



## Changing Property Rights: Reconciling Formal and Informal Rights to Land in Africa

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### VIII.1 INTRODUCTION

Policy planners in Africa confront an intriguing puzzle. At the same time that many African societies are changing social norms and indigenous rights in property to more individualistic systems approaching privatization, we find increasing numbers of societies backing away from government sponsored formal systems of freehold land tenure. Even more curious, we often find that the very same societies that evolved indigenous privatization are now shunning government programs. Obviously something about the supply of formal rights imposed by governments is not meeting the demand for property right change at the local level. Some simple economic explanations provide partial answers: the transaction costs of the registration process are high and lagging markets in essential complementary factors of production (particularly capital) may be constraining growth rather than land. But these explanations are not the whole story. Most agricultural production in Africa is still kin-based and highly risky. Lineages are not just kinfolk, they share some of the characteristics of corporations: they cooperate in labor, risk management, and investment. Fundamental to the high level of trust and cooperation that such systems enjoy are basic guarantees of subsistence in the short run—through access to land—and the long run—through inheritance of that land. Property right changes that violate this complex of complementary interdependencies are doomed to fail. One need not interpret this failure as violation of a sacred “moral economy”; one can as well impute a cost-benefit calculus to farmers’ demands for property rights. But one *must* include in this equation the costs and benefits as they are realized by the farmer, that is, filtered through the calculus of kinship. The fit between formal and informal institutions is key to the farmer’s success.

New institutional economists have long appreciated the significance of the role of institutions in economic performance (Eggertsson, 1990; North, 1981). Over the years the challenge to be all-inclusive has moved further from the domain of institutions with obvious bearing upon economics, such as property rights (North and Thomas, 1973), into the realm of informal social institutions (North, 1990), and finally culture itself (Denzau and North, 1994; Greif, 1994; Putnam, 1993). Anthropologists should applaud this trend, as it not only highlights the significance of their comparative advantage in the stock of knowledge, but it also reiterates the position taken by many of them, including the substantivists who debated the formalists in the 1960s. North (1990) brought informal institutions to the fore because they are important constraints on economic behavior—they both determine the calculus through which the all-important incentives of formal rules will affect choice and they provide for much of the enforcement that is essential to any economy. In North's words (1990, p. 36),

formal rules, in even the most developed economy, make up a small (although very important) part of the sum of constraints that shape choices; a moment's reflection should suggest to us the pervasiveness of informal constraints. In our daily interaction with others, whether within the family, in external social relations, or in business activities, the governing structure is overwhelmingly defined by codes of conduct, norms of behavior, and conventions. Underlying these informal constraints are formal rules, but these are seldom the obvious and immediate source of choice in daily interactions.

The need to better understand informal constraints is highlighted by the fact that

the informal constraints that are culturally derived will not change immediately in reaction to changes in the formal rules. As a result the tension between altered formal rules and the persisting informal constraints produces outcomes that have important implications for the way economies change."

(North, 1990, p. 45)

This last point is beautifully illustrated by the evidence of formally imposed private property rights in African land. An examination of the process of land tenure change in Africa clearly reveals the importance of *complementarity* between informal and formal institutions. When formal systems are imposed upon a society with which they are out of accord, self-enforcement may erode and externally engineered incentives may fail to yield the predicted results.

Africa provides a fascinating laboratory for testing theories of property rights. The vast majority of the continent still recognizes customary rights to land (generally in the form of commons in pastoral areas and lineage or chiefly control in farming areas), but there is also no shortage of experiments in government and locally initiated privatization. Yet at the same time that new government initiatives furthering privatization are underway,

there is increasing evidence from anthropologists and Africanists (Fleuret, 1988; Haugerud, 1983, 1989; Okoth-Ogendo, 1986; Shipton, 1988) that even the longest running national privatization efforts are unraveling, reverting to customary rights, and show few, if any, investment and productivity benefits over indigenous systems (Bruce and Migot-Adholla, 1994). Does this mean, as one might conclude by reading between the lines of the anthropologists' reports, that Africans are communitarian and privatization is just inconsistent with their values, social norms, and social organization? Perhaps to a degree, but this ignores the forces of demographic and economic change, which have driven changes in those very same values and social norms and have led to indigenous movement toward greater privatization in the absence of state programs. But the alternative is not to conclude that freehold property rights can be simply transplanted in Africa. Imported property rights are often poorly matched with the demand driven by the costs, benefits, and preexisting distribution generated by local institutions. As many anthropologists have noted and new institutional economists have accepted, "Property rights are always embedded in the institutional structure of a society, and the creation of new property rights demands new institutional arrangements to define and specify the way by which economic units can cooperate and compete" (North and Thomas, 1973, p. 5). As a consequence, when not properly embedded, new rights become unimplementable and unenforceable. As Eggertsson (1994, p. 19) put it, "The weakness of property rights analysis is its limited understanding of informal institutions, how they evolve and how they relate to formal institutions."

We know a great deal about African land tenure in the colonial, post-colonial, and contemporary eras. The cases are sufficiently numerous and detailed for us to make some real headway in understanding the place of property rights in African development and even to make some suggestions for policy implications. A recent volume (Bruce and Migot-Adholla, 1994) of quantitative studies on the effects of tenure security on agricultural performance also provides us with much needed cross-cultural work from a unified and rigorous framework. I shall argue in this chapter that the basic assumptions of property rights theory (Demsetz, 1967, p. 350; North and Thomas, 1973) are correct—as relative prices change (perhaps through demographic pressure, expanded commercial opportunities, or new technologies), new social norms and property rights emerge to internalize the beneficial and harmful effects and adjust to the new cost-benefit position. There is strong evidence that under these conditions of changing relative prices, African societies have moved toward increasing exclusivity of land rights since before colonialism. Some even go so far as to see a convergence in this direction (Bruce, *et al.*, 1994, p. 262). But Demsetz (1967, p. 350) also reminded us that the gains from property right change must exceed the costs in order to justify change. Further, for new property rights to exist, the

owner must possess "the consent of fellow men to allow him to act in particular ways. An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specification of his rights" (p. 347). Increasing evidence from Africa is calling into question both of these conditions: (1) whether the gains of new property rights justify the transaction costs and (2) whether the fit between customary tenure, social norms, and the new property rights is sufficient to lend legitimacy to their enforcement. If these conditions are not met, then privatization and titling do not necessarily yield more secure property rights. To understand why this is the case we must examine the cost-benefit structure of property rights and the incentives they provide in the social context.

Imposed property rights are not endogenous, and as a consequence, they may fail to "connect" with other complementary indigenous norms and institutions. This is evidenced in Africa today in the most extreme case—when people with title deeds place so little value on them they do not bother to update their own titles, thus yielding a failure of self-enforcement.

In this chapter I begin by tracing the evolution of indigenous property rights in the absence of formal land tenure reform. The evidence provides strong support for the proposition that social norms and institutions respond in ways economists would predict to exogenous changes in relative prices. The trend in Africa also appears to be well established in the direction of increased privatization. I turn next to the evidence of the effects of land titling on investment in the land and agricultural productivity. Here the evidence is not so simply explained, as titling does not appear to lead to positive gains in economic performance. Next I examine the evidence that formal titling in Kenya, the country with the first and most comprehensive titling program, is unraveling. Evidence indicates that part of the failure can be attributed to the transaction costs of maintaining the titling system and lagging factor markets in capital and labor. But I shall argue that there is equally compelling evidence that the formal system is conflicting with the needs and interests of farmers as defined by their current production strategies founded on largely lineage-based systems. Finally, I consider the Kenyan government's response to these failings and discuss the implications for the theory of property rights and institutional change more generally.

## VIII.2 CUSTOMARY LAND TENURE IN AFRICA

One of the most interesting findings from a survey of indigenous systems of land tenure in Africa is the degree of similarity one finds in land tenure across comparable agro-climatic zones on the continent (Migot-

Adholla and Bruce, 1994, p. 5; Migot-Adholla *et al.*, 1994a, p. 99).<sup>1</sup> One can capture the underlying principles of a few general types relatively simply, which is surprising on a continent made up until recently of over 1000 independent ethnic groups with autonomous institutions. A common characteristic in almost all African customary systems is for use rights to be assigned at the household level, whereas transfer rights are assigned at a higher level such as the lineage, clan, or chiefdom (Matlon, 1994, p. 65).

The major types of land tenure in Africa can be crudely lumped into common property (managed either by all members of the ethnic group or some recognized large subset), lineage controlled, and chief-controlled. Typically one finds common property where land is used by hunters and gatherers or pastoralists. Such areas are generally arid and have low population density, rendering more restrictive control costly due to the high transaction costs.

Lineage or clan control is especially prevalent in Africa. Generally the person who cleared the land first is entitled to use it and pass it down to his descendants (through the male line in patrilineal systems and through the sister's son in matrilineal systems). Over time, such lineages become large, as do the areas of land that they control. Generally, the head of the lineage has authority to allocate land to those with need, thus there is a tendency for land to be relatively efficiently matched in people-land ratios.<sup>2</sup> This system also affords the easy accommodation of newly married wives without necessarily having to deprive existing wives in a polygynous household. Typically a husband allocates each wife (or son's wife) separate parcels over which she has near complete control in farm management decisions. Upon the death of the father it was typical for the land to be subdivided among sons or for the eldest or youngest son to inherit the fathers' land, whereas the lineage allocated unoccupied land to the other sons. Until relatively recently, and still in many parts of Africa, frontier land was available. Once lineage lands became inadequate, sons set out to the frontier to break new ground and begin the process once again. The lineage system puts a premium on *use* of the land rather than transfer rights. Those who fail to use the land risk losing it.<sup>3</sup> In some areas this provided people with an incentive to plant cocoa and coffee very sparsely over the plot, not for their economic

<sup>1</sup> For a recent overview of African land tenure, see Shipton (1994).

<sup>2</sup> Matlon (1994; p. 47) demonstrated that this by no means ensures equality even under customary tenure. He found that average holdings varied by four-fold per capita in Burkina Faso. This was a result of historical sequencing and political influence. On the other hand, despite high population density, Blarel (1994; p. 78) found that in Rwanda the incidence of absolute landlessness was rare under customary tenure.

<sup>3</sup> Matlon (1994; p. 54) noted that in Burkina Faso as land pressure increases people fear to lend land for more than one season.

value but in order to lay claim to the land (for Cote d'Ivoire, see Koby, 1979; Cameroon, see Levin, 1976; Zanzibar, see Middleton, 1961, cited in Feder and Noronha, 1987, p. 153). Once the frontier was gone, social norms sometimes changed to allow for equal shares to sons, and this has necessitated the subdivision of parcels.

In more politically centralized African societies that had chiefs, paramount chiefs, and kings, transfer rights in land ultimately rested with the central authority, who allocated use rights to households. When land failed to be used, it reverted to the control of the centralized authority. Such systems shared many of the attributes of the lineage systems, but they were open to more widespread abuse by higher authorities once land became salable (see Firmin-Sellers, 1966, for Ghana). One distinguishing characteristic of most of these systems is that prior to colonialism and the advent of cash cropping, land was rarely if ever recognized as a commodity over which individuals could sell their rights. But another general principle of such systems was enormous flexibility to respond to a wide range of shocks. Far from being conservatively timeless and unable to change, indigenous systems were dynamic and responded in quite predictable ways to the forces of demographic and economic change.

### VIII.3 ENDOGENOUS DEMAND FOR PRIVATIZATION IN AFRICA

Just as there appears to be consistency in the form of land tenure rights across Africa, with the least-privatized systems found in the sparsest environments with the lowest population density and least commercial value, so too were there patterns in the transformation of indigenous systems. In general, we find evidence that areas with the highest population pressure, the greatest returns to commercial agriculture, and the greatest accessibility to technological advances, moved most quickly in the direction of exclusivity of some rights if not outright privatization (cf. Boserup, 1981). In many, if not all cases, this was accompanied by complementary changes in social norms and social organization, which restricted the size and obligations of the kinship group (cf. Hecht, 1985; Parkin, 1972). What is more, this trend is apparent both in pastoral areas making the transition from commons to some form of relatively small group or individual control, and in farming areas making the transition from lineage or chiefly control to individual tenure. One must bear in mind, however, that such transitions are still the exception in Africa, and more classic commons and lineage land rights still prevail in most areas. Nevertheless, the tendency for property rights to move in the direction of exclusivity with the increasing value of land is clearly consistent with, and provides powerful support for, the theory of

property rights as elaborated by North and Thomas (1973) and Demsetz (1967).

It is worth examining some of these cases of endogenous change in property rights in order to better understand how property rights change in Africa. One should bear in mind though that land "sales" did not always mean the same thing, nor did incipient privatization of land represent the same bundles of rights in Africa as it did or does in Europe (Berry, 1988; Okoth-Ogendo, 1986).<sup>4</sup> For example, among the Kikuyu, Meru, Mbeere, and Luo of Kenya, land "sales" appear to have been accompanied by an understanding of redeemability on the part of the seller (Brokensha and Glazier, 1973, p. 191, Coldham, 1978; Glazier 1985, p. 200; Homan, 1963, pp. 226-229) and sometimes required the approval of members of the landholding lineage (Brokensha and Glazier, 1973, p. 191).

Perhaps the earliest examples of land sales come from Ghana, where commercial crops such as palm oil led to the development of a land market even prior to colonial rule (Feder and Noronha, 1987, p. 154). There is also evidence of land sales in Nigeria prior to colonial rule in 1861. Further evidence of an indigenous land market comes from the densely populated areas of Kenya including Kikuyu-land prior to the turn of the century (Leakey, 1977; Muriuki 1974, p. 70), Taita before colonialism (Fleuret, 1988, p. 14), Luo before World War II (Coldham, 1978, p. 95), and in the coffee and tea zones of Mbeere and Kisii well before national land litigation (Brokensha and Glazier, 1973). The Taita and Luo cases are especially well documented in that we have cross-sectional data from within each group showing that the more populated areas involved in cash crop production changed their property rights first. In Tanzania land sales were also common in the areas most involved in commercial production. Dobson (1954, cited in Ault and Rutman, 1979) found that among ten Tanzanian societies, those with individual rights were the ones experiencing land pressure. Hailey (1957, cited in Feder and Noronha, 1987, p. 155) reported that among the Sambia of Tanzania land sales did not even require the consent of kin. In one of the richest studies of this process, Netting (1965, 1968) provided an analysis of two sites over time. The Kofyar of Nigeria who farmed intensively on the plateau had individual ownership of plots, whereas in the areas where the same ethnic group practiced shifting cultivation there were no individual rights. By the 1980s when the Kofyar were also farming the plains intensively, they had developed a market in land there as well

<sup>4</sup> Berry (1988) discussed at length the issue of multiple and overlapping bundles of rights in land, as well as the symbolic battles over "meaning" associated with property rights in Africa when these rights are altered. Barzel (1989) provides a theoretical framework to understand why some rights are specified, and some are not in different contexts and cost environments.

(Netting, 1993). Colson (1971) documented the same trend associated with increased commercialization in southern Africa.

Interestingly, the pressure for land privatization was so great that a land market developed in some areas, even though it was expressly outlawed under colonial rule. In some areas where active land markets were operating prior to colonialism, they were stopped by the colonial authorities; this was the case among the Sukuma of Tanzania, whose pre-1891 land market was stopped after the German occupation (Malcolm, 1953, p. 12, cited in Feder and Noronha, 1987, p. 155). In Kenya the colonial government engaged in a debate over whether to contain the indigenous pressures toward individual rights among the Kikuyu by shoring up communitarian institutions such as the council of elders. Others argued for allowing the continued development of individualism in social norms as well as property rights as a necessary precondition for economic growth (Chanock, 1991, pp. 72-74; Sorrenson, 1967, pp. 52-71). Eventually, the colonial government of Kenya led the way in national privatization (see below).

In a nicely documented case of the development of an indigenous land market in the Ivory Coast, Hecht (1985) described the process whereby the Dida made the transition from lineage-based rights to individual rights in the cocoa-growing zone from 1940-1980. This is an especially interesting case as it involves the transfer of land to immigrants or other "African strangers." In many of the examples discussed previously, the transfers were within ethnic groups, but it is arguably far more difficult to secure property rights and contracts across ethnic groups, at least in the absence of commonly shared national institutions. Yet the Dida managed to do this without the formal recognition or backing of the Ivorian government (Hecht, 1985, p. 333).

Hecht's description is valuable because of the detail he provided on the changes in social organization that preceded the changes in property rights. Under the pressures of export crop production, Dida lineages began to fragment as brothers split into separate families and sons kept their wages for their own nuclear families rather than turning them over to their fathers or the head of the lineage. Hecht (1985, p. 324) reported that

Marriage transactions ceased being a lineage affair and took on an individualistic character, with young men arranging their own matches.

Local attitudes and practices related to land followed this larger pattern of change in the rural economy. Before 1945 planted, fallow and virgin forest land alike was all viewed as part of the lineage patrimony; membership in the lineage and use of lineage land were synonymous. After the second world war, however, land began to be regarded as belonging to individual conjugal households, independent of lineage affiliation, and subject to purchase and sale only by the conjugal units directly involved in the transaction.

Although most of the instances of indigenous development of land markets occurred as a consequence of land pressure or recent commercialization, Allan (1965, p. 369) provided an example driven by technological change:

In the maize-growing parts of the southern and central provinces of Northern Rhodesia cash transactions in land have emerged in the form of payments for improvements, a development which appeared first among the Plateau Tonga with their comparatively long history of plough cultivation and maize marketing. Where the plough is used land must be stumped, at much greater labour or cost in wages of labour than in the case of normal hoe cultivation. Stumped land thus acquires a special value, easily assessed in money terms, which is independent of the scarcity or abundance of land in general. Nowadays when land is transferred, payment is commonly asked for the value of stumping and for such other permanent improvements as houses, out-buildings, wells, fencing, and fruit trees. This practice is not confined to the land-hungry Tonga: a very similar pattern of payment for improvements has appeared among the Soli and Sala and other comparative newcomers to the maize market who are not yet short of strong and fertile land. On the other hand, cash transactions in land appear to be unknown in the greatly overcrowded lands of the Ngoni where the plough is not used and land is not stumped.

National programs for formal land titling are still the exception rather than the rule in Africa. Consequently, we find the same pressures at work today for change in indigenous property rights that have prevailed in some parts of Africa for at least 150 years (Migot-Adholla et al., 1994a, p. 102). One gets a flavor for the more contemporary era from the following passage in Feder and Noronha (1987, p. 155):

Independence has not put a stop to land transactions. In Tanzania, Pitblado (1981) reports that in one village in the North Mkata Plain, some 16 percent of land was acquired by purchase; in another, the figure was 36 percent. In Lesotho, where land cannot be legally sold (and where urban and rural lands have equal value in the eyes of the law), Mosaase notes that as a result of land scarcity 'a clandestine land market had developed and the indiscriminate selling of arable land for residential and commercial sites has become uncontrollable' (1984, p. 90). In Mali, land is inalienable in theory. In practice, though, sales of less fertile lands to stronger farmers take place, even though it is difficult to obtain data on such sales. In Niger, sales of land are increasing, although indigenous rules say that land cannot be sold (University of Arizona, 1979). Ega's (1979) survey of three villages in Zaria, Nigeria, showed that 18 percent of those surveyed had obtained their lands by purchase. He notes that 'there is a significant prevalence of illegal commercial transactions in land and considerable mobility of land. In particular, purchase has become an important means of acquiring land' (1979, p. 291). Of the Volta region of Ghana, Nkonya says that 'outright purchase . . . is becoming more and more common these days'.

(1974, p. 4)

Some recent quantitative studies are also evidence that commercialization and population pressure continue to provide incentives for indigenous change in property rights. Migot-Adholla and colleagues (1994a) found that although all three regions they studied in Ghana are highly commercialized, the one with high population pressure had 82.5 percent of "complete transfer" parcels (defined as the highest tenure security) as opposed to 76.7 percent and 70.3 percent in the other two regions. The effect of commercialization on privatization was demonstrated in a Rwandan study (Blarel, 1994), where in two regions of comparable population density, the one with greater commercialization had 81.5 percent of permanently held parcels with "complete transfer" rights as opposed to 57.6 percent and 46.7 percent in less commercialized regions.

Although pastoral lands are considerably less developed in many parts of Africa, one sees similar trends in areas where population pressure, commercialization, or technological advances have provided an incentive to privatize the gains from investment. One of the best-documented instances of the move toward greater exclusivity of rights on pastoral lands comes from Peters' work (1992) among the Bakgatla of Botswana. This is one of the most technologically developed pastoral systems in Africa, where diesel-powered boreholes are common and there is beginning to be talk of fences. Peters (1992, p. 414) reported that the push to introduce private property in water supplies (which determine access to land) began in the early 1930s, following the drilling of deep bore wells in the late 1920s and early 1930s. Between 1936 and 1976 the human population increased nearly threefold while the livestock population increased nearly twofold, contributing further pressure for revised property rights. Particularly well-documented in this case is the parallel change in indigenous social organization. Syndicates own the boreholes, which effectively limit access to the land. Syndicate rules limit heirs to one son and place constraints upon the use of the range by dependents of members. Such limitations run in strong contradiction to African norms of large, polygynous, extended families where sons often have expectations of equal inheritance. In fact, it was also common among the Bakgatla for sister's sons to be treated as classificatory sons, but such relationships are disappearing under resource pressure. Peters (1992, p. 421) noted how pressures have caused, "individuals and groups within syndicates to redefine conventionally accepted statuses and rules that govern claims to resources, and to reduce the degree of negotiability of those definitions. The outcome is a narrowing of the social orbit of syndicate organization and growing exclusivity." Peters (1992, p. 430) concludes that, "Changes in the relative economic costs of ranching compared with open-range herding, in the use of cattle to express and validate social or political links, or in the

diversity of use of available resources, are all likely to increase the trends toward exclusion."<sup>5</sup>

These cases of indigenous response to changing relative prices provide strong evidence of the ability of societies to adapt to exogenous forces. We see complementary changes occurring simultaneously in both social organizations and property rights. The complementarity of these simultaneous adjustments is crucial to their success in coping with both the constraints and opportunities of a changing world. I shall later argue that it is currently extremely difficult for top-down national mandates to achieve this same level of complementarity with informal institutions. The demographic and commercial changes that Africa is currently experiencing are of such a rapid and intense nature that some greater level of stability may need to be reached before imposed change can be effective. African social norms and informal institutions are currently a rapidly moving target. In this context, I turn now to an examination of the fate of one formal government effort at property rights change in Africa.

#### VIII.4 KENYA: A CASE STUDY IN LAND TITLING IN AFRICA

Given the many endogenous efforts at privatization around the continent in the precolonial and early colonial days, it is not surprising that colonial governments, and later independent governments, experimented with nationalized tenure programs. In Kenya at least as long ago as 1933,

<sup>5</sup> The Kgatla case is a more pure example of endogenously driven efforts to privatize pastoral common lands than are many others that are confounded by interethnic competition for grazing lands (for the Orma, see Ensminger, 1992; Ensminger and Rutten, 1991; for the Boran, see Hogg, 1990; and for the Maasai, see Galaty, 1980). One of the problems associated with commons when there is interethnic competition for the land is that the ethnic group is dependent on the state to enforce their common property rights against the claims of competitors. States have proven themselves to be particularly unreliable in this regard, perhaps because they are ambivalent about standing up for ethnic institutions (including those that manage the commons) while they are attempting in other arenas to downplay ethnicity and create a common national identity (Ensminger and Knight, 1997). Yet the failure of governments to defend the boundaries of ethnic commons effectively turns such commons into open access and a recipe for the ravages of overgrazing. As a consequence, we find an increasing tendency for pastoral populations to push for greater privatization in order to "pre-empt" other claims to their land. While Hogg (1990) for the Boran and Ensminger and Rutten (1991) for the Orma have argued that the endogenous forces for increasing privatization were also evident, it is all but impossible to separate out the independent effects of the external threat. In the Kgatla case, however, it is clear that it is the underlying demographic and economic forces that are driving changes in norms more of social organization and more exclusive definitions of property rights.

the Carter land commission heard evidence arguing that communal tenure was retarding agricultural development and some advocated private tenure in the interests of development. Belief in the efficacy of fee-simple property rights was also shared by the African leaders of newly independent states. President Banda of Malawi told the Parliament in 1967 that the absence of individual title was the main obstacle to development, "No-one is responsible for the uneconomic and wasted use of land because no-one holds land as an individual. Land is held in common" (Malawi Parliamentary Debates, 1967, cited in Chanock, 1991, p. 71).

Kenya was the first colony to initiate a nationwide effort to register land, known as the Swynnerton plan (1954).<sup>6</sup> Kenya has also experienced marked stability in government policy toward privatization, with the independent government of Kenya (since 1963) remaining deeply committed to land registration. As noted earlier, there were already areas in Kenya where customary tenure was moving in the direction of individualization and where land markets were developing. The Swynnerton plan attempted to speed up and formalize these efforts by imposing a system based on 1925 English land law (Okoth-Ogendo, 1986, p. 79). The consolidation and registration began in Kikuyu areas in the 1950s, and much of that area was registered by the end of the decade; Luo-land and Western Provinces were nearly completed by the mid-1970s. By 1981 more than 6 million hectares had been registered nationally (Barrows and Roth, 1990, p. 269). Okoth-Ogendo estimated in 1993 that 90 percent of all land in farming districts had been privatized.

The goals of the Swynnerton plan (1954) were to promote cash-crop agriculture by consolidating scattered strips into units of "economic" size,<sup>7</sup> securing titles so as to encourage investment in the land, facilitate the extension of credit by use of title deeds to secure loans, reduce land disputes, and ease transfer. In fact, the planners consciously anticipated that titling would facilitate the concentration of land in the hands of farmers better able to farm more profitably. It was understood and accepted that this would create a landless class, who were expected to labor on the larger farms and in industry. The intention was that once consolidation, adjudication, and registration were complete, land would no longer be subject to customary law and would resemble English freehold tenure (Pedraza, 1956; Sorrenson, 1967).

<sup>6</sup> For a discussion of the privatization efforts in Uganda and Zimbabwe, see Barrows and Roth (1990).

<sup>7</sup> "Economic" size was defined locally according to the carrying capacity of the land. Local committees seem also to have given some consideration to the potential numbers of people who would have been rendered landless if the size was set too high (Haugerud, 1983; p. 73).

Brokensha and Glazier (1973, p. 198) described the process of land adjudication in Mbeere:

Land adjudication committees, provided for in the Act, are to be established in each Sub-location, and will include at least one representative of each clan which has land claims, giving a total membership of twenty to thirty-five. Clans will select their own representatives. . . . The committees in conjunction with the demarcation officer must settle clan boundaries. In committee proceedings neither the traditional oath nor modern lawyers will be allowed.

Once clan borders have been determined and final maps drawn, the committee will then face its second Herculean labour, the hearing of cases on individual rights. This may prove to be less difficult for the adjudication committee than for the clan committee which has the task of deciding on individual grants of land. Men who are unsatisfied with their new plots can appeal to the adjudication committee.

A colonial land tenure officer of the day, Derek Homan (1963, p. 237) described the process of land consolidation under Swynnerton as follows:

Briefly, the whole process is carried out by committees of elders which first adjudicate as to the nature and extent of each man's rights to land in the area concerned, and then, after deducting a percentage from each for land required for 'public purposes' (roads, schools, markets, etc.), re-allocate all land in the area so as to give each man, in one piece, the equivalent of the total he previously had in a number of fragments.

Although Kenya's program is the best researched and most extensive in Africa, many other governments have attempted private titling, especially the Ivory Coast and Malawi, but with variations: Botswana, Cameroon, Ghana, Lesotho, Liberia, Mali, Senegal, Sierra Leone, Somalia, South African reserves, Sudan, Swaziland, Uganda, and Zimbabwe (Feder and Noronha, 1987, p. 150; Shipton, 1994, p. 365). Meanwhile, socialist regimes have attempted collectivized land tenure in Ethiopia, Tanzania, and Mozambique with fairly disastrous results (see Shipton, 1994, p. 365, for case study references). Nigeria and the francophone countries proceeded by first declaring all lands as the property of the state, thus undermining lineage and chiefly claims and leaving the way open for outright land grabs by elites (Shipton, 1994, p. 365).

Whereas those coming from a property rights tradition will easily discount the failures of socialized and nationalized efforts at land reform, explaining the unexpected consequences of the Kenya land reform and others like it (which most parallel the British system of freehold property rights) is more problematic. Not only have scholars failed to find strong evidence for the expected investment, productivity, and security effects from land titling, but there is considerable evidence of reversion to customary tenure in titled areas, even those areas that prior to titling were experiencing indigenous shifts toward privatization.



#### VIII.4.1 Evidence of the Effects of Land Titling

Bruce and Migot-Adholla (1994) just published a volume reporting on the effects of land tenure security in eight country studies from Africa. These articles represent four World Bank studies (Burkina Faso, Ghana, Kenya, and Rwanda) focusing upon indigenous customary tenure and the degree to which it does or does not discourage investment and limit increased agricultural production. Four other studies were carried out by the Land Tenure Center at the University of Wisconsin (Kenya, Senegal, Somalia, and Uganda) and focus on the effects of individualized tenure systems on investment and agricultural productivity. In a similar study, Feder and Onchan (1987) found a significant correlation between land titling in Thailand and improvements in the land in the form of bunding and clearing of stumps. In the Thailand study, titles were also associated with greater access to credit and higher capital formation in two provinces, but not in a third where informal credit was readily available. Given the positive correlation in Southeast Asia, it is particularly striking that in none of the eight country studies in Africa found unequivocal empirical support for any of the performance outcomes examined.

One of the tenure effects that these studies looked at closely was improvements in the land. Blarel (1994, pp. 88, 93) did find that Rwandans with higher tenure security improved the land more, but this was not correlated with higher productivity because the very poor (with less tenure security) have higher yields on short-term land. Migot-Adholla and associates (1994a, p. 107) found no effect in Ghana of type of tenure on land improvement. They suggest that this is because those without title already in fact enjoy the same security as those with title. In the World Bank Kenyan study by Migot-Adholla and colleagues (1994b, p. 137), they found that after controlling for other possible variables, neither title nor tenure security (operationalized independently) were related to terracing or perennial tree crop planting in three of the four in-country sites. In Somalia (Roth *et al.*, 1994, p. 224), titling had no statistically significant effects on investments in agriculture. The studies also considered the use of agricultural inputs, but like the effects on land improvement, the data were inconclusive at best (Bruce *et al.*, 1994, p. 255).

With regard to effects on agricultural productivity (Migot-Adholla *et al.*, 1994, p. 137), the World Bank Kenyan study found no effects of titles on yields in any of their regressions.<sup>8</sup> Furthermore, the authors noted (Bruce and Migot-Adholla, 1994, p. 255) that these findings, "cannot simply be dismissed as the result of noisy yield data, because the results for many other variables included in the regressions were satisfactory, both in terms of statistical significance and expected signs." In an analysis of the Ghanaian,

<sup>8</sup> The authors specifically suggested that this is probably related to the failure to use credit.

Kenyan, and Rwandan data sets together (Place and Hazell, 1993, pp. 16–18), the authors also found that with few exceptions land rights were not significantly related to whether farmers made land-improving investments or used yield-enhancing inputs. This led to their conclusion that either all current types of land tenure are equally constraining (which might be surprising given their variation) or that some other constraint is binding agricultural productivity (p. 18). The authors also noted that in the Kenyan case a possible explanation for the lack of difference between the customary tenure systems and the titled areas is that the titled areas have in practice reverted to customary tenure, thus eliminating difference in the independent variable. I turn now to this most curious and unexpected phenomenon.

#### VIII.4.2 The Unraveling of Formal Title Systems in Kenya

Given that many African societies have been evolving systems of more privatized land tenure since the colonial days, one might expect the formalization of these changes at the national level to have been well received and effective. However, there is considerable evidence, much of it collected in detailed case studies by anthropologists, that things have not gone the way they were expected to go.

Data are mounting that what is occurring on the ground bears less and less resemblance to what is documented in land registries. Typically, parcels are subdivided among sons without them having legal title to the plots. What is more, even once the fathers die, the succession claims are often not registered. A government officer named Homan (1963, cited in Coldham, 1979, p. 618) reported that in the early 1960s "after about four years of full registration in Kiambu District [arguably the most developed in Kenya], over 3,000 titles are still registered in the names of deceased persons." Coldham (1979, p. 618) himself observed that in East Kadianga (Luo-land in western Kenya) during 1966–1973, not more than 3.4 percent of successions (1 out of 29) had been registered, and in Gathinja during 1963–1974, not more than 21.4 percent (9 out of 42). Even more puzzling is the failure to register changes in title upon sale of the land. Coldham (1979, p. 618) reported that in East Kadianga during 1966–1973, "at least 30 per cent of all sales of land (13 out of 42) were unregistered, while in Gathinja during 1963–1974, the equivalent figure was 15 per cent (2 out of 13)." In Embu (Kenya), Haugerud (1983, p. 73) found similar evidence in 1979, 20 years after adjudication. Approximately 20 percent of her sample households occupied land registered in the name of an individual who was not a household member. Three-fifths of these (12% total) were living on land registered to a deceased person. She also found that refragmentation was common (1983, p. 74): 58 percent of sample households owned two or more parcels of land, 12 percent owned at least three parcels, and 6 percent owned at



least four parcels. She noted that this degree of fragmentation approached that of the preconsolidation era.<sup>9</sup> Another study of a site in Luo-land (Migot-Adholla *et al.*, 1994, p. 138) found that although 75 percent of the parcels in Kianjogu were titled, only 8 percent of the owners reported that they could be sold, thus implying that customary norms prevented them from doing so.

Mirroring many of North's (1990, p. 45) statements about formal and informal institutions cited earlier, Coldham (1979, p. 619) stated the situation regarding customary versus formal land tenure clearly in the following passage:

The fact that a title is registered, and that therefore the land ceases to be governed by customary law, is unlikely in itself to affect the behaviour of those concerned. Customary controls will continue to be exercised; customary institutions-like the 'redeemable sale' or the 'muhoi tenancy' among the Kikuyu—will continue to exist; customary rules and procedures governing the transfer or inheritance of land will continue to be observed.

The literature leaves little doubt that formal land titling is not having the intended effects of increasing agricultural investment and productivity by providing greater security, or even, given its failure to replace customary norms of succession and transfer, of creating a land market. Why?

#### VIII.4.3 Understanding the Failure of Land Titling in Kenya

I shall argue that the failure of formal land tenure change in Kenya is the result of the transaction costs of the registration process, the failure of complementary factor markets, and, especially, incompatibility with the all-important social norms and organizations without which people cannot produce or enforce anything. I stop short of the position taken by some Africanists, however, whose tone sometimes suggests that customary systems suffer none of these limitations. We have seen considerable evidence earlier that Africa has been and continues to experience enormous demographic and economic pressure on social systems and property rights institutions. Inheritance patterns are changing as land pressure intensifies, and these changes will drive further changes in customary land tenure. The real policy questions for Africa are when to leave customary systems to accommodate these changes and how to intervene if customary systems appear to no longer guarantee tenure security?

<sup>9</sup> Similarly, in Rwanda Blarel (1994, p. 89) found evidence that even shortly after registration land was being sold and subdivided without a record of the transaction being made or the "title" being updated.

#### Transaction Costs

The studies cited in Bruce and Migot-Adholla (1994), which fail to find compelling economic benefits as a result of land titling, certainly call into question whether the economic returns to society justify the transaction costs of the registration system. The costs from the point of view of Kenyan farmers themselves also appear to be prohibitive to some in both time and money.

Okoth-Ogendo (1986, p. 88, see also Coldham 1979, p. 618) describes the process of land registration as it related to succession, which under the original adjudication act was limited to five heirs. It should be borne in mind that in polygynous Kenya, which in the 1980s had the highest population growth rate in the world, men often had more than five heirs.

The administration of this qualification [that only five heirs may succeed to any parcel of registered land], however, was turned over to local chiefs and courts rather than to the indigenous institutions or in consultation with them. As a result, the system turned out to be patently absurd, for *inter alia* its implementation depended very heavily on the active co-operation of potential heirs, particularly in the transmission of all relevant information relating to property left by intestate owners. For example, they were expected to report to their local chief the death of persons from whom they expected to inherit land. The chief was then required to transmit that information to the local court for the issuance of a certificate of succession. In that certificate, the court was required to indicate who the heirs and their respective shares were and, where the number exceeded five, to determine who among them would be allowed to succeed and how the rights of those excluded would be dealt with.

To the extent that no provision was made for the participation of indigenous institutions, for example, family councils, clan elders, etc., in this procedure both at its reporting and allocative stages, it remained to all intents and purposes a dead letter. Besides, to the extent that the procedure was patently inequitable, it became the cause of a great deal of *de facto* subdivision that was not reflected in the register. It is not surprising, therefore, that so very few applications for certificates of succession ever came up to the local courts.

This passage by Okoth-Ogendo captures both the cumbersome nature of the bureaucracy, and also the unacceptable distributional consequences associated with disinheriting some of one's children.

Wangari (1990, p. 70), writing on the land registration process in Embu, Kenya, also pointed to the inadequacy of the administrative structure and the simple logistical problems for rural families getting to towns in order to keep up their titles. Such trips can be extremely costly in time and money, and those who have lived in rural Africa will appreciate the fact that every trip to a government office does not necessarily result in finding the appropriate official, much less accomplishing the intended objective.

Many of the costs of land registration are the same regardless of the size of the parcel. It is not surprising, therefore, that the owners of larger parcels maintain their titles more often than do the owners of small (Feder and Noranha, 1987). From their Kenyan study, Migot-Adholla and col-

leagues (1994, p. 133) reported that only 31.6 percent of households with less than \$400 annual income have titles, whereas 87.9 percent of households with income of more than \$2,250 per year have titles.<sup>10</sup> Time constraints, fees, and, in resettlement areas, the failure to have fully repaid purchase loans, may explain the variation by wealth in use of titling. Haugerud (1989, p. 84) for Embu, Blarel (1994, p. 90) for Rwanda, Migot-Adholla and colleagues (1994, p. 102) for Ghana, and Ault and Rutman (1979, p. 177) all suggested that the transaction costs of the registration process are not justified by the economic returns. The Land Tenure Center's comparative data (Bruce *et al.*, 1994, p. 256) estimate that survey and registration costs in smallholder agriculture run at least \$50 to \$100 per parcel, also calling into question the economics of this process from the point of view of African governments.

Although transaction costs are clearly a relevant issue, they are not the whole story. Large landholders do appear to believe that titling is worth the expense, implying that there is some value (at least to some categories of farmer) in the process of registration. I turn next to the subject of lagging factor markets, which have also been suggested by many people as an explanation for the failure of titling to have positive economic effects.

#### Lagging Factor Markets in Capital and Labor

If land is not the constraining factor of production, it stands to reason that more formal property rights will accomplish little and probably not recoup their transaction costs. One can assume that the original architects of the Swynnerton plan in Kenya believed that title deeds must precede the widespread availability of credit because commercial lending institutions would require collateral. However, as innumerable researchers have noted, the development of capital markets in Africa, even in land-adjudicated countries like Kenya, has not lived up to expectations (Collier, 1983). Barrows and Roth (1990, p. 276) made the cogent point that when capital is limited by other factors, titling will merely *redistribute* the inelastic supply.

Capital for agricultural investment is the key to the whole success of land registration. Titles were to provide sufficient collateral to open up commercial loans for investment in land improvement and purchase of necessary complementary inputs to raise agricultural productivity. The data on credit in Kenya are not altogether clear. Haugerud (1983, p. 83) reported that only 15 percent of titles from one portion of the Embu coffee and cotton zones had current loans charged against them. However, if one takes into account the fact that households had multiple parcels (46 percent with two, 6 percent with three, and 6 percent with more than four), we arrive at

an estimate of 26.4 percent of households holding loans in a given year—arguably a healthy credit market. This higher figure seems more consistent with the fact that Haugerud (1983, p. 83) and others have noted that the price of land is “inflated” in part due to the borrowing power that it confers. Highly pertinent, however, is the fact that many of these loans were not used for agricultural development, as has also been reported by others; loans often go for school fees, bridewealth, subsistence, luxury goods, or to purchase more land.

Shipton (1992, p. 374) reported a far lower rate of loans for Luo-land in Kenya. By 1991, 16 years after land registration, only 6 percent of the registered parcels had ever been mortgaged to any financial institution. Okoth-Ogendo (1986, p. 81) reported that in “Kisii and South Nyanza [Luo-land] districts, little more than 2 per cent of registered smallholders were able to obtain secured or unsecured credit in any single year between 1970–1973.” Migot-Adholla and associates (1994, p. 134) found a similar level of borrowing in their four Kenyan sites, where from 1987–1988 between 1 and 10.7 percent of households were currently borrowing. But of the 28 formal loans they recorded, only 12 were secured by land title. Citing Odingo's 1985 work, Barrows and Roth (1990, p. 275) report that he

found that farmers were reluctant to use land as collateral because of fear of losing it. About one-third of those sampled in Machakos had applied for credit, but very few had approached the commercial banks or used land as collateral. Only one per cent had sought credit in Nakuru.

In their quantitative Kenyan study in Njoro, Carter and associates (1994, p. 159) found that capital was the limiting factor constraint for small farms, whereas labor was the limiting constraint for large farms.

One of the most interesting questions raised by these findings is why titles have not led to an increase in the supply of credit. In order to address this question we must delve more deeply into some norms and social practices in African societies. This brings us to the general question of the complementarity between informal institutions and formal land law.

#### VIII.4.4 Complementarity between Formal and Informal Institutions Regulating Land

Property rights in Africa are intimately wrapped up with kinship relations and rights over people. As Watts (1993, p. 161) put it, “Rights over resources such as land and crops are inseparable from, indeed are isomorphic with, rights over people; to alter property rights is, as Robert Bates (1987) says, to redefine social relationships.” On the frontier, pioneers opened land as a means of attracting and controlling large numbers of dependents and followers (Kopytoff, 1987). African agricultural production was and is lineage based in most places. Formal land legislation conflicts with many of the social norms and relationships of production that are still crucial to agri-

<sup>10</sup> In Somalia (Roth *et al.*, 1994; p. 225) also found that whereas *all* large farms had title deeds, the same was not true of smaller farms.

cultural success. We have seen the effects of these conflicts in a number of the studies cited earlier; they fall into the following domains: consolidation was inconsistent with the ecological need for scattered strips and broke up cooperative work units, the restrictions on the minimal allowable "economic unit" and the limit on heirs was inconsistent with indigenous norms of inheritance, household composition was highly fluid over time, asymmetries in information were great and meant that the educated were able to manipulate the system and gain what was perceived by others as illegitimate advantage, and, finally, the new property rights reduced the rights of many over the customary system while enhancing those of the single titled "household head." To the extent that formal land tenure change failed to take account of these necessities of sound agricultural management, as well as "prevailing distributional norms" and the "vested interests they create" (Libecap, 1989, p. 116), it failed to take hold and became mired in dispute and, worse yet, disuse.<sup>11</sup>

#### **Lack of Ecological Complementarity: Fragmentation and Consolidation**

As originally conceived, the Swynnerton plan in Kenya put a great deal of emphasis on the consolidation of fragments into one "economic unit" per household. A number of authors (including Bates, 1989) have examined the political motivations of the colonial officials who promoted this practice. Although couched in the economic logic of efficiency and agrarian development, there is good reason to believe that consolidation also allowed the British to use land reform as a means of rewarding their friends, that is, the loyalists who fought against the Mau Mau during Kenya's war for independence, which also precipitated land reform. Although consolidation actually appears to have been welcomed later on in some politically less sensitive areas where it was also no longer an ecological necessity (Fleuret, 1988), the Embu experience is probably more typical. Haugerud (1983, p. 74) found that much of the work of consolidation had been undone by the time of her survey in 1979, by which time 58 percent of households had more than one parcel. Embu is an area with high ecological diversity, ranging from the rich tea zone on the slopes of Mount Kenya, through the lucrative coffee area, to the far more arid cotton zone in the low-lying areas that are also good for cattle and where land is less scarce. Historically, households have split their holdings as a form of insurance. Given the re-creation of this pattern, one can only surmise that it still offers benefits that outweigh the costs of travel and dual maintenance.<sup>12</sup>

<sup>11</sup> Watts (1993) has documented exactly such a case study for the Gambia.

<sup>12</sup> In the only quantitative study of which I am aware in Africa on the costs and benefits of fragmentation, Blarel (1994; p. 91) found in Rwanda that the labor loss of walking due to fragmentation is more than compensated by the gains; furthermore, analysis reveals that farm fragmentation is not related to yields.

Fleuret (1988, pp. 149–152) noted that in the Msidunyi area of Taita, where they do not have irrigation, there is a high degree of fragmentation, with the mean number of parcels at 13. Fragmentation is a risk management strategy and there was much resistance to consolidation. In the nearby Iparenyi area of Taita, in contrast, the climate is much more favorable to cash crops such as coffee and there is water for irrigation. As a consequence, agriculture is less risky, farms are less fragmented, and consolidation (along with adjudication and registration) were complete by 1967, only four years after the start of the program in that area. Nevertheless, Fleuret (1988, p. 149) noted an important problem associated with consolidation even in this area:

[Traditional irrigation is] highly dependent on kinship relations and on the expression of those relations in landholding patterns for its success, in particular the proximity of close agnates due to the partitioning of their father's holdings into individually held portions for each heir. But in Iparenyi, the act of consolidation has seriously disrupted the landownership pattern on which traditional water management rests. . . . Because the land reform program has as one of its consequences that close agnates no longer necessarily have holdings contiguous to one another, the basis for irrigation management has been transformed. Those who cooperate in such a system in Iparenyi now are business partners whose relationship is commercial rather than consanguine. Of the six existing systems, three are characterized by serious disagreements between the partners which inhibit the availability of water, and one has become privatized.

We see in this case a perfect instance of the trade-off between the economic rationale for consolidation (economies of scale) and the obvious increases in transaction costs due to the loss of kin connectedness that had benefited cooperation.

In a highly analogous situation, land adjudication among Maasai pastoralists has also led to ecologically unviable units under management regimes that have no basis for traditional legitimacy (Coldham, 1979, pp. 620–623). The Maasai were the earliest Kenyan pastoralists to be targeted with land tenure changes aimed at controlling overgrazing and the tragedy of the commons. Coldham (1979; 624) catalogs the misfit with indigenous norms as follows:

[The group ranch] introduces an alien system of land tenure: it creates boundaries which not only conflict with customary grazing patterns, but are the source of novel distinctions between members, invitees, and trespassers; and it establishes a new system of authority, and calls for the adoption of unfamiliar procedures based on election, representation, delegation, and the majority vote. In practice, as we have seen, the desired changes of behaviour have not occurred. The Masai continue their semi-nomadic existence in search of pasture regardless of ranch boundaries.

### **Lack of Complementarity with Social Organization: The Problem of Succession**

The Swynnerton plan placed a great deal of import on the need to maintain economically viable units of land, and thus it forbade the titling of units below a certain size (determined by local carrying capacity). The number of heirs was also limited to five to prevent rapid fragmentation of parcels through subdivision. As we saw earlier, one response to these limitations was for families to subdivide the land anyway and merely fail to register the subdivisions, thus undermining the entire exercise (Okoth-Ogendo 1986, p. 88). The conflict between the formal system and customary inheritance patterns was great, and in this instance, social institutions clearly out-survived formal innovation. As Coldham (1979, p. 617) noted, sometimes people were attracted to adjudication as a means to demarcate clear boundaries in areas where disputes were getting out of hand, but they did not intend to buy into a system that would also change their practices of conveyance.

Haugerud (1989, p. 70) made the important point that indigenous household composition was highly fluid and not well suited to the inflexibility of title deeds. Only 20 percent of the households in her sample were nuclear families, which fit best with land registration, while about a quarter of the sample households had considerable changes in membership over her 20-months of fieldwork. Domestic conflict changed the composition of 27 percent of the sample households by one or more members. One of the advantages of customary tenure systems, where transfer rights were retained by the lineage, was the ability to respond quickly and frequently to needs for the reallocation of land.

### **Lack of Complementarity in Distribution: The Problem of Asymmetries of Information**

In the early days of land adjudication in Kikuyu (Sorrenson, 1967) and Embu (Brokensha and Glazier, 1973; Glazier, 1985), there is considerable evidence that the educated elite took advantage of their position to secure far better and larger holdings than their less sophisticated kin. As Bates (1989, pp. 30–31) put it, the educated had strong incentives for changes in property rights, they faced lower costs in pushing legal claims, they spoke the language of the colonizers, and the colonizers were dependent on them for insight into local law and custom. Haugerud (1983, p. 79) described how mere knowledge of the implications of land registration and what was to come were used by the well informed to gain advantage. In the early days, before most people understood what was happening, an assistant chief, his father, and other elders of his clan staked out claims in lowland Embu where the population density was relatively low and rights to land more ambiguous than in the tea and coffee zones. Because of his office, the assis-

tant chief knew what evidence the land boards would consider legitimate for land claims, and the men were able to stake claim to much land prior to adjudication. These men wound up with parcels five to ten times the average size for that zone and also retained large claims in the richer zones.

As Libecap (1989, p. 28) warned, "Distributional conflicts will be intensified if there are known serious information asymmetries among the competing parties regarding the evaluation of individual claims." This was certainly the case in Kenya's past and quite likely in the present. Although the population of Kenya is today quite literate by African standards, there are still large numbers of illiterate farmers (more of whom are women than men), who are vulnerable in the courts as a consequence of their lack of familiarity with legal procedures and their lack of literacy. This is one argument for keeping as many adjudication decisions regarding land as possible closer to the village and out of the courts; in the village, information regarding claims will be greater and the playing field more level (all other things being equal).

### **Lack of Complementarity in the Distribution of Rights within the Household**

When property rights are changed there are always winners and losers. But it stands to reason that the closer the fit between the new and old systems, the less the injustice to prevailing distributions. Libecap (1989, pp. 3–4) suggested that the net social gains from changes in property rights will be modest specifically because the difficulty involved in resolving the distribution conflicts that result is so great. There is ample evidence from the Kenyan situation to support his argument.

We have already noted that the limitation on the number of heirs resulted in disinheritance. So abhorrent was this perceived miscarriage of social justice that households merely let titles lapse rather than disinherit family members. But there were other mismatches of rights between customary tenure systems and formal registration. Most notably, women do most of the farming in Africa, and under customary tenure they were granted considerable control over farmland in the form of usufruct rights and managerial control over the plots allocated to them by the household head. In the absence of a land market, women's access to and control of property was considerable. With land adjudication, this changed markedly. Land was now registered solely in one person's name and this was almost always the male household head. Only 5 percent of parcels in Kenya are registered in women's names, and rarely do sons have registered land while their fathers are still living. With the development of a commercial credit market and a land market, the potential now exists for titled heads of households to sell their land (or lose it through loan default) and thus extinguish all of the usufruct rights of women and the traditional lineage inheritance rights of sons.

Although the Kenyan registration process has always provided some protection for the interests of others against sale of land, the potential for mortgage foreclosure was not guarded in the original law. The protection against sale was built into the law in that the land boards, which had to approve land sales, were specifically entrusted to act paternalistically to look out for the best interests of the landowner and his or her family (Okoth-Ogendo, 1986, p. 84). This meant that they had the authority to reject sales (and frequently did) if they deemed them not to be in the interest of the family on the grounds that the land was the sole source of support for the family or that the remaining holding would be too small a parcel to sustain the family. The boards were also supposed to consult with other interested family members (especially wives and sons) prior to granting sale approval.<sup>13</sup> However, no such control over loss of land due to loan default was built into the system (Okoth-Ogendo, 1986, p. 85).

I would argue that mortgage foreclosure, while it is an emotive issue anywhere, has been especially so in Kenya because of the failure of formal land law to adequately capture the full range of customary rights in land held by other parties. The fact that one member of a family can unilaterally extinguish those claims has caused enormous outrage. This is but one of the many examples in Africa in which an inappropriate model based on the assumption of a unitary household utility function has led to unexpected consequences (cf. Guyer, 1981). Although it may be the most extreme case, the Luo are worth considering in this context, as it is a well-documented case of mortgage foreclosure.

Under customary tenure, Luo households were free to use the land, but a man could not transfer the rights of the lineage or his heirs by sale or gift to a stranger (Coldham, 1978, p. 94). Although Luo-land was one of the areas in Kenya that moved to greater privatization before land reform, land sales were rare and usually to clansmen. Shipton (1992, p. 380) explained that the Luo have a segmentary lineage system and each genealogy is literally reflected in the landscape by the pattern of burials on local farms. Like many African peoples, the Luo revere the ancestors, who are buried on the family plot. To the Luo (p. 375), "mortgaging the land is mortgaging the ancestors." Bank efforts to foreclose on land consistently meet with resistance or violence. People suspect that witchcraft is used against those buyers who try to settle but eventually leave (p. 377). As one woman commented, "If you want to make an enemy for life, mess with a dead Luo" (p. 377). Land auctions have often been canceled for fear of violence or political repercussion, and for 13 months the AFC suspended its loan recovery program altogether (p. 378).

Under these circumstances, it is not surprising that banks place rela-

<sup>13</sup> It is not clear how much local variation there was in practice concerning this stipulation.

tively little value upon title deeds as collateral for loans. They have learned that the prospects of foreclosure, at least in some areas, are too low to warrant the risk. Obviously this must affect the supply of credit and account at least in part for the failure of the anticipated increase in credit that was expected to flow from land registration. Thus, we see that what might appear as a "lagging factor market," has its roots more deeply in a failure of social complementarity between formal and informal norms and social organization. But is the root of the problem here really the segmentary lineage system of the Luo (as Shipton suggests) or the failure to properly acknowledge and give legal authority to the rights of all vested parties—namely, wives, widows, and sons—who may have had greater tenure security under customary law?

#### VIII.4.5 Government Response—Revision in the Formal Law

Over the years there have been efforts on the part of the Kenyan government to respond to many of the perceived failings of the original land law, but these have never resulted in reversal of the general trend toward greater privatization. Interestingly, changes in the land law have been consistently in the direction of greater fit with customary law.

In 1968 the land act was revised and, most notably, compulsory consolidation was abandoned (Okoth-Ogendo, 1986, p. 83). Given the highly political as opposed to economic motives for the original consolidation initiative under colonialism (see Bates, 1989), it is not surprising that this was one of the first inconsistencies with customary practice to go.

In 1972 the government also repealed the limit on the number of heirs who could inherit registered property (Sections 120 and 121 of the Registered Land Act, Government of Kenya, 1989, p. 58; see also Okoth-Ogendo, 1986). Although this constraint undoubtedly dissuaded some people from trying to register successions that would have been deemed illegal, its repeal by no means led to complete registration of subdivisions. Most of the studies cited earlier that documented the failure to register successions were carried out after the change in the law.

One of the most far reaching and potentially interesting changes in land law is still underway. In 1991, by decree, President Moi ordered that all land foreclosures must be approved by the provincial administration, a more cumbersome process than the courts (Shipton, 1992, p. 378). This formalized a policy that he had been promoting since the late 1980s in public meetings and the press. In the late 1980s an increasing number of mortgage foreclosures were making it into the popular press (Laban Gwako, personal communication). In populist fashion, the president made an issue of standing up on the side of the innocent who were rendered landless when kin defaulted on loans over which they had no control.

Wangari (1990, p. 92) cited a newspaper account from the most widely read Kenyan English-language paper (*Daily Nation*, June 21, 1989) that captures the tone of the president's position, and he specifically remarked on the failure of formal law to adequately account for customary law. On this occasion the president called upon the courts to "consider the traditional tenets of [a] particular society, especially when passing judgment [in] matters that affect land." At issue in this case was a foreclosure and sale of land due to the default on a large loan by the eldest son who inherited the titles to all of his father's land as trustee for his mother, her cowife, and his brothers. Due to the foreclosure and subsequent sale, all were rendered landless. President Moi personally refunded the purchase price to the new buyer and issued new title deeds to the one surviving widow and one son of each widow. The rest of the article describes the speech by President Moi upon his visit to the community:

#### Respect Traditions, Moi Tells Courts

President [Moi] said that through generations, people had acquire[d] traditional and social norms in which their lives were deeply rooted. He said that if written laws negated against the traditional aspects of life, or caused distress after failure to consider them, then injustice is done.

The president observed that this particular case was a classic example of acute suffering and haplessness of a family due to hasty judgments delivered without considering their wider implications.

President Moi said the ordinary people could easily be exploited due to their ignorance of legal technicalities adding that it was unfair to take land cases to courts.

He said the provincial administration and elders ought to consult and find the root cause of any land dispute with a view to solving the problem amicably.

The President added that in settling such a dispute, the traditional aspects of land ownership should be catered for.

This change in land policy is actually more significant than it may appear. Two things are happening simultaneously: more land transactions are being moved out of the courts and back to the local land boards and those boards are under more pressure than before to hear evidence from wives, sons, and other parties with legitimate customary rights in the land, prior to authorizing any land sale (Richard Kisiara, personal communication).<sup>14</sup> Both the movement of land cases from the courts to the local level, and the

<sup>14</sup> Richard Kisiara was carrying out research in Uasin Gishu District, Kenya in 1993–1994. He reported that title holders wishing to sell land had to bring their wives and sons to the chief, who wrote a letter to the land board in that location verifying that the sale was agreed to by the family. This, of course, does not prevent the intimidation of wives, which was common. In one case followed by Kisiara, the wife did refuse the sale, the chief refused to authorize it, and the wife was badly beaten by her husband.

increased emphasis on consent of the family in all land matters could represent subtle but far-reaching departures from past practice.

It was noted earlier that the educated elite have distinct advantages in the court system. At the village level, however, not only do those advantages diminish, but they have some actual disadvantages. As elites, their ties may be more solidly rooted in the urban areas and they may not be as versed in customary law as their less-educated kin who have lived their entire life in the village. The shift from the courts to the village-level also affects the level of information that is brought to bear on land cases. No one knows the facts better than those closer "to the ground."

There is much support in the theoretical literature for leaving control of property rights to local communities (Ostrom, 1990). One reason for this is that information is greater at the local level and this facilitates rapid synchronous adjustment (Ault and Rutman, 1979, p. 171) as well as better cooperation and easier resolution of disputes. We have seen that communities all over Africa evolved more private property rights without the intervention of national governments and these systems often functioned remarkably effectively. However, the same pressures that drive the choice of increased privatization often bring a dissolution of community and a failure of local enforcement (Ensminger and Rutten, 1991). Fleuret (1988, p. 142) reports that land disputes under customary tenure rose in Taita in the 1940s with the increasing value of land (cf. Coldham, 1978, p. 95). Brokensha and Glazier (1973) have a beautiful description of the demise of the traditional oathing practice, which was used by the Mbeere to resolve land disputes prior to adjudication. Increasing inequality in that community had undermined the traditional system. Once it was known that land adjudication was coming, people stored up their grievances for the anticipated land board that was to be put into place for land registration rather than use the traditional oathing ritual (which had lost effectiveness) or the courts (which they distrusted). Here we have a case where the indigenous system appears to have no longer been capable of handling the pressure of increasing land values.

## VIII.5 CONCLUSION

Anthropologists talk of the need for "contextual fit" in policy development (Shipton, 1992, p. 381), sociologists talk about "embeddedness" (Granovetter, 1985), and institutional economists talk about the need for formal institutions to build upon informal institutions (North, 1990). I suspect all of these theorists are talking to some degree about the same thing, but the abstractness of this language can obscure a great deal. There are, in fact, significant similarities and differences in the theoretical positions of all of these authors. I believe that by applying the concepts and theory to em-

pirical case studies we are better able to move the debate forward and clarify points of agreement and difference.

I attempt in this chapter to show that "contextual fit," or what I refer to as the complementarity between formal and informal institutions, really is crucial to successful property right change. But in my analysis I do not abandon a rational choice framework in which farmers make calculated choices concerning property rights under the constraints of prevailing distributional norms and their production systems. It just so happens that in Africa a large number of these constraints are connected to social relationships and kin. However, unlike some anthropologists, I am less persuaded that ideological issues such as attachment to the ancestors in the ground are such strong constraints on choice regarding major economic decisions such as those dealing with property rights. Violation of distributional norms, on the other hand, is a powerful motivation, perhaps too often overlooked by economists (see Knight, 1992). Equally, embeddedness does not for me mean resistance to change, as I believe is well brought out in the evidence of the indigenous narrowing of social orbits and embrace of privatization in the face of rising land values. For me, embeddedness means synchrony in change. During periods of rapid and intense exogenous shock, such as prevails in much of contemporary Africa, such adjustments may best be left to indigenous local institutions. However, there is ample evidence that these same exogenous shocks lead to increasing inequality and local heterogeneity, which eventually erode community and the cooperation, low transaction costs, and high self-enforcement that it affords (Taylor and Singleton, 1993). Once this occurs, indigenous institutions may no longer be able to cope effectively and could benefit from national formal institutions designed as carefully as possible to fit with prevailing relations of production and distributional norms. Identifying the proper point and means of intervention is obviously *the* challenge for policy planners, and it will demand a deep understanding of indigenous norms and local institutions.

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