

The Commons and Customary Law in Modern Times: Rethinking the Orthodoxies

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Much attention needs to be paid to common properties. These are often the only asset of the very poor and possess untapped economic potential. Unregulated attrition and wrongful state appropriation of these lands continues. Entrenching these estates as the private group-owned property of communities is urgent and registration programs need refocusing accordingly. It is the tenure of the commons, not individual farms or houses, that is least secure.

Background

There is much conceptual confusion about communal property. The idea of commons as un-owned open access land is still widespread and increasingly self-fulfilling through lack of correct policy and legal support. From a customary perspective, common properties are not un-owned lands at all but the private property of all members of a group or community. This ownership is appropriately held in undivided shares given the nature of these estates as usually pasture, swamp or forest lands. Failure to distinguish between these communal properties and communal tenure (or customary tenure) also persists. The first is real property that may be mapped and described and the second is a regime of land administration comprising norms, regulations and enforcement mechanisms. It is distinctive by being based upon local, not imported norms and through its exercise as a community-based regime.

Even after a century of attrition and state appropriation, common properties remain a substantial resource in agrarian states, amounting to over 30 percent of the land area in Africa. Quite aside from their contributing role to livelihood, the commons possess an extraordinary real estate and rental value and their products massive, and sustainable, extractive income. Governments, not communities, have so far reaped the benefits. This is because even after a decade of land reforms, common property in most countries still bears the status of un-owned or public land, falling to governmental jurisdiction and de facto tenure. Involuntary loss of commons continues up to the present, for example in Sudan, where millions of hectares of customary property are still in the pipeline for reallocation to outsiders as commercial farms.

These losses directly affect the poor. Even the poorest members of rural communities, those with no or little farmland share the customary ownership of common properties with other, better-off members of the community. This may be their only real property.

Why Record Common Property?

Clarifying and entrenching the rightful tenure of the commons is needed to enable customary owners to hold onto and reap benefits from these estates, current and potential. This requires adjudication and recordation. Up until the present individually-held properties have been the focus of registration. These are the wrong target. For those properties that are most at risk of involuntary loss are not the family farm or house, but the commons. This is not to say insecurity of tenure does not afflict individual estates but that the risk of wrongful appropriation and failure to pay any compensation at all when acquired for public purpose is much higher for the commons.

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 others than the customary owners. Statutory recognition of all customary land interests as private property rights due the same protection of non-customary land rights needs purposive acceleration, achieved thus far in only a handful of African states.

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The purpose of titling itself is long overdue for review. Longstanding and recurrently revitalised justification of titling as for the purpose of collateralization has over-focused the procedure upon classically-centred individual enterprise and muddled clarity as to what must remain the founding reason for recording and entrenching customary rights – simply to secure that tenure, irrespective of whether or not this provides a basis for investment loans. Each has its own rationale but for strategic clarity need to be de-linked.

In any event, collateralization in the agrarian context could be a red herring. It is yet to be demonstrated that individual mortgaging may occur at mass scale in Africa, although this appears to have more promise in both technically advancing agricultural economies and transitional states like the Ukraine. The reasons are many but prominently include the fact that other safer routes for raising loans exist in the emerging African micro-credit market, that commercial lending agencies are understandably wary of mortgaging peasant holdings for fear that foreclosure will render the household destitute and that demand for mortgages remains low in the absence of better agriculture markets and given the limited potential for intensification in the mainly dryland agro-economies.

Collateralization could however gain a new lease of life in respect of common properties. Owning communities could mortgage one part of their often substantial commons to raise loans for community based income-generating activities such as maize grinding mills and without risking family livelihood and to the greater inclusion of the majority poor. The rental

capacity of these estates without mortgaging should however be explored first, widely demonstrated in government use of captured commons for leasehold commercial agriculture. Even pursuit of this potential must remain academic however without first identifying the rightful owners of each common property and to whom such opportunities and benefits should accrue.

What Is Required

In pursuit of registration, clearer understanding is needed as to the relationship between statutory and customary law. These are not an either/or. Statutory support – i.e. parliamentary enacted laws – is essential to recognise, 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 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 already widely experienced over the last century. Rather it is the founding template of the customary tenure regime itself which needs legal support; the fact that at essence this is no more and no less than community based land tenure administration, a foundation in tune with modern demands for devolved and democratic land governance and upon which modern customary owners can slowly build more modern 'customary practice'.

An equally important requirement is to make real the mantra 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 so-called reformist administration programmes. The fact remains that while desirable in

principle, registration based upon a cadastral title system may never be applicable or sustainable at scale, and for the vast majority of small estates like rural farms and houses, is unnecessary. Legal recognition of detailed boundary description, lodged in community land registers, may be more than sufficient, and land law redrafted accordingly.

Recommended Steps to Implementation

Implementation of simple customary land security measures that target vulnerable properties and build upon what exists in cost-effective ways deserve more application and testing. The following ten step model may serve as example:-

1. Following determination of interest, 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 neighbouring 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 is available to promote compromises. GPS readings are taken to enable maps to be produced. It is the detailed boundary description however that is put before full community meetings for their approval.
3. Where the customary domain has been routinely used by outsiders (e.g. pastoralists) with acknowledged customary access rights to products or areas, these outsiders are consulted and their support secured. In the process these access rights are renegotiated to clarify their nature as access, not ownership rights and to establish a new management regime agreeable to both parties.
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 root title of the domain on behalf of the community and 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. Community members determine beforehand how they want the council constituted, with what proportion of elected and traditional leadership and the procedures through which land councillors will be accountable to itself and how decisions will be implemented. Annual training of land councillors is useful, gradually increasing their capacity and scope of their administrative mandate.
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. Where restitution of wrongfully appropriated customary lands is constitutionally provided for, community land councils are assisted to identify affected areas and to make those claims, seeking direct restitution and/or compensation as appropriate. Where such lands are under lease or licence to outsiders, rental

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income thereafter accrues to the council, with rigorous financial accountability measures instituted as a prerequisite.

9. Formal identification and registration of common properties in the domain as the private group owned property of all community members is encouraged where these remain vulnerable to wrongful occupation or appropriation by Government agencies or others, including by local elites or corrupt leaders. Registration of these conservation areas (e.g. Community Forest, Pasture or River Reserves) may provide double protection.
10. Reworked and modernized community based regimes are put in place for resolving disputes between and within communities, with appeal to higher levels.

Conclusion

Such a process 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. Finally, the process clarifies customary rights and access rights, while providing relevant local institutions for their modern administration.

Further reading:

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