Entrapment or Freedom: Enforcing Customary Property Rights Regimes in Common-Law Africa

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Abstract
This chapter examines customary property rights and the role of customary leaders in enforcing those property rights from an institutionalist perspective. The issue of societal benefit is at the forefront of this chapter, which proceeds in three parts. Subchapter 13.2 discusses the pervasiveness of customary tenure and customary authority structures throughout Sub-Saharan Africa and their genesis in the colonial era. Subchapter 13.3 notes the lack of consistency between statutory law and customary law, which leads to a pluralistic legal setting. This part also identifies the winners and losers within customary legal systems. Subchapter 13.4 discusses how we can evaluate customary land tenure patterns and customary authority. The chapter ends by suggesting ways in which customary property rights and customary authority might persevere with a positive benefit to the society.

Document Type
Book Chapter

Publication Date
2011

Publisher Statement

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Purchase online at Cambridge University Press.

Recommended Citation

A common or public property right remains a right held by someone. The choice is not therefore whether to modify property rights to improve environmental outcomes, but how to do so in a way that optimises national welfare. Section 6 reviews key details around the major property rights regimes in New Zealand and the relationship between the Resource Management Act (RMA) and private property rights. Section 7 notes some uses of market-based instruments for these purposes in Australia. Concluding remarks are in Section 8. Land is therefore over-grazed and fisheries are exhausted. “Freedom in a commons brings ruin to all” (Hardin, 1968, p3). Sandra F. Joireman, Where There Is No Government: enforcing property rights in common law Africa. Oxford: Oxford University Press (hb £40 – 978 0 19978 248 2). 2011, 224 pp. ‘People want their property rights defended and they will seek the means to have them enforced.’ The author points out that, given the equity issues resulting from customary law and customary dispute resolution, simple formalization of existing rights would be disastrous for women and migrants, and inequalities would thereby be structurally consolidated. If property rights are enforced by the most powerful, ‘might’ will simply become ‘right’. Considering the vital role of women in agriculture, this would potentially have very detrimental effects on the economy as a whole.