "One shrinks from describing the genus of the law administered but it seems

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37 Quoted in Burman 1976:76-770.

38 Quoted in Eldredge 2009:41.

39 Fourchard 2009:187-215.

to consist of common-sense gleanings of common law and Mohammedan law and bits of tribal custom where the latter is thought applicable".<sup>40</sup>

#### 4.2.2 Botswana's experience with tribunals

After independence in 1968, Botswana, another former British protectorate kept separate from South Africa, reformed its land tenure through a flexible and gradualist approach to its traditional authorities, increasing the area of land under tribal rather than state or private freehold tenure to currently 71 per cent; 4 per cent and 25 per cent, respectively. The *Tribal Land Act* 1968 transferred authority over land from chiefs to local tribal land boards: such land not to be bought and sold, only the un-extinguished improvements, although the Minister could grant common law leases. The boards were to provide separately residential, arable and grazing land, rights to residential land being exclusive and permanent, and arable land allocated to family heads under exclusive occupation as long as the land was being cultivated.

Botswana now struggles with land scarcity and overcrowding in low-income settlements and problems of land administration, particularly on peri-urban customary land. Various Presidential Commissions and official reports have sought to address land-tenure issues and, as the volume and complexity of land board business increased, complaints grew that they allocated land inequitably, ignoring claims from the poor and politically inarticulate. Alternative land conflict resolution mechanisms in Botswana are now represented by Land Tribunals, which are more satisfactory than administrative processes established under the *Tribal Land Act*, but which are generally viewed as state organs, and not trusted by the communities they serve.

Although ostensibly modelled on indigenous customary courts, they currently resemble and function as common law courts, and are composed of attorneys, surveyors, town planners and other land-related professionals instead of ordinary citizens, and with attorneys representing plaintiffs and deponents. Conflicts are largely determined under provisions of the *Tribal Land Act*, the *Town and Country Planning Act 2013* and other states or regulations instead of customary rules and practices that take long periods to determine cases.

Kalabamu advocates the establishment of community-based ADR structures for land, established at ward, village and district levels, and run by ordinary but respected citizens who would be guided by living law instead of customary and statutory laws, which may no longer be relevant to people's everyday life and prevailing societal values. The new structures should promote reconciliation and amicable settlements by going for win-win/lose-lose settlements, instead of winners-and-losers, as is characteristic of ordinary courts.<sup>41</sup>

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40 Kano Provincial Annual Report 1932:27, quoted in Home 1974:221.

41 Kalabamu 2019:337-345.

### 4.3 Alternative dispute resolution in Africa

Without claiming to be comprehensive, this section summarises some countries' approaches to ADR.

In Zambia, growing land conflicts include invasion of idle or undeveloped private or public land, illegal allocation of land by some politicians and some government officials, violent land acquisition by political cadres, boundary conflicts, multiple allocations of land, as well as eviction by private landlords and government agencies. Institutions dealing with land disputes include Land Tribunals, the Town and Country Planning Tribunal, the Magistrates Court and the High Court. The lands tribunal, established in 1995 as a low-cost alternative to the formal court system, is handicapped by its centralised nature, and limited capacity. Decentralising its activities to district level requires more resources for capacity-building (adequate funding, training, sufficient transport, and adequate human resources). Few Zambians are even aware of this legal option, due to a lack of funding for public awareness campaigns and the fact that most of the proceedings are conducted in English. Currently, the vast majority of land disputes are dealt with through local, traditional leaders, and can proceed through several ranks of leadership before reaching a resolution. Similar approaches can be noted in urban areas whereby parties in resettlement areas approach the resettlement scheme management or in other types of disputes, where the help of agricultural officers or government committees are sought.<sup>42</sup>

In Kenya, land disputes are often first addressed through community dispute-resolution mechanisms and, if the parties are not satisfied with the outcome, they may take them to the formal court system. Informal dispute resolution is especially important in rural villages where formal institutions may be difficult to access. The use of alternative or traditional dispute-resolution mechanisms is encouraged in the 2010 *Constitution* as well as by the National Land Policy and major land laws. One shortcoming of traditional dispute-resolution mechanisms is that they may be biased against women. Another is that community elders, generally those responsible for resolving disputes at the local level, no longer have the authority they once had.<sup>43</sup>

In Ghana, British colonial dual mandate policy encountered sustained local opposition. Consequently, the customary land tenure institutions have been resilient and maintained their traditional power to allocate land and resolve land conflicts. This, however, means long litigation over indeterminate stool lands boundaries and chieftaincy disputes, with litigants in peri-urban areas preferring local state courts to chiefs. New technologies are slowly improving boundary demarcation to facilitate land-title registration.<sup>44</sup>

In Lesotho, as land disputes and overcrowding grew, the government legislated to replace customary land tenure with title registration under a cadastral reform project, making inhabitants formal owners of the land that

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42 Mushingi 2017:16-23.

43 Coldham 1984:59-71; Jones *et al* 2016.

44 Adarkwa 2009; Arko-Adjei 2011; Ubink 2018: 930-950.

they had possessed informally for many years. The report presented that Lesotho had an opportunity to serve as a model for other African countries that are now struggling to deal with land reform and land administration in an efficient and cost-effective manner. Lesotho's small size may make it difficult to harness the human resources needed, but it also means that there is a smaller land area and smaller population of landholders that must be covered with the new system. The merger of cadastre and registry into a new autonomous, self-funding agency could, in some ways, be easier in Lesotho; yet the model can be scaled up fairly easily for replication in other countries.<sup>45</sup> The report resulted in a new central government authority, providing products and services required by the land market, while land-management functions remained with local authorities.

Cameroon, where an estimated 80 per cent of lands are not registered, has had a Land Consultative Board since 1976 to resolve land and boundary disputes in the absence of a land certificate, with appeals heard by the Ministry of Lands and Survey. This complies with the human right requirement of an independent adjudicator, and indeed, justified the Bakweri Claims brought to the African Commission owing to the lack of a national body where their case could be heard.<sup>46</sup> In Uganda, the 1998 *Land Act* created a new institutional framework of district land boards under a Land Tribunal.<sup>47</sup>

From this brief review of ADR practice in the Africa land sector and the UK, one can make tentative suggestions for future research and scholarship in the area. In the UK, there is a growing body of empirical legal research on ADR practice, but hardly any on the land and property tribunals, which display great complexity and multiple jurisdictions. Some African countries now have enough years of post-independence land tribunals to justify comparative research on their efficiency and effectiveness, and possible improvements, while recognising the diversity of circumstances and legal regimes on the continent, and the limited academic resources to undertake such research. The legal regulatory framework can be expected to grow in complexity as population pressure upon land grows, and the balance between court and tribunal jurisdictions will change.

The appointment and composition of decision-makers justifies scrutiny, especially in matters of gender balance and the proportions of lawyers, other professionals and non-lawyers. Rules for tribunal procedures need to address issues of local language, site inspections, evidence on matters of fact and policy, and public record of decisions and reasoning behind them. Training of decision-makers, better public awareness of ADR and public perceptions about fairness and quality of decisions all deserve research. Different academic disciplines beyond law have contributions to make.

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45 Urban Institute 2009.

46 Njoh 2011.

47 McAuslan 2013.

## 5. CONCLUSION

It has been argued that, viewed through a lens of path dependency and historic institutionalism, the countries of Africa still experience tenacious legacies of colonialism in land law and governance structures. These maintain a dominant yet inefficient state that affords its own citizens an inferior status and fails to protect their human rights. Forced evictions occur with hardly any or no opportunity for objections to be heard or compensation granted. Official gazetting of customary land for public purposes such as forestry or wildlife parks effectively extinguishes communal land rights. Even successful appeals to the African Court confirming violation of a collective right to property have been found to provide little effective redress.

There is a mismatch between, on the one hand, international legal instruments on right to development, indigenous peoples and AU Charters, protocols and declarations, supported by the particular trajectory of international institutional development agencies, and, on the other hand, the laws and policies of AU member states determined to preserve sovereignty over their laws and institutions. The SDGs and AU legal instruments may urge priority to women's rights of access to land, yet the practical application in individual states and locally has lagged behind. An example of isomorphic mimicry? The optimistic AU land policy guidance that the dominant position of the state in land matters "must change" has not been heeded because of institutional and legal state structures and attitudes continuing from the colonial past.

As the soft law policy agenda around the right to development continues to evolve, knowledge and innovative approaches towards land governance have grown rapidly over the past decade, through initiatives such as the UN-Habitat's GLTN, the African Land Policy Centre and NELGA. The policy emphasis within the land sector upon food security and agricultural policy has expanded into issues of urban governance, as urban populations have grown both in absolute and relative numbers, and the New Urban Agenda was adopted at Habitat III. The incorporation of the right to development in international legal instruments should help the citizens of African countries hold their governments accountable for their failings as duty-bearers. The growing populations are increasingly demanding land reform and redistribution, which has become a highly political issue in several countries.

Analysing through concepts of path dependency, historical institutionalism and isomorphism may be illuminating, but should generate undue pessimism about the prospects for change. External initiatives can create critical junctures for ADR through new law governance structures, planning law reform, and innovative land tools as promoted by UN-Habitat's GLTN. These require national law reform and corresponding political commitment.<sup>48</sup>

From a juridical perspective, land disputes often give rise to expensive and protracted court proceedings. Poor litigants may suffer from inequality of arms in legal representation when pitted against the resources of the state.

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48 The Commonwealth Secretariat 2017 provides guidance on law reform process.

They may lack the necessary knowledge, understanding of the official and technical language of the court, and confidence in the independence of those deciding their case. Indeed, there may not even be an appropriate forum to address the issues, leading indigenous peoples having to appeal to the AU judiciary, because local remedies did not exist. The potential of land tribunals as an ADR process is increasingly being recognised in national laws. Perhaps Africa's particular challenge is how to integrate traditional authority and community-based approaches with national policy priorities, through a policy framework.<sup>49</sup>

Without lapsing into unthinking institutional isomorphism, the transfer of approaches from elsewhere justifies comparative research into the issues to be considered. The appointment and composition of tribunals includes the mix of lawyers and professional non-lawyers, and of community leaders. A balance has to be struck between traditional cultural values and perhaps conflicting universalist values coming from international soft law and policy. The methods for obtaining factual evidence may vary, with flexible attitudes to witness procedure, while holding tribunals close to the site of the dispute allows the important action of visiting the land in question, and relating the decision to the land, its environment, condition, history, occupancy and use. Finally, the tribunal decision should include the reasoning behind it, and must be written, recorded, and publicly available.

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