

THE DYNAMICS OF PERI-URBAN LAND MARKETS IN SUB-SAHARAN AFRICA: ADHERENCE TO THE VIRTUE OF COMMON PROPERTY VS. QUEST FOR INDIVIDUAL GAIN

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With 3 figures and 1 table

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Summary: Sub-Saharan cities are currently experiencing the world's highest rate of urbanization. A vast number of people migrate towards the peri-urban areas, changing the use of the land and its ownership, which often implicates a change of the land tenure system as well. Peri-urban land markets are the most dynamic and most diverse in sub-Saharan Africa. The question is whether the different land tenure systems in Africa in the long-run converge towards private property or develop into a diversity of property regimes which might be more diverse than elsewhere. The article therefore analyses the changes in property regimes and land tenure systems which are forming current land transaction processes. What types of land tenure systems developed so far? Which property regimes are most in demand? Is there a general trend towards one specific property regime? Are there specific land tenure systems which only exist in sub-Saharan Africa? Based on this analysis, the article aims to identify which land tenure systems and property regimes fit best to meet current needs. Differing from earlier theories such as the Property Rights Doctrine and the Induced Institutional Innovation Hypothesis, the current institutional change in sub-Saharan Africa is neither a straight-forward transition from common to private property nor a self-acting and smooth process. It is rather characterized by insecurity of tenure and numerous conflicts as predicted by BOSERUP as early as in the 1960s. Although there is a trend towards formal private property, (neo-) customary common property provides for numerous advantages which are appreciated not only by the poor. Common property being so appreciated in sub-Saharan Africa, the author also investigates why over centuries it has been neglected by mainstream theories.

Zusammenfassung: Die Dynamik peri-urbaner Bodenmärkte in Afrika südlich der Sahara: Festhalten an den Vorteilen des Gemeinschaftseigentums vs. Streben nach individuellem Gewinn. Die Städte südlich der Sahara weisen derzeit das weltweit höchste Bevölkerungswachstum auf. Menschen migrieren aus dem ländlichen Raum, anderen Städten sowie den Kernstädten in die peri-urbanen Gebiete, in denen sie die Eigentumsstruktur und die Landnutzung von ländlicher zu städtischer verändern, was häufig mit einer Veränderung des Bodenrechts einhergeht. Peri-urbane Bodenmärkte sind die dynamischsten und vielfältigsten des gesamten afrikanischen Raums südlich der Sahara. Es stellt sich die Frage, ob die unterschiedlichen Bodenrechtssysteme sich langfristig einander angleichen und ausschließlich oder vorwiegend Privateigentum anstreben, oder ob sich eine besondere Vielfalt an Eigentumsformen entwickeln wird. In dem Artikel wird analysiert, wie sich die Bodenrechtssysteme und die Allokation der Verfügungsrechte verändert haben, die den derzeitigen Transaktionen von Grund und Boden zugrunde liegen. Welche bodenrechtlichen Systeme haben sich bisher entwickelt? Welche Eigentumsformen werden am meisten nachgefragt? Lässt sich ein Trend hin zu einer spezifischen Eigentumsform erkennen? Gibt es in Afrika spezifische Bodenrechtssysteme? Basierend auf dieser Analyse wird das Ziel verfolgt, die bodenrechtlichen Systeme und Eigentumsformen zu identifizieren, die die derzeitigen Bedürfnisse unterschiedlicher Bevölkerungsgruppen am besten befriedigen. Entgegen verschiedener bisheriger Theorien ist die derzeitige Entwicklung in Afrika südlich der Sahara weder eine gradlinige Transformation von Gemeinschafts- zu Privateigentum, noch ein automatischer und reibungsloser Prozess. Sie ist vielmehr von bodenrechtlicher Unsicherheit und zahlreichen Konflikten geprägt und hält in Teilen am Gemeinschaftseigentum fest. Obwohl sich ein eindeutiger Trend zum formellen Privateigentum abzeichnet, bieten das auf autochthonem Bodenrecht und den aus ihm hervorgegangenen post-modernen Varianten basierende Gemeinschaftseigentum zahlreiche Vorteile, die nicht nur von den Armen geschätzt werden. Dies lässt die Autorin der Frage nachgehen, warum Gemeinschaftseigentum, obwohl in Afrika südlich der Sahara so geschätzt, über Jahrhunderte in der Literatur so stiefmütterlich behandelt wurde.

Keywords: Land market, property rights, property regimes, land tenure systems, peri-urban areas, sub-Saharan Africa

1 Introduction: land markets on the edge of capitalism under legal pluralism

1.1 Urban sprawl and the normality of informality

Sub-Saharan Africa is currently experiencing the highest rate of urbanization in the world. With 3.76%, the African urban population is growing almost 1 per cent faster than the world's urban population. The urban transition, where the urban population is expected to outnumber the rural population, will already be reached in 2030, although at the turn of the millennium only one third of Africans lived in urban areas (UN-HABITAT 2005).

A consequence of this rapid urban population growth is a rapidly and uncontrolled changing land use and ownership in peri-urban areas, resulting in urban sprawl. This is further enhanced by limited capacity and financial means to guide urban development as well as by illicit practices including corruption.

Peri-urban areas of sub-Saharan Africa completely surround the city centres (“*couronne péri-urbaine*” by DEZERT et al. 1991) and fade into the adjacent rural areas, which are therefore often called transitional zones (ALLEN et al. 1999) or interface (DPU w/o year and SATTERTHWAITTE 2000). They include the entire suburban zone and its residential and industrial suburbs as well as satellite towns, exurbia and the surrounding areas of predominantly rural character. In peri-urban areas, people of diverse backgrounds and social status live in mostly segregated residential areas. Peri-urban areas are characterized by rapid social change mainly due to constant in-migration consequently leading to the juxtaposition of urban and rural life styles. This creates a multitude of partly overlapping institutions – concerning amongst others land tenure (RAKODI 1998; DPU w/o year; DE SOUZA 2001). Consequently, there is an uncoordinated ‘patchwork’ or ‘mosaic’ of predominantly unplanned land uses as well as generally limited formal and informal means to earn a living (DPU w/o year; BIRLEY a. LOCK 1998). The peri-urban area is subject to permanent change: while areas close to the city adopt urban life-styles, the currently peri-urban area is stretching outwards into the hinterland. There, areas with a rural character, which have until now mostly been beyond the city's influence, are increasingly integrated into the city, bringing along their generally customary institutions. The dynamic and uncontrolled development of peri-urban areas results among other factors (lack of infrastructure, environmental damage etc.) in a most active formal

and informal land market: most changes in terms of land ownership and land use occur within peri-urban areas (BRANDÃO a. FEDER 1995).

Urban population growth increases the demand for land. The resulting scarcity of land increases its value making it difficult for the poor to access land while middle and high-income groups increasingly consider land as an inflation-proof investment, thereby putting additional pressure on the emerging land market. In Africa, land only became a commodity good during colonization and in many regions it has remained a common good until today. Along with the concept of land as private and state property, colonialists imported institutions to deal with this property – quite different from those regulating access to, and use of, common property. Until today, both land tenure systems continue to exist; in some countries side by side, in others overlapping, but always based on different kinds of property regimes (state and private property versus common property).

Peri-urban areas are characterized by a wide range of formal and informal land transaction practices, while in central urban areas formal (statutory) land tenure generally dominates and in remote rural areas customary land tenure often persists. Nowhere else does legal pluralism become as present as in peri-urban areas. Consequently, they are breeding grounds for innovative informal (neo-customary as well as extra-legal) land tenure systems and land transaction processes which exist side by side with formal and customary systems.

1.2 Aims of the article

Peri-urban land markets are the most dynamic and most diverse in sub-Saharan Africa. It is for this reason that the article focuses on them to find out if the different land tenure systems in Africa in the long-run converge towards private property or develop into a diversity of property regimes which might be more diverse than elsewhere.

The aim of the article is twofold:

1. To understand the changes in property regimes and land tenure systems which are forming current land transaction processes. The following research questions have been posed:

- What types of land tenure systems developed so far?
- Which property regimes are most in demand by which social group and for which purpose?
- Is there a general trend towards one specific property regime?

- Are there specific land tenure systems which might only exist in sub-Saharan Africa?
2. Based on this analysis, the article aims to identify which land tenure systems and property regimes fit best to meet current needs.

The article is organized in three parts: after a short theoretical introduction into land markets and their institutions, the main body focuses on current changes and trends of land tenure systems and property regimes, including a number of case studies. The final chapter summarizes the key conclusions and discusses the main implications.

2 Theoretical background: formal and informal institutions constituting and regulating land markets

Property rights are at the core of any land market. They include the right to use, to manage, to generate income, to temporarily or permanently transfer the land (including to lend on mortgage), the right to exclude others and the right to compensation (BIRNER 1999; FAO 2002). It is not land that is transferred but a bundle of varying property rights on a given piece of land which is handed over from the previous or current owner to the current user, possessor or owner. These property rights should be secured by documents confirming the possession of certain rights (tax bills, certificates, permits, deeds, titles etc.) and a suitable land registration system (deeds register, cadastre, land registry, land information system etc.), as well as rule of law. These institutions provide the necessary legal security for a land market to function.

Therefore, these ‘constitutive institutions’ are all that is needed to establish an economically efficient land market. They can be, but do not have to be, supported by additional institutions (‘supportive institutions’) such as land valuation. Such an economically efficient land market will, however, have a number of negative social and environmental side-effects. Additional ‘regulative institutions’ are needed to provide for sustainable land use, such as land management (land use planning, land readjustment, land banking, state land management etc.) and ethical principles. Finally ‘complementary institutions’ in the form of financial mechanisms can improve the functioning of land markets (WEHRMANN 2005, 2006; see Tab. 1).

In most of Africa, all the institutions that ideally constitute, support, regulate and complement the land market are not only weakly developed but are also partly formal, partly informal and result in a wide range of different, sometimes competing, sometimes contradictory institutions. In this context, it is important to differentiate between informal institutions that are legitimated by local society based either on customary, religious or extra-legal rules and those that contradict all legitimated rules and norms, namely criminal practices (see Fig. 1). Legitimated informal institutions should generally be supported, legally acknowledged and incorporated into the formal system. Criminal activities that do more harm than they benefit the common weal should on the other hand be strictly controlled (WEHRMANN 2001).

The main focus of the article is on the core institutions: the property rights and, related to this, property regimes and land tenure systems. Property regimes are also called property rights systems and

Table 1: Institutions constituting, supporting, regulating and complementing land markets

Type of institution	Details	Formal institutions	Diverse informal institutions
Constitutive institutions: Providing legal security	<ul style="list-style-type: none"> • Property rights in land • Land registration, land information systems etc. 	Formal land tenure system; Public land administration	Informal land tenure systems; Customary land administration
Supportive institutions:	<ul style="list-style-type: none"> • Rule of law • Land valuation 	Formal land valuation	---
Regulative institutions: Providing for sustainable land use	<ul style="list-style-type: none"> • Land management • Ethic principles 	Land use planning by state authorities etc.	Informal parcelling etc.
Complementary institutions:	<ul style="list-style-type: none"> • Financial instruments (capital, credit, mortgage) 	Banks	Private money lenders

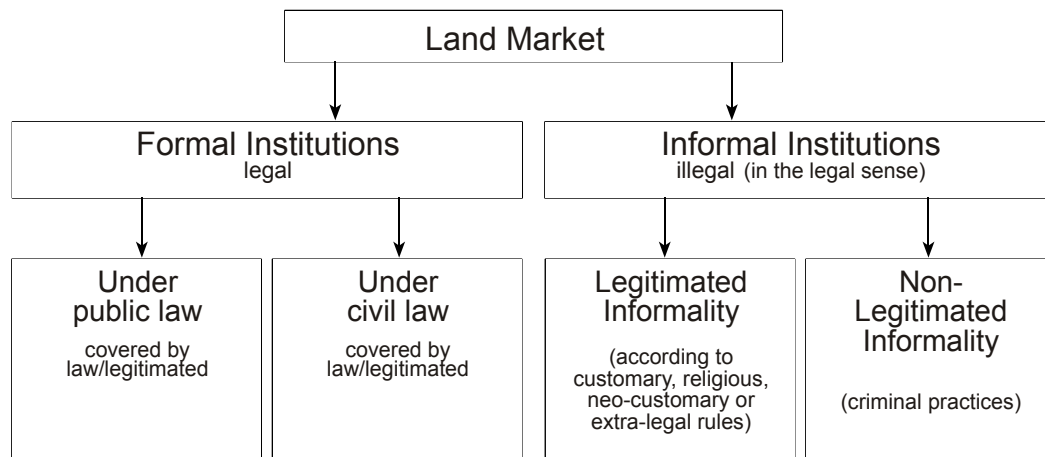


Fig. 1: Land market institutions and the relevance of legitimacy

include private, state and common property as well as open access. Land tenure refers to the jurisdiction or rather regulatory frame (statutory, customary, extra-legal etc.) that defines which property regimes exist in that given system and who is holding which property rights in relation to land. Whilst being aware of the complexity of institutions constituting, supporting, regulating and complementing land markets, analysing all institutions of the land market would go beyond the scope of this article. They are, however, referred to in the conclusion to complete the picture.

3 Current trends

This chapter aims to identify recent changes in land tenure and property regimes in peri-urban areas in sub-Saharan Africa. In a first section, the existing forms of land tenure and property regimes are identified. In the second section, current land transaction practices are summarized with the objective of identifying the extent of commodification of land. Is land still allocated for free to a considerable extent or is it mainly purchased and consequently seen as a pure commodity good? The discussion is followed by four case studies which aim to illustrate the inadequacy of former – formal as well as customary – land tenure systems in meeting present demands. Based on the previous findings, the fourth section identifies four major changes in relation to land use and land ownership in peri-urban areas. The last section, finally, focuses on the uncertainty between private and common property.

3.1 Existing forms of land tenure systems and property regimes

Land tenure in African countries, especially in peri-urban areas, is characterized by legal pluralism. Different systems exist along each other such as formal or statutory, customary, religious, neo-customary, extra-legal and criminal land tenure systems.

Depending on the country, the *formal law* either provides only for state property in combination with long-term leases or includes private property. Few countries provide for common property, and if so generally in the form of national property. The author is not aware of any local common property provided for by statutory land tenure, but would not rule out the possibility of its existence somewhere. (In a way, the homelands which existed in South Africa until 1994 could be seen as common properties, although they were rather self-governing territories.) Formal or statutory land tenure is comparatively new in Africa as it only came with the creation of states. Colonialists introduced the concept of state land (crown land) on which leases (for up to 99 years) were given to white settlers. In urban areas, private property was introduced. After independence, crown land, where existent, was converted into state land leaving the newly emerging independent states with a usually large amount of state land – in theory. In practice, customary land tenure continues to exist in most rural areas to this day. It has increasingly been recognized by the formal system since the 1990s. In the former French colonies, state land can be differentiated into state public and state private land, the former being used for public infrastructure only, while the latter can

be used to generate income mainly through leases and concessions. After independence some countries followed the capitalist way (e.g. Kenya and South Africa with its infamous apartheid system) disposing of huge areas of private property, others went through a period of communism (Tanzania) giving priority to state property, and still others went back to their own roots tolerating customary tenure in rural areas on so-called national domains (Senegal). Still today, the formal law of some countries e.g. in Ghana or Ethiopia does not provide for private property. Others heavily rely on it. However, no matter if the formal land tenure system covers only state or state and private property, in its shadow customary land tenure has survived – if not thrived.

Customary land tenure manifests itself in many variations but shares certain characteristics (MÜNKNER 1994, 1995; PAYNE 1997): initially established to safeguard access to land by all members of an exclusive and subsistent peasant society, featuring religious or spiritual character, customary land tenure is based on the idea of common property. As the perception prevails that land belongs to the ancestors and that the current generation is only in charge of managing it for the generations to come, full individual private ownership of land is excluded. Land is not transferable and the right to exclude others is limited by secondary rights of others. Individuals can, however, acquire the right to use and to generate income as well as limited rights to manage the land, which are granted by an authorized person holding the main rights to manage the land. At the same time, this person is the administrator of the common property, representative of the ancestors' interests, judge in case of land disputes and spokesperson for the group. In brief, even though the land is common property, families and individuals receive individual plots for use and income generation and do have the right to make decisions on the use and all types of investments (KASANGA 1999). Therefore, customary land tenure does in fact provide for individual property rights to land! The non-existence of private property does not necessarily mean that there are no individual property rights. The so-called specific land rights (BINSWANGER a. MCINTIRE 1987) are merely limited, bringing about disadvantages (no access to credit, limited economic incentives), but also advantages (safeguarded access to land for all group members, including the very poor). Other characteristics of customary land tenure systems are exclusively oral agreements, vague demarcations of plots, the juxtaposition of (mostly seasonal) primary and secondary rights on the same piece of land and the inequality of legal subjects (limited ability of foreigners

to acquire use rights; only indirect access to land for women through their male relatives), which nowadays is in sharp conflict with the constitution (MÜNKNER 1994, 1995; PAYNE 1997). Customary land tenure, however, should not be seen as an inflexible, outdated and pre-colonial relic, but rather as an institutional arrangement, which is extremely flexible and adaptable (GTZ 1998). This assessment is underlined by the fact that customary land distribution systems are rapidly being integrated into urban land markets (DURAND-LASSERVE 1998), resulting in new forms of land tenure the so called neo-customary land tenure systems which claim to be rooted directly or indirectly in local customs (DURAND-LASSERVE 2005).

Neo-customary land delivery systems either work through individuals, who sell as market commodities more rights than they have received through a customary system, or operate through groups that replicate familiar elements of customary systems and thus inspire confidence among those obtaining land (DURAND-LASSERVE 2005). In this way, a *de facto* transformation of communal towards private ownership takes place. There are, however, many different forms of neo-customary land tenure systems: some of them allocating all property rights to individuals. Others only transfer selected additional property rights to the individual, the others remain with the group. This results in a gradual institutional change in the shadow of official legislation. Customary institutions gradually adapt to the changing demands of the people, thereby transforming customary into neo-customary land delivery systems, mainly because of commodification (DURAND-LASSERVE 2005). Unlike in the past, traditional authorities nowadays often hold an interest in economic profit and they will sell the land (also to outsiders) instead of merely distributing use rights to members of the group. Poor peoples' access to urban land is more restricted under neo-customary tenure than under customary tenure, as it makes access to land dependent on purchasing power and no longer on criteria of social membership. Even for group members, the traditional symbolic price (drinks money) which was originally paid in the form of alcoholic drinks, has reached unaffordable levels often in the range of the current market price (KOOP 1997). In spite of the fact that neo-customary actors offend against customary rules, people have more trust in neo-customary systems than in other informal land tenure and land delivery systems because of the customary social relationships that are embedded within these systems. It therefore provides better security of tenure and generally faster and cheaper access to land than extra-legal land tenure systems do (DURAND-LASSERVE 2005).

Land tenure systems are called *extra-legal* when they are legitimated within the group and are neither based on statutory nor on customary law. Compared to formal and customary land tenure, extra-legal rights have gained in importance to an extreme degree over the last decades (PAYNE 1997). Extra-legal property rights can arise from various actions and have differing influence on the land's legal status (FARVACQUE a. MCAUSLAN 1992; PAYNE 1997). This can be grouped into two broad categories: illegal or semi-legal land acquisitions. According to MERTINS (1984), illegal land acquisitions are land occupations, such as squatting, while semi-legal land acquisitions are characterized by land transactions against payment with an unauthorized development of the land, such as subdivisions or offences against zoning or building standards. Most extra-legal tenure systems – especially those based on illegal land occupation – only allocate limited property rights to the individual, such as a *de facto* use right and eventually the right to generate income while all other rights remain with the legal owner. The rich and middle class show a clear preference for individual, private ownership generally based on semi-legal land occupation. The poor, who are primarily illegally acquiring the land, place more emphasis on tenure security and thus protection against eviction, which does not necessarily depend on private ownership but can also be (and sometimes be even better) secured by group rights with individual use rights. Only in South Africa do the poor insist on individual private ownership, drawing lessons from their experience with the apartheid regime.

The transition from extra-legal to *criminal land distribution* practices is fluid and is solely dependant on legitimacy. If a non-legitimated person is dealing with somebody else's property rights (belonging to the state or a group) for his/her own benefit, then these actions can rightfully be described as criminal. Most

of the time, the actual practices differ only slightly from the ones mentioned above. Some, however, include protection fees and involve violence if these are not paid. Others are based on misuse of power and position: state officials illegally selling state land on their own account, influential people grabbing land or traditional authorities selling-out clan land. Corruption in land administration and state land management has a major influence on today's land markets in sub-Saharan Africa and is one of the driving forces towards increasing privatization of land.

In some African countries, there also exists *religious land tenure* based on Islamic law. In most countries under Muslim influence, however, this plays a minor role, as it has existed for centuries and has been absorbed and included into customary tenure. For this reason, it is often difficult to distinguish religious tenure from pure autochthonous tenure. Purely religious tenure only exists in a few Arab societies within sub-Saharan Africa.

Each of the land tenure systems (formal, customary, religious, neo-customary, extra-legal and criminal) represents a different set of rules which do not always conform with each other. Conventionally *legal pluralism* in African societies describes the juxtaposition of customary (or autochthonous) rules and European law imported by the colonialists. In today's reality legal pluralism in peri-urban areas is, however, much more complex with more than five different systems. Figure 2 illustrates in a generalized way the situation of peri-urban Dakar where peri-urban areas have been nationalized while the people living and moving there continue to allocate land use rights according to customary rules. Other groups illegally seize land. Matters are additionally complicated if someone articulates claims based on land titles from colonial times when private property temporarily existed (WEHRMANN 1999a).

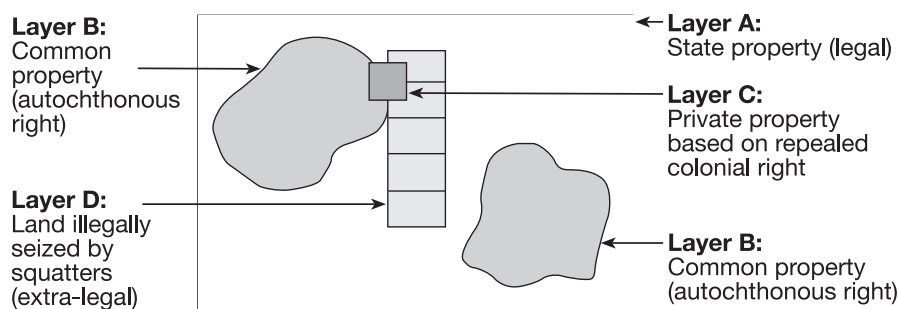


Fig. 2: Overlapping land tenure systems in Dakar, Senegal

3.2 Current land transaction practices

Currently land transactions in Africa go through different formal and informal channels (based on RAKODI a. LEDUKA 2004; MERTINS et al. 1998; KOMBE 1995):

First through the state:

- Legal allocation of public land (e.g. leases, conveyances)
- Illegal allocation by officials

Secondly through the market:

- Legal purchase of land through the market
- Illegal purchase of land through the market often preceded by sub-divisions

Thirdly through customary systems:

- Delivery of land through customary channels to members
- Purchase of customary land

Fourthly through neo-customary systems:

- Purchase of mainly customary land

Fifthly by extra-legal and criminal channels:

- Organized group invasions (including fees and rent)
- Individual self-allocation

It becomes obvious from this overview that most land is purchased. Selling land becomes increasingly normal and people even use the term land sales for long-term leases. Although urban dwellers in Accra (Ghana) officially lease the land, they talk about buying and selling land, signboards publish land sales and announcements on land sales can be found in the newspapers. The perception of buying the land is supported by the fact that there is only a one-time payment for the land, which corresponds to the current market value of the land. The perception is further enhanced by the common belief that as the house on the land is and remains private property the land below cannot be taken away and returned to the state or clan when the lease expires.

Recent research in six anglophone African medium-sized cities in Kenya, Nigeria, Botswana, Uganda, Zambia and Lesotho which focus on housing land supply reveals that the main channels of housing land supply are informal commercial systems of land delivery (RAKODI a. LEDUKA 2004). There are only few non-commercial channels left: allocation of customary land (either through membership or an Indigenous Land Board), allocation of serviced plots by private-public-partnership programmes (generally involving some fees), settling in hazardous areas or through legalization of an informal settlement (ibid.). "For many new households in contemporary African cities, especially the poor, the only way of becoming

the owner of a plot on which to build a house is through subdivision or inheritance of a parent's plot. In practice, most poor households are tenants" (RAKODI a. LEDUKA 2004, 1). Tenancy becomes increasingly important in the formal as well as in the informal housing sector. Probably the majority of squatter settlers are tenants paying monthly rents (e.g. between € 5-15 for a small sheet iron shack in a Nairobi slum) to their landlords (slum lords).

3.3 Case studies

Case 1: The peri-urban area of Addis Ababa (Ethiopia): the formal land tenure system does not meet today's requirements

The entire urban and peri-urban area of Addis Ababa is either state or national property. Formal private and common property does not exist; likewise neither does customary tenure as Ethiopia went through a monarchy, feudalism and socialism to a market economy based on national land ownership. Since 1993, individuals have been granted access to land in peri-urban areas based on 50 to 99-year leasehold contracts. The introduction of this leasehold market was supposed to replace the inefficient socialist allocation system. As leasehold contracts are being allocated by the administration, however, inefficiency and corruption have not been reduced, in fact they have increased. Even for the middle class, it is increasingly becoming difficult to acquire land by formal means. The poor have not been able to afford land for a long time. Consequently, there is a great demand for cheap and easily available land, which is being intensified by in-migration from rural areas and other Ethiopian cities. This demand is indeed met by sufficient informal (!) supply: farmers fearing expropriation (meaning a revocation of their agricultural use rights based on leasehold) by the state without adequate compensation as (black) market prices are eight times higher than regular compensation, brokers and speculators living from informal transactions in land and corrupt state officials are willing to sell their own or other's property, including state land. The result is a rapid development of an informal land market, based partly on extra-legal, partly on not-legitimated, and therefore criminal, land tenure regulations. Part of these regulations is to declare land transactions as a gift, inheritance, repayment of debt or the like or to sell a small shack of no value on big properties for the value of the property and thus – despite all illegality – increasing the legitimacy and

thereby the chances of a legalization later (TEKLUE 2003; GEBEYEHU 2005).

The current situation in Addis Ababa is an illustrative example of the high demand for private property in peri-urban areas. The non-existence of formal private property is being compensated by informal practices. The lacking ability of the state to influence the type of land use is, however, problematic. It has resulted in a degradation of natural resources (land and forests) and has consequently caused floods, a reduction of (anyhow limited) agricultural land and insufficient supply with infrastructure. For peri-urban settlers it also means that land ownership is insecure, which in return negatively influences investments and sustainable land use (GEBEYEHU 2005).

Case 2: The peri-urban area of Accra (Ghana): formal and customary land tenure systems coexist, both being neglected, abused and modified

Land cannot be privately owned in Ghana. It is either managed by the state for the country's citizens (state land) or by customary authorities for particular groups (*stool* land). Leases of up to 99 years (leasehold), typical of former British colonies in Africa, exist on state as well as *stool* land. *De facto*, however, leases on *stool* land increasingly resemble land sales as one-time payments in the range of the current land prices have to be paid. Even closer to private property is customary freehold which clearly constitutes private property as all property rights are without restriction or limitation being transferred from a *stool* to the new private owner in the course of the transaction.

In some cases, traditional authorities are authorized by their group to sell land and invest the revenue to the benefit of the entire group, while in other cases revenues are exclusively used to line only a few people's pockets. In the case of at least one *stool* this has led to substantial land scarcity for members of the group concerned and thus has extremely complicated access to land particularly for the poor (WEHRMANN 2005). These transactions are either legitimated (consequently called neo-customary) or not (then being criminal). This depends on who has been involved in the transaction, how transparent it was and how the revenues are being distributed within the *stool*.

In spite of increasing privatization of customary land many Ghanaeans stick to the concept of common property. Legally they are only lessees on either state or *stool* land, although they pay the price of the current land value, when they – as they call it – “buy” the land. To better understand the contradic-

tion between *de facto* privatization on the one hand and the emotional ties to group property on the other hand, the author has conducted several socio-dramas with Ghanaean land management students. In their course, the fear of losing traditional values became obvious and an inner uncertainty has been articulated over whether to stick to traditions or to risk alien, unfamiliar modern ways.

As in Addis Ababa, the current situation in Accra is an example of the increasing demand for private property. Unlike in Addis Ababa, where customary land tenure does not exist, the demand for private property in Accra is predominantly met by a neo-customary land tenure system, but just as in Addis Ababa criminal land transaction practices are also common. In Accra, modern or non-customary informal practices therefore compensate for the lack of formal private property. As in the case of Addis Ababa, this hinders formal land management with the above mentioned consequences for the environment and supply of infrastructure. It also results in widespread insecurity of tenure (even for the middle class) as legal pluralism, insufficiently defined customary boundaries and a partly dilapidating customary system result in multiple sales and other land conflicts (WEHRMANN 2002).

Case 3: The peri-urban area of Dakar (Senegal): formal and customary land tenure systems overlap, both being neglected and abused

In Dakar legal pluralism is not parallel but overlapping: the state and customary authorities claim ownership over the same piece of land. According to formal law, most of the land is national property, about 5% is state property and less than 1% is private property, limited exclusively to urban areas. This means that formally recognized private property generally exists, but only to a very limited extent. The nationalization of land had no consequences for the rural population and thus also not for the villages in today's peri-urban area of Dakar. People in these areas have continued to transfer land according to customary land tenure, although officially the right to use land under national domain was supposed to be allocated by the state. Similar to Accra, traditional land administrators in Dakar tend to sell land. In Dakar they generally hire brokers for this purpose. Sometimes these brokers sell land on their own behalf. Thus, both land administrators and brokers sell land that does not belong to them neither according to customary nor according to formal rules, thereby contravening both land tenure systems. Not only

customary authorities but also public sector officials abuse their position. At least in the late 1990s it was well known that civil servants purchased state-subsidized land illegally and sold it at market price (EIDAM 1993; WEHRMANN 1999a, 1999b).

This shows the high demand for (private ownership of) land, which cannot be satisfied by formal means – at least not at a low price. As in the cases of Addis Ababa and Accra, the lack of a formal land market which adequately meets the demand of privately owned land thus leads to informal land sales.

Case 4: The peri-urban area of Johannesburg (South Africa): where criminal practices satisfy the high demand for land ...

Unlike the examples mentioned above, the formal land tenure system in South Africa provides for private property at a large scale – since the abolition of the apartheid regime theoretically for every citizen. One conclusion from the first three examples could be that South Africa providing for formal private property is not in need of informal land sales. However, the housing policy of the 1990s provided only limited accommodation in urban and peri-urban areas for the majority of the black population, which as a consequence of the previous regime is rather poor. This resulted in the emergence of informal land transactions that occurred less in the form of land sales but primarily as organized group occupations of state land. Besides the more or less legitimated semi-legal and illegal land occupations numerous criminal practices are common in Johannesburg, for which the so-called land mafia is responsible. The latter could be described as “illegal private-public-partnership”. Insiders from municipal land administration authorities closely cooperate with private land developers or slum lords. The lack of legitimacy is created partly by illegal sale of state land and partly by slum lords demanding protection money and applying deadly sanctions for disobeying their rules (WEHRMANN 1998, 1999b; REEVES 1998).

3.4 Complex transition of land use, ownership, property regimes and land tenure systems

The case studies illustrate the current transition of formal and customary land tenure systems towards neo-customary, extra-legal and criminal systems accompanied by a shift from predominantly state and common property to increasingly private property. This transition has been provoked by new owners or

demanders of land which coincides with a change of land use. Consequently, four different changes related to land ownership and use currently occur in peri-urban areas:

Land use changes from predominantly agricultural and forest use towards predominantly urban types of land use such as housing, commerce, industry as well as for public use (administration, services, and infrastructure).

Change in land ownership: migrants from rural areas, other cities or from the urban area as well as foreign private investors, the state or squatters take hold of land in various forms (purchase, expropriation, occupation, inheritance, tenancy etc.) and thus change the former predominant or even exclusive ownership by customary groups (peasants).

As a result of these transactions, *property regimes can change* from formerly common property into private or state property or from state property to private property. In this process, property rights that have until then mostly been shared among several persons are usually transferred to one (juristic) person, who becomes the *de facto* owner or even a *de jure* owner. In the case of informal land acquisitions, the latter, however, can be delayed until the transaction is legalized at a later point.

Result and precondition therefore is a *change in land tenure systems:* this might be a change from customary land tenure towards a modern, state-executed land tenure system (Tanzania), towards neo-customary tenure (Ghana), towards extra-legal tenure (Ethiopia, Ghana) or towards non-legitimated, criminal forms of land tenure (Ethiopia, Ghana, Senegal, South Africa). It might also represent a change from state towards extra-legal or criminal regulations (Ethiopia). Peri-urban areas are thus breeding grounds for neo-customary and extra-legal land tenure regulations as well as non-legitimated criminal allocation procedures. In the long term, however, the transferred property rights are increasingly transformed into formal land rights, thereby increasing the part of formal land tenure and private property, which are becoming more and more dominant over time. The transformation process or institutional change has, however, not yet been completed and will not be for a long time.

Figure 3 illustrates the transition of land use, property regimes and land tenure systems in peri-urban areas and highlights the current diversity of land tenure systems. Although the tendency seems to be towards private ownership, many people won't arrive there because of the unaffordable costs. They will remain within one of the informal categories of land tenure, eventually inventing additional ones. Pri-

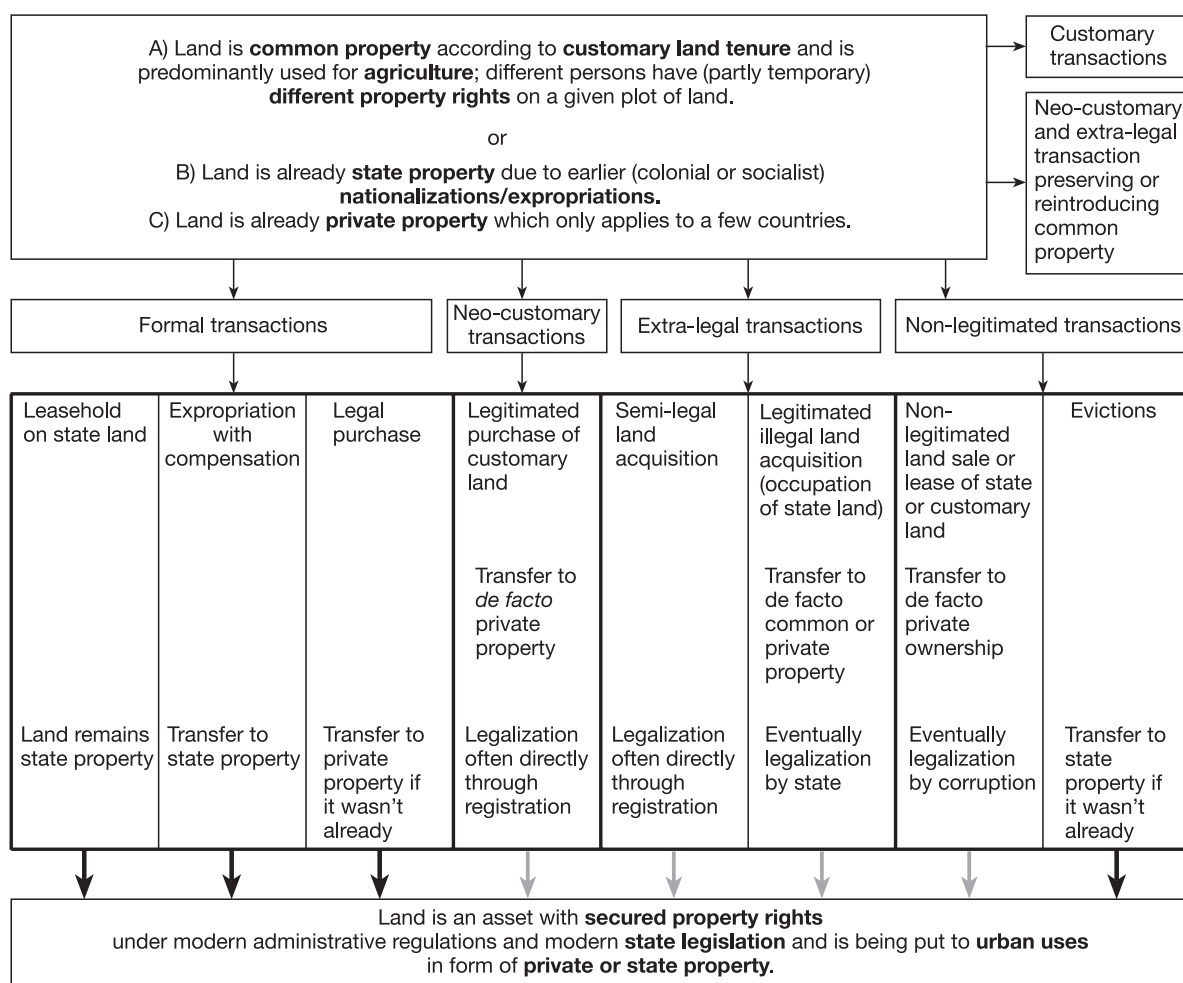


Fig. 3: Peri-urban transition of land use, property regimes and land tenure systems

vate property might therefore be attractive without however being realistically achievable by the majority of people. In 2001, 72% of the urban population in sub-Saharan Africa was living in slums and hardly any of these people owned the property where they lived (UN-HABITAT 2005).

3.5 Privatization and the destiny of common property

The creeping transformation from customary common ownership to private ownership – at least for those who can afford it – partly confirms the thesis first elaborated by BOSERUP (1965) with regard to agricultural land markets that population growth and land scarcity trigger the transition from customary, group-oriented land tenure systems to modern, indi-

vidual tenure systems (its crucial theoretical contribution being the emphasis placed on a stage of common ownership, whereas former studies argued that a stage of free access was directly replaced by individual ownership – probably a very North-American point of view). The diversity of existing formal, customary, religious, neo-customary, extra-legal and non-legitimated forms of land tenure was not foreseeable by BOSERUP, but even so her theory anticipated and predicted a rise in conflicts and increasing insecurity of tenure in the course of the transition (BOSERUP 1965, 82): “Each new step on the road to private property in land may well create less and not more security of tenure, and a vast amount of litigation is the obvious result”. This contradicts the perception of a smooth and peaceful transition from common to individual property rights to land based on the *Evolutionary Thesis* so popular in the 1970s and 80s (ALCHIAN a. DEMSETZ

1973 containing a very questionable definition of common property; and BINSWANGER and MCINTIRE 1987 with a concise analysis of the transition from general land rights to specific land rights in tropical agricultural societies). After common ownership had been deemed harmful and not competitive in a market economy (HARDIN 1968 who, when talking about the *Tragedy of the Commons*, actually confused commons with open access and public goods; and LEWIS 1955), many authors predicted a slow, mechanical and smooth transition from common property to individual ownership for Africa. Referring to the *Property Rights Doctrine*, the *Induced Institutional Innovation Hypothesis*, as well as to BOSERUP's elaborations, supporters of the evolutionary thesis mostly backed up this (simplifying) thesis. However, they over-estimated the market forces and assumed state actions that did not correspond with reality (PLATTEAU 1992). It was FEENY (1988) who – while investigating the development of land rights in Asian countries in the 19th and 20th century – questioned the smooth transition towards private property by referring to the numerous land conflicts that accompany such a development. For him, land conflicts reflect the weakness of the institutional framework. They occur when the expected profit from property, however acquired, outweighs the transaction costs of dispute and negotiations. Today, it is widely accepted that phases of transition are generally characterized by opposing forces: those who want to preserve the status quo and those who intend to change it (PLATTEAU 1992). This transition is hardly ever harmonious; rather it involves numerous uncertainties including insecurity of tenure. However, if the property rights to land are not secured, “more wealthy and influential persons in the country are in a better position both to safeguard their existing rights and to divest others of their customary rights” (ibid., 183). As a consequence, particularly the poor do not tend to aspire individual ownership, but prefer to rely on traditional securities based on group ownership. Neo-customary tenure models such as the Community Land Trust in Kenya, where the community owns the land and the members of the community act as trustees with limited property rights to the land (no right to transfer which protects the poor from being driven out by market forces), are very popular and the demand seems to exceed the supply (MERTINS et al. 1998; JACOBS a. BASSETT 1996). The development of land tenure systems in Africa questions or even contradicts the straight forwardness of institutional change from common to private property as stated by the *Evolutionary Thesis*.

The adherence to common ownership over land

is a major characteristic of many neo-customary and extra-legal land tenure systems. It is even visible within formal land tenure: leasehold on state land (Tanzania, Ghana) as well as on land under customary tenure (Ghana). Most transactions based on leasehold are almost equivalent to land purchases as they are based on one-off payments in the range of the current land value. This is the case for leasehold on state land as well as on land under customary common ownership. In both cases, however, ample cultural and emotional significance is attached to the traditional understanding that land cannot be privately owned. This looks like a contradiction: *de jure* a lease, *de facto* a land purchase. The current discussion in Tanzania (where officially no private property exists) over developing options for valuation of state land to enable mortgages on state land under leasehold and thus put leaseholders in the position to access credit has to be seen in this context. This could link the economic advantages of individual private ownership with the social advantages of group ownership, such as membership, identity, and security – especially where state institutions (land administration) are too weak or expensive to guarantee or protect private property.

It has been said that (private) property needs civil government (SMITH 1896) or even that government has no other end but the preservation of (private) property (LOCKE 1690). Therefore, if the government or rather state institutions do not function properly, private property lacks security. The adherence to common property can therefore partly be explained by the security it provides, at least where common rules are still in place and respected. In spite of some customary authorities misusing their power, customary systems are by far more reliable than state institutions and people generally trust them much more than they trust in the state, which often suffers heavily from corruption.

If common property or at least some of its features is so highly appreciated in Africa, why is it that throughout centuries the mainstream economic and philosophical literature has treated it as an orphan, over and over again confusing it with open access and sometimes state property? An explanation might be that both 17th/18th Britain – the time of LOCKE and SMITH – and today's America have limited knowledge of common property. During the Middle Ages while the Commons were popular in Europe, science was so quiet as to be hardly existent. Long before in the Antics, Plato and Aristotle had already discussed the pros and cons of common ownership. (Did not the Greek mythology teach them that most problems on earth started with the privatization of land in the Iron

Age?) For the last centuries, however, the economic and philosophical discussion on property generally argues for or against private property in opposition to either state, or crown, or feudal property, or open access. Only recently has common property started to be discussed as a positive option for decentralized natural resources management. The local conventions (e.g. between pastoralists and farmers) agreed upon by peasants in Western Africa show that even in practice they work very well.

Common property differs from open access by a complex system of rules (including the exclusion of outsiders and rights and duties for group members), enforcement and sanctions. It works best in a rather small and homogenous group as it requires shared values and ethics, respect for each other and the common rules, trust and honesty. If these preconditions get lost, common property can turn into open access. Some of the non-legitimated land tenure systems derived from collapsed customary land tenure (multiple sales) are *de facto* open access situations. On the other hand, common property will be transformed into private property when the costs of common property become too high in comparison with the benefits of private property. However, the process of institutional change is generally driven by individuals who recognize that they can gain personally by changing the rules governing who has access to land, who captures returns there from, and who bears the costs of use (ANDERSON a. HILL 2003). “[Therefore] some forces push the [common property] system toward open access and other forces toward more individual property rights” (EGGERTSSON 2003, 86).

4 Conclusions and implications

4.1 Diversity of constituting institutions

In spite of a general trend towards private property under formal tenure, the current situation in sub-Saharan Africa is characterized by a broad diversity of primarily informal land tenure systems covering customary, religious, neo-customary, extra-legal and non-legitimated institutions. Property regimes under these informal land tenure systems include *de facto* private property as well as different forms of common property and often a mixture of both. The high amount of formal and especially informal tenancy should not be overlooked either. For the majority of the African urban population it is simply a matter of affordability. Those who can afford private property will go for it: the rich, business people and foreign

investors. Many Africans, however, prefer to keep at least a notion of common property to profit from the additional tenure security but also for traditional reasons, stating that land simply cannot be owned privately. One cannot rule out the possibility that spiritual beliefs might also play a role, as there are strong beliefs that private ownership of land or cases where someone sells land will bring harm and misfortune. Therefore, common property will continue to play a significant role in Africa for a very long time – if not for ever. Common property over land suits the African culture perfectly well. It would not be surprising if additional new models of neo-customary and extra-legal tenure arose combining the advantages of both – private and common ownership. Another often overseen aspect is the fact that common property in sub-Saharan Africa has always provided for a number of individual property rights and has been far from collective ownership. In a way, African customary tenure has always been a mixture of common and private property. The current trend is simply a shift towards a greater portion of individual property rights.

As for the other constitutional institutions – land registration and rule of law – they are rather weak, the formal system lacking capacity and suffering from corruption, the customary land administration ignoring the formal one and lacking capacity too. So far, no land registration system has been developed that responds to the diversity of land tenure systems with their unusual splitting of property rights among different individuals or groups.

If governments are needed to protect private property, the diversity of formal and legitimated informal land tenure systems rather depend on functioning governance, especially good land governance (as defined by FAO/UN-HABITAT *in print*) which among others consists of rule of law and provides for affordable, transparent and equitable land registration systems guaranteeing tenure security for all, denying evictions and fighting corruption.

4.2 Shadowy existence of regulating institutions

A consequence of the current increase in land value in the peri-urban areas is that “poor people are priced out of even less desirable areas by middle-income earners” (ALLEN a. DÁVILA 2003, 5). For poor households it is hardly possible to access land for new residential buildings (RAKODI a. LEDUKA 2004). Neither formal nor customary regulating institutions are taking sufficient care of the negative social conse-

quences of the growing land market. The same applies to the negative ecological effects of the haphazardly developing peri-urban areas, which are not taken care of. "One of the most difficult issues for the rural-urban interface [...] is how to manage the [...] rapid land use changes in ways which enhance prosperity while controlling environmental costs, ensuring sufficient land for housing [...] and ensuring more stable and secure livelihoods for poorer groups" (SATTERTHWAITE 2000, 21).

There is an urgent need for functioning regulating institutions to ensure sustainable use of land. There is already awareness for innovative informal tenure solutions to be supported (e.g. PAYNE 2001) and good governance in land administration to be applied (e.g. ZAKOUT et al. 2006), however, feasible approaches of sustainable land management adapted to the African context are still in their beginnings.

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