Ahead of the Curve: Promoting Land Tenure Security in Sub-Saharan Africa to Protect the Environment

Andrew R. Falk

Follow this and additional works at: https://digitalcommons.law.seattleu.edu/sjsj

Part of the Agriculture Law Commons, Construction Law Commons, Cultural Heritage Law Commons, Environmental Law Commons, Estates and Trusts Commons, Land Use Law Commons, Natural Resources Law Commons, and the Property Law and Real Estate Commons

Recommended Citation
Available at: https://digitalcommons.law.seattleu.edu/sjsj/vol15/iss1/9

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.
Ahead of the Curve: Promoting Land Tenure Security in Sub-Saharan Africa to Protect the Environment

Andrew R. Falk*

I. INTRODUCTION

Since 2006, the Sub-Saharan African economy has grown as fast as almost any economy in the world.1 At the same time, hundreds of millions of people still live in extreme poverty.2 One important reason for this disparity is that the economy is largely based on agriculture, which requires access to land. Far too many people lack such access.3 Thus, the absence of secure land tenure has contributed greatly to the institutionalization of

---

* Andrew R. Falk is a Senior Fellow with the Sagamore Institute in Indianapolis, Indiana, where he researches international environmental law and property issues. He also studies domestic criminal justice reform. In writing this article, Andrew gratefully acknowledges the invaluable research assistance of Benjamin Pickett and the instrumental drafting and editing assistance of David Dickmeyer, Logan Gentile, and Sheila Willard.


2 See Simmons, supra note 1 (“Today, the percentage of people living on less than $1.25 a day in Sub-Saharan Africa (41 percent) is more than twice as high as any other region (such as Southern Asia, with 17 percent).”).

poverty. For the millions of people without access to land, landlessness is synonymous with poverty.

Another incongruity is less obvious but nearly as important—for all of Africa’s natural resources and biological diversity, its environment is threatened by deforestation, desertification, soil degradation, erosion, deforestation, desertification, soil degradation, erosion.

---


5 See Kebec, supra note 4, at 556.

6 See Joseph Opio-Odongo, Africa Environment Outlook 3: Summary for Policy Makers, UNEP, at 10 (2013), http://www.unep.org/pdf/aceo3.pdf (depicting Africa’s biodiversity hotspots, listing traditional medicinal cures, and noting that “fruits, vegetables, honey, spices, oils, bush meat, fish, edible worms [yum!] and mushrooms [can be found] found in Africa’s ecosystems [that] contribute to food and nutrition security on the continent,” and that in Zimbabwe alone 50 types of mushrooms, 25 kinds of fruit, and 50 vegetable species are harvested from the wild).

7 See Theodore Panayotou, Environmental Degradation at Different Stages of Economic Development, in BEYOND RIO: THE ENVIRONMENTAL CRISIS AND SUSTAINABLE LIVELIHOODS IN THE THIRD WORLD 20 (Hikihar Ahmed & Jacobus A. Doleman eds., 1995) (observing that forests are “particularly vulnerable” as developing countries begin to industrialize “when the rural sector is heavily taxed to generate a surplus for industrial growth and while a protected industry generates very few jobs for the induced ‘surplus’ rural labor.”).

water shortages, and species extinction. Once again, land tenure insecurity plays an important role, and a heightened awareness and implementation of secure tenure would allow communities to take great strides in protecting Africa’s environment.

Alleviating poverty and protecting the natural environment are interconnected and critical elements for sustainable development in Sub-Saharan Africa. This paper explores how secure land tenure addresses both elements, with a particular focus on the latter, exploring the ways that secure land tenure can sustainably protect the natural environment in Sub-
Saharan Africa. To do so, Part I introduces the concepts of land tenure, tenure security, tenure reform, and the types of land tenure. Part II identifies two problems flowing from insecure tenure in SSA—poverty and environmental degradation. Part III discusses the benefits of tenure security generally, including how it helps alleviate poverty. Part IV narrows the focus and explores how tenure security helps protect the environment. Finally, Part V proposes specific policies that promote tenure security and, by extension, a reduction in poverty and protection of the Sub-Saharan environment.

II. THE CONCEPTS OF LAND TENURE, TENURE SECURITY, AND TENURE REFORM

Communities have long recognized some form of land tenure by using both written law and oral traditions. Land rights first emerged as society transitioned to “sedentary agriculture to encourage investment . . . in the form of land clearing or establishment of perennials.” According to the International Fund for Agricultural Development (IFAD),

Land tenure refers to rules and norms and institutions that govern how, when and where people access land or are excluded from such access. Land tenure security refers to enforceable claims on land, with the level of enforcement ranging from national laws to local village rules, which again are supported by national

15 FAO, Land Tenure, supra note 4, at 3 (recognizing that environmental sustainability is both affected by and has an impact on land tenure).
16 Johannes M. Renger, Institutional, Communal, and Individual Ownership or Possession of Arable Land in Ancient Mesopotamia from the End of the Fourth to the End of the First Millennium B.C., 71 CHI.-KENT. L. REV. 269, 269 (1995) (noting that “we are able to observe land tenure systems in varying degrees of accurateness from the end of the fourth millennium B.C. until Late Achaemenid times towards the end of the first millennium B.C.”; the written nature of these records is discussed throughout Renger’s article); Peter Ho & Max Spoor, Whose Land? The Political Economy of Land Titling in Transitional Economies, 23 LAND USE POL’Y 580, 581 (2006) (observing the “unwritten and fluid features” of the historic customary tenure rules).
17 Ali, Deininger & Goldstein, supra note 3, at 264.
regulatory frameworks. It refers to people’s recognized ability to control and manage land—using it and disposing of its products as well as engaging in such transactions as the transferring or leasing of land.18

Land tenure security is defined by many factors, such as how long a land right lasts, whether a right to land will be protected from those who threaten it, and how much control an owner has over her land.19 More simply, tenure “defines property and what a person or group can do with it—their property rights.”20

Four types of land tenure are common: private tenure, where land is owned by an individual or corporation; customary or communal tenure, where land is owned in common by a group of individuals, such as a village or a tribe; state tenure, where land is government owned or the property rights are assigned to some government authority; and open access, where specific rights are not assigned to anyone, and no one can be excluded from using the land.21

Of the four types of land tenure, customary tenure is the least well known. Through customary tenure systems, many Sub-Saharan communities22 have some form of land tenure, which is rarely recognized or

18 International Fund for Agricultural Development, Improving Access to Land & Tenure Security, at 27 (2008), http://www.cpahq.org/cpahq/cpadocs/Land%20Access%20Rural%20Communities.pdf (internal citation omitted) [hereinafter IFAD, Improving Access]; see also World Resources Institute, World Resources 2005: The Wealth of the Poor—Managing Ecosystems to Fight Poverty, WORLD RESOURCES SERIES, at 57 (2005), http://pdf.wri.org/wrr05_lores.pdf [hereinafter World Resources] (noting that “secure tenure” is the “certainty that a person’s rights to continuous use of land or resources will be recognized and protected against challenges from individuals or the state”).
19 See IFAD, Improving Access, supra note 18, at 27.
20 World Resources, supra note 18, at 56.
21 Id. at 59; FAO, Land Tenure, supra note 4, at 8.
22 Approximately 90 percent of the land in Sub-Saharan Africa, other than national parks and private land, is administered under customary tenure. In Sub-Saharan Africa, Time to Legally Recognize Customary Land Rights, USAID (2013), http://www.usaidlandtenure.net/commentary/2013/08/in-sub-saharan-africa-time-to-
protected by the government.\textsuperscript{23} Deeply rooted in indigenous culture, customary tenure usually provides security through extralegal or informal community frameworks.\textsuperscript{24} For example, lifetime land tenure security in Senegal, Chad, and Mauritania is guaranteed and informally regulated through rules of inheritance determined by Sharia law.\textsuperscript{25} More than 50 percent of the peri-urban African population live in areas with informal systems of land tenure, with highly insecure land rights.\textsuperscript{26} These forms of customary land tenure do not usually involve any form of legal titling or registration, as most titled properties are in urban cities, which make up less than one percent of Sub-Saharan Africa’s land area.\textsuperscript{27} At the same time, some communal tenure systems include strong household or individual rights to use a resource or plot of land, and some community tenure systems

\begin{footnotesize}
\begin{itemize}
\item[]\textsuperscript{23} Roy Prosterman & Tim Hamstad, \textit{Land Reform in the Twenty-First Century: New Challenges, New Responses}, 4 \textit{Seattle J. for Soc. Just.} 763, 765–66 (May 2006) (hereinafter Prosterman, Land Reform) (discussing plight of the poor who hold rights recognized by customary law but are not protected by the nation’s formal laws); Liz Alden Wily, \textit{’The Law is to Blame’: The Vulnerable Status of Common Law Property Rights in Sub-Saharan Africa}, 42 \textit{Dev. & Change} 733, 733 (2011) (“national land laws have generally \ldots den[ied] that customary rights amount to real property rights, deserving of protection”); World Resources, \textit{supra} note 18, at 60-61 (recognizing the continuing importance of community tenure systems at the local level versus national politics and institutions and the uneasy balance of power between them); see also Kebec, \textit{supra} note 4, at 556 (discussing indigenous peoples’ customary title in Central and South America).
\item[]\textsuperscript{24} Kebec, \textit{supra} note 4, at 556; World Resources, \textit{supra} note 18, at 59-60.
\item[]\textsuperscript{27} Wily, \textit{supra} note 23, at 2.
\end{itemize}
\end{footnotesize}
can be as secure as titled private property. Outsiders often confuse “communal tenure” with “open access” and opine that communal tenure property will be subject to the tragedy of the commons—the theory that natural resources held in common will be overused. This tragedy of the commons theory is particularly applicable to open access tenure, where no one is excluded from using the available resources. It is less applicable, however, to communal tenure where the community usually excludes outsiders and enforces limits to prevent overuse and increase the net product for its own benefit.

“Tenure reform” differs from “land reform” in that, whereas land reform often involves redistribution of land from the state or wealthy landowners to the poor, tenure reform adjusts the rights to possess and use land. Tenure reform often works to strengthen tenure rights by making such rights legally enforceable.

III. TWO FRUITS OF INSECURE TENURE: POVERTY AND ENVIRONMENTAL DEGRADATION

Like a burgeoning tree without firm roots, economic growth without land tenure security precludes sustainable development in Sub-Saharan Africa, creating particular consequences for both the social and the natural environment. An in-depth understanding of how insecure land tenure

28 World Resources, supra note 18, at 59; see also Kebec, supra note 4, at 556 (2015) (discussing the “complex system of allocating resources fairly among bands and family groups” amongst the Ojibwe in North America).
29 Id. at 60.
30 Scott J. Shackelford, Neither Magic Bullet Nor Lost Cause: Land Titling and the Wealth of Nations, 21 N.Y.U. ENV’T’L L.J. 272, 299 (2014); see also World Resources, supra note 18, at 60, identifying eight “principles for successful communal management of natural resources.”
31 World Resources, supra note 18, at 57.
32 Id. at 58.
33 See IFAD, Improving Access, supra note 18, at 4 (listing pressures that “threaten the land and tenure security – and hence the food security and livelihoods – of millions of
devastates both the environment and those who depend on its bounty
provides the requisite contextual framework in which to implement policies
designed to inspire and promote land tenure security.

A. Tenure Insecurity in an Agricultural Economy Institutionalizes Poverty

It is not difficult to understand that “secure access to productive land is
critical to the millions of poor people living in rural areas and depending on
agriculture, livestock or forests for their livelihood.”35 Without reliable
access to land and its produce, the poor are more susceptible to hunger and
poverty; insecure access to land precludes their ability to invest in
productive agricultural activities or to sustainably manage their resources,
thus reducing their prospects for better livelihoods.36 More peripherally, but
just as importantly, insecure land tenure makes the poor’s participation in
democratic government and equitable relations with the rest of their society
much more challenging.37 Specifically, insecure land tenure and the
consequent lack of property rights prevent the collection of taxes by the
government and undermine the reciprocal exchange of tax revenue and
resultant social services.38 Consequently, many citizens are excluded from

35 Id.; Elisabeth Wickeri, Land is Life, Land is Power: Landlessness, Exclusion, and
36 FAO, Land Tenure, supra note 4, at 5-6; IFAD, Improving Access, supra note 18, at
5-6, 13.
37 IFAD, Improving Access, supra note 18, at 1.
38 Paula Ximena Meijia & Vincent Castel, Could Oil Shine like Diamonds? How
Botswana Avoided the Resource Curse and Its Implications for a New Libya, AFR. DEV.
state revenue creation, which then terminates the social contract between
the state and such citizens.39

Instead of protecting property rights and securing land tenure for those in
poverty, the governments of developing countries often exclude the poor—
either intentionally, due to corruption or prejudice, or unintentionally, due
to bureaucracy, instability, or ineptitude.40 As resources in the world
become more valuable, Africa has drawn considerable attention from
investors who often seek (and gain) approval from governments to rent or
purchase land.41 While much of Africa’s arable land is claimed by
communities through customary land tenure, land rights are often either not
recognized or ignored by the state.42 It is thus common for the state to seize
this land and lease or sell it to an international corporation or foreign
government, leaving the customary tenure holders who previously lived or

39 Id.
40 See Tapscott, supra note 22, at 36 (Tapscott explains that the governments of
developing countries are disinclined to help marginalized peoples who “typically have
different political, religious, or social interests; they are marginalized for a reason.”)
Tapscott further warns that “in resource-poor economies, governments might be wary of
giving any additional rights to citizens that could be politically or financially costly in the
future.”).
41 Rachel Knight, Statutory Recognition of Customary Land Rights in Africa: An
(“scarcity is being exacerbated by wealthy nations and private investors who are
increasingly seeking to acquire large tracts of land in Africa for agro-industrial
enterprises and forestry and mineral exploitation.”).
42 Id. (observing that “rural communities often have little power to contest such grants”
because they “operate under customary law and have no formal legal title to their lands or
documentation of their claims.”). Nevertheless, the governmental perspective is not
always so nefarious: the challenge of what to do with land under customary tenure is a
tricky one. As two scholars observed, “any national government that has embarked on the
path of economic development is confronted with the question of what position informal
institutions, such as customary and informal land use arrangements, should be accorded
relative to the formal, statutory institutional framework. In land registration the question
is whether to disregard or recognize land claims that predate the statutory legal system.
Due to its unwritten and fluid features, customary tenure is generally seen as
irreconcilable with a modernized economy that needs registered plots with clearly
established ownership for efficient land market transactions.” Ho & Spoor, supra note 16,
at 581.
relied upon the land for their survival with no remedy and few options. As a result, urban populations are booming but certainly not blooming—“the majority of urban dwellers in sub-Saharan Africa live under slum conditions, without durable housing or legal rights to their land or businesses.”

Meanwhile, the rural poor often have limited access to land for pasturing animals, growing food, and gathering medicinal plants and forest products. These “landed poor” remain poor because they have little land and because their right to the land is insecure. The property of the rural poor is largely undocumented, “making it highly vulnerable to land grabbing and expropriation with poor compensation.” For these poor, formalizing a legal right to property is frequently both unaffordable and overwhelmingly difficult, especially in countries with broken and corrupt governments.

---

43 Smita Narula, The Global Land Rush: Markets, Rights, and the Politics of Food, 49 STAN. J. INT’L L. 101, 103-05 (2013) (discussing a land deal between Ethiopia and Saudi Arabia. The Ethiopian government claimed no one lived on or used the land, but an investigation showed that villagers were forcibly removed from the land and that they only learned about the deal when bulldozers showed up to clear the area. The villagers were reportedly told, when they asked why they had to move off their ancestral land, that “you don’t have any land, only government has land.”).


45 Opio-Odongo, supra note 6, at 10 (finding that 80 percent of Africa’s rural population depends upon the continent’s biodiversity as a source for its traditional medicines).

46 World Resources, supra note 18, at 56.


48 This article follows the custom of other authors in the literature and uses the terms “formalization” and “land titling” interchangeably. See, e.g., Shackelford, supra note 31, at 275 n.16.
Africa, causing Africans to miss economic opportunity, the benefits of formalization, or an appreciation of assets.49

Thus, the absence of tenure security leaves many Sub-Saharan Africans without an opportunity to harness resources to sustainably alleviate poverty. This same tenure insecurity greatly impairs their ability to protect the natural environment.50 It is increasingly understood that “long-term, secure rights to land set the stage for environmental stewardship and sustainable farming practices.”51

B. Tenure Insecurity Precludes Incentives and Opportunities for Environmental Protection

It is well recognized that for all the riches of Africa’s natural resources52 and its relative abundance of arable land,53 the continent’s natural environment is increasingly threatened by a number of dangers. These threats include poverty; rapid population growth; soil degradation, deforestation, and desertification; a global land “rush” for property; weak and corrupt governance; a land “productivity gap”; and insecure community land tenure.54 Three of these threats—population growth, the global land rush, and insecure community tenure—are discussed in this section due to their close connection with land tenure security.

50 Prosterman, Land Reform, supra note 23, at 772.
51 Id.
52 Opio-Odongo, supra note 6, at 10.
53 Ali, Deininger & Goldstein, supra note 3, at 262; see also Opio-Odongo, supra note 6, at 22 (recognizing that Africa’s supply of arable land has the capacity to produce sufficient food for the majority of the continent’s population).
1. Sub-Saharan Africa’s Rapid Population Growth

Sub-Saharan Africa’s population has skyrocketed from 228 million people in 1960 to over 1 billion people in 2015.55 At the end of the colonial period, social services expanded rapidly, particularly in the areas of education and health care.56 Due to these improvements, Sub-Saharan Africa’s infant mortality has dropped significantly, leading to a surge in population growth.57 While Sub-Saharan Africa’s population growth could negatively impact the environment, most of the sub-continent still has a relatively low population density.58 Some of the best agricultural land is largely unsettled, while the areas that are less suitable for agriculture are more densely populated.59 Even in relatively densely populated areas, environmental damage most commonly occurs where three circumstances are met: (1) the population is greater than 500 people per square kilometer; (2) the area itself is physically or biologically vulnerable; and (3) the socioeconomic conditions impede the implementation of conservation measures.60 Thus, Sub-Saharan Africa’s rapid population growth becomes much more of an environmental concern in conjunction with other environmental threats, such as the degradation of soil fertility due to the intensification of agriculture without replenishment of nutrients.61

---

56 Mabogunje, supra note 54, at 6.
57 Id.
58 Id. at 8.
59 Id. at 31.
60 Id. at 32.
2. The Global “Land Rush” and State Concessions

Another significant threat to Sub-Saharan African environmental sustainability, which is directly related to land tenure security, is state appropriation of land—particularly land held by customary tenure—and the award of the land to foreign investors for purposes of mineral extraction and large-scale commercial farming.62 Over the last decade, attempts to purchase or lease agricultural lands in developing countries, such as those in Africa, have grown exponentially.63 One study documents the yearly growth of such agreements to have jumped from an average of about a four million hectares worth of growth in 2008 to more than 56 million hectares before the end of 2009, with the rates unlikely to slow.64 Another study indicated that about 60 million hectares of farmland were acquired in 2009—an area about the size of Arizona and New Mexico combined.65 In 2010, the going rate for such land acquisitions was approximately four dollars per acre per year.66 Such appropriations are often made without the consent or even knowledge of those most affected by the change—the residents who lived on the land.67

63 Narula, supra note 43, at 105 (2013); Opio-Odongo, supra note 6, at 22 (estimating that Africa supplies 70 percent of the land leased or purchased by foreign entities to produce agricultural crops).
66 Id. at 105.
67 Hughes, supra note 62, at 4; see also World Resources, supra note 18, at 57 (noting that “Government agencies, corporations, large landowners, poor farmers, indigenous peoples, and different ethnic or cultural groups frequently make overlapping and conflicting claims on the same set of natural resources. Unfortunately, unless the tenure
Such appropriations cause environmental damages both directly and indirectly. Appropriations cause direct environmental problems because large tracts of land are cleared, leading to deforestation and a decline in vegetative cover, with soil erosion, desiccation, and desertification following soon after. Less immediately, pollutants are emitted into the air, water, and soil. Appropriations indirectly cause environmental problems by taking land away from smallholder farmers who previously used the land to raise their livestock, grow their crops, and harvest natural resources such as coffee, cocoa, and rubber. These small farmers are thus required to more intensively farm their remaining land, leading to overuse and soil degradation.

3. Insecure Customary Land Tenure

As serious as the global land rush is, even this threat to the environment of Sub-Saharan Africa is eclipsed by insecure customary land tenure. The amount of land under customary land tenure and the limitations of such systems, specifically its inability to withstand governmental actions to seize and sell the property, are readily apparent. Unfortunately, customary land tenure has further limitations. Whereas individuals with secure property rights may use their land as collateral, individuals with customary tenure rights of the poor are secure, they usually lose out in these conflicts over competing claims”).


70 For guidelines on dealing with concessions (or “large-scale transactions”), see FAO, Voluntary Guidelines, supra note 4, at 21-23.

71 Mengisteab, supra note 62; Hughes, supra note 62, at 3-5.

72 See supra notes 22, 23 & 67 and accompanying text.
have no economic assets, and thus no collateral upon which they can rely to obtain credit to invest in equipment and improvements.73

Furthermore, while traditional communities have inherent strengths that lead to environmental protections, they also have certain weaknesses that cause environmental sustainability to break down.74 Uncultivated land in customary tenure systems, such as forests and pastures, is often in effect open access, even where the land may be informally managed by village leaders or by other traditional arrangements.75 Such open access has been found to be a major cause of deforestation and disappearance of communal grazing land.76 Even where individuals in customary communities could theoretically obtain deeds, it is often too complicated and requires too much time and expensive for the individuals to obtain the deeds.77 Thus, while customary tenure systems may have some value, in most current applications they are much more likely to fall short when it comes to either helping the poor or protecting the environment. With recognition of the negative precipitants of insecure tenure security and the shortcomings of customary tenure systems, this paper now turns to the benefits of secure land tenure.

73 Mabogunje, supra note 54, at 32.
74 FAO, Land Tenure, supra note 4, at 24 (“Insecure land tenure is linked to poor land use which in turn leads to environmental degradation”).
75 Otsuka & Place, Evolutionary Changes, supra note 61, at 2-3; FAO, Land Tenure, supra note 4, at 24. “The notion of unsustainable use of common property resources received considerable publicity through the ‘tragedy of the commons’ described by Hardin. This analysis of over-exploitation has been faulted because it was based on the unrestrained ability to use open-access property systems rather than the community-controlled access of common property resources. However, at times common property tenure systems have been transformed into open access systems, for example, when a communal system becomes too weak to prevent the communal grazing lands from being used by people from outside the community.” Id.
76 Otsuka & Place, Evolutionary Changes, supra note 61, at 2-3; FAO, Land Tenure, supra note 4, at 24.
77 Hughes, supra note 62, at 3.
IV. TENURE SECURITY’S BENEFITS FOR THE POOR

Secure land tenure has many identifiable benefits, from increasing land protection to decreasing the flight of the rural poor to constantly expanding city slums. This section describes eight general benefits of secure land tenure.

First, land tenure security leads to an increase in agricultural production. Where a farmer knows his tenure is secure, he is much more willing to spend time and money to practice all the techniques required to raise a productive crop: buying good quality seeds, planting carefully, cultivating the crops, removing weeds and pests, fertilizing the soil, protecting the crops from pests, watering the fields as necessary, and taking all the other little steps necessary to achieve a maximum yield. A farmer with secure tenure will also think toward the future and be willing to invest in his land. For example, he could plant coffee, rubber, or fruit trees that will not yield a harvest for a number of years but will, when mature, produce a greater return than if the farmer had only thought about short-term returns. These efforts will put the farmer in the best position to harvest a much larger crop than one who has made no such efforts.

Second, a farmer with secure land tenure is much more likely to improve and maintain his property, whereas one who may lose the fruit of his labors at any time has no such incentive. Since at least the time of William

---

78 World Resources, supra note 18, at 59.
79 See Prosterman, Land Reform, supra note 23, at 769.
80 Frank Place & Keijiro Otsuka, Land Tenure Systems and Their Impacts on Agricultural Investments and Productivity in Uganda, 38 J. OF DEV. STUD. 107-09, 121, 125 (2002).
81 World Resources, supra note 18, at 59; FAO, Voluntary Guidelines, supra note 4, at 20.
82 See Shackelford, supra note 31, at 278 (observing that “the incentives created by private property rights are, assuming perfect enforcement, critical to enticing individuals to maximize the benefit of their land”).
Blackstone, the law has recognized that enforcing property rights incentivizes owners “to make socially desirable investments in improving assets.” Thus, property owners, including farmers, with secure land tenure consider what valuable improvements can and should be made to the land, “view[ing] maintenance expenditures and the like as investments in existing assets.” A farmer with established land rights on agricultural land is more likely to consider longer-term improvements such as manuring, rotating crop, conserving soil, and planting trees. In particular, a farmer secure in his tenure may add wells and irrigation pipes or trenches to transport water to the fields, drainage ditches or tile to remove excess rainfall, trees to serve as windbreaks, and swales and terraces to prevent erosion.

Third, land tenure security leads to the practice of sustainable agriculture. A farmer employing slash-and-burn techniques—where the

(observing that private owners “bear the costs of poor management decisions and have strong incentives to maintain their property”).

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND VOL. II: OF THE RIGHTS OF THINGS 979 (1766).

Adler, supra note 83, at 673; Prosterman, Land Reform, supra note 23, at 769.

84 Otsuka & Place, Evolutionary Changes, supra note 61, at 3 (citing studies indicating that due to secure land tenure, tree cover increased on farms in Uganda and that farmers now grow trees on the edges of crop fields in East Africa); Tapscott, supra note 22, at 35.

85 World Resources, supra note 18, at 57; see also Ali, Deininger & Goldstein, supra note 3, at 272, 274 (illustrating how farmers whose land rights were regularized under Rwanda’s land tenure reform were twice as likely “to have initiated or maintained soil conservation investments in structures such as bunds, terraces, and check dams” and that female heads of households with secure tenure were three times as likely to engage in soil conservation measures); Berhanu Gebremedhin & Scott M. Swinton, Investment in Soil Conservation in Northern Ethiopia: The Role of Land Tenure Security and Public Programs, 29 AG. ECON. 69, 82 (2003) (concluding that “tenure security encourages land improvements, notably the use of conservation practices”); Petr Sklenicka et. al, Owner or Tenant: Who Adopts Better Soil Conservation Practices?, 47 LAND USE POL’Y 253, 257 (2015) (reporting the results of a study showing that erosion control measures were adopted in a significantly more responsible way by land owners than by tenants).

86 See Sklenicka et. al, supra note 87, at 253, 257-59 (concluding that “land tenure security is widely considered to be a fundamental factor in motivating farmers to adopt sustainable land management practices”); Gebremedhin & Swinton, supra note 87, at 83 (“Land titling and legal enforcement of title are fundamental for the widespread adoption and sustained use of conservation practices”).
farmer hacks a plot of earth from the forest, burns the area, and plants a
crop for one season—must move on to the next season, as the soil is now
nutrient-poor and he likely has no legitimate claim to the land. 89 In contrast,
a farmer with land tenure security has the opportunity and motivation to
practice sustainable agriculture. 90 A farmer who expects to own his property
indefinitely is more likely not only to invest in his property, 91 but also to use
disease-resistant plants and to choose native, drought-tolerant crops. 92 To
allow for natural soil regeneration, a farmer who has secure land tenure is
more likely to practice techniques such as crop rotation and leaving his
fields fallow. 93

Fourth, due to each of the above factors—an increase in agricultural
production, better property maintenance, and the practice of sustainable
agriculture—a farmer with secure land tenure is certain to receive a much
better return on his investment. 94 These advantages are especially
pronounced on smaller, family-operated farms, where “the highly motivated
application of intensive family labor to a small piece of land owned or held
securely by that family is precisely what makes economic sense.” 95 These
families also reap the nutritional benefit of retaining a significant portion of
crops grown on the land, which would have otherwise been transferred to
the landowner or landlord. 96

89 See, e.g., Otsuka & Place, Evolutionary Changes, supra note 61, at 5-6 (noting that
land may be put into fallow for twenty to thirty years to restore soil quality after only one
or two seasons of cultivation).
90 See Sklenicka et. al, supra note 87, at 254 (finding that of the four types of sustainable
farming practices tested in their study, all were adopted in a significantly more
responsible way by owners of property than they were by mere tenants).
91 See supra notes 71-75 and accompanying text.
92 Prosterman, Land Reform, supra note 23, at 769; see also ROY L. PROSTERMAN &
93 Otsuka & Place, Evolutionary Changes, supra note 61, at 3.
94 Prosterman, Land Reform, supra note 23, at 770.
95 Id. at 769-70.
96 Id. at 770; Tapscott, supra note 22, at 35, 41, 42. But see Michael Roth & Dwight
Haase, Land Tenure Security and Agricultural Performance in Southern
Fifth, secure land tenure increases the value of the property. Land will be worth more if it is more productive, has better returns on investments, and is better maintained. Land with secure tenure is also more valuable because, unlike unregistered land which is sometimes sold simultaneously to multiple buyers, the buyer of land with secure, registered title can be certain that he will receive that for which he has paid.

Sixth, owners of land with secure tenure can use that land as security ("capital") to obtain credit. The use of such credit allows the owner to purchase additional improvements for the land, better agricultural products, improved equipment for the operation, and other items needed by the farmer. Formalized tenure also serves as a safety net and a secure investment in times of financial crisis or in an uncertain economy.

---

97 Tapscott, supra note 22, at 36.
98 See Karol Boudreaux & Daniel Sacks, Land Tenure Security and Agricultural Productivity 3 (2009), http://mercatus.org/sites/default/files/Land_Tenure_and_Agriculture.pdf (noting that "if formal transactions are allowed, sellers can command greater prices for their land"); Shackelford, supra note 31, at 301 (observing that "the incentive structure of private property rights . . . give[s] the owner a pecuniary interest in refraining from destructive practices and that in turn may be used to catalyze the creation of capital markets"); Wickeri, supra note 35, at 998.
99 World Resources, supra note 18, at 59, 62; Prosterman, Land Reform, supra note 23, at 772-73.
100 Panayotou, supra note 7, at 33 ("Titling untitled agricultural land and allocating water rights to farmers and other rural dwellers would provide them with access to capital markets, thereby increasing on-farm investments that improve agricultural productivity and help to arrest the erosion of the resource base"); Prosterman, Land Reform, supra note 23, at 772-73.
101 Tapscott, supra note 22, at 36.
Moreover, studies have shown that investment doubles on land with secure tenure.\textsuperscript{102}

Seventh, for each of the reasons above, land tenure security results in increased wealth, both for individuals and the national overall.\textsuperscript{103} It is recognized that “property in land has been a principle source of wealth and also a guarantor of individual liberty.”\textsuperscript{104} The Food and Agriculture Organization of the United Nations acknowledges that “countries that have invested in the technical and institutional infrastructure required for efficient and equitable land tenure administration, and that have been in the forefront of ensuring property rights for both men and women, have developed much faster with a much higher level of food security, health and welfare.”\textsuperscript{105}

The same principles apply on a national level. One of the detrimental effects of insecure land tenure is soil degradation, which has a significant effect on the continent’s gross domestic product (GDP):

\begin{quote}
  The productivity loss due to soil degradation is pronounced in SSA. As much as 25 percent of land productivity has been lost due to degradation in the second half of the twentieth century in Africa. Because of the importance of agriculture to African economies, this has cost between 1 percent and 9 percent of GDP, depending on the country.\textsuperscript{106}
\end{quote}

\begin{footnotes}
\item[102] World Resources, supra note 18, at 59.
\item[103] See Shackelford, supra note 31, at 285-86 (“The developed world got rich . . . because of advanced property systems that allowed entrepreneurs to realize the full potential of their fixed assets, and in turn led to the development of banking and capital markets.”); Steven J. Eagle, A Prospective Look at Property Rights and Environmental Regulation, 20 GEO. MASON L. REV. 725, 746 (2013) (“A strong system of private property rights promotes economic wellbeing, and also protects liberty and autonomy.”).
\item[104] Eagle, supra note 103, at 14.
\item[105] FAO, Land Tenure, supra note 4, at 5.
\item[106] Otsuka & Place, Evolutionary Changes, supra note 61, at 19 (internal citations omitted).
\end{footnotes}
When land tenure is secure, landowners have a greater incentive to use sustainable agriculture practices, leading to greater production and therefore higher incomes. When agricultural families receive higher incomes, they have a greater ability to purchase goods and services in the marketplace, which also creates more demand for non-farm employment. In this way, a “broad-based distribution of land assets not only benefits the poor but becomes a solid basis for sustained and inclusive economic growth.”

Finally, tenure security leads to “grassroots empowerment” and democracy, reduced social unrest and instability, and reduced urban migration. Tenure security empowers landowners by removing hierarchies of control, allowing landowners to participate directly in the marketplace and political process. This shift represents a grassroots, marketplace-driven, and democratic redistribution of power, in which “more secure and self-confident producers . . . [can] challenge the inertia, elitism, and neglect that frequently characterize the politics of underdevelopment.” Tenure security also gives agricultural producers a stake in local communities—not to mention a sustainable income from the

107 See Prosterman, Land Reform, supra note 23, at 769-70.
108 Id. at 770; Prosterman, Land Reform, supra note 23, at 770.
109 Id. at 768; World Resources, supra note 18, at 62 (citing Hernando de Soto for the proposition that “the countries that achieve substantial economic progress over the next two decades will be those that have developed strong property rights institutions” and arguing that “tenure reform has emerged as an essential component of a broader sociopolitical transition to greater democracy and decentralization in developing countries”).
110 Id. at 770-71.
land—thereby reducing, if not eliminating, the pressure to migrate to urban areas.\footnote{113}{Prosterman, Land Reform, supra note 23, at 772.}

V. HOW TENURE SECURITY HELPS PROTECT THE ENVIRONMENT

While the general benefits of land tenure security are relatively well known, there has been much less discussion of how tenure security protects the environment. Environmental protection stemming from land tenure security falls into two categories: a set of protections flowing from the aforementioned benefits, and a second more general set arising from the legal status held by a person with secure land tenure.

A. Environmental Protection Flowing from Secure Tenure Benefits

First, tenure security helps protect the environment when a farmer employs sustainable practices. As discussed in Part III, land tenure security leads to greater agricultural production.\footnote{114}{See supra notes 78-82 and accompanying text.} This growth in production means that each acre of land has become more efficient and that fewer additional acres must be converted from their natural state into pastures or fields.

Second, better-maintained property, with greater improvements and use of sustainable agriculture, protects the environment directly—fewer chemicals and agricultural waste run off the land, the nutrient-depleting slash-and-burn techniques are abandoned,\footnote{115}{Prosterman, Land Reform, supra note 23, at 772.} and wastes are reused.\footnote{116}{See supra notes 83-87 and accompanying text.} Secure, transferable tenure provides incentive—even for someone unconcerned about or adverse to environmental protection—to consider environmental concerns, because “despoiling the resource [the property] may reduce its value in the eyes of potential buyers.”\footnote{117}{Adler, supra note 83, at 670.} Tenure security stimulates land practices that protect the environment.

\footnotesize{\begin{itemize}
\item \footnote{113}{Prosterman, Land Reform, supra note 23, at 772.}
\item \footnote{114}{See supra notes 78-82 and accompanying text.}
\item \footnote{115}{Prosterman, Land Reform, supra note 23, at 772.}
\item \footnote{116}{See supra notes 83-87 and accompanying text.}
\item \footnote{117}{Adler, supra note 83, at 670.}
\end{itemize}}
Third, many of the benefits of secure land tenure, such as increased returns on investments, an increased value of property, an increased ability to use land as credit, and salability, both together and individually, contribute to a growth in wealth.\textsuperscript{118} It is well recognized that those with more disposable income can and do care more about better protecting the environment, and that support for environmental measures correlates with income.\textsuperscript{119}

Finally, and of particular interest to the countries in Sub-Saharan Africa, secure land tenure is one of the keys to helping a developing country shorten the normal progression from a poor, uncontaminated state to a developed country taking environmental concerns seriously. Economists have articulated a theory identifying a relationship between income changes and changes in environmental quality called the “Environmental Kuznets Curve,” or “EKC.”\textsuperscript{120} According to this theory, as per capita income increases, pollution increases, peaks, then decreases, forming an inverted “U.”\textsuperscript{121} People with the lowest per capita incomes and who live on a subsistence basis pollute less because they consume products requiring less

\textsuperscript{118} Prosterman, Land Reform, \textit{supra} note 23, at 772-73 (arguing that “by clarifying and strengthening existing informal and/or weak land rights, governments can create wealth for the poor and bring ‘dead capital’ to life”).

\textsuperscript{119} \textsc{Jack M. Hollander}, \textit{The Real Environmental Crisis: Why Poverty, Not Affluence, is the Environment’s Number One Enemy} 15-16 (2003) (arguing that “there is no inherent conflict between a healthy economy and environmental quality; actually they go hand in hand” and that “an environmentally sustainable future is within reach for the entire world provided that affluence and democracy replace poverty and tyranny as the dominant human condition”); Adler, \textit{supra} note 83, at 681-84 (discussing a “significant body of literature [that] has found a correlation between economic improvements and several measures of environmental quality. . . . Wealthier societies have both the means and the desire to address a wider array of environmental concerns”); see \textit{supra} notes 94-109 and accompanying text.


energy and use few if any industrial processes. In contrast, people in developing economies initially pollute more because they use fossil fuels to light and heat their homes, fuel their transportation, and manufacture goods. In other words, at this stage “environmental damage [is] increasing due to greater use of natural resources, more emission of pollutants, the operation of less efficient and relatively dirty technologies, the high priority given to increases in material output, and disregard for—or ignorance of—the environmental consequences of growth.” Once a higher level of income is reached, however, emissions level off due to a combination of innovations in technology and increases in energy derived from cleaner, renewable sources that make economies more successful.

For citizens of developing countries eager for not only rising incomes but also environmental protection, the “inevitability” of the standard EKC model seems to be depressing in that the standard model requires a period of environmental degradation in conjunction with “development and industrialization progress” and rising incomes. Additional study, however, has revealed that countries may “tunnel through” the EKC,

122 See Panayotou, supra note 7, at 25.
124 Panayotou, supra note 7, at 17-18 (discussing low demand for environmental amenities when income is low, but observing that environmental degradation is also low due to low levels of waste and unimpaired capacities of the environment); see also Al-Mulali, Footprint, supra note 123, at 319.
125 Panayotou, supra note 7, at 18; Al-Mulali, Footprint, supra note 123, at 316.
126 Panayotou, supra note 7, at 28 (observing a “certain inevitability of environmental degradation” as a country develops); Bruce Yandle et. al, The Environmental Kuznets Curve: A Primer, PERC RES. STUDY 02-1, at 4 (May 2002). But see Panayotou, supra note 7, at 28-30 (suggesting that “resources can best be focused on achieving rapid economic growth to move quickly through the environmentally unfavorable stage of development,” while also advancing multiple reasons, including possibly irreversible environmental damage as well as the impact of environmental degradation on the economy, why such an approach is unwise).
effectively taking a “shortcut” to higher income and environmental protection.\textsuperscript{127} To do so, a country may adopt appropriate policies and maintain quality institutions allowing it to “leapfrog ecological thresholds” and thus significantly reduce environmental degradation at low-income levels and speed up improvements at higher-income levels.\textsuperscript{128} Similarly, another study concluded that “improvement in institutions that empower people through secure property rights for forests will ultimately reduce the pressure on resources and lead to forestland conservation.”\textsuperscript{129}

Therefore, where a country provides well-defined property rights, eliminates harmful environmental subsidies, and establishes environmental standards appropriate for the country’s level of development, the country can flatten the EKC and achieve its environmental goals faster.\textsuperscript{130} This conclusion is buttressed by additional research indicating that there is a strong relationship between property rights enforcement and environmental quality.\textsuperscript{131} This research reveals that strong property-right institutions support free markets, which in turn leads to growth in income and wealth.\textsuperscript{132}

\begin{flushright}
\begin{small}
127 Mohan Munasinghe, \textit{Is Environmental Degradation an Inevitable Consequence of Economic Growth: Tunneling Through the Environmental Kuznets Curve}, 29 ECOLOGICAL ECON. 89, 107 (1999) (concluding that “developing countries could learn important lessons from the experiences of the industrialized nations, and devise development strategies that can ‘tunnel’ through any potential EKC—thereby avoiding going through the same stages of growth that involve relatively high (and even irreversible) levels of damage to the environment”); Hollander, \textit{supra} note 119, at 15 (observing that “developing societies have a tremendous advantage over yesterday’s [societies]” because they “do not need to tread through the entire learning experience in each technology area; instead they can ‘leapfrog’ over the pathways (and mistakes) of the industrial pioneers and jump straightaway to the environmentally kinder and smarter technologies of the twenty-first century”).

128 Panayotou, \textit{supra} note 7, at 14; \textit{see also} Yandle et. al, \textit{supra} note 126, at 13-14.

129 Culas, \textit{supra} note 120, at 436; \textit{see also} R.T. Deacon, \textit{Deforestation and the Rule of Law in a Cross-Section of Countries}, 70 LAND ECON. 414-30 (1994) (discussing deforestation in connection with land tenure security in the context of 120 countries); Panayotou, \textit{supra} note 7, at 34, 36 (tying secure property rights to a flattened EK-curve).

130 Panayotou, \textit{supra} note 7, at 31-32; Yandle et al., \textit{supra} note 126, at 14.

131 Yandle et. al, \textit{supra} note 126, at 14.

132 Prosterman, Land Reform, \textit{supra} note 23, at 770, 772-73.
\end{small}
\end{flushright}
As a result, two forces are at work in achieving environmental protection: the recognition and enforcement of land tenure security leads to higher income levels, which in turn generates demand for environmental quality.  

B. Environmental Protection through Common Law Remedies

Whereas the benefits of tenure security discussed above tend to deal with the possessors’ use of the land and resulting wealth, this final benefit of land tenure security arises due to the owner’s standing before the law. In other words, the benefit derives from the property-right aspects of the owner’s tenancy: owners with secure tenure can take legal action against those who pollute or damage their property.

Long before any specific environmental regulations existed, citizens used the common law to protect themselves and their property from damages that today we would consider environmental contamination. The common law served as a precursor to zoning laws, compelling polluters to locate themselves away from populated areas. More recently, the possibility that citizens could bring a common law action against polluters provided an incentive for pollution control technology. Today, individuals with secure property rights may pursue one of several common law actions—trespass, nuisance, strict liability, and negligence—to protect their property.

---

133 Yandle et. al, supra note 126, at 14.
135 Adler, supra note 83, at 670.
136 Eagle, supra note 103, at 749.
137 Id. at 749-50.
1. Trespass

Trespass actions “protect an occupier’s right to enjoy his or her land without unjustified interference.” Trespass is limited to direct or tangible interference, such as when a person causes a physical object to directly contact another person’s land, and one who commits such interference is liable for the resulting harm. Courts have developed the law of trespass as an intentional tort and typically construe its limits strictly. For example, if a defendant can prove that he trespassed accidentally, the plaintiff will not succeed, but the plaintiff may still succeed under a nuisance or negligence claim.

In environmental litigation, the law of trespass focuses on whether a tangible object—such as a power line or particles of air pollution—has entered another person’s property. If a plaintiff is successful, powerful remedies are available. A court may award nominal, compensatory, or even punitive damages, along with injunctive relief for threatened or continuing harms. For example, a plaintiff in Kenya pursued an action in trespass after the defendant began construction on the plaintiff’s property to install a utility line without following the prescribed land acquisition process. The High Court of Kenya granted a temporary injunction against the defendant

140 Id.
141 Id. at 10115.
142 Id. at 10116.
143 Id. at 10115.
144 Id. at 10116.
145 Id. at 10116.
and ordered that fair compensation be provided to the property owner.  

When applicable, the law of trespass can offer a strong remedy for property owners against those trespassing onto their property.

2. Nuisance

The second common law remedy has two variations: public and private nuisance, collectively considered “the true ancestors of environmental law.”

Public nuisance actions arise when there is “an act or omission that causes inconvenience or damage to the public health or public order, or an act which constitutes an obstruction of public rights.”

In general, a public nuisance occurs when the effect of the interference is so pervasive that it would be unreasonable for a single person to challenge the matter herself.

Public officers, such as attorneys general, are usually the only party with standing to challenge a public nuisance.

Private nuisance, while not always distinct from public nuisance, arises when there is a “nontrespassory invasion of another’s interest in the private use and enjoyment of land.”

Courts often evaluate private nuisance actions by considering factors such as whether the utility of the defendant’s conduct is outweighed by the gravity of the harm.

In the environmental context, a property owner may rely on private nuisance theory to challenge interferences like dust emissions from an adjoining cement plant, unpleasant odors from a nearby pig farm, or

---

147 Id. at ¶ 5.
148 Antolini & Rechtschaffen, supra note 141, at 10116.
149 Roger Meiners & Bruce Yandle, Common Law and the Conceit of Modern Environmental Policy, 7 GEO. MASON L. REV. 923, 927 (1999). In other words, public nuisances concern “interference with the public’s reasonable comfort and convenience.” Compendium, supra note 139, at 4.
150 Compendium, supra note 139, at 4.
151 Meiners & Yandle, supra note 149, at 927.
152 Id. at 928.
153 Id. at 929.
groundwater contamination from a pulp mill. 154 Similarly, an environmental public nuisance could include the contamination of groundwater, a release of hazardous chemicals into the environment, or common cesspools. 155 As a result, parties may obtain a variety of remedies. A court may order equitable relief: operational limitations (such as emissions control devices), the establishment of funds for the benefit of injured persons, or even the imposition of a permanent injunction if the problem is not resolved within a specified timeframe. 156 Parties may also recover money damages corresponding to depreciation in property value and certain special damages, including losses from injury to livestock or direct damage to property. 157

Several of these remedies were employed in Naigum v. Nanette, where the plaintiff’s health and property use were affected by an industrial byproduct that emanated from the defendant’s adjoining property. 158 The defendant ran a licensed cabinetry business that employed the use of industrial electrical machines and caused noise and dust pollution in the residential area where the plaintiff lived. 159 The Supreme Court of Mauritius ordered the defendant to pay compensatory damages to the plaintiff and placed a permanent injunction against the defendant to prohibit further hazardous industrial practices. 160

---

154 Antolini & Rechtschaffen, supra note 141, at 10119.
155 Id. at 10120-21.
156 Meiners & Yandle, supra note 149, at 935.
157 Id. at 934-35. In some circumstances, even punitive damages may be available. Antolini & Rechtschaffen, supra note 141, at 10120.
159 Id.
160 Id.
3. Strict Liability

Under the theory of strict liability, a person is absolutely liable for the harmful results of any escapes from that person’s land. In other words, “[t]he theory of strict liability in tort for harms to strangers holds a party responsible for the harm that it causes by way of trespass or nuisance, regardless of the level of precaution taken.” The theory derives from the famous case of Rylands v. Fletcher, in which a property owner was held liable when his water reservoir flooded an adjoining property. In the United States, many courts have expanded the theory to cover other “abnormally dangerous activities.” In the environmental context, “abnormally dangerous activities” include, among others, crop dusting, operating oil refineries in densely populated residential areas, blasting, and fumigating buildings with toxic gas. In this way, strict liability remains a powerful theory in the environmental context, “as courts generally reason that, quite simply, entities engaged in dangerous activity should bear the costs of damages caused thereby.”

In Ndetei v. Orbit Chemical Industries Limited (Orbit), the High Court of Kenya relied upon Rylands when it ordered an injunction against Orbit’s industrial practice. Orbit manufactured soaps, detergents, and other related products, and it regularly drained industrial wastewater onto

---

161 Compendium, supra note 139, at 5.
163 Rylands v. Fletcher [1868], L.R. 3 H.L. 330.
164 Antolini & Rechtschaffen, supra note 141, at 10122.
165 Id.
166 Meiners & Yandle, supra note 149, at 937.
167 Id. at 937-38.
Ndetei’s property.\textsuperscript{169} Ndetei complained that due to Orbit’s negligent construction and operation of the plant, Ndetei’s property had become unfit for occupation or agricultural use.\textsuperscript{170} For these reasons, the court additionally ordered Orbit to pay compensatory damages for soil restoration, general damages for nuisance, and court costs.\textsuperscript{171}

4. Negligence

Unlike the three preceding causes of action, negligence actions do not depend on the occupation of property.\textsuperscript{172} As a general rule, a person is negligent when he breaches a duty of due care, resulting in injury to another person.\textsuperscript{173} In terms of remedies, a plaintiff may be entitled to compensatory damages and possibly (albeit rarely) punitive damages, but injunctive relief is not available.\textsuperscript{174} In the environmental context, negligence is often combined with the theories above and might be “the least productive of all tort law theories for environmental practitioners.”\textsuperscript{175} An example of environmental negligence where compensatory damages were awarded occurred in \textit{Agbara et al. v. Shell Petroleum et al.}, where the plaintiffs claimed that Shell’s negligence in constructing and failing to maintain a pipeline caused the uninhabitability of several square miles of land.\textsuperscript{176} The Federal High Court of Nigeria ordered Shell to pay the plaintiffs compensatory damages for the systematic damage caused by a pipe that, for 15 years, had leaked crude oil onto the plaintiffs’ property and caused the

\begin{itemize}
\item \textsuperscript{169} \textit{Id.} at § 30.
\item \textsuperscript{170} \textit{Id.} at § 5.
\item \textsuperscript{171} \textit{Id.} at § 1.
\item \textsuperscript{172} Compendium, \textit{supra} note 139, at 5.
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} Antolini & Rechtschaffen, \textit{supra} note 141, at 10121.
\item \textsuperscript{175} \textit{Id.} at 10122.
\item \textsuperscript{176} Compendium 2015, \textit{supra} note 158, at 52 (citing \textit{Agbara et al. v. Shell Petroleum et al. (Unreported) Suit No. FHC/ASB/CS/231/2001 of (June 14, 2010) (Nigeria)).
\end{itemize}
property to become uninhabitable. The Court also ordered Shell to remediate the contamination and restore the land to its original state.

5. Common Law Remedies Evaluated

Since the birth of the major environmental acts in the United States—such as the Clean Air Act, the Clean Water Act, the Endangered Species Act, and others—common law actions to address environmental contamination have been much less common in the United States. This may be beginning to change in the United States. Nevertheless, because most Sub-Saharan African countries do not have similarly comprehensive environmental legislation and accompanying regulations, the use of these common law actions may be more helpful and applicable in helping to protect the Sub-Saharan African environment.

The application of these common law actions is not without its detractors. According to some critics, the actions are “cumbersome,” only “reactive in nature,” and merely “operate on the basis of reactive cure rather than prevention.” A second objection to applying the common law to environmental litigation is that it perceives “the common law as a rather primitive legal system.” Building on this shaky foundation, the critics’

177 Id.
178 Id.
180 See Jonathan H. Adler, Is the Common Law the Free Market Solution to Pollution?, 24 CASE WESTERN RESERVE UNI. SCH. OF L. PROP. AND ENV’T RES. CTR. (2012) (collecting articles from advocates calling for the use of common law approaches to protect property rights and concluding that while the “case for common law environmental protection has not been made . . . that does not mean it cannot be”); see also Meiners & Yandle, supra note 149, at 959-63; Michael S. Greve, The Demise of Environmentalism in American Law 110, 115-18 (1996) (defending a common law approach to environmental law, but recognizing that no significant changes are on the horizon).
181 Erhun, supra note 138, at 31.
182 Greve, supra note 180, at 116.
argument next posits that only comprehensive legislation and administrative regulations “can account for the complexities of modern life.”

But, as a fair, analytical evaluation of the common law approach reveals, “nothing in the basic logic of common-law arrangements precludes their extension to more complex cases.” In reality, the very simplicity of the common law allows it to apply in many different situations—“[t]he basic intuition of the common law is that precisely because the world is complex, it needs simple rules that allow it to be managed not through collective, centralized, one-size-fits-all arrangements but in small chunks and by individuals who are likely to get the results.” Thus, Sub-Saharan Africans may find these common law actions to be very helpful in addressing their unique environmental law situations.

---

183 Id.; see also Joseph Sax, Introduction, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT, at xvii (Clifford Rechtstaffen & Denise Antolini, eds.) (2007) (opining that “the traditional common law remedies were utterly inadequate to deal with contemporary environmental problems”). One could respond that it is impossible for even the exceptionally complex U.S. environmental regulations to handle every possible environmental situation. “It is uncontested, for example, that much regulation is woefully inefficient and needlessly expensive; only the order of magnitude is seriously disputed.” GREVE, supra note 180, at 87. Greve similarly argues that this perspective on regulations “is emphatically not a partisan phenomenon but approaches a consensus: virtually no economist or policy analyst of any political persuasion would defend the existing regulatory regime—taken as a whole—as even tolerably efficient and effective.” Id.; see also id. at 88 (discussing further regulatory woes and experts critical of environmental regulation).

184 Greve, supra note 180, at 116.

185 Id. at 116-17.

186 This author is not suggesting that these common law actions should be used to address environmental issues to the exclusion of national regulation. Nevertheless, he is proposing that they may be useful alongside governmental regulation to protect the property of individuals, particularly where it is widely recognized that many Sub-Saharan governments are less than vigilant in their monitoring of environmental contamination, to say nothing of their actual enforcement of their environmental regulations.
VI. POLICIES THAT ARE WORKING TO PROMOTE TENURE SECURITY

Recognizing that land tenure security is instrumental not only in helping the poor but also in protecting the environment, this part discusses policies to promote tenure security in two types of situations: (A) where tenure security needs to be strengthened, such as in many customary tenure situations or where the individuals are using land belonging to another, albeit without opposition; or (B) where there is almost no tenure security, because either the land possessors’ claims are completely absent or the land possessors have no access to the land at all.

A. Strengthening Land Tenure Security

Tenure reformers take two primary approaches to helping promote tenure security: (1) formalizing property rights by issuing titles to land, or (2) promoting strengthened security by helping governments recognize traditional customary tenure.

1. Formalization of Land Tenure

There is little argument that registered land tenure is the most secure form of tenure security.187 In considering the development of nations, “there is a growing consensus ‘that the material rise of the West during the last’ three centuries is at least in part attributable to legal institutions formalizing property rights.”188 In the years since South American economist Hernando de Soto published his book, The Mystery of Capital,189 world leaders have praised his theory that the formalization of property rights is the key to a

---

187 Lasse Krantz, Securing Customary Land Rights in Sub-Saharan Africa: Learning from New Approaches to Land Tenure Reform, GOTEBOGS UNIVERSITET DEPT. OF ECON. & SOC’Y 1 (2015) (noting that the “conventional approach for securing property rights to land is by establishing a system of private ownership through individual titling”).
country developing and flourishing, and many nations and agencies have sought to implement his recommendations. Few argue with de Soto’s basic premises that secure property rights are invaluable to progress and development and that providing individuals with title to property is, wherever possible, the ideal.

Unfortunately, formalizing land tenure—giving title to the owner of a property that has not previously been titled—can be difficult. For example, in Sub-Saharan Africa, land titles have rarely been issued, if at all. Title administrators must be trained, property borders must be established, and titles must be formatted, created, and distributed. Even where land titles are available, the process to obtain title is often arduous and expensive. As de Soto exhaustively documented, the cost to purchase land (not including the land price) can be expensive, and obtaining legal

---

191 See Hendrix, supra note 190, at 184 n.2 & 185-86 (collecting examples).
192 See id. Hendrix, after identifying six “myths” in response to de Soto’s work, admits that “titling of property may give security” and that “security of ownership plays [an important role] in economic development.” Id. at 209, 212. Hendrix’s main point is that while “titling is a highly important ingredient to a more general strategy for development . . . the true impact of titling should not be overstated, nor should other factors be ignored. Such an overemphasis would give policymakers unrealistic expectations about the way in which titling does impact on broadly based economic growth.” Id. at 183.
193 Indeed, some have suggested that the problems with existing land tenure in Sub-Saharan Africa are so complex that no effort to overcome the challenges will be successful. Thankfully, this opinion has not stopped many individuals and institutions from pursuing reform.
195 See, e.g., Wickeri, supra note 35, at 973-74, 986 (reciting the challenges Nepali farmers undergo to obtain land certificates, the Nepali equivalent to land titles).
title to the land (where a title is available at all) and a building permit can be very time-consuming. 196

With a view toward promoting tenure security and reducing or eliminating these costs and barriers, reformers such as de Soto, as well as governments of developing countries, have sought to implement formalization procedures in many developing countries. 197 For example, Rwanda has engaged in a series of land reforms seeking to protect property rights for its citizens. 198 Legislation was enacted providing that both sons and daughters could inherit parental property, property rights of women in a legal marriage were protected, and spousal consent was required before matrimonial property was transferred. 199 Subsequently, additional reforms established a “single statutory system of land tenure that vests land ownership with the state and provides users with long-term usufruct rights (up to 99 years, depending on land use) that can be sold, passed on to heirs, mortgaged, leased, or otherwise transferred.” 200 Trained surveyors travelled throughout the country identifying parcel boundaries, recording them on aerial photos, and issuing receipts. 201 The information was transferred to a registry, digitized, and publically displayed. 202 Although more studies need to be done, initial studies indicate that Rwanda’s tenure reforms have

196 Key Concepts, The Power of the Poor, http://www.thepowerofthepoor.com/concepts/c7.php (last visited Apr. 22, 2016) (citing de Soto’s researching showing the following times and costs: in Guatemala, 4,307 days and $9,312 (4.3 years pay); in Argentina, 3,974 days and $12,592 (4.3 years pay); in Albania, 225 days and $816 (three months pay); in Egypt, 1,371 days, $5,070 (more than three years pay); in Tanzania, eight years and $2,252 (more than three years pay)); see also De Soto, supra note 189, at 18-28.


198 Ali, Deininger & Goldstein, supra note 3, at 267-74.

199 Id. at 267.

200 Id.

201 Id. at 268.

202 Id.
provided secure tenure, helped protect the environment, and increased protection for married women and girls.\textsuperscript{203}

Nevertheless, other efforts have been less rewarding, and researchers have found that efforts to obtain title, certification, or registration had mixed results in strengthening individual land rights.\textsuperscript{204} Indeed, some scholars have found that efforts to achieve formal tenure systems may increase tenure insecurity in some places due to the conflicts between traditional rights and the newly created legal land rights.\textsuperscript{205} Similarly, others have recognized that attempts to bring about “exclusive, alienable and legally registered individual land rights [are] not always the best solution for poor rural people.”\textsuperscript{206} Many poor farmers have come to “depend on more flexible, diversified, decentralized and common property systems over which they can often exert greater influence and that are more conducive to optimum uses of land.”\textsuperscript{207} In the face of these odds, many reformers have switched their focus from formalization of property rights to strengthening customary tenure systems.\textsuperscript{208}

\textsuperscript{203} Id. at 267, 274.
\textsuperscript{204} See Krantz, supra note 187, at 1-2; see also Otsuka & Place, Evolutionary Changes, supra note 61, at 9.
\textsuperscript{205} Otsuka & Place, Land Tenure, supra note 9 at 263 (explaining that tenure insecurity results because of conflicts between traditional rights and the newly formalized rights and opining that “[o]nce the individualization of land rights has been achieved endogenously, land registration is likely to strengthen land rights because of the absence of overlapping land rights among family members.”); see also Otsuka & Place, Evolutionary Changes, supra note 61, at 10.
\textsuperscript{206} IFAD, Improving Access, supra note 18, at 6.
\textsuperscript{207} Id.
\textsuperscript{208} To be sure, there are still those who favor the effort to formalize property rights. Hernando de Soto continues to urge that formalization is necessary and that without overt efforts, “it could take 300, 500 years” for formalization to occur and for greater prosperity to be achieved. Tapscott, supra note 22, at 33, quoting de Soto, “Commanding Heights,” Video Transcript, PBS (March 30, 2001), available at http://www.pbs.org/wgbh/commandingheights/shared/minitextlo/int_hernandodesoto.html.
2. Customary Tenure as a Means of Tenure Reform

Due to the challenges of efforts to replace customary tenure systems with title formalization in Sub-Saharan Africa, tenure reformers have shifted their approach from replacement to adaptation.209 In other words, reformers have concluded that instead of implementing Western-style individual land rights to the exclusion of customary tenure, it may be easier and more effective to work within the customary tenure system to strengthen the property rights of the community. North American readers may appreciate the example of the challenges the United States Congress encountered when it attempted to convert Native American communal tenure to individually titled property, a process called “allotment.”210 According to one reviewer, the allotment failed because Congress sought to “impose private property on the indigenous peoples who had no conception of the private ownership of land.”211 A more insightful perspective, however, suggests that because the Native Americans actually already possessed a “complex system of fluid tribal property rights,” the allotment failed because it “impos[ed] a rigid system that failed to account for traditional Native American property rights regimes that were based on cultural norms reflective of the common social good.”212 Thus, tenure reformers cannot simply expect to establish a “single, externally-imposed and static system of private property rights” that will be a “one-size-fits-all solution to catalyzing capital and building wealth.”213 The goal must be to work with local communities in customary tenures to reinforce rather than replace customary tenure systems.214

209 World Resources, supra note 18, at 61.
210 Shackelford, supra note 31, at 277.
211 Id. (quoting Kenneth H. Bobroff, Retelling Allotment: Indian Property Rights and the Myth of Common Ownership, 54 VAND. L. REV. 1559, 1561 (2001)).
212 Id.
213 Id. at 278.
214 Id. at 279.
One of the more innovative approaches to helping establish a more secure customary system has been proposed by land tenure expert Liz Alden Wily, who suggests that “it is above all rural people’s rights to the collectively possessed and used ‘commons’ that need protection in Africa.”

Alden Wily includes the commons area in her proposal for two reasons. First, these resources—off-farm woodlands and pastures—are especially vulnerable to being used and abused by outsiders. Second, these commons are considered by many African governments to be publican lands. Alden Wily’s approach therefore works to secure the entire area—both individually held property and off-farm commons—as community-owned property.

B. Creating Land Tenure Security

For many of the Sub-Saharan African poor, their poverty stems from effective or complete landlessness. They may be slum-dwellers with no more land than that upon which the crate they call home sits, or they may be trying to scratch some meager existence from the dirt alongside a rural road. In any case, the discussion of providing land tenure security is meaningless to them because they have no access to land.

In such circumstances, particularly where “a high degree of ownership concentration is combined with a significant level of rural poverty attributable to lack of access to land, fisheries and forests,” land redistribution may be an effective means of providing the poor with land and secure land tenure. Allocation of public land, voluntary and

215 Krantz, supra note 187, at 11-12.
216 Id. at 12.
217 Id.
218 Id.
219 Id. For additional customary tenure reform proposals and studies of existing reforms, see Knight, supra note 35.
market-based purchases of land, or seizure by eminent domain and redistribution of land to the poor “can facilitate broad and equitable access to land and inclusive rural development.”

Certain practices are necessary, however, to help ensure that land redistribution leads to secure land tenure and not bitterness and resentment, which can lead to open hostility, strife, and revenge. Thus, whether the land is seized by eminent domain or procured on the market, efforts must be made to ensure that adequate compensation is provided without undue delay for the expropriated or purchased land. Many tenure reform efforts have failed largely because the financing for expropriation has been insufficient to adequately compensate the former owners of the land and legitimize the reforms. Insufficient compensation almost guarantees that the landowners who are losing property whose property is being taken will “evade the law, cause the law to be rescinded, or violently resist enforcement” of it. Payments may be less than market value, but should replace the former owners’ lost income from the land. Furthermore, where the transfer is by

---

221 The distribution of public lands is not uniformly supported. Professors Prosterman and Hanstad argue that alternatives such as distribution of public lands, voluntary sales of land through “market-assisted” means, and resettlement programs have failed by either not having any significant impact or, worse, being simply “costly, disruptive, and environmentally damaging.” Prosterman, Land Reform, supra note 23, at 780-81.
222 FAO, Voluntary Guidelines, supra note 4, at 25. Since there is some evidence that formalization increases rental prices, it may be helpful to consider creating tenure security in leasing arrangements without reallocating property rights—an issue that has not been considered adequately. Similarly, removing restrictions on renting land promotes the rural economy without the expense of traditional titling efforts, as studies in Ethiopia and South Asia demonstrate. Shackelford, supra note 31, at 298–99.
223 Tapscott, supra note 22, at 31 (observing that forced transfer of land without compensation “creates a host of political and human rights concerns and can instigate enduring tension and conflict”).
224 Prosterman, Land Reform, supra note 23, at 778; FAO, Voluntary Guidelines, supra note 4, at 26, 27 (¶¶ 15.4, 15.9).
225 Prosterman, Land Reform, supra note 23, at 778.
226 Id. at 781.
227 Id.
eminent domain, the state must be careful not to communicate a sense of judgment or penalty on the former owners.\textsuperscript{228}

Care must be taken to ensure that the redistribution is successful. While the amount of the land provided to the beneficiary should be sufficient to earn an adequate standard of living,\textsuperscript{229} the size of the property supplied need not be excessively large, as even small land plots with tenure security can provide significant benefits.\textsuperscript{230} Providing plots of land sufficient for a small house and garden, between 1/25 acre (about 1,730 square feet) and 1/10 acre (about 4,350 square feet), to agricultural families has proved to make a significant difference for the beneficiaries.\textsuperscript{231} While these plot sizes may seem very small to many Westerners, it is important to realize both how productive a small plot can be\textsuperscript{232} and how valuable to a poor family the plot will be.\textsuperscript{233} The state should use the amount of land a family can farm with its own labor and capital as a guideline for sizing the property.\textsuperscript{234}

In addition to right-sizing the property redistributed, the state should also ensure that the beneficiary has access to credit, markets, farming advice, technical assistance, and other resources necessary to make the redistribution successful.\textsuperscript{235} Some tenure reforms have failed in large part

\textsuperscript{228} Id. at 782.
\textsuperscript{229} FAO, Voluntary Guidelines, \textit{supra} note 4, at 26.
\textsuperscript{230} Prosterman, Land Reform, \textit{supra} note 23, at 782.
\textsuperscript{231} Id at 782-83 (collecting case studies); Tapscott, \textit{supra} note 22, at 31, 35.
\textsuperscript{233} Tapscott, \textit{supra} note 22, at 35 (observing that “even minor profits can provide resources sufficient to enhance child nutrition, decrease time spent gathering food and firewood, and increase family income. Slight improvements in each of these categories can be sufficient to fight malnutrition and child mortality, allow children to attend school, increase access to healthcare, and expand future opportunities, effectively lifting families out of the cycle of poverty and allowing them to chart a new path toward development”).
\textsuperscript{234} Prosterman, Land Reform, \textit{supra} note 23, at 783.
\textsuperscript{235} FAO, Voluntary Guidelines, \textit{supra} note 4, at 27; see IFAD, Improving Access, \textit{supra} note 18, at 30.
because, despite the provision of land and tenure security to the beneficiaries, the new owners had “no other inputs and services to be able to cultivate [the land] properly.”

VII. CONCLUSION

A growing body of scholarly research ably demonstrates that land tenure security provides relief for the poor. Those with no- or low-income, upon obtaining secure access to land, enjoy improved livelihoods because they can grow more food, harvest more products for consumption or trade, invest in more economically productive activities, and use the property to obtain credit.

The research is less developed but equally persuasive that land tenure security also promotes environmental protection. Where a country adopts law and policies promoting and protecting tenure security, it can significantly reduce environmental degradation. Land tenure security also results in greater environmental protection through better stewardship of natural resources. Thus, farmers who have secure land tenure are motivated not only to make improvements to aid in their agricultural work but also to help improve their environment. Providing secure land tenure under the rule of law and enforcing claims under the common law, enables developing countries to achieve their environmental goals faster.

To achieve these ends, progress must continue to be made in formalizing property rights, strengthening customary tenure systems, redistributing land, and providing tenure security to the landless poor.

---

236 IFAD, Improving Access, supra note 18, at 6, 13 (noting that “measures to strengthen land tenure security must be complemented by pro-poor policies, services and investments that reduce vulnerability and enable people to make the best use of their access to land”).