

Private Land Use Restrictions in East Africa

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ABCG Meeting

Property Rights

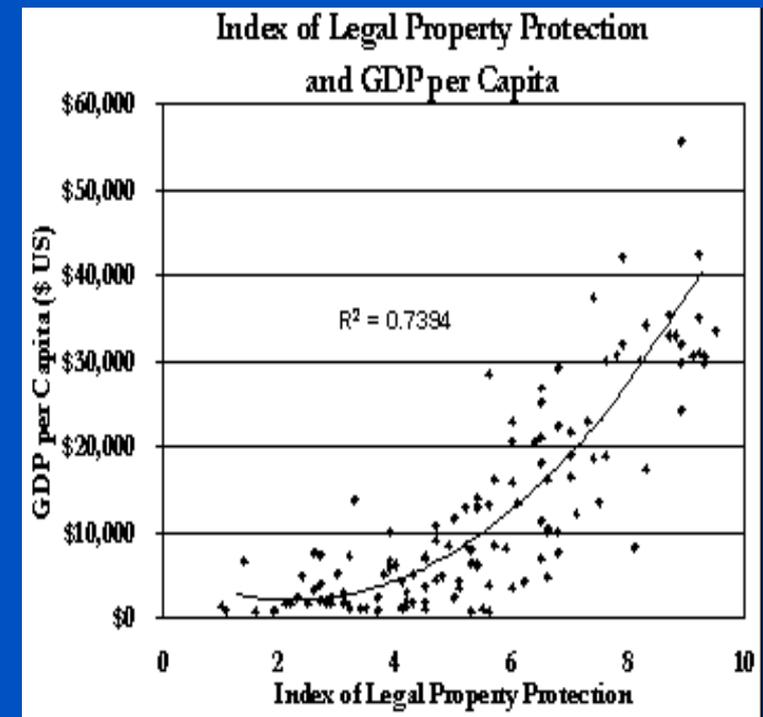
Land and natural resource tenure from bundles of property rights (e.g., assess, use, transfer)

Bundle sizes vary—from minimal rights of access to full ownership rights

Secure rights encourage investments, but absolute private property rights can be a curse on society

Development efforts often focus on securing rights through demarcation, documentation, registration, titling

Less attention on limiting state authorities to extinguish or restrict property rights



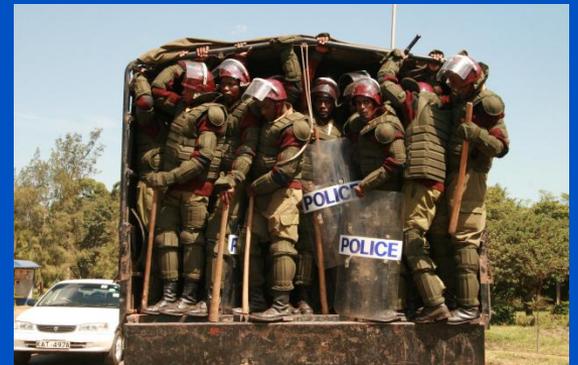
Extinguishing or Restricting Land Rights

Legislation provides African governments two sets of authorities to extinguish or restrict private property rights:

- Eminent Domain—authority of state to compulsorily acquire private property for public purposes (= extinguish all private property rights)
- Police Powers—authority of state to restrict/limit personal rights, including property rights, also for public purposes



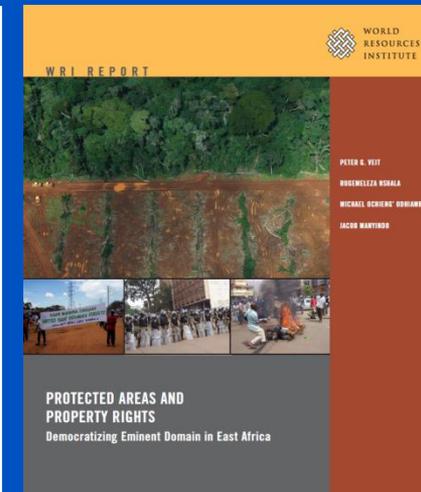
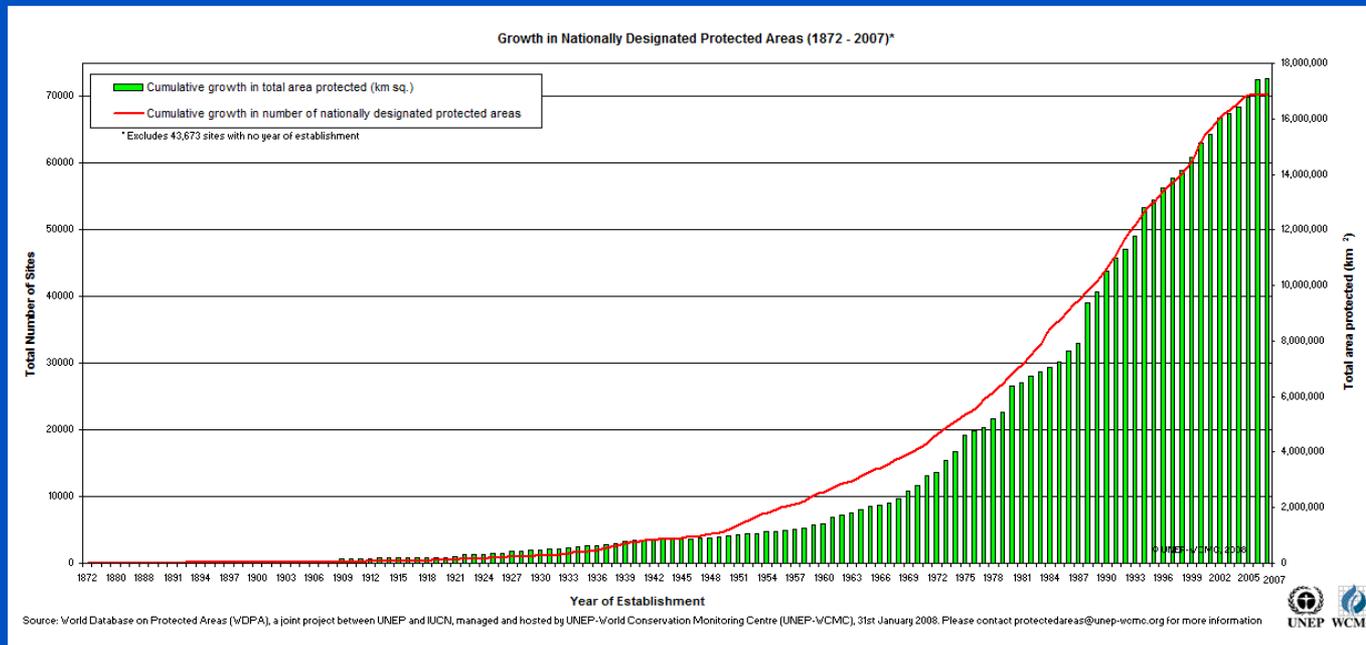
**PROPERTY RIGHTS
ARE HUMAN RIGHTS**



Land Rights and Biodiversity Conservation

Environmental management, including biodiversity conservation are recognized and established uses of eminent domain and police power

Biodiversity conservation can be a major threat to tenure—many protected areas (PAs) in Africa established through use of eminent domain



New Frontier for Biodiversity Conservation

Establishing new PAs is now problematic in many African countries—
politics, advocacy, community opposition, rural resentment

Uganda has not created a PA since independence

- Degazettement, downlisting and change in PA land use threaten conservation
- Uplifting legal status of existing PAs (often involves loss of user rights to NRs)

New frontier is restricting land use on privately-held land for wildlife corridors, dispersal areas

- Voluntary vs mandatory
- Can reduce land values, limit livelihoods options, and create economic hardships



Private Land-Use Restrictions: Kenya



- Imposition of restrictive covenants on private land titles (Government Land Act)
- Direct statutory restrictions (e.g., land preservation orders) on use and development of agricultural land (Agriculture Act, Registered Land Act)
- Restrictions on dealings with family land or customary land (Registered Land Act, Land Control Act)
- Chiefly directives to plant trees and other orders (Chief's Authority Act)
- Restrictions of subdivision of land (Local Government Act)
- Application of zoning regulations (Physical Planning Act, Local Government Act)
- Development and application of land use plans
- Application of EIA and other mechanisms, such as easements (Environmental Management and Coordination Act)
- Common law restrictions of private land use (Judicature Act)



Agriculture Act: Kenya

Authorizes government to issue land preservation orders to:

- Prohibit or control clearing or breaking of land for cultivation
- Prohibit grazing or watering livestock on land
- Prohibit or control burning or destruction of vegetation for protection of land against storms, winds, rolling stones, floods and landslides, soil erosion and for maintaining water
- Undertake afforestation and reafforestation of land
- Protect water catchment areas
- Undertake drainage works
- Destroy or uproot any vegetation planted on land that contravenes land preservation order
- Prohibit the use of land for agricultural purposes altogether



Environmental Mngt & Coordination Act: Kenya

- Protect hill tops and sides, mountain areas, forests (Sec. 44, 46, 48)
- Protect environmentally-significant areas (Sec. 54)
- Protect coastal zones (Sec. 55)
- Develop and apply environmental quality standards (Sec. 70)
- Develop and apply noise standards (Sec. 101, 102)
- Issue restoration and conservation orders (Sec. 108, 109, 111, 112)
- Impose environmental easements (Sec. 112, 115)
- Apply internationally-recognized environmental principles
- Apply Environmental Impact Assessments and associated development conditions (EIA and Audit Regulations)



Police Powers in Practice



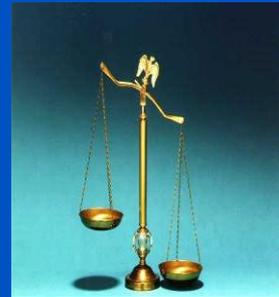
- British colonial government routinely exercised police powers, especially to protect ASALs, steep slopes and riverbanks
- Today, government routinely uses some authorities (EIA, zoning ordinances); other powers used less frequently (easements)
- Government restrictions are commonly upheld by the court
- Developers concerned by the use of these powers; environmentalists criticize government for not exercising authorities and enforcing laws
- Authorities not exercised to the full extent of the law. Many reasons—weak capacity, political pressure, community resistance, lack of public awareness, etc.
- Government emphasizes voluntary compliance and “self-regulation”



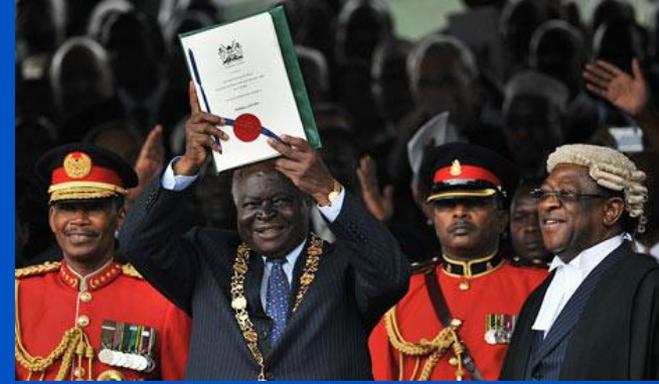
Balance: Property Rights vs. National Interests

Cause for concern:

- Broad range of available authorities to restrict private land use
- Broad range of allowable uses
- Absence of a justification standard for exercising many authorities
- Considerable discretion granted to government agencies to exercise these authorities (simply relying on reluctance is insufficient protection)
- No legal or established procedures for exercising most authorities
- Fundamental democratic principles not embedded in the actual exercise of these authorities (participation, transparency, accountability)
- The exercise of many authorities does not obligate the government to compensate landowner for losses
- Citizens seek redress in courts, but courts have upheld powers



2010 Constitution



New Constitution preserves eminent domain (Article 40(3)(9b)) *and* police powers to restrict private land use (Article 66):

“(1) The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning. (2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.”



Promoting Accountability

New legislation is expected...

Options for promoting accountability:

- Develop robust, unqualified public purpose requirements for use of powers
- Establish high justification standards (e.g., cost-benefit analysis—do benefits to public outweighs costs to affected landowners?)
- Establish and codify procedures for exercising authorities that include fundamental democratic principles (e.g., participation, transparency)
- Other accountability measures include FPIC, parliamentary approval, ballot box initiative, etc.
- Given importance of land to rural populations and the hardships from land-use restrictions, providing fair and adequate compensation for losses may be appropriate



<http://www.wri.org/>

<http://usaidlandtenure.net/>

<http://www.wri.org/property-rights-africa/>

THANK YOU

