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The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law

S.F. JOIREMAN *
Wheaton College, Wheaton, IL, USA

Summary. — Economists such as Hernando De Soto have argued that clearly defined property rights are essential to capital formation and ultimately to economic growth and poverty alleviation. This article traces two impediments to the clear definition of property rights in the African context: customary law and the status of women. Both of these issues interfere with the attempt of African countries to rearticulate property law with the goal of capital formation. Constructive attempts to define property rights must address the problem of enforcement in under-resourced environments where changes may not be welcomed.

Key words — property rights, law, Africa, capital formation, poverty, women

1. INTRODUCTION

Scholars agree that poorly defined property rights are an impediment to economic growth. This observation is both empirical and intuitive. Ambiguity with regard to ownership and usage rights to land does not allow for the most efficient use of property. Admirable efforts have been made to apply theories regarding property rights and economic growth to Africa, the continent with the unfortunate distinction of being in greatest need of development. Well-intentioned scholars and policy makers have followed the tested practice of attempting to isolate the institutions which lead to economic growth and then promoting them in countries and economies in which they are lacking. The neoliberal goal is to fix what is broken so that market forces can take over and work the magic of development. In this paper, I seek to draw attention to two property rights issues that impede capital formation in Sub-Saharan Africa: the presence of customary law and the complex social status of women. These realities make the Sub-Saharan African environment a challenging one in which to affect change along the lines suggested by recent economic theory. In noting these difficulties, our goal is not to arrest the attempt to define and enforce property rights in Africa. Rather, we seek to highlight these issues so that both the expectations and methods of policy makers fit the circumstances at hand, and not an idealized setting.

The literature in the field of economics reveals the accepted wisdom that clearly defined and enforced property rights contribute significantly to economic development (Acemoglu, Johnson, & Robinson, 2004; De Soto, 2000; Libecap, 2003; Norton, 2000). Anthropologists, lawyers (Berry, 1992; Chanock, 1991; Platteau, 1996) and political scientists (Fukuyama, 2004; Weimer, 1997)

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have also noted the importance of property rights in the issues of economic and political development. Secure property rights encourage people to invest their resources and protect their investments against expropriation. Scholars have argued that economic efficiency requires a clear definition of the rights of ownership, contract, and transfer (Johnson, 1972). Ambiguity in the definition or enforcement of any of these rights limits the use of property, leads to an increase in the transaction costs of exchange, and causes residual uncertainty after any contract.

Economists, the most well known of whom is Hernando de Soto, have argued that the definition and the defense of the property rights of the poor worldwide will increase their well being and allow them access to new business and educational opportunities through capital formation (De Soto, 2000). It is argued that property rights in law will facilitate economic growth by creating what De Soto calls "meta" property – the paper trail of title and mortgage which can free the surplus value of assets and provide the necessary capital for economic growth and development. Without this legal framework of property rights people can effectively do business only with those whom they know or their family. [1] Wider economic opportunities remain restricted due to the absence of contracts and law that would enable individuals to mortgage their property and use the capital for investment. De Soto's argument follows on other work that suggests security of land title leads to greater investment and is linked to productivity (Demsetz, 1967; Feder & Noronha, 1987; Platteau, 1996). However, De Soto diverges from previous theory in identifying the importance of titling informally held urban plots as well as rural in an effort to boost the potential of capital accumulation for the poor.

De Soto has popularized this idea that secure property rights lead to capital formation through the formalization of existing informal claims. But research into the application of De Soto's ideas has led to a number of concerns regarding his conclusions. The first and perhaps most important is that "meta" property rights do not create credit markets where they have not previously existed (Field, 2005; Gilbert, 2002). Clearly defined property rights can lead to other improvements in people's lives, but they do not necessarily cause the immediate availability of capital. A second problem with De Soto's argument is that while clear, secure property rights are desirable, there are complex social and political challenges to their establishment and enforcement. Elaborating on this second criticism, this article raises a third issue, that attempts to implement De Soto's ideas through land titling programs can unintentionally formalize inequitable property rights systems. This formalization of inequitable rights can undermine the goal of capital formation among the poor, specifically among women.

While noting these criticisms of De Soto it is also important to address the fact that De Soto's ideas about the importance of secure property rights correspond with a demand for clarity and security of property rights by people across the African continent. This demand is evident in the plethora of legal disputes started in national courts or addressed in alternative dispute resolution bodies and local conflict resolution mechanisms (Deininger & Castagnini, 2004; Fenrich & Higgens, 2001; Human Rights Watch, 2003; Joireman, 1996; Toulmin, Lavigne Delville, & Traore, 2002). Legal disputes heard in national courts represent a costly allocation of state resources to the adjudication and enforcement of ownership. There are also less obvious social and economic costs at the local level resulting from conflicts among family members and between neighbors.

If policy makers and people in both rural and urban communities across Sub-Saharan Africa believe that well-defined property rights are important then why have they been so difficult to implement? Is it simply a problem of governance? Government may be one part of the problem, but governments that have in good faith tried to implement new property rights and failed to do so, such as those in Kenya and Uganda, suggest that we might look further for more complete answers.

In the following discussion we will address two major impediments to capital accumulation through the implementation and enforcement of property rights on the African continent: customary law and the complex status of women. The focus herein is on the enforcement of the law necessary for capital accumulation as this is the area of greatest challenge for many states. Countries across the continent have exerted great effort and resources writing property and inheritance laws that can promote capital accumulation. Burkina Faso, Niger, South Africa, Mozambique, Ethiopia, Ghana, Kenya, Rwanda, and Uganda have all implemented (or are attempting to implement) law that clarifies property rights, both private and communal, and makes them more secure. However, new law alone is a necessary but