2011

Where There is No Government: Enforcing Property Rights in Common Law Africa

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OXFORD
UNIVERSITY PRESS

CHAPTER 1

Introduction

Land, Law, and Social Welfare

Conducting research in rural Uganda a few years ago, I met a well-educated widow whose husband had died while she was quite young. She went to court to get the letter of administration that would allow her to settle her husband's estate, collect his pension, and provide for her young children. Her application for the letter was challenged by her husband's family, who claimed the letter of administration for themselves. When the widow met with the judge hearing the case, he advised her to withdraw her application, advocating the customary rather than the formal, legal settlement by asking her, "Who will look after your children if something happens to you?" (Widow J 2006). Custom dictated that all the husband's possessions go to his natal family and that if something should happen to her, the children would be taken care of by their father's family. She had a choice to live by law or by custom, and the judge recommended that she follow custom. The judge, with altruistic motives, suggested that she follow customary law traditions that violated her legal property rights.

It may seem odd that anyone would challenge a widow's right to her husband's assets, or that a judge would encourage a widow to relinquish her legal rights. If law exists, we might think it obvious

that it will be enforced. Unfortunately, this is not always true. This widow's property rights—her rights to control over assets and land within the bounds of the law—were violated. Her experience is common in Sub-Saharan Africa, where customary law dictates what property rights are enforced, even when contradictory to statute law. Custom is just one of the impediments to the enforcement of property rights.

All over the world, legislatures and judges create the laws and regulations that protect property rights. However, the courts, local administrative structures, and police are the people and institutions that enforce those rights. Sometimes, as exemplified above, cultural resistance prevents the enforcement of statute laws. In other cases, the law and changes to it simply do not filter down to the appropriate administrative structures in communities located far from the center of power and the reach of the state.

In developed countries, established networks of information provision ensure that knowledge of the creation of new laws is put into the hands of those most likely to be affected by them. Consider a U.S. Supreme Court decision changing the criteria for lawful searches by police officers. Once the decision is made public, the police patrolling the streets learn about it via both public and private mechanisms. On the public side, they will likely be made aware of the law via their local state's attorney, district attorney, or county attorney. Regional law officers' associations send out daily bulletins via e-mail updating chiefs of police on legal decisions that might affect them, and many police departments have an officer responsible for following legislative and legal decisions. At the same time, a variety of private information networks also exist. Publications and websites (such as www.officer.com) target officers on the street, discuss legal changes and their affect on police behavior, and provide additional information and education for officers. Print and broadcast media also impart substantial pressure for conformity to the law. When an enterprising reporter discovers a local jurisdiction flouting the law, she is ensured a great story.

These are well-developed mechanisms to keep law-enforcement personnel accountable and informed about changes in law that affect the way they work. In developed countries, the making of a new law triggers institutional change because of the many channels for information flow and accountability. In contrast, much of Sub-Saharan Africa lacks the organizational capacity and the resources necessary to convey facts about alterations in law and necessary changes in police or judicial behavior as efficiently as is done in the United States.

Whether property law is not enforced because local administrations are unaware of it or because the law is objectionable, the effect is the same—without the enforcement of laws related to property, or indeed to any other area of legal rights, the law may as well not exist. There exists a fallacy of legalism, a belief that the creation of law through statute, legislation, or precedent will be sufficient to bring about social change. This misunderstanding springs from the experience of developed countries and from the tremendous effort that goes into the writing and passing of legislation in all countries. Creation of law may be necessary, difficult, and challenging, but it is ultimately insufficient to achieve social change; enforcement is what enlivens law and moves it from printed word to public space. A property right that is not enforced does not exist.

Theoretically, this fallacy of legalism is based on the idea that once the state is present, it is the most efficient definer of property rights and enforcer of contracts. North and Thomas note that in the West as the state developed it became the lowest cost enforcer of property rights and people were willing to pay taxes in exchange for well-defined property rights (North and Thomas 1973: 7). Here I argue that the state may not be the most efficient or lowest cost enforcer of property rights. Even after a state is established and consolidated there may be competing authorities, a variety of non-state actors, which can more efficiently enforce contracts and defend property rights than the state. This is true, not just in the geographic hinterland, but in capital cities, the very centers of power.

This book focuses on the enforcement of property rights in communities in common law Africa—those countries in Sub-Saharan Africa that were colonized by the British and that inherited the British legal system.[1] Rather than assuming that statute law, or what we might think of as the "law on the books," is what is being enforced, an alternative approach is followed. Starting from within communities, I examine what is happening in specific localities and ask these questions: Whose property rights are being enforced? What group or institution is enforcing these property rights? This forces a consideration not only of what local rules are developed to regulate access to land but also how power is mobilized and institutionalized within communities.[2]

LAND AND THE POLITICAL COMMUNITY

Property rights are the rules that regulate control over a variety of assets including land. The enforcement of property rights is fundamentally political. This claim hearkens back in intellectual history to the work of John Locke, who viewed property rights as intertwined with the existence of the political community. For Locke, the preservation of property is the "chief end" of the formation of the state; citizenship is the mutual contract between people for the preservation of individual rights to property. Locke argues that claims to property should rightfully arise from the exertion of labor on the land (1764). The social contract is undermined when property ownership is denied to some or when not all who work the land have the ability to claim ownership or use rights. Locke's perspective emerges out of an agrarian society and, not surprisingly, his ideas about labor and property have a contemporary resonance in places around the world where livelihoods are primarily agricultural.

Jean-Jacques Rousseau shared Locke's conviction that property was responsible for the creation of the political community, but he believed that the establishment of property was an uncorrectable

mistake that brought oppression and hardship to human beings (1755). From his perspective, as property was established "equality disappeared, forests became smiling fields, [and] slavery and misery arose with the crops" (Copleston 1960: 68). Rousseau argued that property led to the creation of a political society with government and law, which in turn created social classes and the entrenchment of inequality. Pierre-Joseph Proudhon famously criticized property as "theft," preferring an understanding of property based exclusively on the product of one's labor. He observed that the upper class exploited the labor of the lower class, stealing the "property" of the workers through claims to the ownership of the means of production (e.g., a large piece of arable land). Proudhon believed that no one had a right to own the means of production and that upper-class ownership of property resulted in exploitation. He therefore advocated the abolishment of property beyond the product of one's labor because it created injustice (1876).

These early theorists were acutely sensitive to the political nature of property rights as they were living in societies that were predominantly agricultural and where authority structures were contested. In this regard their understanding of property is relevant to contemporary contexts like Sub-Saharan Africa where a peasantry still exists, there are competing ideas about property, and the reach of the state is limited. It is ironic that while these theorists, Locke in particular, have so influenced the development of Western concepts of property, we have lost their understanding of property formation—the definition and enforcement of property rights that occurs within the complexity of political structures and social networks.

In these early political theorists there is an understanding of the practical use of land for production, its hierarchical relation to authority, and its horizontal links to community and citizenship. This perspective sharply contrasts with modern understandings of property rights, which are both reified to represent sound economic institutions and simplified by their isolation from authority and community.[3] While property rights and their enforcement mechanisms are important economic institutions, they cannot be isolated from the

social and political systems in which they are embedded. They are absolutely dependent on local patterns of authority.

Because of the nexus between property and authority, property evokes strong feelings. Emotional ties to property additionally stem from the meanings that it carries beyond its importance for economic subsistence and its ties to politics. It also has cultural importance as a marker of adulthood, identity, or community membership and, in certain places, property can even have religious significance. Commenting on a land conflict in South Texas, an Apache woman tied her land claim to her identity as an Apache saying, "We must be with this land. We were born for this land."(Norrell 2008: 5).

Where property is closely tied to culture and identity, it is difficult to disaggregate the role that land, exclusive of identity or ideology, plays in political conflicts. One recent example is the 2007 Kenyan election violence. While voting for the presidential election occurred in an orderly fashion and was relatively free and fair, officials manipulated the vote tally and violence broke out. The worst violence occurred in areas in which property rights to land were contested. Though not the cause of the violence, land conflicts did influence the way that the post-election conflict played out in two ways: increasing the intensity of the violence and encouraging what appeared to be a calculated displacement of people who did not have "blood ties" to the land (Allen 2008). Land conflicts defined the nature and location of election-related violence. Pushing people off the land was an expression of a deep belief that the land belonged to those who came from that place—the autochthones, or "sons of the soil" (Lentz 2006a, 2006b; Hagberg 2006).

THE ARGUMENT FOR CLEAR PROPERTY RIGHTS

For decades, economists and development specialists have argued that secure property rights are a precondition for vibrant economic growth. Property rights, as noted above, refer to control over assets.

Anderson and McChesney give a more complex definition of property rights as "formal or informal rules that govern access and use of tangible assets such as land and buildings, and intangible assets such as patents and contract rights" (2003:1). Without clear knowledge of who owns what, it is difficult to make use of a resource, whether it is a plot of land, a tree, or a house in an urban settlement.

Many of the poorest countries in the world, with the so-called "bottom-billion" population (Collier 2007) are in Sub-Saharan Africa. These countries are overwhelmingly agricultural with disproportionately rural populations in comparison to other areas of the world. In these countries, property rights to land are particularly critical to both food provision and the small-scale production of crops that can be sold in domestic and international markets. Many have poorly defined property rights, an artifact of the colonial era when indigenous populations were thought to hold land in common and were required to administer it through customary mechanisms. Over time, as populations have grown and the relative value of land has increased, these customary institutions have persisted, often due to the benefits accruing to certain groups of elites rather than to the population as a whole. This type of social order is what North, Wallis, and Weingast refer to as limited access or natural states—those that have strong social hierarchies and inequalities in market access and the enforcement of property rights (North et al. 2009).

Throughout much of Sub-Saharan Africa, many people who use or possess land have no legal proof that it is theirs. Moreover, whole segments of the population, such as women and migrants, have no claim to control land under customary landholding systems, which extend over approximately 75 percent of the land in Sub-Saharan Africa (Augustinus 2003). Their rights to land, discussed in detail in the following chapter, are secondary rights, or what we also might conceive of as use rights.

Scholars have noted that the definition and defense of the property rights of the poor will increase their well-being and allow them access to new business and educational opportunities through

capital formation.[4] Hernando de Soto (1989, 2000) argues that property rights spur economic growth by creating "meta" property—the paper trail of title and mortgage that can free the surplus value of assets and provide the necessary capital for economic growth and development. Without this legal framework of property rights, people can only effectively do business with those whom they trust.[5] Wider economic opportunities remain restricted by the absence of proof of ownership and control that would enable individuals to mortgage their property and use the capital for investment. De Soto posits that property rights for the poor will lead to poverty alleviation, drawing on previous work that suggests land title leads to greater investment and productivity (Platteau 1996; Demsetz 1967; Feder and Noronha 1987; Libecap 2003). However, de Soto diverges from previous theory by identifying the importance of titling all informally held land, small urban plots as well as farmland, in an effort to boost the potential of capital accumulation for the poor.

Recent studies of titling suggest that de Soto was not correct in thinking that title will lead to mortgaging and the creation of capital, at least in the short –term. However, there are other positive benefits from titling that run the gamut from home improvement to increased wage labor and smaller households (Cousins et al. 2005; Field 2005, 2007; Galiani and Schargrodsky 2007). Time will tell whether access to capital results from titling in the long term, What we know at present is that titling improves human well-being in ways that were unanticipated.

Scholars are not the only ones advocating for secure property rights; people across Sub-Saharan Africa are demanding clarity and security of property rights. This demand is evident in the plethora of legal disputes to clarify ownership that congest courts and conflict resolution mechanisms (Deininger and Castagnini 2004; Fenrich and Higgens 2001; Human Rights Watch 2003; Joireman 1996; Mwangi 2009; Toulmin et al. 2002). Legal disputes heard in national courts represent a costly allocation of state resources to

the adjudication and enforcement of ownership. There are also less obvious social and economic costs at the local level, resulting from conflicts among family members and between neighbors that, though difficult to measure, can be quite significant. Disputes over land are exacerbated by civil conflict, which leaves a legacy of confusion over land rights. As original occupants of land flee, sometimes residing elsewhere for years, their claims to the land they left is often challenged by new occupants when they return (Integrated Regional Information Network 2008a, 2008b, 2008c).

Liberia is an example of how war can exacerbate land conflicts. Prior to the civil war in Liberia there were two types of landholding: customary and formal. Formally held property was designated with title deeds and written contracts. There was typically little documentation of customary land or a 'tribal certificate' which held no legal weight. When the war came, large segments of the population were displaced. Moreover, because the war lasted 14 years many property transactions were made during the conflict. With peace in 2003, displaced people returned and the challenge of asserting original ownership and reclaiming property that had been exchanged or appropriated during the war began. Complicating these matters are rising property values and an inadequate land registry ("Liberia: Searching for Solutions to Land Disputes" 2010).

Policy makers and government officials across Africa, interested in the development of their countries and convinced by extant theories of the importance of property rights for poverty alleviation, have embraced the idea that property rights need to be better defined both to promote growth and to reduce societal conflict. For example, Laurent Sedogo, the Minister of Agriculture, Water and Fisheries for Burkina Faso, recently noted that "The Government of Burkina Faso has made it a priority to solve land policy issues. The population needs concrete measures to guarantee and protect their land, reduce conflict and arrest degradation" (Economic Commission for Africa 2008). Poorly defined or defended property rights have also been identified by bureaucrats and government officials

as sources of violent conflict. One Ivoirian magistrate noted that "The failure to fully implement the land law is partly to blame for the continuation of territorial conflicts . . ." (Integrated Regional Information Network 2006). Citizens of many African countries would agree with the economists and policy makers that they need secure property rights. Many would also affirm the need for legal proof of ownership. In research conducted in rural and urban areas of Ghana, Kenya, Uganda, Rwanda, Ethiopia, and Eritrea, I have never had anyone respond negatively to inquiries about whether they would like clear proof of their property rights to land and houses. Indeed, their answers are often followed by a request for information as to how they might go about getting more secure property rights.

The transformation of land into usable capital has not happened throughout most of Sub-Saharan Africa. Why? We need not indulge in stereotypes of backward farmers resistant to change, as farmers in Sub-Saharan Africa are quick to adopt changes in technology and technique that result in increased production. If people recognize their need for clear and secure property rights, and scholars and government officials believe this is necessary for economic growth to occur, then why is it so difficult to define property rights clearly? Given their importance for both food production and economic growth, why is it that countries have been slow to act in defining property rights and then enforcing them? These puzzles motivate this book.

WHICH PROPERTY RIGHTS ARE ENFORCED AND BY WHOM?

In many countries there is a disparity between those who have well-defined property rights and those who do not. For example, urban dwellers in Kampala, Uganda, are more likely to have some sort of title or certificate of occupancy than people living outside of the capital city. Politically privileged groups are able to defend

their property rights in court and through the action of the police. Conversely, groups that are outside the center of power, either physically or politically, have difficulty harnessing enforcement mechanisms. Political violence is just one potential consequence of poorly defined property rights. Additional political issues such as representation and citizenship are also coupled with the definition and administration of property rights.

Often the property rights that are enforced are not law, but social norm or custom that may be in opposition to public or statute law. Local administrators, police, and other officials may act in ways that are mediatory or peacekeeping, but not legal. This is evident in the example that opened this chapter. Sometimes bureaucrats act outside the law with the intention of collecting payments from parties to the disputes; at other times they may act outside the law with altruistic motives.

Additionally, the cases presented here, particularly in chapters 5 and 6, demonstrate that previous arguments regarding urban bias and the political geography of power do not always hold with regard to the enforcement of property rights. We observe an evident lack of enforcement of property rights in Nairobi and Accra, along with a variety of choices that people have to pursue enforcement of their property rights outside of the state system. This finding runs contrary to the suggestion of Robert Bates (2005) that urban areas are privileged in terms of the expenditure of the state and to work by Jeffrey Herbst (2000) and Catherine Boone (2003) suggesting that state power radiates outward from the capital city, becoming weaker in the hinterland. While these scholars are noting general trends, in both Accra and Nairobi we see pockets of statelessness—areas where property rights are ill-defined and state enforcement mechanisms lack the power to resolve disputes and enforce contracts. These are both capital cities, the very core of the state, and yet with regard to property rights the state has competitors in enforcement and there is an urban demand for dispute resolution processes outside of the state.

When we turn our focus from the creation of law to its enforcement, our attention must move from the national political arena of each country to the locality and to the exercise of authority within communities. In the following pages I will argue that the state does not have a monopoly on property rights enforcement; customary leaders, gangs, local bureaucrats, and nongovernmental organizations (NGOs) provide competing enforcement mechanisms for property rights. Though the state may have a monopoly on the legitimate use of force, it cedes that use to others in the arena of property rights enforcement through the recognition of customary law and authority, lack of policing in areas outside the center of state control, and tolerance of privately contracted security forces, gangs, and ad hoc private specialists in violence. A somewhat less disturbing trend is the role that NGOs play in enforcing property rights through persuasion rather than force. There are many places throughout the continent where the absence of state power is accepted, and privately ordered institutions simply fill in the gap. (By institutions I mean the formal and/or informal rules by which society is organized.) The development of privately ordered institutions where the state is absent is consistent with the work of economic historians which suggests that when the state is not doing all that is needed to enable a market, privately ordered institutions will develop (Ellickson 1991; Greif 2006).

Implicitly and sometimes explicitly in the literature, privately ordered institutions are thought to be superior to those provided by the state precisely because they are organic, spontaneously arising to fulfill the needs of a particular community in a limited setting (Ellickson 1991; Smith 1992). While this text does not completely contradict this perspective, I argue that it is wise to entertain another possibility—that organically developed institutions might be predatory, representing the interests of only the most powerful members of the local community.[6] These predatory or suboptimal institutions can persist even when the state institutions for enforcement are present. Because organically developed institutions are not assumed

herein to be "good" or "bad," we need a measure by which to assess which property regimes and enforcement mechanisms are helpful and which might be harmful.

ASSESSING SOCIAL INSTITUTIONS

The literature on property rights and market development indicates that certain types of institutions are better than others. However, no one has yet assembled the characteristics of "good" institutions into any sort of meta-evaluative structure. Rather, particular studies have illustrated specific elements of good institutions that emerge from cases or historical analyses. In this book the characteristics of good institutions are compiled into a set of criteria. Institutions that enforce property rights are then evaluated based on their *predictability, accessibility, equity, effectiveness,* and *restraint.* While the nature of the cases and the data prohibit absolute consistency in evaluation, each chapter of this book concludes with the use of these criteria to both interpret and assess the social benefit of the institutions that are in place.

Why focus on the evaluation of institutions? The simple answer is to move beyond a belief that non-state institutions exist until the state replaces them. What we find in this book is that state and non-state institutions coexist and are sometimes intertwined in complex ways. There must, therefore, be a reason that the non-state institutions continue. In some cases, state institutions are inaccessible in some way, or are viewed to be less predictable than customary or local institutions. While we cannot ascertain from this research precisely why different institutions *emerge,* higher scores in the five areas of evaluation enlighten us as to why non-state institutions *persist.*

These evaluation criteria are taken from published literature in political economy, yet the principles they reflect have been articulated in interviews with people across our research sites in Ghana, Kenya, and Uganda. For example, effectiveness and accessibility

are two characteristics of good institutions. The need for both is exemplified in the following statements from citizens in a slum area of urban Nairobi regarding why they would not go to the government Rent Tribunal (the appropriate legal institution) with a case:

> The Rent Tribunal can take two, three, five years. The landlords prefer the shortcut of the chief because if the case is in court, you might refuse to pay your rent for that period of time. So the landlords don't want cases brought there. Landlords don't like coming to the Rent Tribunal. When they go to the chief, you [the tenant] are knocked out (evicted). (HA 2007)

Another respondent noted that the government Rent Tribunal "takes long and there is that contribution," which the respondent estimated to be 500 KSH, well beyond his budget (SO 2007). In these responses we see both the issue of effectiveness and accessibility brought up as reasons why citizens might choose to avoid government channels of conflict resolution. These responses are examples of the resonance between the criteria selected from the literature to evaluate social institutions and people's stated opinions regarding their institutional choices.

Although these criteria were selected based on what would be the best evaluative measures of property-related institutions, they serve as a model for the evaluation of other social institutions in both content and design. The evaluative criteria are based on the experiences people have engaging institutions in a particular locality, rather than simply the presence of the institution or what its intention might be as articulated in law and policy.

As noted above, one of the most important qualities of a good property rights institution is its *predictability*. Whether a social norm or a statute law, predictability in terms of access and process is key. If a person owns a house and wants to improve it, she needs to know if she will own the house in three years; otherwise her benefit might not be worth the costs of making any changes or improvements. A property rights or enforcement regime such as a customary dispute

resolution process should assist people in maximizing their well-being by enabling long-term investment (De Alessi 2003; de Soto 2000; North and Thomas 1970; World Bank 1997). Certainty of possession raises the value of any property, and certainty in institutional structures is so important that scholars have argued that even corrupt regimes can garner international investment if they provide a predictable economic environment (Campos et al. 1999). Predictable conflict resolution institutions, whether they are state or customary courts, settle property disputes based on a set of criteria that are either stated (in law) or sufficiently obvious to the political community that they can plan their actions accordingly.

Second, in order to function well, social institutions governing property rights must be *accessible*. Courts, mediators, or mechanisms that prove too costly to reach in terms of money, time, or both are ineffective in resolving problems (Henrysson and Joireman 2009; Nyamu-Musembi 2003). Customary courts or conflict resolution mechanisms are often lauded for their accessibility (Connolly 2005; Kane et al. 2005). While national courts may be difficult to reach because they are only in larger towns, customary dispute resolutions are everywhere. Elinor Ostrom has noted with regard to common property regimes that "simple, local mechanisms, to get conflicts aired immediately and resolutions that are generally known in the community" can reduce the number of conflicts that exist and build trust in the community (Ostrom 2000). 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 (Greif 2006).

Third, social institutions must meet minimum standards of *equity* (Libecap 1991; North 2005). Those that work only for one ethnic group or exclude a particular segment of the society are undesirable. No institution will be perfect in achieving equity, as social institutions are composed of imperfect people who operate with their own biases. That said, the less biased an institution, the better it will be

able to serve everyone within a society regardless of the social location of the individual. Institutions using criminal gangs, corrupt officials, or others who solve problems based on the highest payment received from participants are also unacceptable based on standards of equity.

Fourth, any kind of allocation or enforcement regime must be able to serve its role authoritatively and completely. Resolutions that are temporary or eventually compel a different institutional choice are disadvantageous (Anderson and McChesney 2003; North 2005). For example, if a person goes to a traditional leader to resolve a dispute, but finds that the leader is unable to bring a resolution to the conflict and that it is necessary to take the case to court, the plaintiff has wasted his or her time and perhaps other resources as well.[7] Temporary solutions indicate the powerlessness or insignificance of the institution and may also become a cumbersome extra step in attempting to achieve a goal, whether it be land access or the resolution of a land conflict. I call this criteria *effectiveness.*

Lastly, social institutions are desirable to the extent that they do not rely on unrestrained violence (McChesney 2003; Weingast 1993). Violence can be a fast and effective solution to property rights allocation issues or disputes that arise over resources. Several of the chapters in this book document the use of violence to resolve property disputes, and we see this in other places around the world. However, the private allocation or enforcement of property rights through violence can both consume valuable resources and undermine the potential for economic progress (Anderson and Huggins 2003). Additionally, conflict resolution that occurs through violence can exacerbate, rather than resolve, disputes and can have other negative externalities. Therefore, *restraint* is an important characteristic of social institutions.

Using these five criteria—predictability, accessibility, equity, effectiveness, and restraint—we can assess the net benefit of different property rights regimes and institutions that resolve conflicts over property. Table 1.1 provides a rubric that notes how we might begin to measure each of these criteria on a continuum from low to

Table 1.1. 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 clearly defined up front. Needed documentation is obvious. Nature of decision-making process is clear.
Accessibility	Not affordable for the average person either due to fees or unpredictable necessary payments. 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.	Fees are affordable for the average person, proximate venue to people who will be accessing the institution or service.
Equity	Only serves the needs of a relatively small percentage 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.

high. These measures can be applied more widely to other types of social institutions such as policing and service provision. The model of creating a meta-analysis for assessment of institution is also useful beyond the study of property rights and the institutional choices in Ghana, Kenya, and Uganda.

MAP OF THE BOOK

The following chapters address some of the key issues of property rights and their enforcement in Sub-Saharan Africa. Chapter 2 provides a context for what we know about property rights, examining the issue of customary property in Africa in the pre-colonial and colonial periods and how customary property regimes persist in the current era. There is an extensive literature on the conflict between statutory law, customary law, and other norms of behavior that might construct the rules of property in any given society. Rather than focusing on the sources of these differences, I examine what is happening on the ground where law is enforced and certain people have control over resources while others do not. By examining what is enforced and for whom, we find instantiations of property rights that reveal critical issues of authority and practice. Examining the locality also reveals a wealth of privately ordered institutions, some of which are exploitative and undesirable.

Customary law and statute law are separate arenas of power for the articulation and adjudication of land rights in Africa. They overlap and sometimes conflict, creating a situation of legal pluralism. Additionally, there is often confusion as to which body of law applies where. Under these circumstances, what does it mean then to implement new property law in an environment in which any new statute will not apply to the vast majority of the land in a country? Moreover, customary tenure is dependent on customary law and customary leaders to articulate and enforce it. Customary leaders often have their own interests to pursue, contrary to the agenda of the state. The

chapter identifies winners and losers from customary law and tenure and discusses its future and effectiveness.

One of the most significant group of losers under customary tenure and law is women. While women may have full citizenship and economic rights protected in statute or public law, under customary law they rarely have autonomous rights to land and can face significant challenges in defending the use rights that they can claim. Chapter 2 ends with an assessment of customary law and the role of customary leaders against the evaluative rubric. Not surprisingly, one of the weakest areas for customary law is that of equity because of the differential property rights of men and women under customary systems of land tenure and law.

Land is so important that where there is no clear institutional control of it by either customary authorities or by the state, we see other institutions organically developing to control access and enforce the property rights that exist. The second half of the book examines institutional development where the state is too weak to allocate and enforce property rights. In chapters 3, 4, and 5, three types of organic property rights enforcement mechanisms are discussed. Chapter 3 tackles the issue, pervasive in Sub-Saharan Africa, of bureaucrats operating outside of their area of responsibility. I identify multiple examples of bureaucrats taking on a role in the allocation and enforcement of property rights that is either explicitly prohibited by law or not within their normal set of responsibilities. Attention here is given to the role in Kenya of chiefs who have been specifically forbidden from adjudicating property disputes, yet do so with frequency in both rural and urban areas. Chapter 3 will also examine the role of Ugandan elected officials who act as judges and registrars of land, in spite of a recent law providing alternative formal mechanisms for doing so. I assess the social welfare maximization of bureaucratic entrepreneurs according to the five criteria presented above and note that while at times it is clear that bureaucrats are demonstrating venality, in other contexts their role might be considered helpful.

Some substitutes for the state, such as mafias and warlords, are an obvious threat to public safety; other state substitutes are more innocuous. Chapter 4 examines the role of nongovernmental organizations in enforcing law when the state does not do so. It has long been accepted that nongovernmental organizations have taken over the role of the government in spheres of health and education in Africa. Here it is argued that we are increasingly seeing NGOs active in the legal and law enforcement sphere, particularly when it comes to enforcing property rights that exist in public law but are impeded by customary or traditional authorities. Using examples from Uganda, the chapter shows how NGOs can fill in for the state in educating people about property rights and even in enforcing property rights that exist in law. These examples both contribute to the understanding we have of nongovernmental authority vis-à-vis the state and demonstrate a private response to state failure or weakness.

The role of criminal gangs, private security firms, and other "specialists in violence" in administering territory in Africa has been the subject of much scholarly research in the past decade. Chapter 5 begins with an examination of the privatization of security at multiple levels and then narrows to the role that private security companies play in filling in for the lack of state authority in oil-rich regions of the continent. The second part of the chapter addresses the unique problem of property protection by specialists in violence in Accra, Ghana, where young men called Land Guards act informally to secure property rights from encroachment. The role of the Land Guards as an informal innovation to fill the need for security of property rights will then be assessed according to the five criteria we can use to evaluate institutions: predictability, accessibility, effectiveness, equity, and restraint. The chapter concludes with comments regarding our current understanding of the political geography of power in Africa and the Weberian understanding of the state.

After examining these three alternatives to state enforcement mechanisms(bureaucratic entrepreneurs, NGOs, and specialists in violence), I address their competition with the other existing "legal"

system—statute law and the enforcement mechanisms that go along with it—in chapter 6. Examining the issue of property rights enforcement in urban Nairobi's largest slum, Kibera, Rachel Vanderpoel and I present evidence of all three non-state systems of property enforcement existing as alternatives to the state system in the same time and place. Intense urbanization in many African countries over the past decade has led to the development of areas and populations that are geographically proximate to the center of power (indeed, within the very centers), yet as notably beyond state control as the geographic hinterland. Urban informal settlements like Kibera are creating pockets of statelessness within capital cities that often have neither formal political representation nor basic public goods. This chapter speculates as to why these pockets of statelessness persist and why attempts to title and enforce property within them have been bypassed.

A simplistic understanding of property rights ignores the complexity of rights and vested interests already in existence, the measures needed beyond the creation of law or legal rulings in order to change existing property rights, and the difficulty of enforcing property rights, not just in rural areas, but in urban areas as well. When we examine the areas of Sub-Saharan Africa where property rights are controlled by statute law, how many people actually have property rights defined and protected by law? How many can get these property rights enforced by the police and by the courts? Few indeed. Secure and enforced property rights are important for poverty alleviation, but the path to achieving them is far from straightforward.