

Wealth-Destroying Private Property Rights

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Abstract

Conventional political-economic wisdom predicts that privatizing the commons will create wealth. Yet in cases found throughout the developing world, privatizing the commons has destroyed wealth. To explain this phenomenon, we develop a theory of wealth-destroying private property rights. We show that private property rights created by public actors, but not private ones, sometimes destroy existing wealth. When property regime decisions are left to private actors, rights-creation authority often devolves to the beneficiaries of the property-regime status quo. This situation can prevent privatization when it would generate net social gains but, critically, always prevents privatization when it would impose net social losses. In contrast, when rights-creation authority is transferred to public actors, privatization occurs even when it imposes net social losses if public actors are not residual claimants and privatization benefits them personally. We apply our theory to understand wealth-destroying land privatization in Kajiado, Kenya.

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1 Introduction

Every political economist knows that private property rights create wealth. Private property internalizes externalities, incentivizes optimal resource use, and enables markets that coordinate value-adding economic activity through the price system (Hayek 1945; Mises 1949; Demsetz 1967). Which presents a puzzle: Why has privatizing the commons in some places not created wealth but destroyed it?

From Ghana to Afghanistan, Kenya to Madagascar, Rwanda to Uganda, Cambodia, and Peru, the creation of private land rights has led to questionable economic benefits at best and economic losses at worst (see, for instance, Attwood 1990; Baxter and Hogg 1990; Place and Hazell 1993; Migot-Adholla et al. 1994; Hunt 2004; Bassett et al. 2007; Jacoby and Minten 2007; Kerekes and Williamson 2010; Loehr 2012; Murtazashvili and Murtazashvili 2015). To explain this phenomenon, we develop a theory of wealth-destroying private property rights. Our theory is grounded in a simple insight: private property rights have different sources, and their source sometimes matters for how they affect economic outcomes.

Broadly, private property rights can come from one of two places: the activities of private actors, as in the case of forest-animal hunters in eighteenth-century Quebec, famously documented by Demsetz (1967), or the activities of public actors, as in the case of land privatization projects legislated by politicians, assented to by voters, and implemented by bureaucrats in contemporary Kenya and elsewhere in the developing world (Fratkin 2001). We show that private property rights created by public actors, but not private ones, sometimes destroy existing wealth.

When property regime decisions are left to private actors, rights-creation authority often devolves to the beneficiaries of the property-regime status quo. This situation can prevent privatization when it would generate net social gains but, critically, always prevents privatization when it would impose net social losses. In contrast, when rights-creation authority is transferred to public actors, privatization occurs even when it imposes net social losses if public actors are not residual claimants and privatization benefits them personally.¹

We apply our theory to understand land privatization among the Maasai of Kajiado, Kenya, for whom creating private property rights destroyed rather than created wealth. Consistent with

¹ On the importance of residual claimant status to the wealth-producing capacity of governance arrangements, see Salter (2015).

our theory, we find that wealth-destroying private land rights in Kajiado were created by public actors who were not residual claimants and who land privatization benefited personally.

Our paper is most closely connected to the literature that examines government's ability to improve economic outcomes by designing property regimes. Traditionally, this literature considers the difficulties of improving economic outcomes through government-created common property (see, for instance, Mises 1920, 1949; Hayek 1945; Boettke 1990, 1993, 2001; Kornai 1992). A different strand, however, considers the difficulties of improving economic outcomes through government-created private property (see, for instance, Anderson and Hill 1983, 1990; McChesney 1990, 2003; Easterly 2008; Murtazashvili and Murtazashvili 2015, 2016a, 2016b).²

Empirically, this research finds that the conventionally predicted economic effects of state-led privatization do not manifest universally. Recent field work conducted by Murtazashvili and Murtazashvili (2015, 2016a, 2016b), for instance, suggests that government land titling efforts in Afghanistan have not improved welfare. Theoretically, this research identifies the causes for such failure. Anderson and Hill (1983), for instance, demonstrate how costly rent-seeking may dissipate new wealth promised by state-led privatization, leaving society no richer than it was to start. Our analysis contributes to this literature by demonstrating how, even when rent-seeking is costless, state-led privatization may destroy existing wealth, leaving society poorer than it was to start.

Our paper is also connected to the literature on self-governance, which considers privately created property regimes.³ Anderson and Hill (1975, 2004), for example, study the private emergence property rights in the American West. Benson (1989a) does so in the context of preliterate societies, and Benson (1989b) and Kerekes and Williamson (2012) do so in the context of medieval Europe. Leeson (2007a, 2007b, 2009) examines privately created property regimes among the Caribbean pirates, in precolonial Africa, and along the historical Anglo-Scottish border. Most recently, Skarbek (2011, 2014, 2016) considers the private creation of property rights in prison gangs. Our analysis contributes to this literature by identifying an overlooked potential

² See also, Bromley (1989, 2009); Heller (1998); Herbst (2000); Platteau (2000); Arrunada (2012); Bromley and Anderson (2012). A related literature emphasizes the importance of distributional conflicts and power relations in generating or preserving "inefficient" property institutions. See, for instance, Libecap (1989), Knight (1992), Platteau (1996), and Acemoglu (2003).

³ On the comparative importance of private vs. governmental sources of property protection, see Williamson and Kerekes (2011).

consequence of using public actors to remedy the shortcomings of privately created property regimes: the destruction of social wealth.

2 A Theory of Wealth-Destroying Private Property Rights

Private property rights offer society potential benefits. Relative to common property, such rights tend to prevent resource overuse, provide stronger incentives for investment, and direct productive economic activity via market prices. In a pastoralist society, for example, private land rights may prevent overgrazing, promote investment in land improvements, and guide land toward uses that increase its value.

These benefits, however, are not free. Private property rights also impose costs on society. Relative to common property, such rights tend to require more resources to define and enforce (Anderson and Hill 1975; Field 1989; Lueck 2002). In certain environments, private property rights are also more expensive to use. In a pastoralist society that inhabits an arid or semi-arid region, for example, it is often cheaper to realize scale economies when land is held in common than through costly market transactions under private property (Onchoke 1986; Coleman and Mwangi 2015; see also, Dahlman 1980; Ellickson 1993; Platteau 2000). Similarly, in such a society, common land holdings may insure individuals against drought risk more cheaply than arranging insurance through markets when land is owned privately (Kabubo-Mariara 2005; Coleman and Mwangi 2015; see also, Picht 1987; McAllister et al. 2006).

Like all choices, the choice between property regimes therefore involves tradeoffs. A property regime's effect on social wealth depends on how it negotiates these tradeoffs. When the social benefits of private property in some asset exceeds the social costs, creating private property rights in that asset creates social wealth. When the opposite is true, doing so destroys social wealth.

Whether an asset currently found in the commons is left there or instead privatized depends on how privatization affects the personal wealth of the people who have authority to make property decisions relating to it—the rights creators (Riker and Sened 1991). If privatizing the asset would increase these individuals' personal wealth relative to leaving the asset in the commons, they will privatize it, and vice versa.

Crucially, privatization's effect on the personal wealth of rights creators need not vary positively with its effect on social wealth. Consider, for example, a society of pastoralists where

land is held in common but other property, such as livestock, is owned privately. Government in this society plays no role in land rights, so if private land rights are to emerge, they must be created privately—by the pastoralists' unanimous agreement.

For a minority of the pastoralists, the costs of private land rights would exceed the benefits. For example, overgrazing imposes a cost on them, but their cost of fencing parcels—the technology available for enforcing exclusive claims—is higher still. For the majority of pastoralists, the benefits of private land rights would exceed the costs. For instance, these pastoralists may be more productive, so the cost that overgrazing imposes on them is higher than for the others and higher than the cost of fencing parcels.

Suppose the net benefit of private land rights for the latter pastoralists, privatization's beneficiaries, exceeds the net cost of private land rights for the former pastoralists, privatization's losers. Thus, creating private property would create social wealth. What will the rights creators—the pastoralists as private actors—do?

It depends on their cost of bargaining. To privatize the land they hold in common, the pastoralists must agree to privatization, beneficiaries and losers alike. And since the losers of land privatization are the beneficiaries of common land tenure—the beneficiaries of the status quo property regime—it is the beneficiaries of privatization who must do the convincing and the losers of privatization who must be convinced. We may say that the losers have rights-creation authority—a de facto property right to the decision about which kind of property regime will govern their society's land.

Since land privatization would create new wealth, in principle, it is possible for the beneficiaries of privatization to pay the losers more than they would lose from privatization to agree to the creation of private land rights—a bargain the losers would be happy to accept. If the pastoralists' cost of negotiating such a bargain is less than the beneficiaries' gain from privatization, that's just what they will do. But what is possible in principle is often precluded in practice by prohibitive bargaining costs (see, for instance, Coase 1960; Eggertsson 1990). And if the pastoralist's cost of negotiating a bargain to privatize is greater than the beneficiaries' gain from privatization, no agreement will be forthcoming. Land will be left in the commons; potential wealth, left on the table.

Conventional wisdom adduces this private-actor failure to counsel government involvement in the creation private property rights, which may take two forms (see, for instance,

North 1981, 1990; Sened 1997; Hodgson 2009). The first: creating private property rights to an asset by governmental fiat. For example, legislators may pass a new law mandating the privatization of land currently held in common. The second: empowering a public body composed of citizens to decide the asset's privatization. For example, government may subject land privatization to a vote of the pastoralists, decided by the majority. If the majority votes to privatize, the government carries this out.

Both forms of government involvement make it possible to create private property rights without bargaining and thus permit wealth-creating privatization that would otherwise be prevented by prohibitive bargaining costs. And both forms accomplish this by transferring rights-creation authority, which is wielded by privatization's losers—the beneficiaries of the status quo property regime when rights creation is left to private actors—to public actors instead.

To see how, consider again our society of pastoralists, but suppose that government plays a role in creating land rights: It subjects land privatization to a vote of the pastoralists and privatizes their land if privatization receives a majority of votes. What will the rights creators do?

First, note that the rights creators' identity has changed. Before, they were the pastoralists in the minority, who would lose from privatization—private actors whose agreement was required to create private land rights. Now, the rights creators are the pastoralists who comprise the majority of voters—public actors to whom government has transferred effective rights-creation authority and thus do not require anyone's agreement to create private land rights.

Since the pastoralists who comprise the majority of voters would benefit from land privatization, they will vote to create private land rights, and government will create them. In this way, transferring rights-creation authority to public actors permits the realization of new wealth, which would not have been realized if rights creation were left to private actors.

This reasoning, which underlies conventional wisdom about government involvement in private property creation, is correct but incomplete—in two ways. To see the first, return to our society of pastoralists when government plays no role in creating land rights, but suppose now that the net cost of land privatization for the (less numerous) pastoralists who would lose from it exceeds the net benefit of land privatization for the (more numerous) pastoralists who would gain from it. Thus, privatization would destroy existing wealth. What in this case will the rights creators do?

The same as they did when privatization would create wealth but bargaining costs were prohibitive: leave land in the commons. Rights-creation authority remains in the hands privatization's losers. And since land privatization would reduce existing wealth, there is no sum that privatization's beneficiaries would be willing to pay the losers that could secure the losers' agreement to privatize whether bargaining costs are prohibitive or not.

Conventional wisdom is thus correct that private actors do not always privatize the commons when creating private property rights would create new wealth. But it ignores the equally important fact that private actors never privatize the commons when creating private property rights would destroy existing wealth.

To see the second way in which conventional wisdom about government involvement in the creation of private property rights is incomplete, consider again the case in which privatization would destroy wealth, but suppose that government plays a role in creating land rights, putting land privatization to a popular vote of the pastoralists, just as it did earlier. What now will the rights creators do?

Also the same as they did when privatization would create wealth but bargaining costs were prohibitive: privatize land. And for the same reason: the majority of pastoralists, to whom government has transferred rights-creation authority, benefit personally from the creation of private land rights and so vote for privatization. Land is therefore privatized despite the fact that private land rights destroy existing wealth.

Conventional wisdom is thus correct that transferring rights-creation authority to public actors makes possible the creation of new wealth, which would be left on the table if rights creation were left to private actors. But it ignores the equally important fact that transferring rights-creation authority to public actors also makes possible the destruction of existing wealth, which would be preserved if rights creation were left to private actors. The former possibility is typically realized because the net social benefits available from privatization are usually, though not always, positive. For the same reason, the latter possibility is realized infrequently, but when it is, with dire consequences.

If bargaining costs were not prohibitive, and bargains to vote in a particular way could be enforced, the latter possibility could be avoided. Privatization's losers could pay privatization's beneficiaries to vote against privatization, and the sum offered would be enough to do the trick. But bargaining costs are prohibitive—the reason government is involved in creating land rights,

for transferring rights-creation authority to public actors—so bargaining will not prevent the creation of wealth-destroying private property rights when rights creators are public actors.

This outcome could also be avoided if the public actors to whom government transferred rights-creation authority were residual claimants—if changes in social wealth resulting from the creation of private property rights redounded to these actors personally. In that case, public rights-creators would internalize the net social loss resulting from the creation of private property rights when the social costs of privatization exceed the social benefits and so would refrain from creating them.

But in most cases, rights-creating public actors are not residual claimants. Consider voters: Prohibitive bargaining costs preclude the voters who comprise the majority of the pastoralists—privatization’s beneficiaries—from internalizing the net losses they would impose on the society of pastoralists more generally by voting for land privatization. Thus, while these voters reap benefits from wealth-destroying privatization, they bear none of its costs.

Typically, government officials also lack residual claims: An official may confront lower tax revenues if he creates wealth-destroying private property rights and, in principle, this could lead him to internalize his property decision’s effect on wealth. In practice, however, it usually does not. Since enforcing tax compliance in the developing world is often difficult, tax revenues are often low to start with, hence, so is the revenue sacrificed at the margin by creating wealth-destroying private property rights. Most important, with rare exceptions, government officials do not have personal claims to tax revenues, and the potential indirect benefits of tax revenues that might accrue them, such as an expansion of the government’s general budget, are tiny.

In contrast, land privatization—wealth creating and destroying alike—presents administering government officials a new, potentially lucrative source of rents to which they do have personal claims: payments by pastoralists, and perhaps others, in exchange for choice parcel allocations. Bribes paid to officials, for example, are pocketed by officials and benefit them directly. Land privatization may also personally benefit administering officials indirectly, for example by expanding the budgets of the government agencies that oversee land privatization, for which such officials work. Thus, like the voters above, privatization-administering officials stand to benefit from wealth-destroying privatization but bear none of its costs.

When the rent-seeking activity of the pastoralists in their competition with each other for choice parcels does not use resources, public actors’ creation of wealth-destroying private land

rights of course destroys wealth—the social costs of privatization still exceed the benefits—but no additional wealth is destroyed because of rent-seeking. However, when the rent-seeking activity of the pastoralists does use resources, as it must if it goes beyond simple bribes, public actors' creation of such rights is doubly destructive: the first part, wealth destroyed by creating private land rights where the social costs exceed the social benefits; the second part, additional wealth destroyed by costly rent-seeking.

3 The Case of the Maasai in Kajiado, Kenya

We apply the theory of wealth-destroying private property rights developed above to understand the effect of land privatization among the Maasai of Kajiado, Kenya. Once a prominent tribe of nomadic herders found throughout Kenya, in the early twentieth century, European colonizers relegated many of the Maasai to the southern part of the country that borders Tanzania—Kajiado and Narok—where they remain (Mwangi 2007a).

3.1 Maasai Land Rights Before and After Colonization

For most of their history, the Maasai practiced mobile pastoralism under a property regime in which livestock and other property was owned privately but land was held in common. The climate the Maasai inhabited, then and now, was arid or semi-arid. In Kajiado, for example, 94 percent of the land area is classified as such, characterized by low, variable rainfall and infertile soil (Rutten 1992, Kabubo-Mariara 2003). To raise livestock in this environment, the Maasai used a simple but effective herding strategy: they grazed animals over large-scale ranges that contained both high- and low-potential pastures, rotating from the former during the dry season to the latter during the wet season.

Politically, the Maasai were divided into twelve sections, or tribes (Mwangi 2006, 2007a). A section consisted of several localities; a locality, of several neighborhoods, camps, and households (Rutten 1992; Mwangi 2007a). Each section had its own well-defined territory, whose boundaries were protected by community members—warrior age-sets from the section's localities—and its own governance institutions, provided at the top by councils of elders, who also attended to intersectional disagreements (Hedlund 1979; Rutten 1992).

Most of the Maasai's governance needs, however, were found and fulfilled locally (Mwangi 2007a). Each locality, for example, had its own age-set group and council of elders, which attended to local disagreements. The local council of elders also facilitated the management of locality resources, in particular the grazing schedule, deciding which pastures would be reserved for the dry season and when they could be used (Mwangi 2006, 2007a).

Across Maasai sections, land use was exclusive. Grazing pastures in a section other than that of which one was a member required consent. However, in light of commonly felt, environmentally imposed land needs—particularly in times of drought—intersectional grazing permission was almost always granted, and amicable intersectional relations that facilitated intersectional land sharing were typical, fostered through shared rituals (Rutten 1992; Mwangi 2006).⁴ Within a Maasai section, land use was not exclusive even in theory. Here, section members, no matter their locality, were free to graze their herds as they pleased, respecting only locality-established limitations on pastures reserved for grazing in the dry season (Rutten 1992).

The precolonial Maasai's communal land regime reflected a wealth-preserving institutional response to the environmental conditions they faced (Coldham 1979; Fratkin 1994; Blewett 1995; Kabubo-Mariara 2003; see also, Ensminger 1997).⁵ This regime entailed the usual tradeoffs of common property, most significantly in the pastoralists' context, overgrazing. But for the Maasai, that social cost was more than compensated for by the social benefits of common land tenure.

For example, common land rights offered the Maasai inexpensive social insurance, indispensable in their climate for cheaply reducing shared environmental risks (Kabubo-Mariara 2005; Sundstrom et al. 2012; Coleman and Mwangi 2015; see also, McCloskey 1991; Nugent and Sanchez 1993). Pastoralists in one locality who suffered drought could move freely within and between sections in search of useable pasture that was not affected, avoiding their herds' devastation.

The Maasai's communal land regime also minimized resource expenditures required to define and enforce exclusive claims to land—a substantial savings in their environment. In 1990,

⁴ Moreover, while most Maasai resided in the same locality and thus remained members of the same section for extended periods, it was possible for a member of one section to join another by participating regularly in the age-set activities of a locality in that section (Rutten 1992; Mwangi 2007a).

⁵ On the suitability of communal property arrangements under other conditions, see, for instance, Netting (1976), Ostrom (1990), and Seabright (1993).

the estimated cost of fencing just 40 ha of land in Kajiado was approximately Ksh. 150,000—about nine times the average annual income of an unskilled, Kenyan laborer (Rutten 1992: 362, 300). In precolonial Kenya, the cost of fencing land was undoubtedly higher still.

Equally important, the Maasai's communal land regime economized on transaction costs. Common land tenure offered pastoralists low-cost opportunities for joint production and investment. Moreover, it facilitated resource mobility in a region where large-scale ranges and rotational grazing are required for sustainable livestock production (Kabubo-Mariara 2005; Borwein 2013; see also, Mearns 1996; Banks 2003; Hobbs et al. 2008).

The Maasai's European colonizers, however, saw their land regime differently. In 1895, the British established the East Africa Protectorate over the territory that would become Kenya. They concluded that the pastoralists' communal land tenure was an unnecessary impediment to developing the region economically. Pastures reserved for the dry season, for instance, were seen as wasted capacity; large stocks of cattle, as wasteful sources of land degradation (Blewett 1995; Kieyah 2007).

To remedy such “inefficiencies,” the British deployed a simple solution: land privatization (Kieyah 2007; Mwangi 2007a). In practice, this typically meant giving colonizers private rights to the land inhabited by the Maasai, redistributing the most productive areas to settlers. Most of the land that remained in Maasai possession after these colonial “reallocations” was located in Kajiado (and Narok), where the pastoralists consequently ended up (Blewett 1995).

In their smaller, less productive domain, the Maasai continued to hold land in common, albeit at higher cost, since grazing livestock on less abundant and fertile land meant more severe overgrazing. After becoming independent of Britain in 1963, the government of Kenya would use this situation to motivate new privatization efforts: the privatization of the Maasai's common land holdings in Kajiado.

To that end, in 1968, the government of Kenya promulgated the Land Adjudication Act, which created from those holdings private titles to individual and group ranches, the latter owned corporately. Supplementary legislation, the Land (Group Representatives) Act, created a legal framework for group ranch administration (Mwangi 2006, 2007a).⁶ Financial support for the

⁶ Group ranches were presented a compromise between the need for private land rights to promote economic development, on the one hand, and the need for large-scale ranges and mobile herds for livestock production in arid and semi-arid regions, on the other (Rutten 1992).

government's land privatization program was provided largely by the World Bank and other international development organizations, directed through the Kenya Livestock Development Project, which aimed to, for instance, increase Maasai investment via land-title collateralization and to commercialize the Maasai livestock industry by creating a market in land.

Land privatization, initially at the group ranch level, then at the level of individuals, proceeded apace. By 1980, roughly three-quarters of the land in Kajiado had been privatized in the form of 52 private group ranches. Not long after, those ranches began to be subdivided—their groups dissolved and land broken up to create private individual land titles. By 1990, approximately 80 percent of Kajiado's group ranches had entered the process of subdivision (Rutten 1998). And as of 2006, all but five of the original 52 had completed or were in the midst of completing individual land privatization (Mwangi and Ostrom 2009).

3.2 The Economic Effect of Land Privatization in Kajiado

Given the extent of land privatization in Kajiado, one might expect significant economic improvement for the Maasai to have followed. But then one would be disappointed—and surprised—for what followed instead was economic decay. “[I]ncome levels for the Maasai pastoralists have not improved since land tenure was formalized; on the contrary, per capita income levels are in a downward trend in the longer term” (Rutten 2008: 109).

On the one hand, the social benefits that land privatization were supposed to generate for the Maasai proved modest at best. Collateralization-enabled investment, for example, turned out to be all but non-existent. According to a study of more than 750 Maasai who received private individual land titles post-subdivision, only 2.2 percent had or intended to use their title as collateral for a loan (Rutten 1992: 394).⁷ Among the members of one former group ranch (Empuyiankat), not a single person mortgaged his land. And in the former group ranch whose members exhibited the highest rate of mortgaging (Olkinos), only six percent applied for a loan (Rutten 1992: 392). Similarly, the vibrant Maasai land market expected to result from creating private individual land titles turned out to be not-so vibrant. According to same study, only 15.2

⁷ This study covers 757 individuals from the former Olkinos, Embolioi, Empuyiankat, Kitengela, and Poka group ranches, which subdivided between 1986 and 1989.

percent of former group ranch members had even applied to sell a portion of their land (Rutten 1992: 386).

On the other hand, the social costs of land privatization for the Maasai proved substantial. Most significantly, under private individuals land rights, livestock production—historically the Maasai’s chief source of income—declined precipitously. According to a survey conducted in the southeast region of Kajiado, between 1977 and 1996 the average pastoralist’s cattle holdings fell 60 percent; his sheep and goat holdings, 90 percent (Campbell et al. 2000; see also, Rutten 2008; BurnSilver 2016). The reason: in the Maasai’s environment, producing livestock under private land rights is considerably more expensive than doing so under common land tenure.

Successful herding in the arid and semi-arid climate that Kajiado’s pastoralists confront requires large-scale ranges that permit rotational grazing between wet- and dry-season pastures. According to the Kajiado Ministry of Livestock Development, the minimum land area, or ranch size, required for viable household livestock production here is 800 ha; less than 200 ha is unviable for even subsistence production (Rutten 1992).

Data are available on the size of private individual land parcels created from 32 former group ranches in Kajiado that subdivided or were in the process of doing so as of 1990 (Rutten 1992: 280-282; see also, Kimani and Pickard 1998; BurnSilver and Mwangi 2007; Mwangi 2007a; Rutten 2008). In every case, the average parcel created was dramatically smaller than the minimum size required for viable livestock production, ranging from a maximum of 298 ha (Poka) to a minimum of 21 ha (Olchoro-Onyori). Indeed, if every former group ranch in Kajiado were subdivided equally, none would have an average land size of 800 ha, and only two would have an average size above 200 ha (Rutten 1992: 297). These data imply that land privatization in Kajiado, at least at the individual level, where it was ultimately carried out, was and is incompatible with viable livestock production.

There are two ways for the Maasai to cope with this situation: combine a sufficient number of individual land parcels to reach the minimum size required for viable livestock production or turn to alternative economic activities. Both strategies have been attempted by some Maasai, but both are problematic.

Maasai family members and friends have pursued land re-aggregation where they can (BurnSilver and Mwangi 2007; Mwangi 2007a; Coleman and Mwangi 2015). And if carried far enough, such re-aggregation could, at least in principle, “undo” the scale-obstacle to viable

pastoralism created by carving what were once common land holdings into private individual parcels. Re-aggregation, however, is costly. It requires negotiation with a potentially large number of individual land owners, likely far exceeding one's family members and friends—an important social cost of private land rights. Moreover, Maasai trust in traditional elder leaders—the people in perhaps the best position to forge agreements between private individual landowners—has been weakened by state-led privatization, which shifted authority away from elder leaders to governmental administrators (Mwangi 2007b, 2010).

Engaging in alternative economic activity is equally problematic.⁸ Given the low education level of most Maasai, which largely precludes other forms of employment, the most popular economic alternative is crop cultivation.⁹ However, the same climactic conditions in Kajiado that require large-scale ranges for successful herding render crop cultivation “unlikely to provide a secure source of livelihood” in drier regions. “Crop failures are common in Kajiado,” and cultivation is “more risky than nomadic livestock production”—the reason the Maasai have long produced livestock instead (Kimani and Pickard 1998: 208).¹⁰ Thus, “there is little indication that [Maasai households] poor in animals can end up categorised as wealthy based on the ability of other activities,” such as crop cultivation, “to fill the productive gap” (BurnSilver 2016: 25).

The creation of private land rights in Kajiado has destroyed significant social wealth. In the early twentieth century, the Kenyan Land Commission considered the Maasai one of the wealthiest tribes in East Africa (Rutten 1992: 25). In contrast, as of 2004, average income among these pastoralists was only 65 percent of average income in Kenya (Ndemo 2007: 89).

4 Evaluating the Theory of Wealth-Destroying Private Property Rights

⁸ But necessary: according to Rutten's (2008: 108) field work, for example, which considers the former Olkinos and Meto group ranches, conducted in 2000, between 73 and 87 percent of Maasai households surveyed can no longer depend solely on pastoralism for a living. See also, Mwangi (2006), Thornton et al. (2006), and Thornton et al. (2007).

⁹ On the low level of education among the Maasai, see Ndemo (2007). Among the members of the former Meto group ranch, for example, nearly 73 percent of those surveyed reported a source of income outside of livestock production. Among these, approximately 79 percent pursued subsistence farming and eight percent engaged in wage employment (BurnSilver and Mwangi 2007: 14).

¹⁰ Compared to Kajiado, the land in Narok is significantly better suited to sedentary agricultural production (Rutten 1992: 77).

Our theory of wealth-destroying private property rights implies that when the privatization of some asset destroys wealth rather than creates it, the private property rights in question will (1) be the creation of public actors who lack claims to changes in social wealth resulting from privatization and (2) be created by those actors despite the fact that the social costs of privatization exceed the social benefits because privatization benefits them personally. Below we evaluate these implications empirically using the case of land privatization in Kajiado.

4.1 The Residual Claimant Status of Private Land Rights-Creators

Post-independence privatization of land in Kajiado proceeded in two main phases: the creation of private, corporately owned group ranches and, from those, the subsequent creation of private, individually owned ranches. To accomplish the former, government relied mostly on privatization by fiat. The public actors primarily responsible for creating private group-ranch land rights were non-Maasai political officials. To accomplish the latter, government relied mostly on empowering public bodies. The public actors primarily responsible for creating private individual-ranch land rights were a subset of the Maasai in their capacity as voters. Consistent with our theory, both sets of public actors as private property rights creators lacked residual claims to the social wealth destroyed by creating private land rights.

To create private group ranches in Kajiado, government officials demarcated property boundaries in the district, which defined a “group ranch,” and then invited the Maasai who resided within its boundaries (and sometimes others) to apply for registration as group ranch members. Once registered, these Maasai became corporate owners of the ranch.

The public actors who created these private land rights consisted predominantly of legislators and ministerial bureaucrats in Nairobi. Chiefly, they included the members of the Parliament of Kenya, who (with assistance from international organizations) engineered and enacted the Land Adjudication and Land (Group Representatives) Acts, which decreed the privatization of land in Kajiado; the bureaucrats at the Range Management Division of the Kenyan government’s Ministry of Agriculture (assisted by the United Nations Development Programme’s Food and Agriculture Division), who designed the development plans for private group ranches; and the bureaucrats at the Department of Land Adjudication and the Registrar of Group Representatives in the Kenyan government’s Ministry of Lands and Settlements, who oversaw the

demarcation of private group ranch boundaries and the registration of group ranch members through demarcation and adjudication committees, and later crafted the legal procedures for subdivision (see Rutten 1992; Mwangi 2007b).

None of these public actors were in a position to internalize the net social losses generated by privatizing Maasai land rights. The closest thing that parliamentary legislators and ministerial bureaucrats had to residual claims was the likely modest change in tax revenues the might result from creating private land rights—tax revenues that did not accrue to legislators and bureaucrats personally.

The absence of these public actors' residual claims is underscored by the *maladroit* features of the private property rights they created. Legislators and bureaucrats not only pursued land privatization without concern for its effect on social wealth; they privatized land without concern for even the workability of the private group ranches they created.

Bureaucrats, for example, demarcated group ranch boundaries primarily on the basis of terrain features rather than on the boundaries historically recognized by the Maasai as belonging to different sections (Coldham 1979; Kieyah 2007). Similarly, they paid scant attention to whether the private group ranches they created were ecologically and economically sound. More than half of the private group ranches that bureaucrats created in the first phase of the Kenya Livestock Development Project, for instance, did not even contain both wet- and dry-season pastures (Kimani and Pickard 1998).

The parliamentarians who legislated land privatization displayed equal indifference in creating sustainable private group ranches. Under the legal framework of the Land (Group Representatives) Act, for instance, each member of a group ranch was entitled to an equal share of the land owned corporately by the ranch (Galaty 1994). Presenting a predictable problem: when a group's membership grew, for example as a result of members having children or from other new registrations, the shares of existing group members shrank.¹¹ The effect was to encourage subdivision, not because private individual ranches would be more productive—in fact, they would

¹¹ According to the Land (Group Representatives) Act, members may be added to the group register by agreement of two-thirds of the group ranch committee. In practice, however, “this has often been done with the signature of one or two of the committee members, namely the chairman and secretary, and there are many cases in which the district commissioner, the district officer, or the director of lands in the ministry of lands and settlements, add names with neither the agreement nor the knowledge of the local committee” (Galaty 1994: 113).

be less so—but because by subdividing, existing members could prevent further dilution of their shares.

The public actors who subsequently created private land rights for individual ranches in Kajiado were predominantly a subset of the Maasai pastoralists themselves, as voters. In the early 1980s, Kenyan president Daniel arap Moi began encouraging group ranch subdivision. By the late 1980s, local political leaders in Kajiado resolved to do just that, some of them interpreting, or at least pretending to interpret, Moi's statements as a Presidential Directive, hence individual land privatization as mandatory.¹² The same interpretation would later be leveraged by some Maasai who favored the creation of private individual land titles to cajole support for subdivision from their fellow group ranch members (Mwangi 2005).

To create those titles, the Land (Group Representatives) Act put subdivision to a vote at the annual general meeting of each group's registered members.¹³ Under the act, subdivision needed the assent of only 60 percent of a quorum, consisting of 60 percent of a group's members (Government of Kenya 1968). The creation of private individual land rights was therefore possible with the approval of as little as 36 percent of the pastoralists affected. A vote that secured the required approval triggered individual-level privatization, each member promised title to an equal-sized parcel of the former group ranch. A group ranch committee—whose establishment was also mandated by the Land (Group Representatives) Act and which oversaw the ranch's management before subdivision—exercised authority to allocate private individual titles during the subdivision process.

In their capacity as public actors, the pastoralists who supported the creation of private individual land rights did not have claims to the social wealth destroyed by creating such rights. As voters, these Maasai could not internalize the net costs borne by their fellow group ranch members, whom subdivision harmed—members who may even been a majority, since the law empowered subdivision supported by only a minority of the group's members.

¹² Some authors have suggested that land privatization was in fact a Presidential Directive (Asiema and Situma 1994; Wily and Mbaya 2001; Kibugi 2009; see also, Markakis 1999; Kanyinga 2000).

¹³ For a detailed discussion of the legal procedures used to subdivide group ranches, see Rutten (1992) and Mwangi (2007b).

4.2 Personal Benefits for Private Land Rights-Creators

Consistent with our theory, both sets of public actors who created wealth-destroying private land rights in Kajiado—politicians and bureaucrats, and the Maasai who voted for group ranch subdivision—benefited from land privatization personally.

The politicians who legislated land privatization benefited personally through new opportunities for graft, which the creation of private land rights made possible. “Moi’s pronouncements on land,” for example, “were made alongside an increasing tendency to use it as a patronage resource” (Kanyinga 2000: 52). In fact, already in 1963, five years before government officially undertook land privatization in the region, two candidates in Kenya’s general parliamentary election “rewarded their supporters by granting them title deeds” (Rutten 1992: 267).

This pattern would continue throughout the era of land privatization, often illegally. “[I]llegal allocations of public land,” for example, “escalated significantly before or soon after the multiparty general elections of 1992, 1997 and 2002” (Manji 2012: 470). Even President Moi got in on the act: more than 400 plots of land in Kajiado were allocated to individuals at his request (Mwangi 2006: 172).

Local politicians benefited similarly from the creation of private land rights. Many of the first private individual ranches doled out in Kajiado, for example, were distributed by Kajiado County Council members to reward their supporters (Rutten 1992). Other local politicians benefited personally from land privatization directly, securing private land titles for themselves. With the help of the Kajiado County Council, one of the parliamentary candidates mentioned above, for instance, acquired 15,000 ha for himself (Rutten 1992: 267). In collusion with businessmen, a group of local politicians managed to carve out more than 1,000 ha of the Ewaso Kedong group ranch for themselves. Similarly, one-sixth of the land carved out of the Rombo group ranch to create private individual land titles was generously allocated to the sons and supporters of local politicians (Mwangi 2006: 172).

The personal benefits that privatization-administering bureaucrats reaped through the creation of private land rights in Kajiado were also direct. “The list of illegal registrants” added to group ranches commonly “included relatives of the Minister of Lands, the Director of Lands, and

many other public servants in the Ministry of Lands and the County Council” (Galaty 1994: 114; see also, Galaty 1992). In the Kiboko group ranch, for example, 32 non-members were added at the request of the Minister for Local Government to the Minister of Lands (Rutten 1992: 306). Creating private individual titles from the Loodariak group ranch entailed distributing more than 20,000 ha to 362 non-ranch members—among them, “the political elite including ministers” (Rutten 2008: 113). In the Mosiro group ranch, private land titles were issued to over 450 non-members, again including ministry members and government officials (Galaty 1992: 29). And in the Elang’ata Wuas group ranch, the area chief—a bureaucrat at the Purka Land Control Board—allocated himself about 12 percent of the group ranch’s land, totaling more than 700 ha (Rutten 1992: 307).

Legally, each registered member of a group ranch that was subdivided to create individual private land titles was entitled to an equal share of its land. In practice, however, land allocations were rarely equal: group-ranch committee members allocated much larger parcels to themselves.¹⁴ Indeed, among the five subdivided group ranches considered in Section 3 for which data are available, the average, private individual parcel allocated to a member of a group ranch committee was nearly twice as large as that allocated to an ordinary group ranch member (Rutten 1992: 370; Mwangi 2007a: 133).

Another important source of direct personal benefits for privatization administrators—most notably, the members of group ranch committees—was bribes. Typically, pastoralists paid their bribes in the form of livestock. In other cases, however, committee members suggested to group ranch members who hoped for better allocations that their cause might be aided if they provided committee members with “entertainment” (Mwangi 2007b).

Privatizing bureaucrats also benefited indirectly, through a dramatic expansion of their departments’ resources (often provided by international organizations) for the purpose of creating private land rights. Between 1985/86 and 1988/89, for instance, Kajiado’s District Development Budget rose from Ksh. 22 million to Ksh. 445 million—a more than 1,900 percent increase (Rutten 1992: 110-111). Such budgetary windfalls offered new money-making opportunities for privatization-administering bureaucrats, including budgetary expropriation.

¹⁴ The exception to this rule is the former Poka group ranch, where subdivision yielded roughly equal-sized allocations (Kimani and Pickard 1998).

The personal benefits that land privatization conferred on the Maasai who voted to create private individual titles were equally straightforward. Some of these voters were politically well-connected Maasai elites who anticipated their ability to secure choice allocations through rent-seeking. Others were presumably more productive Maasai, for whom the private cost of overgrazing attendant to communal land, hence the private benefit of land privatization, was higher, and who either anticipated large parcel allocations or saw a ready means of partnering with someone else for this purpose. Still other Maasai who in their capacity as public actors supported the creation of individual land titles were following a defensive strategy: eventual subdivision appearing inevitable, they sought to subdivide sooner rather than later, before their shares were diluted by further growth in their group ranch's membership (BurnSilver and Mwangi 2007; Mwangi 2007a, 2007c; see also, Bruce et al. 1994; Jacoby and Minten 2007).

5 Conclusion

Conventional wisdom predicts that the creation of private property rights will lead to economic improvement and, in most cases, this prediction is borne out. In some cases, however, it is not. On the contrary, in parts of the developing world, the creation of private property rights has worsened economic conditions, destroyed social wealth.

To explain this peculiar phenomenon, we develop a theory of wealth-destroying private property rights. According to that theory, not all private property rights are created equal. The difference that sometimes distinguishes them is their source—whether they were created by private actors or public ones. When property regime decisions are left to private actors, rights-creation authority often devolves to the beneficiaries of the property-regime status quo. This situation can prevent privatization when it would generate net social gains but, critically, always prevents privatization when it would impose net social losses. In contrast, when rights-creation authority is transferred to public actors, privatization occurs even when it imposes net social losses if public actors are not residual claimants and privatization benefits them personally.

We apply our theory to understand the effect of land privatization among the Maasai pastoralists of Kajiado, Kenya. Sustainable pastoralism in the Maasai's arid and semi-arid climate requires large-scale ranges that include both dry- and wet-season pastures, and a low-cost means of coping with drought risk in particular. The Maasai's traditional property regime, whereby

pastoralists owned livestock privately but held land in common, satisfied both of these needs. Common land tenure ensured ranges large and diverse enough to sustain large herds. Equally critical, it served as an inexpensive system of social insurance that permitted pastoralists affected by drought in one area to graze livestock in unaffected pastures, avoiding their herds' devastation. Although common land tenure was costly to Maasai society, most notably in terms of overgrazing, its cost seems to have been more than compensated for by the foregoing social benefits of common land tenure in the Maasai's environment, as evidenced by the economic decay that followed the privatization of their land.

Consistent with our theory, private rights to land the Maasai traditionally held in common were created by public actors who lacked residual claims—legislators, bureaucrats, and some of the Maasai themselves in their capacity as privatization voters. Also consistent with our theory, private land rights were created by these public actors despite the fact that the social costs of privatization exceeded the social benefits because land privatization benefited them personally.

Our analysis suggests that conventional wisdom, which sees government involvement in the creation of private property rights as a means of creating social wealth, reflects only one possible outcome when public actors are used to remedy the shortcomings of leaving property regime decisions to private actors. The other outcome, albeit comparatively rare, is the destruction of social wealth—a result harmonious with a different aspect of conventional economic thinking, which predicts negative outcomes when decision makers are allowed to enjoy the benefits of their decisions but are not required to bear the costs.

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