Political Science Faculty Publications   Political Science

2014

Rebuilding Communities after Violent Conflict: Informal Justice Systems and Resource Access

Sandra F. Joireman

University of Richmond, sjoirema@richmond.edu

Recommended Citation

Rebuilding Communities after Violent Conflict: Informal Justice Systems and Resource Access

Sandra F. Joireman[1]

A community recovering from war or ethnic conflict has to find ways of reweaving the fabric of economic and social life with new patterns of interaction and changed demographics.[2] In post-conflict settings customary law has a particular attraction because of the moral authority it brings to the establishment of order. Customary law is familiar, tied to the identity and history of a community, and operates independently of outside resources. Although the term evokes images of a universal acceptance and ancient origin, customary law has always been dynamic, defined by those in power, and subject to political interests.[3] Informal justice systems based on customary law play two roles in post-conflict settings by both resolving conflict and building working social networks. Here I discuss the role of customary justice systems in controlling access to land, affirming its use as a system of dispute resolution for returnees, while noting serious concerns regarding the changed nature of leadership and the inability of customary mechanisms to mediate disputes with powerful external actors.

To understand both the power and potential problems of customary law, it is important to examine the intertwined nature of customary law, customary leadership and resource access. Customary law is pervasive in Sub-Saharan Africa; however, it also plays an important role in other post-conflict settings such as Afghanistan and the Western Balkans. In Sub-Saharan Africa, customary law, codified during the colonial era and incorporated into national political systems, has provided rules for control over resources, whether people, land, trees, or water. While customary land tenure systems differ by region, they are generally characterized by a vesting of land rights in the community with a, now contested, assumption of inalienability.[4] In Liberia, for

---

[1] Sandra Joireman is the Weinstein Chair of International Studies and Professor of Political Science at the University of Richmond. She is a political scientist with a focus on property rights, law, and development. She has worked extensively in Sub-Saharan Africa and more recently in the Western Balkans.

[2] My thanks go to Paul Joireman and Carol Summers for their comments on an early draft. The Earhart Foundation generously funded the research. All flaws remain my own.

[3] *See generally* Martin Chanock, *A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa*, 32 J. AFR. HIST. 65, 65–88 (1991); SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880–1980 (1986).

[4] Land rights can be held by the ethnic group with clearly defined boundaries, while specific family units retain control over particular plots of land within the ethnic group's territory; this is a common manifestation of customary tenure systems in Sub-Saharan Africa as developed during the colonial era. Martin Chanock, *Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure, in* LAW IN COLONIAL AFRICA 61, 63–68 (Kristin Mann & Richard Roberts eds., 1991).

example, public law recognizes customary land rights in the 'Hinterland' as belonging to ethnic groups, whether or not they have deeds. These rights are vested collectively in all members of the community, protected by the state, and were at one point inalienable, though that is no longer the case and rural land is now bought and sold.[5] Community membership, then, is sufficient for adult males to claim a right to the land of the community.[6] Use rights to specific plots of land are allocated by traditional leaders. People who are not members of the possessing ethnic group can rent land.

Traditional leaders administer and interpret customary law for the community. For example, customary law can determine the distribution of land to migrants for farming, who controls the fruit grown on trees, or whether divorced or widowed women will be able to retain usufruct rights to land.[7] Traditional leaders may bear the title of chief or they may be the recognized leaders of a lineage. In most places, leaders have lived in the community for a long time and have memory, not just of community members, but also of land they have farmed and conflicts they have had with neighbors. Typically, customary leaders are engaged in dispute resolution for the community either as a first step in a dispute resolution process or as the exclusive arbiters when it comes to issues of access to community resources.[8] There are other sorts of dispute resolution processes that are informal, but not customary, such as mediations carried out by specialists in alternative dispute resolution. Here, the focus is on customary, informal systems of dispute resolution, based on customary law.

When an area becomes unsafe due to violence, most of the civilian population will leave and not return until danger abates. Not everyone chooses to return home after being displaced. Indeed, the longer populations are displaced, the more likely people are to re-establish homes and livelihoods elsewhere. When an area becomes more secure, several factors impact people's desire to return to their place of origin: economic opportunities, household characteristics, and the length of their displacement.[9] Because customary land tenure exists predominantly in rural areas, it is

---

[5] LIZ ALDEN WILY, SUSTAINABLE DEVELOPMENT INSTITUTE & FERN, 'SO WHO OWNS THE FOREST,' 113–25 (2007), http://www.rightsandresources.org/wp-content/uploads/2014/01/doc_102.pdf.

[6] Women rarely have primary rights to land under customary systems. Instead they have usufruct rights that they acquire based on their relationship with male lineage members. *See* Sandra F. Joireman, *The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law*, 36 WORLD DEV. 1233, 1238 (2008).

[7] *See generally* MARJA J. SPIERENBURG, STRANGERS, SPIRITS, AND LAND REFORMS: CONFLICTS ABOUT LAND IN DANDE, NORTHERN ZIMBABWE (2004). *See e.g.,* Elin Henrysson & Sandra F. Joireman, *On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya*, 43 L. & SOC'Y REV. 39, 44–48 (2009).

[8] It is important to recognize that the power of customary leaders is often contested or their power limited by statutory law. There is a rich literature on the definition and use of customary law as well as the contested power of customary leaders which space constraints prevent me from addressing here.

[9] Deniz Sert, Property Rights in Return and Resettlement of Internally Displaced Persons (IDPs) A Quantitative and Comparative Case Study 8–11 (2008) (unpublished Ph.D. dissertation, City University of New York).

worth noting that some studies have demonstrated a reluctance of people to return to homes and property in rural settings after they have experienced life in cities or refugee camps. For those moving from rural areas to urban places of refuge, a return to the difficulties of life in rural communities appears unappealing. This holds true for settings as diverse as Sub-Saharan Africa and Bosnia.[10] Young people, in particular, are attracted to the availability of entertainment, education and job opportunities in urban areas.

Conflict creates a 'new normal' in how customary systems are used and administered. Demand for customary land access will not be the same after conflict because of the different composition of the returning population as well as changes in economic opportunities. Indeed, after conflict in both Uganda and Liberia there were reports of a depopulation of the countryside.[11] If there are fewer people returning to an area, one might think that there would be less conflict over resource access, but evidence proves otherwise. In Liberia and Uganda, as well as other post-conflict contexts, return has led to an abundance of disputes over customary land.[12] These conflicts were the result of changed settlement patterns,[13] land claims by outsiders to the community,[14] and confusion regarding legitimate claims.[15]

---

[10] Johnathan Bascom, *Reconstituting Households & Reconstructing Home Areas: The Case of Returning Eritreans, in* IN SEARCH OF COOL GROUND: WAR, FLIGHT & HOMECOMING IN NORTHEAST AFRICA 66, 66–79 (Tim Allen ed., 1996). *See also* Julius Holt, *Looking Beyond the Towns: Facts & Conjectures about Rural Returnees in the Ogaden & 'Somaliland,' in* IN SEARCH OF COOL GROUND: WAR, FLIGHT & HOMECOMING IN NORTHEAST AFRICA 143, 143–52 (Tim Allen, ed., 1996); Gearoid Ó Tuathail, *Localizing geopolitics: Disaggregating violence and return in conflict regions*, 29 POL. GEOGRAPHY 256, 256–65 (2010).

[11] Interview with Antwi Adarkwah, Land Tenure Expert, Liberian Land Commission, in Monrovia, Liberia (Oct. 7, 2012). *See also* UNITED NATIONS PEACEBUILDING PROGRAMME & HUMAN RIGHTS FOCUS, LAND CONFLICT MONITORING AND MAPPING TOOL FOR THE ACHOLI SUB-REGION 24 (2013), http://www.lcmt.org/pdf/final_report.pdf.

[12] NORWEGIAN REFUGEE COUNCIL, CONFUSIONS AND PALAVA: THE LOGIC OF LAND ENCROACHMENT IN LOFA COUNTY, LIBERIA 5–7 (2010), http://www.gltn.net/jdownloads/NRC_Publications/candp.pdf. *See also* USAID, LAND MATTERS IN NORTHERN UGANDA: ANYTHING GROWS; ANYTHING GOES POST–CONFLICT "CONFLICTS" LIE IN LAND 7–9 (2007), http://usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Land_Matters_in_Northern_Uganda_Report.pdf. *See also* UNITED NATIONS PEACEBUILDING PROGRAMME, *supra* note 10, at 31–42; *Liberia: Land-rights Tensions Not Abating*, IRIN NEWS (May 17, 2010), http://www.irinnews.org/report/89149/liberia-land-rights-tensions-not-abating; *Uganda: Escalating Land Disputes in the North*, IRIN NEWS (Feb. 17, 2011), http://www.irinnews.org/report/91957/uganda-escalating-land-disputes-in-the-north. *See also* Levis Onegi, *Post-conflict Land Insecurity Threatens Re-displacement in Northern Uganda*, 41 FORCED MIGRATION REV. 31, 31–32 (2012).

[13] *See generally* Sandra F. Joireman, et al., *A Different Way Home: Resettlement Patterns in Northern Uganda*, 31 POL. GEOGRAPHY 1, 1–8 (2012).

[14] *DRC-Rwanda, Land Rows Complicate Refugees' Return*, IRIN NEWS (Jul. 2, 2010), http://www.irinnews.org/report/89708/drc-rwanda-land-rows-complicate-refugees-return; *UGANDA: Returnees Caught up in Land Disputes*, IRIN NEWS (Oct. 1, 2008), http://www.irinnews.org/report/80694/uganda-returnees-caught-up-in-land-disputes.

[15] UNITED NATIONS PEACEBUILDING PROGRAMME, *supra* note 10, at 17; *see generally* CHERRYL WALKER, LANDMARKED: LAND CLAIMS & LAND RESTITUTION IN SOUTH AFRICA (2008).

Given the challenges facing the state in administering post-conflict territories, an overall lack of state strength, and the moral authority of customary law, the burden of resolving land conflicts generally falls on informal justice systems and customary dispute resolution strategies.[16]   Yet, customary systems are also changed by conflict. There are two important alterations that are noted here as they suggest caution in the expectations of customary dispute resolution systems; 1) changes in traditional leaders, and 2) a shift in external pressures on customary resource allocation. The first is a limitation on the effectiveness of informal dispute resolution that comes from within a community, while the second originates outside the community.

New traditional leaders

The experience of violence and population displacement leads to changes in traditional leadership. Older leaders die during the period of displacement. New leaders with different memories and experiences struggle to replace them. In some cases these new leaders might be ex-combatants or people looking to control territory, rather than those we would typically think of as traditional leaders. Traditional leaders can also take advantage of the ambiguity that exists in post-conflict rural settings. Leaders can work this ambiguity to their advantage, selling land that they might not have full authority to control and otherwise using their 'office' to engage in rent-seeking behavior. Pauline Peters appropriately warns of an excessively positive interpretation of the flexibility of customary tenure systems as this very feature lends those systems to manipulation.[17]

One of the problems in the reconstruction of communities in Northern Uganda has been that the traditional leaders were displaced for so long that there was no longer sufficient knowledge of land claims. "As people return to their villages, they are confronted with the realization that over a period of 20 years, clan leaders, heads of households and the elderly who would have knowledge of the previous set-up in the villages are no more…"[18] Some of those who returned to their homes in Northern Uganda had been displaced for almost two decades. Informal conflict resolution systems are less helpful if the adjudicators have limited knowledge of tradition and community history. In Northern Uganda, it took years after the population returned for

---

[16] *See generally* Stephen C. Lubkemann, et al., *Unintended Consequences: Constraint of Customary Justice in Post-Conflict Liberia*, *in* CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR–TORN SOCIETIES 193, 193–237 (Deborah Isser ed., 2011); *see also* DEBORAH H. ISSER, ET AL., RIFT VALLEY INSTITUTE & UNITED STATES INSTITUTE OF PEACE, LOCAL JUSTICE IN SOUTHERN SUDAN 5 (2010), http://www.usip.org/sites/default/files/PW66%20-%20Local%20Justice%20in%20Southern%20Sudan.pdf.

[17] Pauline E. Peters, *Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions*, 37 WORLD DEV. 1317, 1319–20 (2009).

[18] *Uganda: Escalating Land Disputes*, *supra* note 11.

the customary dispute settlement systems to start adjudicating land disputes; when they did begin to function, customary systems have been effective in resolving conflicts within the community.[19]

The nature of traditional leadership can also change. In Liberia, individuals in positions of traditional leadership prior to the war lost their status after moving to refugee camps where they no longer controlled the same social and economic resources. Other authority structures, such as NGOs or armed groups, took their place in terms of social control.[20] After a conflict ends and people return to their homes, there have been instances in which the actions of traditional leaders were so egregious and counter to the welfare of the community that other institutions have developed to circumvent them. For example, in Liberia, several communities have established locally elected land committees with parallel structures to those of the traditional authorities (who have designated government positions) so that they can undermine the ability of the traditional leaders to give away land for purposes of logging or commercial agricultural ventures.[21] Alternatively, people who have no real claims to traditional leadership can set themselves up as such. In Cote D'Ivoire, after violence occurred, youth returning to communities established their own 'traditional leaders' and refused to recognize the people who had previously been in these positions.[22] Under the customary system prior to the war, youth would rarely have played such a role in community leadership.

Elinor Ostrom has argued that successful common resource regimes exhibit similar characteristics, one of which is the effective monitoring by people accountable to the community users.[23] When customary leadership changes significantly after conflict, or when those who put themselves in the place of customary leaders are former combatants, issues of accountability are called into question and opportunities for rent-seeking increase. In such settings, informal dispute resolution, specifically pertaining to resource access, is unlikely to be a robust system for defending the individual or collective property rights of the community. This threat to resources comes from within the reconstructed community itself.

---

[19] UNITED NATIONS PEACEBUILDING PROGRAMME, *supra* note 10, at 61.

[20] *See generally* NORWEGIAN REFUGEE COUNCIL, *supra* note 11.

[21] Interview with Alfred Brownwell, Lawyer, Green Advocates, in Monrovia, Liberia (Oct. 4, 2012).

[22] BARBARA MCCALLIN, ICTJ & BROOKINGS-LSE PROJECT ON INTERNAL DISPLACEMENT, RESTITUTION AND LEGAL PLURALISM IN CONTEXTS OF DISPLACEMENT 14 (2012), http://ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Restitution-Legal-Pluralism-CaseStudy-2012-English_0.pdf. *See also* Interview with Marzia Montemurro, Country Analyst for Côte d'Ivoire, Liberia, Niger, Nigeria, and Senegal, Internal Displacement Monitoring Centre, in Geneva, Switzerland (Mar. 10, 2011).

[23] *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

New claims on resources

The example from Liberia above in which customary leaders were undermined after they gave away community land to outside commercial interests leads to the second caution regarding informal justice systems and post-conflict resource access. Informal and customary justice systems are significantly challenged in their ability to address resource conflicts with outside actors such as large business enterprises or even the state itself.

In post-conflict settings, there is a demand for development and new opportunities for private business and government projects to kick-start local economies. However, the immediate post-conflict period is also a time of vulnerability in terms of property rights as customary systems may not yet be re-established, strong, or able to defend the interests of their members from resource grabs by the state or outside actors.[24] Daniel Fitzpatrick and others have emphasized the importance of complex customary tenure rules in post-conflict settings as a source of protection of land rights.[25] They argue that community land allocation mechanisms may have an undesirable complexity when viewed by outsiders, but that complexity serves a purpose in that it enables local enforcement mechanisms without relying on the state. This is vital in post-conflict settings where the state may be weak, unpredictable, and simply unable to enforce property rights even if it wanted to do so.

Given the prevalence of land grabs in Sub-Saharan Africa, guarantees of resource security from complex tenure rules are salient only to the extent that the government recognizes those customary tenure rules as valid and enforces customary control over land. If the government itself is facilitating resource expropriation, then customary rules are not likely to have much effect.[26] Even when the government is not the problem, customary dispute resolution systems are challenged by the competition for resources in post-conflict settings as they will not be viewed by all interested parties as the correct forum for resource adjudication. Jon Unruh notes that "....the presence of local farmers, dislocatees, commercial interests, and demobilized combatants from different sides in the conflict, all located in the same areas, will mean that land disputes

---

[24] *See generally* USAID, *supra* note 11.

[25] *See generally* DANIEL FITZPATRICK, et al., PROPERTY AND SOCIAL RESILIENCE IN TIMES OF CONFLICT: LAND, CUSTOM AND LAW IN EAST TIMOR (2012).

[26] LORENZO COTULA, et al., FAO, FAO & IFAD, LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 91–92, (2009), http://www.ifad.org/pub/land/land_grab.pdf.

involving these players will unlikely be able to locate a commonly respected and legitimate authority."[27]

Elinor Ostrom has emphasized the importance of ensuring that the members of a group can protect their resources from outsiders in communal resource regimes.[28] This is precisely the problematic aspect of customary law and dispute resolution systems in post-conflict settings - they are unable to assure the excludability of other claims. That must be done elsewhere by courts empowered to adjudicate the actions of the state and commercial interests that may not be local. Without the ability to effectively exclude claims from outsiders during post-conflict periods, informal dispute resolution systems can be too weak to protect the resources of the group.

Conclusion

Customary law, customary leadership, and control over natural resources have been tied together in Sub-Saharan Africa, creating a context in which informal justice systems have been a traditional and, at times, effective forum for the resolution of disputes over resources. However, in post-conflict settings, significant changes in the nature of traditional leaders and external claims on resources create a 'new normal' in which informal dispute settlements may leave a community vulnerable to land grabs. This is not to say that dispute resolution systems embedded in customary law are not useful. The emphasis on social harmony and reconciliation that characterizes informal dispute resolution systems may be extremely effective in addressing some family disputes, adjudicating minor crimes and injuries, and reincorporating ex-combatants to the community. Customary dispute resolution processes are sufficient to address small conflicts within a community, but when land claims are made by powerful actors who are community leaders or outsiders, informal dispute settlement processes will be insufficient to protect property rights.

---

[27] Jon D. Unruh, *Toward Sustainable Livelihoods After War; Reconstituting Rural Land Tenure Systems,* 32 NAT. RESOURCES F. 103, 108 (2008).

[28] *See generally* Elinor Ostrom, *Design Principles of Robust Property-Rights Institutions: What Have We Learned?, in* PROPERTY RIGHTS AND LAND POLICIES 25, 25–51 (K. Gregory Ingram & Yu-Hong, eds., 2009).