



Best Practices for Land Tenure and Natural Resource Governance in Africa

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Natural Resource Rights and Biodiversity Protection: Guidelines for Policy and Strategies to strengthen Local Governance Systems

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Abstract:

It has long been recognised that the ownership of a resource largely influences the way that the resource is used and managed for future use. The definition of property rights as "the capacity to call upon the collective to stand behind one's claim to a benefit stream" emphasizes quality of the relationship between the right holder and the institution that backs the claim. Regardless of legal and institutional form for decentralization, a primary trend at present in natural resource management is to reconcile legality provided by the state with the legitimacy provided by local institutions for the administration of resource tenure – as a yardstick for genuine subsidiarity. Whereas collective action (or at least organizations) for resource management have been recognized as important in many devolution programs, the role of "property rights" per se has often not been given the same attention, yet ownership (tenure) is a common avenue to authority over resources.



1. Introduction

Natural Resource Management is a collective action problem requiring diverse actors – governments, farmers, business, communities and NGOs – to integrate their activities so that improvements in the condition of natural resources can be achieved. Using contemporary approaches to governance, various actors in NRM have the potential to engage with and value a greater variety of knowledge. Many problems of unsustainable management of natural resources are due to a limited number of basic governance shortcomings such as open access, lack of property rights definitions or insufficient enforcement of existing rules, this holds for all natural resources, regardless whether water, forests, land, the atmosphere, or biodiversity are considered.

Governments typically lack the capacity to exclude encroachers effectively and enforce good stewardship, thus need the participation of its citizens; one of the most effective ways to achieve this is through decentralization of property rights. The basic argument of this paper is that the relationship between property rights and local governance institutions in the management of natural resources, stresses the core value of legitimacy thus, “property rights are only as strong and legitimate as the institutions that stand behind them” neither states nor local institutions typically command the totality of this legitimacy, but rather the reality tends to be the exercise of legal pluralism. This paper conceptualizes property rights as “bundles of different rights”, where by the degree to which resource users have these rights signify the degree of control, this is especially true for exclusion rights and rights to benefit from the resources. Hence, when governments fail to devolve rights to natural resources to citizens, their incentives for good stewardship are often weakened (uncertainty about reaping future benefits) as is their ability to exclude others from the resource.

It has long been recognised that the ownership of a resource largely influences the way that the resource is used and managed for future use. The basic idea is rather straightforward: when an individual owns a resource and can expect to own and profit from the resource in the future as well, the individual has incentive to invest in the resource in the form of protective measures, restrained use and careful management¹. Whereas collective action (or at least organizations) for resource management have been recognized as important in many devolution programs, the role of property rights have often not been given the same attention, yet ownership (tenure) is a common avenue to authority over resources.

2. Conceptualizing Property Rights in Natural Resources

The terms “tenure” and “property” are often used interchangeably while rights are generally associated with responsibilities. Understood broadly, “tenure rights” over natural resources are synonymous with “property rights.” In its most basic form, the definition of a “property right” is visualized as “a defensible claim to a particular place or thing.” To know who has tenure over a natural resource is to identify who owns the resource, who can use or extract it, who can exclude others from having access to it, and who benefits from exploiting it.

Legally, tenure is a bundle of both rights and obligations; the rights to own, hold, manage, transfer, or exploit resources and land, but also the obligation not to use these in a way that harms others. In

¹ Ribot, 2004



other words, tenure defines property and what a person or group can do with it—their property rights². However, tenure is not only a legal concept but a complex social institution, often involving traditional practices and customary authorities’ as much as formal laws. It governs ownership and access to natural resources, which is the gateway to use and benefit from these resources. These definitions illustrate that there are two basic components to tenure security, the particular “bundle of rights” and the matter of whether those rights are transferable, defensible or secure³.

Apart from official documents issued by the government, evidence of long-term occupation or of observance of customary law are recognized ways of establishing tenure⁴ on the basis of legitimacy. Therefore, property rights include formal (*de jure*) and informal (*de facto*) arrangements. *De jure* rights are those rights explicitly recognized and enforced by governments formally or legally recognized. Holders of *de jure* rights can presume that if their rights were challenged in an administrative or judicial setting, they would probably be sustained. *De facto* rights occur in situations where resource users cooperate to define and enforce rights among themselves. They are *de facto* so long as they are not recognized by government authorities but legitimized by the users themselves. Users who have developed *de facto* rights often act as if they had developed *de jure* rights among themselves. Depending on jurisdiction, *de facto* rights may be recognized in courts of law but are less secure than *de jure* rights.

Property rights can also be defined as “the capacity to call upon the collective to stand behind one’s claim to a benefit stream thus, property rights involve a relationship between the right holder, others, and an institution to back up the claim⁵, this means that property rights are only as strong and legitimate as the institutions that stand behind them. If state institutions (e.g. government agencies, police, courts) have no capacity to enforce, then it matters little what is written in the statute books, then customary or local law is more relevant. Conversely, where customary management institutions have been weakened, customary rights may no longer be enforced or observed.

Defining property as a stream of benefits or income implies two things. First, the right holder does not need to have physical possession of the property in order to enjoy the benefits thereof⁶. Second, property does not refer to an object per se, but rather to streams of benefit flowing from assets and objects. It also simultaneously assigns the duties and responsibilities for managing the good and respecting the rights of others as the fundamental social institution that allocates value from natural resources⁷. Thus a single asset can have multiple properties and rights to those properties may be vested with the same or different actors.

A number of elements that property rights in natural resources encompassed have been identified by different scholars;

² Ribot, 2002

³ Ribot, 2004

⁴ Ribot, 2004

⁵ Meinzen-Dick, Ruth and Anna Knox, 1999

⁶ For example, the concept of the atmosphere being a property and the right to breathe clean air can be a property right even though nobody has actual possession of the atmosphere.

⁷ Ribot, 2004



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- (i) *Use right*: The right to derive benefit from the asset.
- (ii) *Management right*: The right to decide who shall be permitted to use the asset and under which conditions.
- (iii) *Income right*: The right to derive income from the use of the resource.
- (iv) *Capital right*: The right to consume destroy and transform the asset.
- (v) *Transfer right*: the right to sell give away or bequeath the asset.

Each of these elements represents a benefit stream, or a property, to which rights may be assigned. In many cases all property rights are held by the same party, but often the different elements are to some degree divided between various parties. Combining the two dimensions of property rights it is clear that very complex property rights structures can emerge⁸. In the alternate, it is possible to legally disaggregate the bundles of property rights⁹ into:

- (i) *use* rights, including *access* (to enter the resource domain, e.g. the right to cross a piece of land, go into a forest or canal) and *withdrawal* (to remove something, e.g. to take a pot of water, some kindling, fodder, or fish); and
- (ii) *control* rights, including *management* (to modify or transform the resource, e.g. by planting trees or shrubs, enlarging a canal, or restricting what can be harvested), *exclusion* (to determine who else may use the resource), and *alienation* (to transfer rights to others, either by inheritance, sale, or gift).

In practice, neither state nor local laws are all-powerful in a given context, nor do they operate in isolation from each other. Rather, property rights are the outcome of a complex interplay between various types of legal frameworks, it is therefore useful to employ the perspective of legal pluralism, recognizing that there is not just one legal system that applies nor a simple division between *de jure* (statutory) and *de facto* (locally practiced) rules, but rather that there are overlapping legal and normative frameworks related to property rights. Not only statutory laws, but also customary and religious laws, and even unwritten local norms address the rights and responsibilities related to natural resources.

3. Importance of Property Rights in Natural Resource Management

The property rights systems provide important analytical leverage for understanding the complexity and flexibility to manoeuvre in the use of natural resources which is essential to understanding or comparison of likely outcomes of alternative arrangements in natural resource management. Most scholars¹⁰ identify four types of property rights regimes:

- (i). state property regimes where a state has use and control of resources, commonly referred to as public
- (ii). common property regimes where a group of people or users has use and control of resources¹¹ (although the state might determine which resources are available to be

⁸ Baden R and Stroup J, 2007

⁹ Meinzen-Dick, Ruth and Anna Knox, 1999

¹⁰ Baden R and Stroup J, 2007

¹¹ Or even determine conditions pertaining to, the ownership of a share in a resource under a common property regime; e.g. an owner may have the right to participate in decision-making about the rules that govern the levels and conditions of resource access. All societies have some system of beliefs, social norms or formal rules that regulate the access of individuals to resources in the natural environment; institutions affecting access to resources range from the spiritual



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- used under a common property regime, and the state may assist with the enforcement of resource use rules set by the group). Regardless of whether they are spiritual beliefs, social norms or enforced rules, or some combination of the three, these institutions mediate in the actions of individuals upon the environment
- (iii). private (individual or corporate individuals or companies) property regimes where individuals have use and control of resources (and their entitlements are protected by the state), and
 - (iv). open access regimes where no person or entity has use and control (which might be the consequence of a negligent state or the prohibitively high costs of establishing one of the three regimes above).

Property rights play a central role in the management of natural resources, conveying authority and shaping the incentives for management¹². Ownership of land or the right to use a resource found on it -- such as water, mineral, or harvest rights -- means control. How property rights or ownership are defined, who benefits from these rights, and how they are enforced are central to ownership of resources. In essence property rights are important in strengthening natural resources governance because;

- (a) Property rights offer incentives for management; by offering confidence to the holder of the rights that they will reap the future benefits of investment and careful management, and bear the losses incurred by misuse of the resources. As a result, holding property rights provides a strong incentive for management, by lengthening users' time horizon by their expectations that they will have access to the resource in the future increases. Transferring property rights transfers the rights to reap the benefits from the resource (or gives additional assurance to be able to reap future benefits).
- (b) Property rights give "a sense of ownership" to the holders so that they will take care of the resource, but "a sense of ownership" is difficult to convey without real rights. Often governments hold natural resources on behalf of citizen (under police power of the state) because natural resources are of vital importance to a country, and their management has important environmental and economic externalities for others (both in the country and internationally). Government often lacks the capacity to enforce state property rights or regulations on extensive resources such as rangelands, forests, etc public property has, in effect become open access. Under this situation there is no management, and any who can exploit the resource do so, leading to over use and resource depletion, property rights therefore give the necessary authorization and control over the resource. If the state cannot exert control over the use of a resource and it is useful for it to turn to local communities or groups of users to do so.
- (c) It is difficult or impossible to control usage if one does not have recognized management and exclusion rights over the resource, and backing from the state, property right therefore enable the grant and enforcement of usage not only among the members of the group, if rights to the resource are held by the state or individuals, but also eases the difficulty in setting and enforcing rules governing resource use than if common property

beliefs of traditional societies that regulate agricultural and harvesting activities, through social norms of resource using behaviour.

rights are vested in some collective management entity. If the resource is seen as governments', then users will not identify with it, and will expect the government to do all maintenance and investment.

- (d) Property rights can reinforce collective action; vesting control over resources, including the right to earn income from them, can also strengthen collective action by giving the organizations a source of revenue to cover their expenses. Collective action for resource management involves not only significant transaction costs, but also costs for maintaining infrastructure, planting trees or shrubs, and even patrolling to ensure rule compliance. Assigning and transferring property rights demonstrates a commitment on the part of the government to the devolution process.

4. Policy and Administrative Approaches for Devolving Property Rights

Governance¹³ is essentially a devolutionary process within the area of natural resource management. Two major forms have emerged; the first seeks to devolve property rights over natural resources to local individuals and communities. The second advocates the decentralization of the formal powers of government to its own subunits. However, for such rights to be upheld and enforced, the institutions that issue or formalise them have to be seen as socially legitimate or legally accepted and have the power to enforce. Efforts to strengthen resource users' rights include combinations of: clarifying the content of those rights and claims (e.g. nature, object and duration of rights), and improving the tools with which those claims are documented and upheld – typically, through some kind of formalisation in terms of deeds, contracts or registration.

The decentralization of natural resource management is considered the best governance system because it integrates the three aspects of; ownership, use and control thus provide local authorities with executive (decision-making and implementation), legislative (rulemaking), and judiciary (dispute-resolution) powers. Having meaningful discretionary powers in any or all of these three domains provides legitimacy for democratic local authorities by making representatives and their decisions relevant to local people. It also gives local people reason to engage as citizens because there are meaningful decisions to influence.

Knox and Meinzen-Dick (2000) discuss decentralization as part of a group of policies that are closely related to each other, whose main driving force is broad principle of *subsidiarity*, i.e. that decision making should be devolved to the lowest appropriate level. Within this, transfers of authority to lower levels of government (deconcentration and decentralization) represent vertical subsidiarity, while transfers to non-governmental institutions (user groups or private firms) represents a horizontal dimension of subsidiarity.

Decentralization¹⁴ is a complex and multifaceted concept. Political, Administrative, Fiscal, and Market decentralization are the types of decentralization. Drawing distinctions between these

¹³ By *governance* we mean 'the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken, and how citizens or other stakeholders have their say' (Graham et al. 2003, p. ii). Governance is understood as the body of rules, enforcement mechanisms and corresponding interactive processes that coordinate and bring into line the activities of the involved persons with regard to a concerted outcome (see Huppert, Svendsen & Vermillion 2003)

¹⁴ the transfer of authority and responsibility for public functions from the central government to subordinate or quasi-independent government organizations and/or the private sector



various concepts is useful for highlighting the many dimensions of successful decentralization and the need for coordination among them. Nevertheless, there is clearly overlap in defining these terms and the precise definitions are not as important as the need for a comprehensive approach, instead they can appear in different forms and combinations across countries, within countries and even within sectors

- (i). **Political Decentralization** aims to give citizens or their elected representatives more power in public decision-making. Advocates of political decentralization assume that decisions made with greater participation will be better informed and more relevant to diverse interests in society than those made only by national political authorities. The concept implies that the selection of representatives from local electoral constituency allows citizens to know better their political representatives and allows elected officials to know better the needs and desires of their constituents. Political decentralization often requires constitutional or statutory reforms, creation of local political units, and the encouragement of effective public interest groups.

- (ii). **Administrative Decentralization** seeks to redistribute authority, responsibility and financial resources for providing public services among different levels of government, it is the transfer of responsibility for the planning, financing and management of certain public functions from the central government and its agencies to field units of government agencies, subordinate units or levels of government, semi-autonomous public authorities or corporations, or area-wide, regional or functional authorities. There are three major forms of administrative decentralization -- deconcentration, delegation, and devolution -- each have different characteristics.
 - (a) **Deconcentration** — Often considered to be the weakest form of decentralization, redistributes decision making authority and financial and management responsibilities among different levels of the central government. It represents the least fundamental change, because authority remains with the same type of institution, and accountability is ultimately still upward to the central government, which is sometimes taken to represent society at large.
 - (b) **Delegation** is a more extensive form of decentralization. Through delegation central governments transfer responsibility for decision-making and administration of public functions to semi-autonomous organizations not wholly controlled by the central government, but ultimately accountable to it. It is a matter of degree, the lower the level where decisions are made, the greater is the decentralization. Usually these organizations have a great deal of discretion in decision-making and may be exempted from constraints on regular civil service personnel or may be able to charge users directly for services e.g. National Environment Management Authority, Wild Life Authorities etc.
 - (c) **Devolution**—usually transfers responsibilities for services to local governments that elect their own elected functionaries and councils, raise their own revenues, and have independent authority to make investment decisions. In a devolved system, local governments have clear and legally recognized geographical boundaries over which



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they exercise authority and within which they perform public functions. It is generally accompanied by the creation or strengthening of a subset of local institutions.

- (iii). **Fiscal Decentralization:** Provides revenues to carry out decentralized functions effectively – either raised locally or transferred from the central government – as well as the authority to make decisions about expenditures. Fiscal decentralization can take many forms, including a) self-financing or cost recovery through user charges, b) co-financing from service users; c) property or sales taxes, or indirect charges; d) intergovernmental transfers that shift general revenues from taxes collected by one government to another; and e) authorization of municipal borrowing and the mobilization of either national or local government resources through loan guarantees.
- (iv). **Privatization (Market Decentralization)** — the transfer of public sector functions to any non-state entity, including the private sector or private individuals. This can include non-profit service organizations (grassroots or external NGOs) and for-profit firms. The private sector can be taken to include user groups, individuals or firms, who are accountable to their shareholders, and NGOs, who are accountable to their donors or membership constituencies. Although often carried out in the name of decentralization, privatization is not a form of decentralization, because it operates on an exclusive logic, rather than on the inclusive public logic of decentralization.

The more decentralized a system is, the more it relies on lateral relationships, and the less it can rely on command or force. The benefits of decentralization include: (1) decisions are made by those who have the most knowledge about local conditions; (2) greater managerial input in decision-making has a desirable motivational effect; and (3) managers have more control over results. The costs of decentralization include: (1) managers have a tendency to look at their division and lose sight of overall goals; (2) there can be costly duplication of services; and (3) costs of obtaining sufficient information increase. The growing literature on the downsides of new governance – which include erosion of democratic process, entrenchment of local power elites, problems with accountability and legitimacy, and insufficient attention to public good outcomes – indicates that the design of natural resource governance arrangements should be alert to these shortcomings.

5. **Strengthening Local Governance to manage and enforce Property Rights to Natural Resources**

Natural resource governance describes the extent to which empowered representative local level non-state actors (*to whom powers have been devolved*) can be held accountable for the exercise of decentralised powers over natural resources are transferred to them. The more representative local organisations are, the more they will provide an avenue for articulation of the interests of citizens. In so doing, these organizations check the arbitrary decisions that are likely to be made by public sector actors or those assigned authority. Natural resource governance has three main dimensions:

- (i) Property rights—the allocation and enforcement of rights ownership, access, and control over natural resources, as determined by policies and laws.

- (ii) Institutions—the mandates, functions, and capacities of government agencies in charge of managing natural resources, the relationships among these agencies and with civil society organizations, the processes for stakeholder participation in decision-making, and the mechanisms for stakeholders to hold government agencies accountable for their performance.
- (iii) Financing—the processes for financing, budgeting, allocating, spending, and accounting for the use of resources for natural resource management¹⁵.

The main mechanisms for strengthening local governance utilize what Townsend and Pooley (1995) distinguished as three forms of ‘distributed governance’:

- (i). rights-based management, in which some collective choice level rights and ownership rights are assigned to individuals and the remaining rights, and particularly the constitutional choice rights, are retained by the national government,
- (ii). co-management, in which the rights held by the state in rights-based management are shared between the state and a local or regional organisation or government, and
- (iii). Contractual-management, in which the various rights are split up between the national government, local or regional organisations or governments and individuals, with a system of contracts among these entities to provide the appropriate pattern of incentives for the behaviours needed to ensure sustainable use of the resource.

The options open to Governments interested in strengthening local governance systems to better manage and enforce property rights to land and natural resources include the following;

- (i). Establishment of appropriate policy and legal framework that recognises and empowers citizens to exercise authority over their resources, so that the devolution of power is made possible through sectoral policies for natural resources management and legalization that implements the principles contained in the policies such as principle laws (e.g. Acts of Parliament) or subsidiary laws (e.g. Statutory Instruments and Orders).
- (ii). The use of administrative controls and regulations relating to access to natural resources as well as control over revenues and profits from exploitation of the Natural resources. This could include instruments such as licences and permits which can determine whether or not the existing frameworks actually confer benefits of natural resource exploitation to citizens.
- (iii). Institutional choice which is also considered the key to democratic decentralisation where elections are one of the most common means for establishing downward accountability of local authorities.
 - a. There is some evidence that elected local authorities can improve natural resource management. Elections, however, do not always ensure downward accountability. Electoral systems must be analysed for how the candidates are chosen, suffrage, term lengths and means of recall. Another advantage of elected local authorities is that they are formally institutionalised and therefore can be sustainable over time and scalable over national territories.

¹⁵ Baden R and Stroup J, 2007



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- b. De-concentrated Local Administration relies on the perceptions and motives of centrally appointed agents to discern the needs of local people. It does not therefore provide representative authority with discretionary power. Its success is dependent upon the goodwill of the centrally appointed agents and their superiors.
 - c. Customary Authority can be a positive force, where accountability mechanisms are in place and customary authorities accurately represent local people. However, reconstituting customary authorities as biodiversity managers can be at the expense of democratically elected local authorities. They are not necessarily accountable to local people and may represent kin groups (regardless of their interests in the biodiversity – including absentee kin members), rather than all the biodiversity users.
 - d. NGOs and CBOs are groups that can play a significant role in decentralisations by making people aware of their rights and empowering their participation. However they can also have a negative effect on local democracy when they represent interest groups rather than the concerns of the local community as a whole. They fall victim to self-appointed spokespersons (or sponsored by donors) based on education, personality or levels of articulation. No mechanisms to ensure NGOs are representative or downwardly accountable (especially if funded from outside sources) are often available except for membership driven ones.
- (iv). Actor-oriented interventions, that aims to improve the power-balance over natural resources, through devolution.

The success of decentralization will be undermined if devolved decision making at the local level is not insulated from political influence, this calls for strong ('positive') political will for decentralisation to succeed, and it implies the security of transfer of decentralized powers. Often times decentralized natural resources management is dominated by elite power capture at local levels and in other cases the decentralized powers are fragmented, especially if imposed along asymmetrical faults associated with natural resource sectoral interests at the local level.

6. Conclusion: Lessons or Take Away Messages

Devolving property rights in natural resources to citizens in local communities provides incentives for good stewardship. Issues of rights and control are closely tied to legal recognition and land tenure security, the means of achieving sustainable management of land and its resources is shaped to a large degree by tension between legality (underpinned by the coercive capacity of the state) and legitimacy (derived from what resource users perceive as right and just). Tenure is important; however, there are also examples worldwide that show that it is not always a sufficient or even necessary condition for success. Tenure needs to be backed by certainty that the state will enforce contracts. Thus, strengthening property rights at the local level needs to go hand-in-hand with strengthening the state's ability to arbitrate and enforce contracts¹⁶.

¹⁶ Giri, 2005



Regardless of which legal and institutional form for decentralization is chosen, a primary trend at present in natural resource management is to reconcile legality provided by the state with the legitimacy provided by local institutions for the administration of resource tenure, rather than implying loss of sovereignty, such genuine subsidiarity provides an opportunity to restore the legitimacy of the state as arbiter. Tanzania and the Gambia the two countries that have transferred legal ownership of unreserved forest lands to local communities and provide ample testimony of the benefits of legal recognition. In this way, resource tenure becomes one of the areas in which a new social contract between the state and the population may be constructed, a matter of necessity in countries where governance is in crisis.

However, property rights alone are not sufficient to secure access to natural resource benefits. Access to these benefits depends on access to markets. In Uganda's for example charcoal commodity chains; there exists several market access constraints that make it difficult for producers to sell charcoal outside production zones. This is a classic case of decentralizing with the right hand and taking away benefits from decentralization with the left hand. Without the powers to access economic values derived from the disposition and use, production and exchange of natural resources, locally accountable representatives will not have real power; "neither representation without powers nor power without representation" is considered sufficient.

Policies and administrative controls under decentralization (e.g. production and transport permits, licenses, quotas, fees, requirement of management plans) sometimes concentrate natural resource benefits in the hands of economic and political elites (including traders and middlemen). A typical example is that of Uganda's 2003 National Forestry and Tree Planting Act that retained the issuance of permits and licences to trade in forests produce at the centre. This is normally used by the National Forestry Authority to exclude those who own forests from commerce in forest resources. Various environmental policies and regulations create barriers or selective forms of access and markets that enable exclusionary and predatory behaviors, undermining natural governance.

The handover of management to users is in many cases desirable, but must be based on sound understanding of the heterogeneity of users' requirements and of the spatial and temporal aspects of formal and informal usufruct rights. It is essential that decentralization policies and laws are in place, although this on its own is not sufficient. The process of legislating for and implementation of democratic decentralization is wrought with fundamental contradictions between (1) the procedural objectives of new democratic processes engendered (e.g. increased downward public accountability) and (2) the instrumental objectives of the state (e.g. service delivery). The questions to tackle include; how actors and powers over resources change due to decentralization. The nature of the powers over resources decentralized (authority, responsibilities, and rights)? How decentralized powers are exercised at various levels? Whether or not decentralization enhances well-being of natural resource-dependent citizens



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