Land in Africa: Market Asset, or Secure Livelihood?

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Securing the commons in an era of privatisation: Policy and legislative challenges

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1. Setting the stage

For the purposes of this document[1], the "commons" are very broadly defined as natural resources over which several users have overlapping rights of simultaneous or sequential use, irrespective of the economic nature of the resource (whether "common pool" or not) and of the property regime formally applicable to it (i.e. even if legally owned by the state). This includes, among other things, water, fisheries, forestry, wildlife, pasture and genetic resources. Within this context, land rights and tenure are key: a) because land itself may be held/used in common (e.g. grazing lands); and b) because, even if it is not, rights over land and rights over the "common" natural resources located on it (e.g. forestry) are closely linked. In practice, rather than a dichotomy between common and private/state property, many systems to manage the commons entail a blend of different property regimes, including elements of common, private and state property.

The report covers the commons in both Africa and Europe. Indeed, far form being "backward" systems relegated to Africa, as often assumed by some in development circles, the commons are alive also in Europe, where they contribute to the livelihoods of many people in rural areas (interventions by Wightman and Marin, on Scotland and Norway, respectively).

The focus here is on the policy and legislative challenges raised by the commons in an era where many vocal actors see privatisation as the only way forward. Such challenges are examined at different levels - local (e.g. local agreements for the shared management of natural resources), national (government policies, legislation), regional (protocols for the management of transboundary resources; treaties on cross-border transhumance) and international (e.g. the Convention on Bio-Diversity). Can policy and legal frameworks help secure the commons against resource grabbing by elites? If so, how can they best do it? How can they ensure equitable participation in benefits by and within local communities? What are the linkages between policy/legislative frameworks and local practice?

2. Policy/legislative frameworks and the commons

Throughout history, the more powerful have used policy processes and legal systems to enable or ratify their grabbing of valuable common resources. In colonial Africa, for instance, law was used to dismantle customary land tenure systems based on common property and to expropriate land and other natural resources. The tools used to do so included protectorate agreements (e.g. the Maasai treaties), legislation and case law. Despite these interventions, customary systems have proved very resilient, and are still widely applied in rural areas (intervention by Okoth-Ogendo). In 17th century Scotland, the legal system - through features such as land registration, rules of prescription and use of Latin - served to legitimise the grabbing of common lands by local elites (intervention by Wightman). In other cases, legal interventions aimed at regulating common property systems ended up paving the way to individualisation. For instance, in Kenya, the Land (Group Representatives) Act 1968 enabled the registration of collective

[1] This document is the report of a workshop held in Nakuru, Kenya, from the 25th to the 28th of October 2004. The workshop was hosted by Reconcile, a Kenyan NGO based in the same town. It brought together some 45 participants, mainly from East Africa and the Horn, but also from West and Southern Africa and from Europe. The workshop took place within the context of a networking programme funded by the European Commission ("Co-Govern"). The programme aims to promote informed policy debate about the management of the commons in Europe and Africa, and to facilitate the sharing of ideas and experience among practitioners working on the same issue. The intellectual contributions presented here are those of the workshop participants. For those contributions coming from papers presented at the workshop, this is explicitly acknowledged in brackets.

property for the creation of "group ranches"; however, most ranches were individualised after registration.

As for policy frameworks, the commons do not seem to have been a priority for policy makers. This is in stark contrast with the importance of the commons for the livelihoods of many people in rural areas, especially in Africa. Here, with the exception of a few countries, only a tiny portion of land has been formally registered to individuals, while the vast majority belongs to the state and is used in common by several users (farmers, herders, hunter-gatherers, etc), either simultaneously or sequentially. Poverty Reduction Strategy Papers (PRSPs), the cornerstone of development aid, are a telling example. They rarely acknowledge the importance of the commons, and even more rarely do they aim to secure them. In Burkina Faso, for instance, while the first PRSP largely ignored the issue, the second one makes a (qualified) attempt to address it. However, the document is based on flawed premises, as it indicates the solution in providing greater tenure security though the full implementation of the Land and Agrarian Reform Act (RAF). This policy directive is not supported by a proper assessment of the impact of the Act on the ground - indeed the Act is seen by many as one of the very causes of existing tenure insecurity (intervention by Thieba).

In recent years, some policy and legislative interventions have provided encouraging signs that the wind may be starting to change. In Scotland, the Land Reform (Scotland) Act 2003 enables communities to register an interest in land, which gives them a right of pre-emption, i.e. the right to buy the land if and when it comes on the market (intervention by Wightman). In South Africa, the Communal Property Associations Act enables communities established as legal entities to hold land in common (intervention by Saruchera). Mozambique's Land Act 1997 provides for the demarcation and registration of community lands and for a community consultation procedure that investors must follow in order to obtain forestry concessions. Ongoing land tenure reform processes in several African countries provide an excellent opportunity to secure the commons (intervention by Okoth-Ogendo). The following sections identify some key challenges that policy makers and legislators face in attempting to do so.

3. How to recognise the value of the commons?

The first challenge concerns recognising the value of the commons. On the one hand, this entails taking fully into account the importance of common resources for local livelihoods and other goods. The economic benefits stemming from the commons are notoriously underestimated due to their often non-monetarised nature. As a result, short-term economic gains from individualisation tend to outweigh the less visible but not less important potential benefits of maintaining resources in common (e.g. equitable access, local peace, cultural identity, etc). While some call for "proper" economic valuation of the commons, so as to make a convincing case with policy makers and legislators, it must be remembered that the social, cultural and environmental importance of the commons may be very difficult to translate in monetary values. As already noted, key policy processes such as PRSPs do not seem to acknowledge the strategic importance of the commons for the pursuit of goals such as poverty reduction and environmental sustainability.

On the other hand, acknowledging the value of the commons entails recognising the validity of local systems for resource access, management and use. Very often, governments have used "tragedy of the commons" arguments to undermine local management systems and claim control over natural resources. For instance, in sub-Arctic Norway, government authorities have blamed overgrazing by the Saami reindeer herders for the degradation of lichen ranges. Although the Saamis contest this view and point at different causes, such as climate change and

greater pollution, this has resulted in government agencies assuming more direct control over rangeland management (intervention by Marin). Similarly, where protection of land rights is conditional upon "productive land use" (e.g. the concept of "*mise en valeur*" in Francophone West Africa), common use is often not recognised as fulfilling this requirements. This has been used by government services for instance to justify the conversion of common pastures to other uses, considered more productive for national and local economies (e.g. irrigated farming, commercial ranching). In this regard, the past decade has seen a promising shift, with several Sahelian countries passing "pastoral" legislation that recognises - to a greater or lesser degree - pastoralism as a form of "*mise en valeur*" (Mali, Niger). However, the concept of "*mise en valeur pastorale*" remains ill-defined, and generally involves investment in infrastructure (wells, fences, etc) that is not required for agricultural forms of land use (intervention by Cotula).

4. How to grant secure tenure to local communities?

The extent to which the policy/legislative framework grants secure access and use rights to local communities depending on the commons is a crucial variable. Even where customary systems seem to work well without any legal backing, they may be undermined when "outsiders" come in. For instance, the Ogiek - hunter-gatherers of Kenya - have been pushed away from their lands by the progressive encroachment of newcomers (intervention by Makenzi). This raises a series of issues, such as:

- **Who are the "communities"?** Local users are rarely homogeneous groups, and tend to be differentiated on the basis of income, power, gender, age, professional groupings (farmers, herders, etc), etc. The field trip to Lake Naivasha showed how "local communities" may include very different actors with very different bargaining power (commercial flower farmers, landowners, fishers, pastoralists). Also, membership of user groups may be fluid and include non-resident users (e.g. transhumant pastoralists). This creates challenges in identifying the right holders and in establishing checks and balances at the community level to prevent elite capture. In Scotland, land legislation defines communities on the basis of postal codes. Communities are to be established as limited companies under the Company Act; all individuals of age, registered on the electoral roll and residing in the post code area are eligible for membership (intervention by Wightman). In South Africa, communities may own land through Communal Property Associations. Mozambique's Land Act adopts a very broad definition of communities, which allows flexibility but may create confusion.

- **What rights should be secured?** Key rights to be protected concern access, management and use. Recognising local tenure systems may present challenges, especially where the national legal system is based on "imported" legal traditions. For instance, in Francophone West Africa, the French legal tradition seems more geared to protecting private property, rather than the flexible, collective property regimes characterising most customary rangeland management systems in the Sahel (intervention by Cotula). As for the object of these rights, this includes not only land and other "tangible" natural resources, but also "intangible" goods such as indigenous knowledge and genetic resources. In many cases, these resources are being privatised and commercialised by bio-prospectors (pharmaceutical companies, etc), with no benefits reverting back to the local communities that identified and nurtured those resources. Addressing this issue may entail the creation of "sui generis" intellectual property rights that could be collectively enjoyed by local communities (intervention by Dhliwayo).

- **How can greater tenure security be provided?** Recognising customary rights and building on local practice is key, as it enables to go beyond the chaotic superposition of different tenure regimes (statutory, customary or combinations of both) that characterises the

commons in much of Africa. While some workshop participants called for a codification of customary law (intervention by Okoth-Ogendo), most advocated more flexible ways of recognising customary rights and integrating them in the formal legal framework. Also, some drew a distinction between recognising customary rights, which are the means through which most peasants gain access to the commons, and endorsing traditional authorities, which are often unaccountable and politicised institutions raising concerns over gender equality and other issues. Many workshop participants also stressed the importance of clarifying the interface between the sectoral laws applicable to the same resource (e.g. land, forestry, water and pastoral legislation; laws on decentralisation; etc), and the roles and responsibilities of different government institutions (ministries and agencies responsible for land, water, agriculture, forestry and environment).

5. How to reconcile competing resource uses?

Because of their very nature, the commons are characterised by multiple users and/or uses, either simultaneously or sequentially. This requires institutional arrangements to regulate the interaction between these different, and possibly competing, uses, and peacefully to solve disputes when they arise.

An example is provided by the pastoral legislation recently adopted in several Sahelian countries. This aims at reconciling different land uses coexisting over the same territory, namely pastoralism and agriculture, particularly by allowing and regulating herd mobility. At the local level, access and management rules negotiated by local stakeholders with support from development agencies ("local conventions") pursue the same objectives (intervention by Cotula).

Another example of competing resource uses concerns the relationship between conservation, tourism and local livelihoods. In many parts of East Africa, the establishment of natural parks and game reserves entailed the eviction of local communities, particularly Maasai herders. For instance, in the Ngorongoro Conservation Area, Tanzania, although a 1959 Ordinance protected the interests of the Maasai, such Ordinance was amended in 1975 without local consultation in order to create the Ngorongoro Conservation Area Authority. This has worsened the situation of local communities, as decisions concerning entry and residence are taken by the Authority, and as local people have been evicted and grazing rights restricted (intervention by Sillevis).

Another aspect of the conservation-local livelihoods equation concerns the obligation for the government to pay prompt and adequate compensation for loss of life and property caused by wildlife (which is usually considered by law as state property). For instance, while Kenya's Wildlife Act mandates compensation for loss of life, it does not require it for damage to crops caused by the passage of large animals such as elephants. This places a heavy burden on the livelihoods of local communities (video shown by...).

6. How to create an enabling framework for partnerships between local communities and the private sector?

In areas such as tourism/conservation and genetic resources, local communities may benefit from partnerships with private sector entities. However, in order for this to happen, policy and legislation should provide an enabling framework for negotiations between communities and private sector operators. This includes granting secure resource tenure to local communities (see above), who would be otherwise deprived of a key asset in negotiations. This was an issue in a case from Zimbabwe, concerning the production and commercialisation of a variety of herbal tea having medicinal properties. The partnership involved a community of growers and a

private investor, responsible the packaging and marketing of the produce. Because the community lacked secure tenure over the resource, its bargaining position vis-a-vis the investor was weak (intervention by Dhliwayo).

Providing an enabling framework also entails establishing mechanisms to ensure community consultation and benefit sharing with regard to revenues generated by the private entity through its use of the resource. An example of this may be the Land Act of Mozambique, although shortcomings in its implementation have been reported, and the African Model By-Laws concerning sui generis intellectual property rights.

7. How to make policy processes and legal systems more accessible?

Where the policy and legislative framework is not accessible to ordinary citizens, it may be manipulated by elites to legitimise their grabbing of common resources. This is what happened in Scotland with the "enclosures" in the 17th century, which were made possible by complex rules formulated in inaccessible language (Latin) by legislative bodies representing the interests of the elites (intervention by Wightman). Greater "access" to the policy and legislative framework concerns: the formulation of policies and laws (public participation in the formulation process; use of clear and accessible language; etc); and their implementation (activities to raise legal awareness; access to courts; etc).

Making the policy and legislative framework more accessible also entails bridging the gap between policy and practice. At the workshop, several NGOs working in East Africa presented their work to support the shared management of the commons on the ground. This includes activities such as capacity building, awareness raising, etc. Similarly, in West Africa, many development agencies support processes through which resource users can agree on set of rules and institutions to manage their resources in an inclusive way ("local conventions"; intervention by Cotula). The challenge is to design mechanisms through which policy makers and legislators can learn from these local processes, and build on them in order sustainably to secure the commons.