Common Property Resource Management: Legal Issues

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Legal Structures for the Managment of Land-Based Common Property Natural Resources in Latin America

Tropical forests in developing countries have declined in area by fifty percent this century. Each year, the world continues to lose about 11 million hectares of forest resources, an area about the size of Pennsylvania. To stem the tide, governments have created new institutions to defend forest land and other common property natural resources.

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The sustainability of such initiatives depends in part on their legal institutional framework. Perhaps nowhere is this more important than in indigenous areas of Central and South America, where land issues are complex: common property or community property is commonplace. Indigenous communities are of increasing political importance and the international donor agenda is full of resource management issues. This bulletin defines and addresses the legal structures for the management of land-based common property natural resources in Latin America.

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Land-based Common Property

"Commons" and "open access" resources are terms typically found in the literature on natural resources in Latin America. The "commons" is a term originated from English feudalism. A pasture on which all landholders of a village had a right to graze their stock, or a forest where all members could gather wood are examples of "commons." Member rights were a function of the ownership of the land used for residential or farming purposes. This right was called a "right of commons." A commons was owned by the feudal lord (not the community), but subject to the use rights of others. Today, the commons that remain in England are publicly owned.

"Commons" was used rather loosely in the social science literature until 1968, when the "tragedy of the commons" was introduced. Accordingly, a commons eventually would be overused and degraded as a consequence of each user's incentive to use as much as possible. (Garrett Hardin)

Some social scientists argue that a commons does not involve unregulated use. Most commons limit use in that only community members have rights to them. For example, many commons have community rules limiting seasons for grazing or limiting types of livestock. The tragedy, therefore, is not inevitable but only occurs if there is a failure to create or enforce limits on use. A new distinction was introduced: open access. Open access places no limits on use while common property is controlled use.

Communal Land Tenure

"Communal land tenure" is a term developed by Western social scientists to describe non-Western property systems. It is often confused with common property. Communal land tenure, often used in Africa and Asia, describes tenure with a large amount of community control over land use. The community (a village or a descent group like a clan or lineage) owns the land and allocates it to its members for cultivation making members' rights "use rights." Use rights are long-term rights for individuals or households to use the land. They may include inheritance rights, but do not necessarily include rights to sell the land. In fact, the community may retain the right to reallocate land holdings among its members. Part of the community's land may also be used as commons. A "communal land tenure system" usually includes both use rights allocated to households or individuals **and** common property in other resources, such as forests and grazing land.

Common Property and Natural Resource Management

Sustainable natural resource management can be a function of who has use rights to what asset and on what basis. Property law thus defines which persons have rights to cut trees, fish streams or use irrigation water, and what responsibilities users have with respect to those resources. Under a common property structure, these rights and responsibilities are clearly defined. However, with open access resources there is no responsibility to refrain from overuse.

Huastec Agroforestry on Common Property in Mexico

In Mexico, approximately 37 million hectares of land are covered by forests. This represents roughly 20 percent of total land area--more than twice the amount of land dedicated to agriculture. About one-third of Mexico's rural population of 10 million live on these forested lands, and about 70 percent of the forest resources are on lands designated as *ejido* and *comunidad*.

The Mestizo Haustecs live in the southeastern part of the state of San Luís Potosí, Mexico. Ancestral occupancy of this region dates back 3000 years. The Haustec operate communities and *ejidos*, but most live on their own landholdings which range from one to 15 hectares. By meeting farm family needs and allowing for forest regeneration and the protection of natural resources for future use, the Haustec-managed agro-system is sustainable. The Haustecs primary source of cash income is the sale of raw sugar or coffee. They also sell honey, fruits and a variety of other minor products (milk, eggs, poultry, wood). For their own use, they produce maize, a variety of domesticated and wild foods, construction materials, herbal medicines, craft materials and fuelwood.

The Haustec create patches of *télom*, or managed primary and secondary forests mixed with introduced species like coffee. Some are cycled into *milpa* swiddens, a type of agroforestry that integrates maize production with secondary forests in Middle America. Although each *télom* is a mere 0.25 to 3 ha. in size, when viewed from a distance the groves appear to be quite extensive. One farmer's *télom* borders another creating managed forest groves of irregular shape covering an area of 25 hectares or more. Some *téloms* have been recently established while others have existed for at least 80 years, indicating that the land use is sustainable. By placing each *télom* side by side, the Haustec created *de facto* common property out of individual holdings.

Adapted from FAO, *Common Forest Resource Management*, 200-4 (1993).

Typically, common property has been associated with low income societies, and many experts assume that the ownership structure of common property somehow caused this poverty. Empirical research suggests, however, that the reason that low-value resources are more likely to be managed as common property is that they furnish insufficient economic surplus to afford a more expensive private property structure. Since fragile lands are usually the least economically viable, resource management becomes critical. Common property approaches can be a low-cost management structure for such resources.

Common Property and the Legal System

Western property law does recognize certain types of co-ownership: marriage, for example. Often, Western property law allows multiple persons to own assets together by allowing them to form new institutions with legal "personality." This new institution may take the form of a partnership or corporation or other legal entity. The law then treats them as a single legal person leaving the ownership of the property in question. The rules about how the benefits of the property are divided and how the property is managed then become part of marital law, the law of partnerships or the law of corporations, not property law.

Indigenous Property in Panama and Costa Rica

In Panama and Costa Rica, the Constitution, Civil Code and the Agrarian Code are the key documents which govern common property ownership. Article 123 of the Panamanian constitution guarantees indigenous communities reserves of land and collective ownership necessary for the economic and social well-being. Indigenous land (*comarca*) is subject to special legislation for indigenous communities.

The Government of Panama's and the community's concept of the *comarca* do not often correspond. From the government's perspective, the *comarca* is created by an administrative act of government, owing its origin to the North American notion of a reserve. From the community's perspective, a reserve and a *comarca* are not synonyms. Both terms refer to a defined physical space where indigenous communities live. However a *comarca* implies land, administrative political division, and recognition of indigenous lands by the state. The "reserve" is protection of these lands and a limitation against non-indigenous persons from entering. As a result, a reserve is respect for a culture.

In Costa Rica, an indigenous reserve is the definition most often associated with common property ownership, as described in the *Ley Indígena*. This arrangement is very similar to the U.S. concept of a reserve.

In both Panama and Costa Rica, there are various options in the civil code for the management of common property. Indigenous development associations (management entities of indigenous reserves), other associations, federations, and confederations have legal personality and obey strict legal formality requiring a constitution, bylaws and other formalities. Foundations and unions represent other options.

Recent changes in property law in countries like Honduras, Ecuador, Mexico, Peru and Nicaragua confirm the need to reexamine legal structures for land use and management and revisit the state of law regarding common property in Latin America. The philosophy underlying recent changes appears to be that law should not dictate any single structure (as many agrarian reforms did in trying to impose collective forms of management), but rather give property holders choice of western or more traditionally indigenous tenure arrangements. Thus, indigenous groups can manage their property according to arrangements they are most comfortable with.

Legal Structures

Many studies refer to the need for community-based natural resource management. This literature assumes that communities, rather than central government, are better placed to manage the resources in a sustainable manner. According to this view, a local management structure is better able to police resource use, and, in theory, creates incentives to ensure sustainability. Such legal structures can take the form of partnerships, trusts, corporations, municipalities, churches, not-for-profit organizations, unions, federations, etc. All of these could be considered potential organizational forms for the "community."

However, with rare exception there is no description of how to organize such an environmentally friendly "community." In fact, there is no definition of the term from a legal perspective. Does it refer to the mayoralty? A church? A corporation? A partnership of individuals? A cooperative? Without practical guidance, a management entity cannot be created to govern resource use.

So how does the legal system understand the community-based entity? These concepts often have been defined locally over centuries, leading to the equivalent of indigenous or local law on community resource management. Nevertheless, the dominant cultures, such as the Spanish in much of Latin America, the Portuguese in Brazil, and the English, French and Dutch in the Caribbean, brought with them their own legal concepts and imposed them on the local citizens. Today, communities are attempting to fit local indigenous practice into a legal structure designed and established by another dominant culture.

Since only entities with legal "personality" can own property under present rules, the practical challenge has been to identify the most akin European entity with legal "personality." In Kenya, for example, the English took the analogy of a "trust" to form a legal structure for managing property. Common property was considered to be held in trust for community members. The trust itself then detailed the rules for use. Similarly, in the United States, Native Americans' lands were transformed into "reservations," in which the Federal Government acted as trustee to manage the lands for the benefit of the local residents. Land was said to be held in trust for the Native Americans.

An issue which emerged from this process has to do with the role of law itself: should law lead social change (a positivist approach), or should it reinforce existing structure? A poor correspondence between the original indigenous structure and its newer more formalistic cousin may lead to reform, or may cause confusion and breakdown. Similarly, the imposition of an entirely foreign structure on an existing community may liberate the system or disrupt it entirely.

If we assume a positivist approach, the question then becomes: what should the structure be? We still do not have sufficient information to dictate a single management structure or the exact linkages between tenure form and resource sustainability. Trees, like minerals and water, have their own economic rules. Tree planting is a very long-term investment. Studies have found that where there is primary or direct tenure (as in direct ownership of land via a purchase or inheritance), there generally is more care for and planting of trees. Where tenure is secondary (as in the case for renters, or groups borrowing land), investment in trees is lower. Furthermore, where there is uncertainty, occupants tend to invest even less. Uncertainty may occur, for example, where there is inconclusive division of property among heirs. ***Therefore, legal structures should seek primary rather than secondary interests.***

Another issue in the selection of legal structures for community-based management of common property is the role of women. Will women have only secondary rights, with primary rights vested in husbands? Men often are the "heads of household," and consequently assume all primary rights. Such a structure may undercut incentives for women to plant trees or care for resources even where the whole household has adequate economic incentive. ***Consequently, structures which allow for joint primary ownership might be preferred over ones in which women have only secondary interests.***

A legal structure should clarify who owns what elements of land. Often, in customary systems, land ownership is different from ownership of trees or minerals. Others may have use rights on a seasonal basis. In cases where trees serve multiple uses, this adds another layer of complexity. Lumping all rights into a single entity may obliter-

Conflict Resolution in Brazil

Brazil handles disputes in a fairly formal manner. Conflicts with the national government must be addressed in federal courts, while conflicts with state or municipal government can be addressed in State courts. For disputes among community members, the entity's constitution and bylaws are followed. Individual directors or managers may be personally liable for any action taken without proper authorization by the community, known as *ultra-vires* acts.

ate the more nuanced practice of local inhabitants. When different interests are represented, legal structures and management become increasingly more complex. A change in legal structure will affect groups differently. ***So any attempt to formalize customary practice should take into consideration the often complex and nuanced system already in place, rather than consolidate all interests in the hands of a single owner.***

Common Property Legal Structure and Dispute Resolution

The choice of legal structure will to some degree indicate how a community will handle its disputes, both internal and external. In Latin America, national governments often maintain the rights to assign "community" rights to outsiders. This occurs with frequency in forestry and mining concessions on indigenous lands. Colonization and agrarian reform have created uncertainty by taking indigenous or community property and offering little protection.

Internal and external disputes are usually governed in very formalistic fashion in most Latin American jurisdictions. Rights and responsibilities are enforced by court order and defined in formal corporate constitutions and bylaws.

An alternative to this structure is to vest all relevant property rights in the community. Disputes with central government over mineral rights access or other interests therefore would be resolved in favor of the community. This outcome would result even when it were in the best interests of the nation to grant a concession to an outside entity, or grant no concession at all. It is conceivable that local communities, if left in exclusive control, could maximize the use of resources in their favor, rather than use them in a sustainable manner. For example, communities suffering from severe poverty or debt would be tempted to liquidate their resources to address immediate needs. In this situation, where resource use maximization is not sustainable, there is potential conflict. Even in countries like Bolivia which are actively engaging in decentralization efforts, these issues may yet be on the horizon.

Rather than vesting all rights in the community, some countries experiment with a compromise solution, a sort of co-management model where law seeks to reinforce local practice while allowing for national interests to be taken into consideration. In these cases, national law provides a framework for resource usage. These approaches make the law fit the practice rather than dictate it or force practice to adapt to a European legal structure.

Promoting Land-based Common Property Natural Resource Management

Choosing a legal structure for community-based common property natural resource management is a complex process. Local and national governments, donors and local communities themselves need to consider the following: options in community control versus government control; the role of primary and secondary interest holders; and incentive structures. Preference of one legal structure over another may have a profound impact on sustainability. The choice should be made with consideration to the possible options and effects. It should be noted that assignment of private property rights might not always be the best way to promote sustainable natural resource management.

Although the most obvious organizational structure for common property management might be a reserve, design of a management entity also needs to consider more traditional organizational forms such as nonprofit organizations, commercial partnerships, corporations, trusts and foundations. Typical substantive variations may include: (1) land belonging to the government, with use rights based only in tradition; (2) land quasi-owned by a traditional use group; (3) land owned by a group but managed by a consensus of all owners; or (4) land corporately owned but controlled by a manager. Either way, the entity should reflect the complexity already found in community relationships and promote primary interests in common property for both men and women. It should also provide sufficient guarantees to the national government that the community will manage the assets sustainably, not just in the interest of the locals. Finally, the community will require bylaws for settlement of internal disputes.

Attempts to reinforce local practice via law in Panama

Panamanian indigenous communities often address management concerns and disputes through their elected leaders. Leaders of various communities form an indigenous congress to address matters of broad concern to the communities. Internal disputes within a *comarca* are often resolved by these authorities, although other officials from Agrarian Reform and civil authorities remained involved.

References:

Daniel W. Bromley, *Making the Commons Work: Theory, Practice and Policy* (1992).

John Bruce, "A Review of Tenure Terminology" (Land Tenure Center report, 1993).

Lizbeth Espinoza E. and Irene Murillo R., "Estructuras Legales para el Manejo de los Recursos Naturales de Propiedad Común Basada en la Tierra" (Informal publication from the Centro de Derecho Ambiental y de los Recursos Naturales—CEDARENA, June 1994).

Nancy Forster and J. David Stanfield, "Tenure Regimes and Forest Management: Case Studies in Latin America" (Land Tenure Center Paper 147, 1993).

Steven W. Lawry, "Tenure Policy toward Common Property Natural Resources" (Land Tenure Center Paper 134, 1989).

Owen J. Lynch and Kirk Talbott, *Balancing Acts: Community-based Forest Management and National Law in Asia and the Pacific* (1995).

José Mendoza Acosta, "Estructuras Legales que regulan la Propiedad Común de la tierra: Panamá" (Informal manuscript from the Centro de Desarrollo Indígena - Panamá, 1994).

Maria Christina Napolitano, Legal Memorandum entitled "Suggestion for Evaluation of Legal Structures for the Management of Land Based Common Property Natural Resources in Brazil" (September 28, 1994).

Elinor Ostrom, Roy Gardner & James Walker, *Rules, Games and Common-Pool Resources* (1994).

Ellen Frankel Paul, Fred D. Miller & Jeffrey Paul, *Property Rights* (1994).

Carol Rose, *Property & Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (1994).

Laurel L. Rose, "Disputes in Common Property Regimes (CPRs)" (Land Tenure Center Report, 1992).

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