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Legal Pluralism and the Position of Customary Law in Mediation of Land Disputes by Ward Tribunals: Insights from Mvomero and Kilosa Districts in Morogoro, Tanzania

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Abstract

This article investigates the extent to which "customary principles of mediation" in Tanzania's ward tribunals are operationalized in practice. Using documentary review, interviews, focus groups, and a short questionnaire across eight wards in Mvomero and Kilosa Districts, we examine the practical salience of customary mediation and the institutional conditions shaping it. We find that Tanzania's legal pluralism is state dominant and complementary. Ward tribunals mediate within statutory frames and natural justice, while substantive tribal norms are seldom invoked. This divergence is linked to the historical abolition of traditional leadership in 1963, court led modification of customary rules, heterogeneous parties (including legal persons), and standardized mediation requirements introduced in 2021. We distinguish substantive from procedural customary law and show that mediation practice in ward tribunals often reflects generic procedural fairness rather than named community norms. We argue for a hybrid, custom-sensitive mediation model, and propose concrete policy actions to deliver community based justice.

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1. INTRODUCTION

Legal pluralism in Tanzania formally places customary law alongside state and religious law.[1] In land matters, ward tribunals are expressly required to begin with customary principles of mediation before resorting to natural justice or training-based practices.[2] Yet, on the ground, tribunal members seldom rely on distinct customary norms.[3] This article investigates the extent to which formal recognition of customary principles translate into practical salience. We argue that Tanzania represents a case of state-dominant complementary legal pluralism.[4] Unlike countries that retained traditional leaders after independence, Tanzania abolished chieftainship in 1963,[5] replacing lineage-based fora with elected ward tribunals under the oversight of local government councils.[6] This trajectory explains why "customary principles" in Tanzania lack institutional carriers and why tribunals default to statutory frames. This paper contributes to showing how this institutional history produces declining reliance on custom, filling a gap in African legal pluralism scholarship. We operationalize practical salience of customary principles through reported reliance on indigenous ward customs, disputants' tribal customs, generalized procedural "wisdom", and frequency of invoking named customary norms.

The study is motivated by the 2021 amendment to the Land Disputes Courts Act, mandating ward tribunal mediation and certification prior to litigation in the District Land and Housing Tribunal (DLHT), and by the National Land Policy (2023 Edition) which emphasises mediation in resolving land disputes. It directly speaks to SDG 16 concerning effective, accountable institutions and access to justice as well as SDG 5 gender equality in land governance, given statutory requirements that women sit on ward tribunals.[7]

The article is divided into six parts. After this introduction, the next part analyses the context of legal pluralism in Tanzania. The third part deals with the establishment and mandate of ward tribunals. Part four presents the methodology while part five presents the findings and discussion of this paper. Part six concludes this article by summarising key findings and offering recommendations.

[1] Judicature and Application of Laws Act [Cap 358 R.E. 2023] sec. 12 & Magistrates' Courts Act [Cap 11 R.E. 2023] sec. 18.

[2] Land Disputes Courts Act [Cap. 216 R.E. 2023], sec. 13(2).

[3] RJ Mwamfupe, CK Mtaki & BT Mapunda, ' Examination of the effectiveness of ward tribunals in mediating land disputes in Tanzania: A case study of Kibaha District Council' (2024) 13(1) *International Journal of Science and Research Archive* 127 https://doi.org/10.30574/ijsra.2024.13.1.1531

[4] G Swenson, 'Legal Pluralism in Theory and Practice' (2018) 20 *International Studies Review* 445-446 https://doi.org/10.1093/isr/vix060

[5] Chiefs were abolished by the African Chiefs Ordinance (Repeal) Act, No. 13 of 1963 and further enforced vide the African Chiefs Act [Cap 252 R.E. 2023].

[6] O Kapinga & VA Gores 'The Post-Colonial Administrative System in Tanzania 1961 to 2019' (2020) 2(5) *EAS Journal of Humanities and Cultural Studies* 260 https://doi.org/10.36349/easjhcs.2020.v02i05.003

[7] Land Disputes Courts Act [Cap. 216 R.E. 2023], sec. 11.

2. LEGAL PLURALISM IN TANZANIA

Legal pluralism concerns the existence of multiple legal sources in a single legal system.[8] It deals with not only the relationship between multiple legal systems but also more broadly the operation of law within diverse cultural contexts.[9] Such understanding is important because during colonialism, indigenous laws were made inferior to Western legal systems.[10] In Tanganyika,[11] for example, prior to colonialism, communities had their customary laws and dispute resolution systems which reflected the realities of the local social organisation.[12] In most cases, disputes were resolved by tribal chiefs and elders. The British colonial government maintained these traditional systems with reservations. Article 24 of the Tanganyika Order in Council 1920 stated that customary law would apply in matters of natives, provided it was not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance, or any Regulation or Rule made under any Order in Council or Ordinance. What would be understood as "just and moral" in that context was based on Western notions. In several instances, the colonial High Court in Tanganyika denounced certain customary rules and practices on the ground that they were repugnant to justice and morality as understood in the European sense.[13] This approach eventually undermined the role and position of customary law and traditional institutions in resolving disputes, gradually replacing them with the English legal system.

After independence in 1961, the repugnance clause was repealed and replaced by section 12(1)(a) of the Judicature and Application of Laws Act (JALA)[14] which states that:

> Customary law shall apply to, and courts shall exercise jurisdiction in accordance therewith in, matters of a civil nature between members of a community in which rules of customary law relevant to the matter are established and accepted, or between a member of one community and a member of another community if the rules of customary law of both

[8] L Holden, 'Cultural Expertise and Legal Pluralism in the United Kingdom, France, and Italy' (2024) 56 *Legal Pluralism and Critical Social Analysis* 171 https://doi.org/10.1080/27706869.2024.2372744

[9] K Benda-Beckmann and B Turner, 'Legal Pluralism, Social Theory, and the State' (2018) 50(3) *The Journal of Legal Pluralism and Unofficial Law* 255 https://doi.org/10.1080/07329113.2018.1532674 & Holden 'Cultural Expertise and Legal Pluralism in the United Kingdom, France, and Italy' (n 1).

[10] J Ubink, A Claassens and A Jonker, 'An Exploration of Legal Pluralism, Power and Custom in South Africa: A Conversation with Aninka Claassens' (2021) 53(3) *The Journal of Legal Pluralism and Unofficial Law* 498 https://doi.org/10.1080/07329113.2021.2013547

[11] Tanganyika united with Zanzibar in 1964 to from the United Republic of Tanzania.

[12] See for example the sentencing structure in Kadume's case as recounted in E Hoseah 'Reflections on Sentencing in Tanzania' (2020) 33(1) *South African Journal of Criminal Justice* 90.

[13] A Swayerr, 'Customary Law in the High Court of Tanzania' (1973) 6 *East African Law Review* 255; BA Rwezaura, 'State Law and Customary Law: Reflections on Their Relationship in Contemporary Tanzania' (1987) https://europainstitut.de/fileadmin/schriften/nr83.pdf

[14] Cap 358 R.E 2023.

> communities make similar provision for the matter.

This provision equates customary law to any other law in dealing with matters of a civil nature between parties who are subject to the same custom. That position was reinforced in 1985 by the Court of Appeal of Tanzania in the case of *Maagwi Kimito v Gibeno Werema*[15] where it held that:

> The customary laws of this country now have the same status in our courts as any other law subject only to the Constitution and any statutory law that may provide to the contrary.

In the same respect, the second proviso to section 12(1) of the JALA enjoins the application of Islamic law in matters of marriage, divorce, guardianship, inheritance, wakf and similar matters in relation to members of a community which follows that law. Also, Hindu law applies in Tanzania mainland in relation to persons who profess the Hindu religion.[16] Thus, Tanzania comprises four major legal systems: state law, customary law, Islamic law and Hindu law. Out of these four, customary law is the most unwritten and often criticised as inequitable and causing injustice especially to women and children in matters of land and succession/inheritance.[17] Accordingly, its substance and application has been subject to modifications by state law and courts.[18]

Under Swenson's archetypes of legal pluralism,[19] Tanzania presents a case of state-dominant complementary legal pluralism in which non-state systems are incorporated and subordinated to formal structures. Thus, unlike countries that retained or re-empowered traditional leaders after independence (often facilitating the continued centrality of customary courts and procedures), Tanzania abolished traditional leadership in 1963, effectively reducing the role and influence of customary law.[20]

3. ESTABLISHMENT AND MANDATE OF WARD TRIBUNALS

Before independence, traditional dispute resolution based on customary arbitration and mediation.[21] However, in 1969, the government established customary arbitration tribunals based on formal village structures.[22] Later in 1985, the Ward Tribunals Act[23] was enacted, establishing Ward Tribunals in every administrative ward throughout the country. This move was preceded by the reinstatement of local government authorities in 1982 as part of the government decentralization reforms. Decentralization aimed generally at promoting public participation at all government levels and creating a local government administration that was answerable to the local council. Ward Tribunals were placed under the supervision of local government authorities, furthering the

[15] Maagwi Kimito V Gibeno Werema [1985] TLR 132

[16] Law Reform Commission 'Report of the Commission on the Law of Succession/Inheritance' (1995) Dar es Salaam: United Republic of Tanzania 21.

[17] Law Reform Commission (n 16) 17.

[18] See *Ephraim v Holaria Pastory and Another*, PC Civil Appeal No.70 of 1989, High Court of Tanzania (unreported) [1990].

[19] Swenson (n 4) 445.

[20] Mwamfupe, Mtaki & Mapunda (n 3) 124.

[21] QY Lawi, 'Justice Administration Outside the Ordinary Courts of Law in Mainland Tanzania: The Case of Ward Tribunals in Babati District' (1997) 1(2) *African Studies Quarterly* https://asq.africa.ufl.edu/wp-content/uploads/sites/168/ASQ-Vol-1-Issue-2-Lawi.pdf

[22] Ibid.

[23] Ward Tribunals Act, [Cap 206 R.E 2019].

decentralization principles through the creation of a community-based justice mechanism.[24]

According to section 3 of the Act, Ward Tribunals are aimed to provide accessible and localized justice at the grassroots level. Their mandate revolves around resolving disputes and conflicts within local communities. They serve as alternative dispute resolution machinery, offering an accessible and affordable avenue for justice administration outside the formal court system. The tribunals operate at the ward level and are composed of not less than four and not more than eight members, of whom, in case of land dispute, three must be women as provided under section 11 of the Land Disputes Courts Act.[25] Except for the secretary of the tribunal, who by virtue of section 5(2) of the Ward Tribunals Act should be "sufficiently literate and educated and capable of satisfactorily discharging the duties of Secretary", other members of the tribunal may not necessarily be literate or educated.

Before 2021, Ward Tribunals had jurisdiction to hear and determine land disputes where the value of the disputed land did not exceed TZS 3,000,000. However, due to various reasons, the tribunals failed to discharge their adjudication role effectively. For instance, in the cases of *Edward Kubingwa v. Matrida A. Pima*[26]*Anne Kisonge v. Said Mohamed*,[27] and J*oseph Siage Singwe v. Boniphace Marwa Wang'anyi*,[28] the Court, on different occasions, overruled the decisions of the Ward Tribunals due to several flaws, including a lack of an appropriate quorum in the composition of the tribunal, no consideration of gender representation as required by law, and no description of the attendance of the members in every meeting of the tribunal. Considering their level of education, members of the Ward Tribunals could have been unaware of these technical legal aspects, which were very fundamental to their daily function of justice administration.[29]

To address the challenges that emanated from the adjudication of land disputes by Ward Tribunals,[30] in September 2021, the Parliament of Tanzania amended the Land Disputes Courts Act to strip Ward Tribunals of the mandate to adjudicate land disputes and require them to only mediate the disputes. If mediation fails, the Ward Tribunal must certify so, thereby enabling the parties to institute adjudication proceedings in the District Land and Housing Tribunals (DLHT). In conducting mediation, Ward Tribunals are

[24] President's Office – Regional Administration and Local Government (PO-RALG), *History of Local Government in Tanzania* https://www.tamisemi.go.tz/storage/app/media/uploaded-files/History-of-Local-Government-In-Tanzania.pdf

[25] Land Disputes Courts Act, Cap 216 R.E 2023.

[26] Edward Kubingwa v. Matrida A. Pima (Civil Appeal No. 107 of 2018, Court of Appeal of Tanzania)

[27] *Anne Kisonge v. Said Mohamed* (Land Appeal No. 59 of 2009, High Court of Tanzania)

[28] J*oseph Siage Singwe v. Boniphace Marwa Wang'anyi* (Misc. Land Appeal No. 111 of 2021High Court of Tanzania)

[29] L Lukiko and C Kilonzo, *Report on Community Engagement and Outreach Activity on Justice Delivery Capacity Building Training for Members of Ward Tribunals in Mvomero District, Morogoro* (Mzumbe University 2023).

[30] Bunge la Tanzania, *Majadiliano ya Bunge, Mkutano wa Nane, Kikao cha Pili cha tarehe 1 Septemba 2021* https://www.parliament.go.tz/polis/uploads/documents/1631514708-01SEPTEMBA,2021.pdf

required to consider firstly any customary principles of mediation; secondly, natural justice in so far as any customary principles of mediation do not apply; and lastly any principles and practices of mediation in which members have received any training.[31] This paper shows the extent to which customary principles of mediation are applied by Ward Tribunals in resolving land disputes and how the position of customary law tribunal mediation is shaped by the plurality of legal systems.

4. METHODS

Document review and field research were used to capture how tribunal members understand and apply "customary principles of mediation," a construct that is largely procedural and context-specific. We triangulated interviews, focus group discussions (FGDs), and a brief questionnaire administered to tribunal members post-FGD, allowing us to align reported practices with thematic narratives. Practical salience of customary principles was operationalised through: reported reliance on indigenous ward customs, disputants' tribal customs, generalized procedural "wisdom" and frequency of invoking named customary norms versus statutory reasoning. We purposively selected eight wards across Mvomero district (Hembeti, Mkindo, Melela, Lubungo) and Kilosa district (Magomeni, Mkwatani, Kasiki, Mbumi) for heterogeneity in livelihoods (agricultural, agro-pastoral, commercial), rural-urban spread, and known conflict prevalence. We recruited tribunal members (MWTs), beneficiaries with prior tribunal experience, and key informants (legal officers, DLHT chairpersons, ward executive officers, paralegals). Of 88 expected participants, 59 participated (67.04%), reflecting constraints in tribunal schedules and availability. While the participation shortfall may affect external validity of findings, we mitigate through role diversity across two districts, method triangulation, and convergence between qualitative themes and questionnaire indicators.

[31] Land Disputes Courts Act, Cap 216 R.E 2019 sec 13(2).

Table 1: Description of respondents

SN	Respondent Category	Expected No.	Actual No	%(actual/expected)	Method of data collection
1	District Executive Director	2	1	50	Interview
2	District Legal Officer	2	2	100	Interview
3	Chairperson – District Land and Housing Tribunal	2	2	100	Interview
4	Ward Executive Officer	8	6	75	Interview
5	Paralegal	2	2	100	Interview
6	Members of Ward Tribunals (MWTs)	48	34	73	FGD & Questionnaire
7	Beneficiaries	24	12	50	FGD
Total		88	59	67.04	

Source: Authors (field data)

5. FINDINGS AND DISCUSSION

5.1. Legal Framework on Land Dispute Settlement in Tanzania

Tanzania has a broad legal framework for resolving land disputes. The Land Act[32] and the Village Land Act[33] are the main statutes on land matters and provide avenues for land dispute settlement. With the coming into force of these laws, the Land Disputes Courts Act (LDCA)[34] was enacted to establish an independent, expeditious, and just system for adjudicating land disputes, as envisaged under the common section 3(1) of the Land Act and Village Land Act.

Section 3 of the LDCA recognises five institutions with exclusive jurisdiction over land matters. These are the Village Land Councils (VLC), Ward Tribunals, the District Land and Housing Tribunals (DLHT), the High Court of Tanzania, and the Court of Appeal of Tanzania. Each of these institutions deals with land disputes arising at various levels of society, depending on the value of the disputed land. VLCs, Ward Tribunals, and the DLHT are structured as quasi-judicial bodies on the lower end of the hierarchy of land dispute settlement organs. The High Court and Court of Appeal of Tanzania are the apex courts in the country, respectively. This structure was a result of the recommendations of the Presidential Commission of Inquiry into Land Matters of 1992.[35] Those

[32] Land Act, Cap 113 R.E 2023

[33] Village Land Act, Cap 114 R.E 2023

[34] Land Disputes Courts Act, Cap 206 R.E 2019

[35] SJ Mramba and MR Lamwai, 'The Land Dispute Settlement in Tanzania Mainland and

recommendations prompted the establishment of a specialized circuit of courts (quasi-judicial bodies) to handle land disputes in place of the ordinary courts, which were loaded with other disputes and gave little attention to land disputes.[36]

The VLC is composed of not less than five and not more than seven members, of whom at least two must be women. The Council is mandated to mediate land disputes arising at the village level according to any customary principles of mediation; principles of natural justice in so far as any customary principles of mediation do not already provide for them; or any mediation principles received through training.[37] This is the elementary stage of resolving land disputes in Tanzania. Parties dissatisfied with the mediation outcome may refer their disputes to a Ward Tribunal for a second mediation.[38]

The establishment, composition, jurisdiction, and functions of the Ward Tribunal are prescribed in the Ward Tribunals Act and the LDCA on land matters. Section 3 of the Ward Tribunals Act of 1985 requires the establishment of a Ward Tribunal in every ward across mainland Tanzania. These Tribunals are tasked with handling minor disputes and communal conflicts, thereby serving as the first point of contact for the resolution of local disputes. The Ward Tribunals Act envisions Ward Tribunals as accessible and community-based bodies that facilitate the quick and amicable settlement of disputes, with a focus on mediation and reconciliation rather than litigation. This decentralized approach is intended to reduce the burden on formal courts and ensure that justice is administered at the grassroots level, guaranteeing local participation.[39]

Each Ward Tribunal is composed of not less than four and not more than eight members, elected from amongst the residents of the respective Ward. Importantly, the Act stipulates that at least three members of the Tribunal must be women, ensuring gender representation in its composition. The members are appointed by the Ward Development Committee, which is responsible for selecting individuals who are respected, impartial, and possess a deep understanding of local customs and issues. This promotes inclusivity and representation in the administration of justice. It also intends to secure the position of customary law in resolving disputes by engaging members who are conversant with the customs of the community.

At their inception, Ward Tribunals were meant to supplement primary courts in the administration of justice. Therefore, they had a limited jurisdiction to deal with minor criminal and civil matters.[40] However, in 1995, when the Presidential Commission recommended a system of specialized circuit land courts and the strengthening of existing quasi-judicial bodies to resolve land disputes,[41] Ward Tribunals were vested with jurisdiction to also determine land matters. Therefore, Ward Tribunals assumed the status of a quasi-judicial organ with powers to hear and decide land disputes not exceeding the value of three million shillings arising from within the

Zanzibar: A Comparative Analysis' (2017) 2(1) *The Law School of Tanzania Journal* 1.

[36] Ibid

[37] Village Land Act, Cap 114 R.E 2023, section 61(4)

[38] Land Dispute Courts Act, Cap 216 R.E 2019 section 9.

[39] Village Land Act, Cap 114 R.E 2023

[40] Ward Tribunals Act, sec 10.

[41] United Republic of Tanzania (URT), *Report of the Presidential Commission of Inquiry into Land Matters* (Ministry of Lands, Housing and Urban Development, Dar es Salaam 1994).

respective wards. This meant that Ward Tribunals alternated between mediating and settling cases, depending on the nature of the cause of action before them.

In 2021, the LDCA was amended by section 45 of the Written Laws (Miscellaneous Amendments) Act No. 5 to remove the powers of Ward Tribunals to adjudicate land disputes. The amendment restricted the jurisdiction of Ward Tribunals in land disputes to mediation only. Section 13(4) of the LDCA[42], as amended, requires Ward Tribunals to mediate all land disputes before they are instituted at the DLHT. This provision reinforces the role of the Ward Tribunal in the mediation of land disputes. The mediation proceedings by Ward Tribunals are supposed to be completed within thirty days from the date of instituting the complaint. Lapse of this period renders the mediation unsuccessful, automatically allowing parties to institute suits in the DLHT.[43] During mediation, the Ward Tribunal is supposed to be composed of three members only, selected by the chairperson of the tribunal, and at least one of whom must be a woman. This mediation quorum is different compared to other Ward Tribunal sessions that handle other disputes not related to land.

In conducting mediation, section 13(2) of the LDCA requires Ward Tribunals to have regard to: (a) any customary principles of mediation; (b) natural justice in so far as any customary principles of mediation do not apply; or (c) any principles and practices of mediation in which members have received any training. This provision is *mutatis mutandis* with section 61(4) of the Village Land Act[44] regarding mediation of land disputes by VLCs. Before revoking the powers of Ward Tribunals to adjudicate land disputes, VLCs were the only land dispute settlement organ whose mandate was limited to mediation. Thus, the present requirement for failed mediations from the VLC to be referred to the Ward Tribunal duplicates mediation of land disputes at the grassroots level, potentially prolonging the administration of justice. We submit that since the LDCA does not make it mandatory for any specific disputes or parties to be mediated first by the VLC, the sequential mediation from VLC to Ward Tribunal may incentivize parties to skip the VLC and go directly to ward tribunals to obtain the DLHT certificate, potentially undercutting the VLC's role and narrowing the space for village-level custom.

The DLHT has original jurisdiction to deal with land disputes at the district, region, or zone of its establishment, where the value of the disputed land does not exceed three hundred million shillings in immovable property and two hundred million shillings in movable property.[45] For a land case to be filed at the DLHT, the parties must have failed to mediate the dispute at the Ward Tribunal, and the Ward Tribunal must have issued a certificate to that effect. The DLHT is the first stage in the land dispute settlement framework, where parties rely on and apply state laws instead of customary principles to resolve their disputes. There is no mediation at the DLHT. Cases instituted at this level take the form of adversarial litigation proceedings. The DLHT is a quasi-judicial body with exclusive jurisdiction to deal with land matters. Appeals from the DLHT go to the Land Division of the High Court.

The Land Division of the High Court of Tanzania was established under section 167 of the Land Act[46] and section 37 of the LDCA with original jurisdiction over disputes on

[42] Land Dispute Courts Act, Cap 216 R.E 2019
[43]LDCA, sec 13(4).
[44] Village Land Act, Cap 114 R.E 2023
[45] Land Dispute Courts Act, Cap 216 R.E 2023, sec. 33.
[46] Land Act, Cap 113 R.E 2023

recovery of possession of immovable property valued above three hundred million shillings and movable property valued at two hundred million shillings. Also, it has appellate, revisionary, and supervisory jurisdiction over cases from the DLHT. This Division of the High Court links the quasi-judicial bodies with the judiciary in the land dispute settlement framework. Meanwhile, the Court of Appeal of Tanzania is the final judicial organ in the hierarchy with jurisdiction over land appeals from the Land Division of the High Court.

5.2. Effect of Legal Pluralism on the Application of Customary Principles

Legal pluralism deals with the coexistence of two or more legal systems in a society.[47] It emerged as a defining feature of colonial administrations that sought to harness local dispute mechanisms to help legitimize their rule. Therefore, formal legal systems were established whilst maintaining the existing local customary legal systems. In many countries, this plurality was maintained by the post-colonial governments. In practice, the interplay between the formal and traditional legal systems in the administration of justice may either conflict, overlap, or complement each other.[48] For instance, in Tanzania, legal pluralism has created a structure where Ward Tribunals are established by state law but operate and discharge their roles within the setting of customary laws. While the two legal sources seem to complement each other, state law is technically superior to customary law and dictates its role and position in society.

When states adopt customary laws to supplement state laws, they also adopt rules prescribing and controlling the conditions of their application. Hence, state laws can limit the recognition and validity of customary laws. Similar limitations were imposed by Article 24 of the Tanganyika Order in Council of 1920 over customary laws through the repugnancy clause. Although the repugnancy clause was repealed after independence, the power of state law over customary law is still vivid in statutes and case law. Section 13 of the JALA empowers the Minister responsible for legal affairs, through recommendation by a district council, to modify any local customary law.[49] Rwezaura argues that such modifications are prompted by the need to balance customs with the general goals of the Tanzanian legal system.[50] The High Court of Tanzania has modified the content of customary law in several cases. For instance, in *Bernado Ephrahim v. Holaria Pastory and Gervazi Kaizilege*, Mwalusanya, J. expunged the Haya customary law which barred women from selling clan land. In that bold judgment, he held as follows:

> I take section 20 of the Rules of Inheritance to be now modified and qualified such that males and females now have equal rights to inherit and sell clan land.

Similar modifications of customary principles through judicial interpretation have been done in other aspects, such as the right of illegitimate children to inherit from their father's estate. In several cases, including

[47] G Swenson, 'Legal Pluralism in Theory and Practice' (2018) 20 *International Studies Review* 438 https://doi.org/10.1093/isr/vix060

[48] HT Kombe, *The Role of Ward Tribunals in Resolving Land Disputes in Tanzania: A Case of Monduli District* (2023).

[49] BA Rwezaura, 'State Law and Customary Law: Reflections on Their Relationship in Contemporary Tanzania' (1987) https://europainstitut.de/fileadmin/schriften/nr83.pdf.

[50] Rwezaura (n 13) 10-14.

Elizabeth Mohamed vs. Adolf Magesa,[51] *Judith Patrick Kyamba vs. Tusime Mwimbe and 3 Others*,[52] and *Wilbard Mathew Senga vs. Mkwega George Mathew Senga & Another*,[53] denounced the customary law principle that barred children born out of wedlock from inheriting their father's estate. The power of the court to modify customary law anytime makes this legal source fragile and unstable.

In the same vein, the 1963 abolition of traditional leadership fundamentally altered local dispute resolution in Tanzania, replacing chiefs and lineage-based fora with elected and appointed bodies under local government. Ward tribunals, created in 1985, inherited a mandate to secure peace and harmony but operate within statutory composition and quorum rules, under administrative oversight of local government councils. In this setting, "*customary principles"* lack a stable institutional carrier such as traditional authorities, making the maintenance and enforceability of customary norms unstable. This contrasts with African polities in countries such as Ghana, Uganda and Sierra Leon where recognized chiefs and customary courts maintain procedural continuity and enforceability of norms.[54]

The relationship between the state and informal judicial actors can take different forms.[55] On the one hand, it can exist either as combative legal pluralism, where state and informal systems are overly hostile to one another, or as competitive legal pluralism, where state law is not challenged by informal actors. In that structure, the two systems respect each other's rights and co-exist while willing to engage with one another. On the other hand, it can be shaped as complementary legal pluralism, which allows the state to structure and incorporate the informal system as a subordinate to the state's judicial system.[56] States accomplish this by allowing disputes to be settled at first instance through mediation or other forms of alternative dispute resolutions, sometimes making it a compulsory requirement prior to accessing courts of law.

Within Swenson's archetypes,[57] Tanzania exemplifies complementary pluralism: the state structures and incorporates non-state norms at first instance (such as mandatory mediation in this context) but retains control over procedures (such as quorum and timelines of tribunals) and ultimately privileges statutory adjudication in DLHT/High Court. This arrangement fosters uniform access but attenuates reliance on distinct community customs, especially under heterogeneity and the presence of legal persons. For instance, we found that banks are reluctant to participate in the mediation process in Ward Tribunals and only seek the tribunal's certification of mediation failure in order to approach the DLHT. One DLHT chairperson stated:

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[51] *Elizabeth Mohamed vs. Adolf Magesa* (Administration Appeal No.14 of 2011) [2012] TZHC 709.

[52] *Judith Patrick Kyamba vs. Tusime Mwimbe and 3 Others*, Probate and Administration Cause No. 50 of 2016

[53] *Wilbard Mathew Senga vs. Mkwega George Mathew Senga & Another*, Misc. Civil Application No. 394 of 2019, High Court of Tanzania.

[54] R Atuguba, 'Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Sub-Saharan Africa' *Journal of International Law & Legal Pluralism*, https://intergentes.com/seven-phases-in-the-evolution-of-customary-law-in-sub-saharan-africa/

[55] Swenson (n 47) 438.

[56] R Mac Ginty, 'Indigenous Peace-Making versus the Liberal Peace' (2008) 43(2) *Cooperation and Conflict* 139 https://doi.org/10.1177/0010836708089080

[57] Swenson (n 47).

> After the amendment of the law, big companies and banks dislike going to ward tribunals because of their unconducive environment. This leads to issuing/buying of the certificate even where mediation was not conducted.[58]

The complementary legal pluralism structure in land dispute settlement in Tanzania creates dominance of statutory law and formal courts over customary law and traditional land dispute settlement mechanism. This impacts the position and role which customary structures play in resolving land disputes.

5.3. Application of Customary Principles in Mediating Land Disputes

Section 13(2) of the Land Disputes Courts Act requires Ward Tribunals to apply customary principles in mediating of land disputes. Where such principles are not applicable, members of Ward Tribunals may resort to natural justice or any principles and practices of mediation in which they have received any training. Noteworthy, paragraph 5 of Part III of the Schedule to the Ward Tribunals Act states that "in the exercise of its jurisdiction in a matter governed by customary law, a Tribunal shall apply the customary law prevailing within any village or ward as the case may be". This provision echoes the legal pluralism concept, where communities must resolve disputes according to their customs and traditions as the first stage of the justice administration system hierarchy.

Customary law has historically played a key role in mediating and resolving disputes, particularly at the grassroots level. Traditional authorities such as village elders and chiefs, served as mediators or arbitrators, drawing upon customary norms and practices to resolve conflicts.[59] In some communities, such as the Luguru of Morogoro, land disputes were traditionally resolved through arbitration where the parties and other clan members would be present at the hearing.[60] Once the matter was decided, the wrongdoer and other clan members cooperated in making reparations and restoring harmony between the parties. In other communities, such as the Kinga of Iringa, community members would sit around a fireplace and let the complainant present their case and then give the defendant an opportunity to respond. Thereafter, the matter would be resolved by reconciling the parties. Once settlement was reached, it was confirmed through sharing alcohol from the same pot and eating meat.[61]

One of the most referred to instances of customary mediation in Tanzania is Kadume's case.[62] The case concerned a land dispute between Kadume (Makara's son) and Soine (Makara's half-brother) regarding the inheritance of Makara's land. Kadume's mother had separated from Makara some years before his death. Makara's life depended largely on Soine. Thus, after his death, Soine took Makara's land, leading to a dispute with Kadume. Kadume sought a remedy from the lineage counsellor, who convened the inner

[58] Interview with DLHT chairperson, Morogoro (September 2024).

[59] J Hopwood, 'Women's Land Claims in the Acholi Region of Northern Uganda: What Can Be Learned from What Is Contested' (2015) 22 *International Journal on Minority and Group Rights* 387 https://doi.org/10.1163/15718115-02203005

[60] J Gabagambi 'Throwing a Baby with Bathwater - Restoration of the Tanzanian Indigenous Justice System: The Case of Sukuma, Kinga and Iraqwi Ethnic Groups' (2021) 13 *African Journal of Legal Studies* 428 https://doi.org/10.1163/17087384-12340073

[61] Ibid, 438.

[62] Hoseah (n 12).

conclave of the inner lineage to resolve the dispute. The inner conclave failed to reconcile the parties, and the counsellor convened the internal moot. After considering customs, principles of inheritance, and balancing the needs of both parties, the internal moot concluded the matter by dividing the piece of land between Soine and Kadume. The decision was celebrated by both parties, and the internal moot cordially retired for beer.

Generally, customary norms governing dispute settlement included convening lineage bodies, the role of elders, order of speaking, ritualized reconciliation including beer-mediations, and community confirmation of settlement. Possibly, the legislature was envisaging similar practices to be conducted by Ward Tribunals when it amended the Land Disputes Courts Act to vest them with the role of mediating land disputes using customary principles. However, our study shows that the application of such procedural norms in the mediation practice of ward tribunals has declined. Throughout the interviews and FGDs, the use of these traditional norms as means to resolving land disputes was rarely mentioned. Respondents indicated that customary principles are not usually applied during mediation of land disputes because of the mixed nature of the population, where people from different customs are living together in one community. One of the interviewed District Legal Officers said:

> Personally, I don't see Ward Tribunals focusing on customary principles. There is a lot of intermingling of people in the community. Therefore, the use of customary laws is not possible. The members of the Ward Tribunals mostly use their wisdom to mediate parties and resolve disputes.[63]

It was further found that most parties, when instituting their cases before the Ward Tribunals, do so in a manner which suggests that they don't intend to rely on customary principles but rather on statutory provisions. One of the interviewed Chairpersons of the DLHT said:

> I have been at this station for five years, and I have seen only a few cases applying customary laws. This is because the parties themselves, when instituting cases, don't intend to rely on customary laws.[64]

Data from questionnaires depicted the same thing. As shown in Table 2 below, out of the 31 MWTs who responded to the questionnaire, 55.9% indicated that they do not apply customary principles in mediating disputes, while 35.3% indicated that they do apply customary principles.

Table 2: Level of application of customary principles

Are customary principles applied in the procedure of mediating disputes in your tribunal?		
	Frequency	Percent
Yes	12	38.7
No	19	61.3
Total	31	100

Source: Field Data

The statistical difference in the respondents' views on this matter suggests that there is divided opinion among MWTs on the extent to which they use customary principles in mediating land disputes. However, when asked to indicate the type of customary principles that they apply, 79.2% of the MWTs indicated that they apply common sense or wisdom, while 12.5% apply the customs of the tribes of the parties, and 8.3% use the customs of

[63] Interview, Morogoro (September 2024).

[64] Interview, Morogoro (September 2024).

indigenous people of the respective ward, as shown in Table 3 below.

Table 3: Source of customary principles applied in mediation

Which customary principles do you apply in mediating disputes in your tribunal?		
	Frequency	Percent
Customs of the indigenous people of this ward	2	8.3
Customs of the tribes of the complainant and defendant	3	12.5
Common sense/wisdom of the members of the tribunal	19	79.2
Total	24	100

Source: Field Data

The results above indicate that MWTs rely mostly on common sense and personal wisdom rather than the customary principles in mediating land disputes. This finding was echoed by qualitative data from interviews and FGDs. One of the interviewed District Legal Officers stated that:

> Operations of the tribunals largely depend on the common sense of the members.[65]

Similarly, during FGDs, one of the members of the Ward Tribunal explained that:

> When conducting mediation, we consider mostly the perception and wisdom that comes after we have heard the parties to the case.[66]

Paying attention to the views of the MWTs and community members who have gone through mediation by ward tribunals, we found that the *"common sense*" or *"wisdom*" referred to involve practices such as summoning the parties to the tribunal, hearing the matter and obtaining evidence, visiting the land in dispute, and advising the parties in line with the opinion of the MWTs. One of the community members said:

> I have had cases during all the periods, before and after the tribunal was stopped from delivering judgments. This time both sides were heard, we went to the site, and I was expecting a day for mediation. However, while we were at the site they gave their opinion saying that, according to the explanations, the land is not mine, but if I am not satisfied, I should go to the tribunal to get the certificate to proceed to the DLHT.[67]

There are few instances where respondents indicated that MWTs also consults community elders and traditional leaders in resolving land disputes. One of the interviewed paralegals said:

> Customary norms are considered in conflict resolution depending on the area. Sometimes traditional leaders are involved in resolving disputes. When there is interaction between communities, elders from the relevant area are involved.[68]

This practice, while resembling traditional procedural norms, was not expressly aired out by MWTs, suggesting their rare resort to it in resolving land disputes. Overall, results from the empirical study indicate that customary principles of mediation are rarely used in mediating land disputes. MWTs report more reliance on procedural fairness heuristics

[65] Interview, Morogoro (September 2024).
[66] Interview, Morogoro (September 2024).
[67] Interview, Morogoro (September 2024).
[68] Interview, Morogoro (September 2024).

("*common sense")* including listening to the parties in turn, promoting compromise, and encouraging joint site visits rather than on named substantive tribal rules. Where elders are consulted, the practice is not consistently framed or recorded as "*customary mediation*."

On the reasons for the decline in application of customary principles, we found that since the establishment of formal courts, the content of customary rules has been under constant modification by courts of law, and the content of customary rules has become increasingly disputable and diverse.[69] Practically, an organ vested with the power to resolve disputes under customary law must work out the content of a customary rule on a case-by-case basis.[70] According to section12 (1)(a) of the JALA, customary rules are applied primarily in cases where the parties are "members of a community in which rules of customary law relevant to the matter are established and accepted, or between a member of one community and a member of another community if the rules of customary law of both communities make similar provision for the matter". On that basis, the customary principles to be applied by a Ward Tribunal are expected to be uniform among the parties in that ward.

That is not entirely the case currently. Communities in Tanzania have, since independence, become increasingly intermingled to the extent that it is hard now to find a community that is composed solely of the members of the same tribe or custom. Likewise, Ward Tribunals, especially in urban areas, are not composed of members who belong to the same tribe or custom. One legal officer stated it this way:

> Personally, I have not seen them rely much on customary laws. There is a large mix of people, so even the use of customs is not really possible.[71]

Another respondent said:

> The concept of customary law as it existed in the past is not the same as it is now. Interaction between communities has changed the nature of customs.[72]

In such a context, it is impossible to define or identify the customary principles of mediation common to the members of a community. In addition, the nature of the parties to land disputes in the contemporary setting makes it difficult to apply customary principles in certain cases. Legal persons such as banks, corporations, and institutions may be parties to the land disputes, which must be mediated by Ward Tribunals. These are not subject to any rule of customary law, and therefore, customary principles of mediation cannot be applied in cases where they are a party. Consequently, in cases involving legal persons, the mediation process in ward tribunals turns into a compliance step towards instituting a case in the DLHT rather than the amicable settlement of disputes envisaged in the law.

6. CONCLUSION AND POLICY RECOMMENDATIONS

This article examined the effect of legal pluralism on the application of customary principles and assessed the position of

[69] BA Rwezaura, 'State Law and Customary Law: Reflections on Their Relationship in Contemporary Tanzania' (1987) https://europainstitut.de/fileadmin/schriften/nr83.pdf

[70] Ibid

[71] Interview with District Legal Officer, Morogoro (September 2024).

[72] Interview with DLHT Chairperson, Morogoro (September 2024).

applying customary law as a medium for mediating land disputes by ward tribunals in the contemporary setting of Tanzanian societies. It has been found generally that while legal pluralism has formally preserved the space for customary law within the legal system, in actual practice, its role and position in resolving land disputes is diminishing. State law has become the dominant legal source, continuously shaping and modifying customary law to align with statutory provisions. While Tanzania follows the complementary structure of legal pluralism, state law is technically competitive with the informal system. Ward Tribunals, which are supposed to apply customary law exclusively, operate more as state-controlled institutions than as traditional structures for customary dispute resolution. This structure limits the organic application of customary principles.

Evidence from our study in Mvomero and Kilosa districts of Morogoro region indicate that the decline in the application of customary principles of mediation is caused by several factors, including the mixed nature of contemporary communities, the presence of legal persons as disputants, and the general inclination of tribunal members to rely on personal wisdom rather than established customary norms.

Given these findings and considering the National Land Policy's direction towards promoting the amicable settlement of land disputes through mediation, we make the following recommendations:

i) PO-RALG should issue standardized, culturally sensitive mediation protocols for ward tribunals that define procedural steps (e.g. listening order, community consultation options, boundary inspections) while allowing space for locally recognized processes where appropriate.

ii) Ministry of Lands should develop training modules that explicitly distinguish procedural and substantive customary principles, include scenario-based exercises (e.g., family succession vs. wayleave disputes), and integrate documentation templates to capture when custom was invoked.

iii) Law Reform Commission should review overlaps and bottlenecks between Village Land Council and ward tribunal mediation to streamline sequencing and clarify referral standards without weakening village-level space for custom.

iv) Judiciary should establish rules requiring the recording of mediation processes in DLHT case filings to track whether procedural custom was used.

v) District Councils/CSO should facilitate community awareness on mediation options and document cases where procedural custom improved settlement durability.

Implementation of these recommendations would lead to improved clarity for MWTs, reinforce the use of customary principles in mediation, ensure the uptake of culturally sensitive steps, and eventually reduce the number of failed mediations.

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