

Commons, Customary Law and Formalization of Land Tenure



Common properties refers to those lands which by tradition rural communities own collectively. They usually embrace lands like forests, woodlands, pastures and rangelands, which are not logically owned on an individual or family basis. And yet it is because these lands are collectively owned which has made them so vulnerable to losses. Expansion of towns and cultivation, including by community members, have been sources of the reduced area of commons now available to communities. However, the greatest losses have incurred by the hand of governments. Because they tend to follow imported European systems of land ownership which are individual-centric, it has been easy for governments to regard communal lands as unowned lands, or 'public lands', and even to be made the private property of the state. The high value of communal lands has been the main incentive. Many commons have accordingly been designated as forest and wildlife reserves or sold or leased by governments to private sector interests for mining, logging, ranching, or agribusiness exports. This represents mass dispossession. However, more than land rights have been lost; communities have also lost their rightful share in the revenues which mining, logging, ranching or farming by government or investors earn from their traditional lands. Generally, the loss of commons is most serious for poorer families. Often their share in the commons is their only real potential capital asset. This is quite aside from the many ways in which commons support the daily livelihood of up to three billion rural families around the world.

SOURCE:

Alden Wily, L. 2005. *The Commons and Customary Law in Modern Times: Rethinking the Orthodoxies*. In: *Land Rights for African Development: From Knowledge to Action*. CAPRI Policy Briefs. International Food Policy Research Institute, Washington, D.C. and UNDP, and International Land Coalition.

It is fair to say that governments, not communities have so far reaped the enormous benefits of the commons in rural economies this last century.

More worrying for reformers and communities, this often remains the case today, even after two decades of land reforms in Latin America and Sub-Saharan Africa especially. Even where wars have been fought over the massive loss of commons (such as in Sudan between 1984 and 2002) governments often find it convenient to persist in treating the commons as unowned, and to use or allocate these at will. Many such areas in Africa are today vulnerable to leasing to Middle Eastern governments and enterprises seeking land to grow food or agrifuels for their own home economies.

Recording of Common Property

Clarifying and entrenching the rightful tenure of commons is needed to enable customary owners to hold on to and reap benefits from these estates, for immediate or future gain. This requires adjudication and recording. Until today, individually held properties have been the focus of registration. These are the wrong target. The properties that are by far and away most at risk of involuntary loss are not family farms or house plots, but the commons. This is not to say insecurity of tenure does not affect individual estates in the customary sector, but that the risk of wrongful appropriation and failure to pay compensation when acquired for public purpose is much higher for the commons. Generally, when a farm or house is taken, the owner at least gets some small recompense.

A second and rising pool of insecurity that also needs prioritization is at the rural-urban interface where farms and commons are often forcibly converted into building plots, often to the manipulated benefit of parties other than the customary owners.

State Recognition of Customary Rights in Africa

Statutory recognition of all customary land interests as private property rights needs purposive acceleration. Only a handful of African states have achieved this.

The purpose of titling itself is long overdue for review. The conventional justification has been that titling is necessary to enable land owners to get bank loans on this basis. While collateralization can be important for better-off farmers, the outstanding reason for certification of holdings today must be simply to enhance tenure security. This is especially so where national constitutions or land laws do not guarantee customary land holding, even when it is unregistered. In Africa, Tanzania and Uganda, both give such guarantees, which have the effect of making all customary properties including those owned collectively less vulnerable. It also makes case-by-case certification and registration of those properties less urgent.

However, in most cases it is important to double-lock customary properties against wrongful dispossession, through certification procedures.

What Is Required

In pursuit of registration, clearer understanding is needed in order to establish the relationship between statutory and customary law (not an either/or). Statutory support, i.e. parliamentary enacted laws, is essential to recognize, sustain, and uphold customary rights, irrespective of whether or not these are held by individuals, families, clans, groups, or whole communities.

Nor should it be assumed that the codification of customary law is prerequisite to formal recognition or registration of customary land interests: it is not the rules themselves that need modern law support, as these do and should continue to alter with changing circumstances such as those already widely experienced over the last century. Rather, it is the exercise of customary land administration which needs support, the founding principle that a customary system is logically exercised by and at the community level. This nature of indigenous or customary regimes is in tune with modern demands for devolved and democratic land governance and upon which living customary owners can slowly build more modern 'customary practice'.

An equally important requirement is to make real the message that formalization procedures must be simple and cheap to enable mass uptake and sustained use. Reversion into expensive and remote systems too often still occurs in new administration programs. While desirable in principle, registration based upon a cadastral title system may never be applicable or sustainable at scale. It is also unnecessary for the vast majority of small estates like rural farms and houses. Legal recognition of detailed boundary description, lodged in community land registers, is usually sufficient.

Ten Steps to Implementation

In a growing number of countries it has become important to assist rural communities to define their overall community land areas or 'domains' as the first step to securing common properties found within. The steps listed below are derived from practical experiences in community-based land securitisation carried out by the author in Tanzania, Afghanistan and Sudan. Similar work is being undertaken by others in some West African states, building upon rural land plans. The following ten-step model may serve as an example:

Empowering Community Members

Community members determine beforehand how they want the land council constituted, with what proportion of elected and traditional leadership and the procedures through which land councilors will be accountable to itself and how decisions will be implemented.

1. A technical facilitator calls representatives of rural communities to a meeting to decide the basis upon which they will identify and operate their customary domains, with a village basis generally preferred.
2. A representative boundary committee from each community is formed. Each works with neighboring committees to agree the exact location of their shared boundary. This is done by walking every step of the boundary and recording the description agreed by the two committees. Expert facilitation should be available to promote compromises. A detailed boundary description should be prepared and approved before full community meetings.
3. Where the customary domain has been routinely used by outsiders (e.g. pastoralists) who now hold acknowledged customary access rights to products or areas these users need to be consulted. It is generally the case that their rights are clarified as access rights, to distinguish these from the local ownership rights held by residential communities. Alternatively other co-owning agreements can be reached.
4. Each community is assisted to form a community land council (with seasonal user representation as appropriate) to serve both as trustee owner of the land itself within the defined domain, and to serve as the local land authority over the domain, responsible for zoning, regulation of access and land use, procedures for transfer and the establishment in due course of simple registers of ownership and transaction of properties within the domain.

5. Policy and legal support is secured, ideally founded upon at least a reasonable degree of trial implementation in the field, to ensure that legal constructs and procedures will be workable and easily replicated and sustained. New legislation may outline how customary land authorities operate and provide for registration of community domains and registers of common properties within them, and, in due course, individual properties on a demand basis.
6. Communal domain registers are established at local government level and simple procedures for this disseminated. Final registration of communal domains takes place only after boundaries have been finally agreed and the community land council is up and running. Registration of the council as the lawful local land authority is part of the process.
7. Councils use simple land-use planning to divide domains into zones — for example, current farming zones, potential investment zones, community pastures, and protected areas — and they devise and put into effect any needed regulations for each zone.
8. Community lands councils have to be assisted to identify and claim wrongly appropriated customary land with the help of law provided in the constitution. Where such lands are in the possession of outsiders, rigorous financial accountability has to be insisted upon.
9. Identification and registration of common properties must be encouraged. This ensures protection from wrongful occupation or appropriation by government agencies, local elites, and corrupt leaders.
10. Reworked and modernized community-based regimes are put in place for resolving disputes between and within communities, with appeal to higher levels.

A process that includes these ten steps may restore and develop the right and practice of communities to create and control their own tenure norms. It begins by inducing the critical mass of popular ownership that mobilizes the effort and sustains implementation. Conflicting land interests are unpacked by the parties themselves, making it more likely that compromises and agreements will be upheld. The process clarifies customary rights and access rights. It also uses existing community organization upon which to build modern, community-based land administration while providing relevant local institutions for their modern administration.

Suggested Readings

- Fitzpatrick, D. 2005. *Best Practice Options for the Legal Recognition of Customary Tenure*. Development and Change 36(3):449-475.
- Alden Wily, L. 2003. *Governance and Land Relations: A Review of Decentralisation of Land Administration and Management in Africa*. IIED, London.
- Alden Wily, L. 2006. *Land Rights Reform and Governance in Africa. How to Make it Work in the 21st Century*. UNDP, New York.
- Alden Wily, L. 2005. *Guidelines for Customary Land Securitization in Central Sudan*, USAID/USDA, Khartoum.

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