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Entrapment or Freedom

Enforcing Customary Property Rights Regimes in Common-Law Africa

Sandra F. Joireman

13.1. INTRODUCTION

Customary land tenure arrangements in Africa have enlivened and sustained the role of customary leaders and authority patterns in Sub-Saharan Africa long after they would have otherwise faded into disuse. Because the allocation and control of land has meaning that extends beyond the cultural realm and into the economic and political, those who control it are assured an important role in the social and political hierarchy of a community. The role of customary authority in Sub-Saharan Africa is tied to the colonial experience and to the decisions of colonial officials to create separate categories of land rights and authority structures for citizens and subjects. Where colonization did not occur, as in Ethiopia, we do not see the same significant role played by customary leaders in land administration systems or even in conflict resolution. Thus, property rights and authority are intimately connected throughout Sub-Saharan Africa.

This chapter examines customary property rights and the role of customary leaders in enforcing those property rights from an institutionalist perspective. The issue of societal benefit is at the forefront of this chapter, which proceeds in three parts. Subchapter 13.2 discusses the pervasiveness of customary tenure and customary authority structures throughout Sub-Saharan Africa and their genesis in the colonial era. Subchapter 13.3 notes the lack of consistency between statutory law and customary law, which leads to a pluralistic legal setting. This part also identifies the winners and losers within customary legal systems. Subchapter 13.4 discusses how we can evaluate customary land tenure patterns and customary authority. The chapter ends by suggesting ways in which customary property rights and customary authority might persevere with a positive benefit to the society.

13.2. CUSTOMARY LAND TENURE IN AFRICA

Prior to colonization, Africa was not a vast undifferentiated and ungoverned area. There were city-states and kingdoms, varying greatly in size and control of territory. These were scattered across the continent in the most habitable areas. Between the city-states were often large tracts of un-administered land, forests, and deserts. In the most politically organized societies, such as that of Abyssinia[1] or the Ashanti kingdom,[2] there was more resistance to colonization, which delayed or impeded foreign domination. In organized, pre-colonial political systems, law – what we now refer to as customary law – existed. However, there were also many areas of the continent untouched by customary law because the forms of political authority that existed were not as complex as the political kingdoms or were simply non-existent.

During the colonial era, "customary law" regulated access to land for Africans and continues to govern land tenure over approximately 75 percent of Sub-Saharan Africa.[3] However, "customary law" during the colonial period was substantially different from that in the pre-colonial period as it was no longer an instrument of organization, but a tool of domination – a fact that has led some scholars to assert that it was reconstructed as something new during the colonial era.[4] Virtually every colonized country in Africa had two systems of landholding in the colonial era, one that was regulated by the state and one by customary law and traditional leaders. The land regulated by the state was privately held by settlers and only infrequently by Africans. The rest of the land was governed by customary law. Although privately held land might have changed hands at independence, reflecting changes in population and political fortunes, customary land was largely left untouched, still regulated by and for the collective ethnic group. At independence, few countries had the capacity to embark on the herculean effort of unifying the disparate landholding institutions. Instead, an institutional lock-in occurred and the existing, bifurcated landholding system has remained intact to the present day with private and customary lands existing and administered separately in every country in Sub-Saharan Africa except Ethiopia.[5]

[1] Abyssinia was the political kingdom that was a precursor to modern-day Ethiopia.

[2] Located in what is currently Ghana, the Ashanti kingdom resisted British control and was not incorporated into the empire completely until 1902.

[3] *See* Interview with Clarissa Augustinus, Chief, Land and Tenure Section, Shelter Branch, UN Habitat, regarding her presentation Key Issues for Africa and Globally (2003), in Tororo, Uganda (Sept. 14, 2005).

[4] *See* Terence Ranger, *The Invention of Tradition in Colonial Africa*, *in* THE INVENTION OF TRADITION (T. Ranger & E. Hobsbawm eds., Cambridge University Press 1983); Martin Chanock, *Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure*, *in* LAW IN COLONIAL AFRICA (K. Mann & R. Roberts eds., Heinemann Educational Books 1991).

[5] *See* Sandra F. Joireman, *The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law*, 36(7) WORLD DEV. 1233 (2008).

Private and customary land tenure institutions each articulate a very different bundle of rights to land, necessitating two different control and enforcement regimes. In the colonial era, this dual system followed racial lines; natives used land, white colonizers owned it. Because colonial governments did not find conceptions of land holding that were equivalent to that of fee simple or exclusive land ownership among colonized peoples, it was assumed that landholding was vested in the community. Africans maintained rights to land as groups and those groups were overseen by a chief who controlled land allocation. White colonizers had their property recorded in legal documents and their disputes heard in state courts, while Africans pursued conflict resolution through customary authority figures and rarely had written documentation of their land claims.

The belief in African communal land rights was supported by two linked administrative impulses of the colonial government: 1) the colonial administration's need to expropriate land and govern its occupation and exchange with some degree of legality; and 2) the necessity of space for the indigenous population to live and to farm.[6] The British and the French followed different systems of organization in their colonies with the French choosing to rule directly through colonial officials, and the British following a system of "indirect rule" in which British colonial officials exercised power through local leaders.[7] Under the system of indirect rule, the best type of arrangement to meet the indigenous population's need for space required no administrative oversight by colonial officials; hence the creation of native reserves, customary tenure areas, or tribal homelands. These areas could be administered by "traditional" leaders without requiring expatriate civil servants working in the adjudicative and administrative institutions of the colonial state. Where traditional rulers could not be found, they were created and empowered. Where their previous powers did not relate to the administration of land, they were given new powers.

The colonial state was complicit in supporting property rights claims proffered by traditional leaders when they served the goals of administration and control. In Ghana, for example, different versions of "customary law" were presented to colonial officials for their support by self-interested leaders, each of whom described a different version of the customary practices in their community.[8] Colonial officials were then left to decide which version they would recognize. At independence, the

[6] *See* Chanock, *supra* note 4; MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (Heinemann Educational Books 2d ed. 1998); MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM (Princeton University Press 1996).

[7] *See* Sandra F. Joireman, *Colonization and the Rule of Law: Comparing the Effectiveness of Common Law and Civil Law Countries*, 15 (4) CONST. POL. ECON. 315 (2004).

[8] KATHRYN FIRMIN-SELLERS, THE TRANSFORMATION OF PROPERTY RIGHTS IN THE GOLD COAST (Cambridge University Press 1996).

enforcement of customary land rights typically remained with traditional leaders, although their role is increasingly under threat.

Customary law is, and has been, malleable and dynamic. It has changed over time and, in this regard, it is similar to common law that evolves in response to changing circumstances and customs. Customary law was both named and developed in the context of colonization and it became a mechanism for the assertion of power by dominated groups during the colonial era. Customary law is explicitly political and can also be an arena for the struggle for power within a society.[9] During the colonial era, customary law provided a way for older men within traditional societies to reclaim some of the independence and control that they lost due to colonization. They were able to use customary law to assert control over women, younger men, and children within their ethnic group – the limited realm over which they were given authority by the colonial power. It has been observed that "those who were doing economically well within the limits imposed by the colonial regime were those who had the most interest in promoting a 'customary' view of persons. A view that could be presented and validated in customary terms."[10] To some extent, it is still the case that customary law can be used as a tool for the promotion of the interests of certain individuals who are given responsibility for its definition.[11] In a 2002 interview, a senior chief in Kenya recognized that customary law in the current era is created and molded by contemporary traditional authorities, saying, "Customary law is what I describe."[12] The emphasis in this claim is on the control of the customary leader over what is defined as law. It is malleable and subject to the interpretation of leaders. Similarly, with respect to the nature of customary authority, "[m]any of the supposed central tenets of African land tenure, such as the idea of communal tenure, the hierarchy of recognized interests in land (ownership, usufructory rights and so on), or the place of chiefs and elders, have been shown to have been largely created and sustained by colonial policy and passed on to post-colonial states."[13]

In communal tenure areas, where an emergent land market developed, colonial officials suppressed it because a land market did not fit with ideas regarding the communal nature of African land tenure.[14] Colonial officials persisted in the belief

[9] *See* Pius S. Nyambara, *Immigrants, 'Traditional' Leaders and the Rhodesian State: The Power of 'Communal' Land Tenure and the Politics of Land Acquisition in Gokwe, Zimbabwe, 1963–1979*, 27(4) J. S. AFR. STUD. 771 (2001); SARA BERRY, NO CONDITION IS PERMANENT (University of Wisconsin Press 1992).

[10] Chanock, *supra* note 4, at 72.

[11] *See* FRANCOISE KI-ZERBO, LES FEMMES RURALES ET L'ACCESS A L'INFORMATION ET AUX INSTITUTIONS POR LA SECURISATION DES DROIT FONCIERS, ETUDE DE CAS AU BURKINA FASO (FAO 2004).

[12] Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya*, *in* KENYA 11 (Human Rights Watch 2003).

[13] Ann Whitehead & Dzodzi Tsikata, *Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary*, 3 (1 & 2) J. AGRARIAN CHANGE 67, 75 (2003).

[14] Evidence of the rapid evolution of land markets in the work of Hill (1963) on cocoa farming and Budy (1979) on South Africa, also work in Zimbabwe by Cheater (1990). In Ethiopia, in traditional tenure

that Africans defined themselves only in terms of their group and kinship ties, even with regard to their economic behavior. This has led to criticism of the entrapment of Africans in the "world of the customary":

> European rule in Africa came to be defined by a single-minded and overriding emphasis on the customary. For in the development of a colonial customary law, India was really a halfway house. Whereas in India the core of the customary was limited to matters of personal law, in Africa it was stretched to include land. Unlike the variety of land settlements in India, whether in favor of landlords or of peasant proprietors, the thrust of colonial policy in Africa was to define land as a communal and customary possession. Just as matters of marriage and inheritance were said to be customarily governed, so procuring basic sustenance required getting access to communal land. With this development, there could be no exit for an African from the world of the customary.[15]

I argue that whether Africans are entrapped within customary law or freed by the ability to express their social and economic interests within it depends on which group of Africans we are discussing, as the legal recognition of customary law and tenure systems creates winners and losers with different interests. Because it applies to people as members of ethnic groups and not as citizens, customary law constructs a separate arena of authority beyond or outside of the state.

13.3. CUSTOMARY VERSUS STATUTORY LAW: THE WINNERS AND LOSERS

As in the colonial era, those who gain the most from customary systems of land tenure and authority are those who control it. Because customary law is unwritten and customary authority positions can be quite powerful and lucrative, they are sometimes the subject of dispute. In 2008, struggles over succession to a Ghanaian chieftainship resulted in twenty deaths as well as a greater number of wounded people.[16] The violence surrounding these struggles is evidence of the desirability of chieftainships. One of the reasons traditional leadership positions are sought after is the potential to gain from control over land. With the development of land markets within customary land systems, for example, those who gain the most from emergent markets in land are those with the most influence over its allocation.[17]

systems, there was evidence of land sales in communal tenure areas with the monetization of the economy. Sandra F. Joireman, *Contracting for Land: Lessons from Litigation in a Communal Tenure Area of Ethiopia*, 30 (3) CANADIAN J. AFR. STUD. 424 (1996).

[15] Mamdani, *supra* note 6, at 50.

[16] *See* International Committee of the Red Cross, *Ghana: Red Cross helps victims of fighting in north* (July 10, 2008), *available at* http://www.icrc.org/Web/Eng/siteengo.nsf/htmlall/ghana-news-100708?OpenDocument&style=custo_print.

[17] *See* Admos Chimhowu & Phil Woodhouse, *Customary vs Private Property Rights? Dynamics and Trajectories of Vernacular Land Markets in Sub-Saharan Africa*, 6 (3) J. AGRARIAN CHANGE 346 (2006).

It is evident that customary authority figures benefit from the recognition of customary law and land tenure. However, there are additional benefits that can accrue to a community from customary systems of property rights. There is a rich literature documenting the flexibility of customary land and resource arrangements. This sort of flexibility can be particularly helpful in controlling common property resources such as forests, pasture land, and water.[18] At the same time, the use of customary institutions to control these resources further accentuates the divide between those governed by customary and those governed by statutory law.[19]

Customary law was formed for ethnic groups and is used to control and organize ethnic groups. As such, it is very much rooted in place rather than ethos or ideology. Integrating or blending customary law with statutory law, which is based on notions of citizenship, poses tremendous problems. Customary law relates to groups of people in a place and only loosely to those people who live outside of that place. Customary law also differs between ethnic groups in the same country. Thus, conceptions of citizenship that bring with them ideas of equality across national space and territory are often at odds with customary law. Take, for example, the pernicious problem of land rights for migrants. Although virtually every constitution in Sub-Saharan Africa enshrines notions of citizenship that transcend ethnicity and region, migrants within a country who seek to settle in rural areas still face tremendous difficulties in either purchasing or renting land to farm, and on which to build housing.[20]

As citizens of a country, migrants should have the same rights to property all over the country. Yet, they do not, as customary land tenure systems by their nature exclude those who are not autochthones, or "sons of the soil."[21] This restriction on property ownership prevents entrepreneurial activity by nationals who might like to move into an area and acquire land. In fact, it may be easier for foreigners to access land for economic development than nationals in their own country who are not of the right ethnic group for a particular area; contrast this with the ease with which one

[18] *See* Tor A. Benjaminsen & Christian Lund, *Formalisation and Informalisation of Land and Water Rights in Africa: An Introduction*, 14 (2) EUR. J. DEV. RES. 1 (2002); CAMILA TOULMIN, PHILIPPE LAVIGNE DELVILLE, & SAMBA TRAORE, THE DYNAMICS OF RESOURCE TENURE IN WEST AFRICA (Heinemann Educational Books 2002); Philip Woodhouse, *African Enclosures: A Default Mode of Development*, 31 (10) WORLD DEV. 1705 (2003).

[19] *See* Jesse C. Ribot, *Decentralisation, Participation and Accountability in Sahelian Forestry: Legal Instruments of Political-Administrative Control*, 69 (1) AFR. 23 (1999).

[20] *See* V. Adefemi Isumonah, *Migration, Land Tenure, Citizenship and Communal Conflicts in Africa*, 9 (1) NATIONALISM AND ETHNIC POL. 1 (2003); Ki-Zerbo, *supra* note 11; INTEGRATED REGIONAL INFORMATION NETWORK, COTE D'IVOIRE: SOLVING CONFLICT ON A SMALLER SCALE (2006). Nyambara, *supra* note 9; Pauline E. Peters & Daimon Kambewa, *Whose Security? Deepening Social Conflict over 'Customary' Land in the Shadow of Land Tenure Reform in Malawi*, 45 J. MODERN AFR. STUD. 447 (2007); MARJA J. SPIERENBURG, STRANGERS, SPIRITS, AND LAND REFORMS: CONFLICTS ABOUT LAND IN DANDE, NORTHERN ZIMBABWE (Brill 2004).

[21] *See* Isumonah, *supra* note 20; Peters & Kambewa, *supra* note 20; Spierenburg, *supra* note 20.

can purchase a farm in any area of Australia, the United States, Canada, or Europe. Any list of losers from customary land tenure arrangements has to include migrants, whose right to own property and live anywhere within the territory is thwarted by customary land ownership patterns and customary authority.

The second, and larger, group of losers from customary land tenure systems and their corresponding authority structures are women. Women in Sub-Saharan Africa face a distinctive social dilemma. Because of their labor, they are the mainstay of agricultural economies; yet, married women in most African countries do not co-own marital property, do not have autonomous rights to lineage or family land, and do not have the ability to protect and retain their homes and movable possessions at the death of or divorce from a husband. There are some encouraging exceptions to these problems of property rights in West Africa where women are able to maintain some rights through their natal lineages.[22] There are also some countries, such as Ghana, Mozambique, Namibia, and Ethiopia, where efforts have been made to give women legal protection of property rights where they have not traditionally existed.[23] That said, in much of Southern and Eastern Sub-Saharan Africa, women have not traditionally or legally shared the same protections of their property and inheritance rights as men, or women in other parts of the world. They face difficulty in representing themselves economically and legally, for example in selling their own produce or in buying new fields on which to grow crops.[24] In Rwanda, women were not recognized as full citizens until the 1991 constitution.[25] Previous to that point they were legal minors. If a Rwandan woman wanted to buy a plot of land, a building, or even a home, she had to either do so in the name of a male relative or establish a corporation that could act as a legal person for her.[26] The position and status of women in Africa is so critical and so unusual that it needs to be taken into consideration, not just by feminist scholars, but by anyone wanting to write seriously about agricultural development, property rights, or capital formation.

[22] *See* N. Thomas Hakansson, *The Detachability of Women: Gender and Kinship in Processes of Socioeconomic Change among the Gusii of Kenya*, 21 (3) AM. ETHNOLOGIST 516 (1994); interview with Dzodzi Tsikata, in Accra, Ghana (July 6, 2007).

[23] *See* Married Persons Equality Act 1 of 1996 (Namib.); ASKALE TEKLU, LAND REGISTRATION AND WOMEN'S LAND RIGHTS IN AMHARA REGION, ETHIOPIA (International Institute for Environment and Development 2005); *Women Lawyers Demand Early Passage of Property Rights of Spouses Bill*, GHANAIAN NEWS AGENCY, 2009; INTEGRATED REGIONAL INFORMATION NETWORK, MOZAMBIQUE: WOMEN STILL STRUGGLE FOR LAND RIGHTS DESPITE NEW LAW, (2003).

[24] In Uganda, for example, while women grow food crops, many ethnic groups view it as the job of the husband to sell the agricultural produce at the market. Focus group interview with Women's Guild of Tororo, Tororo, Uganda (Sept. 14, 2005).

[25] *See* L. Muthoni Wanyeki, *Introduction, in* WOMEN AND LAND IN AFRICA: CULTURE, RELIGION AND REALIZING WOMEN'S LAND RIGHTS (L. M. Wanyeki ed., Zed Books Ltd. 2003).

[26] *See id.*

In most parts of Sub-Saharan Africa, the idea of co-ownership of marital property is an alien one. Women are not supposed to own property but rather, under customary law, they are (or were) property. The idea of a woman acquiring property in her own name during marriage is incendiary, as it implies that she is not committed to her husband or his family.[27] In the few African countries where there are laws providing for the co-ownership of marital property, such as the family home or other assets, these laws have proven very difficult to enforce because they are incompatible with cultural practices.[28]

Typically women have secondary rights to land access, meaning they can cultivate land because they have married a man who is of a particular kinship group or they have children who are seen as belonging to a particular kinship group.[29] In many places, once they marry and go to live with their husband's family, women are not viewed as having membership in their lineage, but are seen in some ethnic communities as a member of their husband's lineage and in others simply as a commodity.[30] One women's organization in Uganda developed the slogan "Women Have No Home" to illustrate the difficulty women face as they are not seen as belonging to any kinship group.[31]

[27] This point was driven home in conducting interviews on the new land law in Uganda in 2006. In an interview with a woman who was the regional gender officer for her part of the country, a fairly elevated position and one in which she was required to assist women in defending their property rights, the interviewee reported that "Women can't own land and have stable marriages." *See* interview with widow J., Mbarara, Uganda (2006). This is a sentiment that was repeated, albeit less vividly, in other interviews and contexts. *See also* Human Rights Watch, *supra* note 12.

[28] *See* Jeanmarie Fenrich & Tracy E. Higgens, *Promise Unfulfilled: Law, Culture and Women's Inheritance Rights in Ghana*, 25 FORDHAM INT'L L.J. 259 (2001); Susana Lastarria-Cornhiel, *Impact of Privatization on Gender and Property Rights in Africa*, 25 (8) WORLD DEV. 1317 (1997); INTEGRATED REGIONAL INFORMATION NETWORK, INHERITANCE RIGHTS STILL A THORNY ISSUE, Feb. 14, 2006.

[29] *See* Winnie Bikaako & John Ssenkumba, *Gender, Land and Rights: Contemporary Contestations in Law, Policy and Practice in Uganda*, *in* WOMEN AND LAND IN AFRICA (L. M. Wanyeki ed., Zed Books Ltd. 2003); Wanyeki, *supra* note 25; Ingrid Yngstrom, *Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate over Land Policy and Changing Tenure Systems*, 30 (1) OXFORD DEV. STUD. 21 (2002); Whitehead & Tsikata, *supra* note 13.

[30] This is true even in matrilineal societies where descent is traced through the female line. That said, it would be wrong to suggest that in all circumstances under customary tenure women have no access to land through their own kin group. In West Africa, women will have some residual claim to land in their natal kinship group or through wider social ties. However, this is more the exception than the rule. There is an anthropological framework for understanding the differences in lineage attachment for women in Africa. There is a bifurcation between lineage systems in which women maintain an identity in their natal lineage after marriage and those lineage systems in which they do not. If a woman maintains a social identity formed by her natal lineage after marriage, she is likely to have property rights associated with that lineage. However, if she is "detachable" and is identified with her husband's clan or lineage after marriage, then she is likely to have few, if any, socially recognized property claims in her natal lineage. Hakansson, *supra* note 22.

[31] This was articulated as a slogan by the Mifumi Project, a Ugandan NGO active in women's issues.

The fact that women have only secondary rights to land is inequitable, but the degree to which it becomes problematic depends on demand for land in a given area. Some anthropologists have praised the flexibility of traditional customary arrangements because they can adapt to changing family composition more readily than more formalized systems.[32] Where demand for land is low, this is almost certainly true. However, when the value of land becomes higher it is easier for traditional leaders to find themselves unable to accommodate all requests for land to farm. Where there is a high demand for land, migrants, divorced women, and women in general are most likely to face exclusion.[33]

Women's property rights and access to land are linked to inheritance patterns. Under customary law, daughters tend to inherit less than sons, and often nothing at all.[34] Inheritance can also be problematic for surviving spouses. Aili Tripp notes that in Uganda, "under customary law ... a woman may have jointly acquired land with her husband and may have spent her entire adult life cultivating land, but she cannot claim ownership of the property. If he dies, the land generally goes to the sons, but may also be left to the daughters. Nevertheless, [the husband] may still leave the wife with no land and therefore no source of subsistence."[35] With the mortality effects of AIDS, civil conflict in Africa, and decreasing life expectancies for men and women, institutionalized inheritance structures are of particular interest in understanding patterns of capital formation.

In many polygamous households, if the head of household dies, any childless wives will receive nothing and will have to return to their families.[36] Because these women have not provided the lineage with heirs, they have no status and no further link to any member of the lineage. Therefore, they can no longer expect to receive access to lineage land on which to farm or live. Women with children are in a slightly less precarious position. They are still not regarded as members of the

[32] *See* Angelique Haugerud, *Land Tenure and Agrarian Change in Kenya*, 59 (1) AFR. 61 (1989); Jean Ensminger, *Changing Property Rights: Reconciling Formal and Informal Rights to Land in Africa*, *in* THE FRONTIERS OF NEW INSTITUTIONAL ECONOMICS (J. N. Drobak & J. V. C. Nye eds., Academic Press 1997).

[33] *See* In Zimbabwe, land-allocating authorities viewed divorced women in particular as social misfits. Nyambara, *supra* note 9, at 777.

[34] This is true even in Islamic areas where sharia law controls inheritance for women. In Nigeria, in the northern states where sharia law is recognized, women still do not inherit as dictated by sharia law. The reason given is that according to the Maliki school of sharia law, Nigeria is an area in which Islam was imposed by conquest and therefore some allowance for pre-existing customs, *urf*, must be allowed. Hussaina J. Abdullah & Ibrahim Hamza, *Women and Land in Northern Nigeria: The Need for Independent Ownership Rights*, *in* WOMEN AND LAND IN AFRICA (L. M. Wanyeki ed., Zed Books, Ltd. 2003).

[35] Aili Mari Tripp, *Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda*, 7 (4) AFR. STUD. Q. 1, 6 (2004).

[36] *See* Bikaako & Ssenkumba, *supra* note 29.

lineage, however, if they are taking care of minors, their property rights will sometimes be respected.[37]

Some studies have argued that inheritance rights for women are not a problem. In Kenya, for example, one study found that most women are able to hold onto their land after the death of a husband by turning to the community as a whole to gain support in legitimizing the wife's claim to the land.[38] In this study, a woman losing her home and land after a husband has died was the 304exception rather than the rule. This would be consistent with other studies in Malawi, Swaziland, and Uganda finding that women are able to negotiate customary law and maintain usufruct rights to land through social networking.[39] However, these studies contradict the weight of evidence emphasizing the vulnerability of women's property rights after the death of a spouse. Other studies in Kenya document that spousal loss of property is a frequent occurrence.[40] In Uganda in 1995, the Federation of Women Lawyers (FIDA) reported that 40 percent of the cases they handled were related to the harassment of widows and property grabbing by their husbands relatives.[41] Poverty and scarcity of resources can tax the goodwill of family members. If a woman has property left by her husband that is viewed as valuable, she may find herself cast off with no land to cultivate and her household goods appropriated by members of the lineage. In Uganda in the Luwero and Tororo areas, about 29 percent out of a total of 204 widows indicated that property was taken from them following the death of their husbands.[42] In Zambia, "[i]n an area where livestock represents one of the few reserves of asset wealth, it was found that in the preceding five years, 41% of female-headed households with orphans had lost all their cattle and 47% had lost all their pigs."[43]

Women's loss of property upon the death of their husband is a human rights issue, but it is also an economic problem. As women tend to be the ones cultivating the

[37] *See* Interview with B, Tororo, Uganda (Sept. 14, 2005); RICHARD S. STRICKLAND, TO HAVE AND TO HOLD: WOMEN'S PROPERTY AND INHERITANCE RIGHTS IN THE CONTEXT OF HIV/AIDS IN SUB-SAHARAN AFRICA (International Center for Research on Women 2004); Tripp, *supra* note 35.

[38] *See* M. Aliber, C. Walker, M. Machera, P. Kamau, C. Omondi, & K. Kanyinga, *Overview and Synthesis of Research Findings, in* THE IMPACT OF HIV/AIDS ON LAND RIGHTS: CASE STUDIES FROM KENYA (Human Sciences Research Council 2004).

[39] *See* Laurel L. Rose, *Women's Strategies for Customary Land Access in Swaziland and Malawi: A Comparative Study*, 49 (2) AFR. TODAY 123 (2002); Lynn S. Khadiagala, *Justice and Power in the Adjudication of Women's Property Rights in Uganda*, 49 (2) AFR. TODAY 101 (2002).

[40] *See* Human Rights Watch, *supra* note 12; RITU VERMA, GENDER, LAND AND LIVELIHOODS IN EAST AFRICA: THROUGH FARMER'S EYES (International Development Research Centre 2001).

[41] *See* Bikaako & Ssenkumba, *supra* note 29, at 250.

[42] *See* LAELIA ZOE GILBORN, REBECCA NYONYINTONO, ROBERT KABUMBULI, & GABRIEL JAGWE-WADDA, MAKING A DIFFERENCE FOR CHILDREN AFFECTED BY AIDS: BASELINE FINDINGS FROM OPERATIONS RESEARCH IN UGANDA 1 (Population Council 2001).

[43] Strickland, *supra* note 37, at 24. The study gave no indication of how this property was lost. *Id.*

land to provide food for their families, their loss of land, livestock, and moveable property has economic consequences for their children and for society as a whole.

13.4. EVALUATING SOCIAL WELFARE

In spite of these considerations of equity, strong arguments have been made for the benefits of customary land tenure systems and customary adjudicatory mechanisms. In areas where land is relatively abundant, customary law can effectively regulate the distribution of land in a manner that has fewer transaction costs than using a more bureaucratized registration system. In these settings, formal systems of property rights show few benefits over customary systems of land rights and, when new systems of property rights are adopted from the top down, they are unlikely to be implemented fully as the transaction costs of land registration are too high to make it worthwhile for people to register their land. After the Ugandan Land Act of 1998 made it possible for people on customary land to title their land and exchange it through governmentally recognized methods, individuals in land-abundant areas still chose to go through locally recognized institutions of exchange rather than the legal system to document land transfers.[44] These individuals felt their land was sufficiently secure to preclude any need to go beyond the recognition of members of their local government in a land exchange. Until the value of land or its attributes increases sufficiently to offset the transaction costs, titling and more formalized land transfers will not be embraced.[45] Moreover, rather than promoting security of tenure, titling efforts may lead to higher levels of conflict over land and thereby reduce productivity.[46]

Given the health and welfare demands on African states, there seems to be little reason to interfere with a customary law system that is working well in a land-abundant setting. In these areas, state mechanisms to regulate the registration and transfer of land are unlikely to be utilized or enforced because individuals feel their security in ownership or occupancy is sufficiently robust. However, no country has abundant land resources in all areas, especially not in capital cities, which invariably have shantytowns and slums that house people without the money or connections necessary for land access. Moreover, there is increasingly a mix between customary tenure arrangements and modern state-administered tenure systems, particularly in

[44] *See* Elin Henrysson & Sandra F. Joireman, *On the Edge of the Law: The Cost of Informal Property Rights Adjudication in Kisii, Kenya*, SSRN (2007).

[45] *See* YORAM BARZEL, A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS AND THE SCOPE OF THE STATE (Cambridge University Press 2002); TERRY L. ANDERSON & PETER J. HILL, THE NOT SO WILD, WILD WEST (Stanford University Press 2004).

[46] *See* Klaus Deininger & Raffaelle Castagnini, *Incidence and Impact of Land Conflict in Uganda*, *in* THE WORLD BANK POLICY RESEARCH WORKING PAPER (The World Bank 2004).

peri-urban areas. It is in these areas where tenure systems and authority structures mix and demand for land tends to be high that the two systems clash most visibly.

Where land is scarce and population densities are higher, land allocation is contested, conflict over land is more frequent, and resort to the courts for dispute settlement and recognition of land transfer is more likely. Consistent with the economic literature on institutional change, ample evidence exists demonstrating the breakdown of institutions and the innovation of new ones when land values increase in Africa.[47] In areas where land has a higher value, customary land ownership patterns can empower and enrich those who make decisions regarding its allocation. "Authority in land whether vested in the chiefs, or in the government officials and political leaders, can in turn, lead directly to private economic benefits for these actors, derived from land accumulation, patronage and land transactions."[48] Traditional leaders can practice the politics of exclusion, denying resources to groups with less political power, such as divorced women and migrants, who are easily identified and denied access to land communally held.[49]

When and where is it appropriate to try to explicitly undermine customary leadership and customary tenure, with the huge social costs that are entailed in any such attempt? This is not a politically correct question to either ask or answer. Yet, given the push for economic growth and better macroeconomic policies, it is worth considering by what criteria we might judge the effectiveness of any land tenure system or customary authority structure. One approach would be to assess the customary land tenure institutions from the 3D perspective and examine the extent to which they are well-defined, divestible, and defendable. However, in this chapter I would like to avoid the question of whether and how customary land should be bought or sold. Literature from the new institutional economics, as well as my own interview data from studying property rights across Sub-Saharan Africa, point to a set of criteria that can help us evaluate the net social welfare resulting from any institutional

[47] *See* John Bruce, Land Reform Planning and Indigenous Communal Tenure (1976) (S.J.D. dissertation, School of Law, University of Wisconsin); Joireman, *supra* note 14; SANDRA F. JOIREMAN, PROPERTY RIGHTS AND POLITICAL DEVELOPMENT IN ETHIOPIA AND ERITREA: THE STATE AND LAND, 1941–1974 (Ohio University Press 2000).

[48] Camila Toulmin & Julian Quan, *Introduction, in* EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA (C. Toulmin & J. Quan eds., IIED 2000).

[49] *See* The Mid-Zambezi Rural Development Project in Zimbabwe illustrates this problem. In this case it was the government of Zimbabwe that in the 1990s recognized an area of communally held land in Dande. They sought to reallocate the land in a more ecologically sustainable way that would be conducive to agricultural development and the resettlement of families living on former European-owned land. In the process of doing so, they effectively stripped land rights from migrants who had been living in the area peacefully and cooperatively for years. Spierenburg, *supra* note 20. By not recognizing that migrants were part of this community, and instead adhering to the old idea of communally held lands belonging collectively to one people group, the government repeated the error of colonization. *Id.*

structure. Below, I develop a rubric that recognizes the joint nature of tenure systems and authority structures. As far as I am aware, there is no area on the continent where customary leaders are recognized but customary tenure is not, or vice versa. In this case, it is wholly appropriate to consider the definition and the defense of property systems as a unified social institution that includes the rules of customary land tenure and the authority structures that enforce it.[50] The criteria I use to assess customary institutions are: predictability, accessibility, equity, effectiveness, and restraint. A measurement rubric is included in the appendix to this chapter.

First, any social institution must be transparent and predictable in terms of access and structure. This should be the case whether it is a social norm or a statute. If I own a house and want to improve it, I would like to know that I will own the house in three years; otherwise my benefit might not be worth the costs of making any changes. A property rights enforcement regime such as a customary dispute resolution process should assist people in maximizing their well-being by enabling long-term investment.[51]

Second, social institutions must be accessible to function well. Courts, mediators, or mechanisms that are so far away as to be too costly to reach in terms of money, time, or both are ineffective in resolving problems.[52] With "simple, local mechanisms, to get conflicts aired immediately and resolutions that are generally known in the community, the number of conflicts that reduce trust can be reduced."[53] Economic historians have also observed the importance of accessible conflict resolution mechanisms in the development of markets. Where conflict resolution mechanisms exist, markets with impersonal exchange can develop and thrive.[54]

[50] In Botswana and Kenya, however, although traditional leaders and customary land tenure co-exist, the leaders have been legally stripped of any control over land. *See* The Chieftainship Act of 1987; Chiefs' Act of 1997.

[51] *See* Louis De Alessi, *Gains from Private Property: The Empirical Evidence*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT AND LAW (T. Anderson & F. McChesney eds., Princeton University Press 2003); Hernando De Soto, THE MYSTERY OF CAPITAL (Basic Books 2000); Douglass C. North & Robert Paul Thomas, *An Economic Theory of the Growth of the Western World*, XXIII, (1) THE ECON. HIST. REV. 1 (1970); WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD (Oxford University Press 1997).

[52] *See* Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239 (2005); Henrysson & Joireman, *supra* note 44; Minneh J. Oloka-Onyango Kane & Abdul Tejan-Cole, *Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor*, World Bank (2005), *available at* http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/ Kane.rev.pdf; Celestine Nyamu-Musembi, *Review of Experience in Engaging with Non-State Justice Systems in East Africa*, *in* INSTITUTE OF DEVELOPMENT STUDIES, Sussex University (2003).

[53] Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 (3) J. ECON. PERSPECTIVES 137 (2000).

[54] *See* AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE (R. Calvert & T. Eggertsson eds., Cambridge University Press 2006).

Third, social institutions must meet minimum standards of equity.[55] Those that work only for one ethnic group or exclude one segment of the society are undesirable. Institutions that solve problems based on the highest payment received from participants are also unacceptable (based on standards of equity). The less biased an institution, the better it will be able to serve everyone within a society regardless of their social location.

Fourth, any kind of allocation or enforcement regime must be able to serve its role authoritatively and completely. Resolutions that are temporary, transient, or must eventually involve another institution are disadvantageous.[56] Temporary solutions indicate the powerlessness or insignificance of the institution and may also identify a cumbersome extra step in attempting to achieve a goal, whether it be land access or the resolution of a land conflict.

Lastly, social institutions are desirable to the extent that they do not rely on unrestrained violence.[57] Private allocation or enforcement of property rights through violence can both consume valuable resources and undermine the potential for economic progress.[58] Additionally, conflict resolution that occurs through violence can exacerbate, rather than resolve, disputes.

Using these five criteria – (1) predictability, (2) accessibility, (3) equity, (4) effectiveness, and (5) restraint – we can assess the net benefit of different property rights regimes and customary authority structures. Traditional authority structures and conflict resolution mechanisms are strongest in the areas of accessibility, effectiveness, and restraint and weakest in terms of equity and predictability. Traditional leaders and conflict resolution mechanisms are often far more accessible than national courts (high, according to the rubric in the appendix). They are able to effectively adjudicate most property conflicts and only rarely lead to decisions that needed to be appealed to national court systems (medium high). Moreover, traditional leaders and conflict resolution systems seldom use violence (medium high). However, they are not equitable in their adjudication of disputes as they favor the interests of men over women and autochthones over migrants even though both are citizens of the

[55] *See* Gary D. Libecap, *Distributional Issues in Contracting for Property Rights*, *in* THE NEW INSTITUTIONAL ECONOMICS (E. G. Furubotn & R. Richter eds., Texas A&M University Press 1991); DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE (Princeton University Press 2005).

[56] *See* TERRY ANDERSON & FRED MCCHESNEY, PROPERTY RIGHTS: COOPERATION, CONFLICT AND LAW (T. Anderson & F. McChesney eds., Princeton University Press 2003); North, *supra* note 55.

[57] *See* Fred S. McChesney, *Government As Definer of Property Rights: Tragedy Exiting the Commons?*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT AND LAW (T. Anderson & F. McChesney eds., Princeton University Press 2003); Barry Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 (1) J. INSTITUTIONAL AND THEORETICAL ECON. 286 (1993).

[58] *See* TERRY L. ANDERSON & LAURA E. HUGGINS, PROPERTY RIGHTS: A PRACTICAL GUIDE TO FREEDOM AND PROSPERITY (Hoover Institution Press 2003).

same country (low). Additionally, traditional leaders and conflict resolution mechanisms tend to make decisions that are compromises rather than a clear victory of one party over another in a dispute. While this type of decision making can preserve the integrity of the community, it renders traditional conflict resolution systems unpredictable in terms of the kinds of decisions that are made and the factors that are taken into consideration.

Although it will not be attempted here because of space considerations, the land tenure and dispute resolution systems of the government in each country could also be subjected to the same set of assessment measures and these institutions would rank high in some areas and low in others. Differences in the traditional and state institutions would indicate the reasons why people would choose one over the other or "forum shop."

13.5. WHITHER TRADITIONAL AUTHORITY STRUCTURES?

What can we learn from the use of this assessment measure and the issues that have been raised earlier in the chapter to better understand the role of traditional leaders and customary law in the contemporary African setting? The first major lesson is that there are conflicting authority structures that are delivering different bundles of social goods. Increasingly, government officials are going to be implicitly doing what I am explicit about here – assessing the effectiveness of the different existing institutional systems. In this context, I would argue that if traditional leaders want to maintain any sort of legally recognized authority, they must consider their roles carefully. They must articulate an institutional identity that is not based on representing a single ethnic group or a geographically bounded set of interests, but instead a set of societal concerns that may have importance beyond the locality. For example, they need to articulate their roles not as leading or constructing the legal parameters for their ethnic group, but as preserving and protecting the land (or forests or water resources) as the patrimony of all citizens of the country.

In a similar way, traditional leaders must begin to articulate the interests of the whole society – not just the men. If traditional leaders do not begin protecting and advocating for the economic and social well-being of women and children in their communities, they will find themselves slowly sidelined by alternative sources of societal power as women's groups begin to challenge their authority through legal action and legislation.

This leads to the second major lesson, which is that constitutional standards of equity matter. If customary leaders and customary law are to remain relevant, they must align with constitutional standards of equity and citizenship. Increasingly around Sub-Saharan Africa, we are seeing constitutional challenges to customary

authority based on citizenship rights. The Bhe case in South Africa is one example.[59] In Uganda, women have articulated their demand for land in terms of constitutional guarantees of equality of citizenship and equality of economic rights.[60]

Lastly, traditional leaders and customary dispute resolution systems have a clear advantage in their ability to provide a cheaper and more accessible source of land allocation and conflict resolution than the state institutions in most contexts. If they can allocate land and resolve conflicts in a manner that aligns with constitutional concerns for equity and citizenship rights, then they are likely to be accommodated rather than undermined in any reform of property rights and conflict resolution systems that occurs.

13.6. CONCLUSION

This chapter began by discussing the genesis of the customary land tenure systems and their endurance into the present era. It then addressed how customary law creates a bifurcation of winners and losers in the society. Those who benefit from customary law are traditional leaders, men and communities who are able to use customary law to protect important resources. Losers under customary systems are migrants, local entrepreneurs, and women. Given this split in the society between winners and losers under customary law, this chapter proposed a rubric to assist in assessing the overall impact of customary law on social welfare. Following this, I offered some suggestions for how customary law and customary authority structures might endure in their usefulness to society by playing to their advantages of local knowledge and accessibility and addressing the weakness of inequity.

[59] *See Bhe v. The Magistrate, Khayelitsha* 2004 (2) SA 544 (C) (S. Afr.). In South Africa, women are guaranteed equal rights under the law by a constitution that also recognizes the rights of traditional leaders to allocate land. Given that in customary tenure systems women do not have access to land in their own right, it was inevitable that a case would be brought on behalf of a woman denied access to land. In South Africa, the decision of the constitutional court in the *Bhe* case famously argued that a woman must be allocated land by a traditional leader. However, the reason given in the ruling was not that she had equal standing as a citizen of South Africa and a member of that kin group, but rather that she had children that were members of that kin group and their rights could not be denied. What was important in the *Bhe* case was that the children were girls. A decision that these girls deserve access to land because they are members of the kin group was an affirmation of their membership in the lineage – a membership that was not previously explicit in the case of girls or women. For a comprehensive discussion of the *Bhe* case, see Christa Rautenbach and Willemien du Plessis, *Reform of the South African Customary Law of Succession: Final Nails in the Customary Law Coffin?*, in this volume.

[60] *See* Interview with Carol Bunga Idembe, Kampala, Uganda (Sept. 12, 2005); interview with Atuki Turner, Kampala, Uganda (Sept. 16, 2005).

APPENDIX

Institutional Assessment Rubric

	Low	Medium	High
Predictability	Unclear what the cost will be to utilize the institution. Unclear whether the institution will work or how it will work.	Not entirely apparent why or how decisions are made. Costs, documentation, and other needs unspecified.	Costs and time frame are clear up front. Needed documentation obvious. Nature of decision-making process is clear.
Accessibility	Not affordable for the average person either due to fees or side payments demanded. Location requires a large sacrifice in terms of time or money to reach.	Affordable for some people in the society, although beyond the reach of others, proximate to some, limited need for side payments.	Fees are affordable for the average person, proximate venue to people who will be accessing.
Equity	Only serves the needs of some members of society. Discriminates on the basis of sex, ethnicity, or other trait.	Discriminates against some members of the society, serves the needs of others.	Serves the needs of all members of the community. No discernable discrimination based on individual traits.
Effectiveness	Unlikely to resolve problem. Will need to pursue some other parallel or competing process to achieve goal.	Can resolve conflicts in certain circumstances, although in others it is necessary to pursue other institutional remedies.	Will resolve problem and/or provide service finally and completely.
Restraint	Processes rely on violence or the threat of violence, intimidation, or other harm.	While generally free from violence or intimidation, at times these can enter into the process.	Completely free from unrestrained or illegal use of violence and threats.