POLICY BRIEF
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Accelerate legal recognition of commons as group-owned private property to limit involuntary land loss by the poor

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Summary

This brief focuses on the main finding and recommendation of "The Tragedy of Public Lands: Understanding the Fate of the Commons under Global Commercial Pressure" by Liz Alden Wily, a contributing paper to the ILC Commercial Pressures on Land Global Research Project.

Its *key finding* is that rural communities are in danger of involuntarily losing millions of hectares of their common properties to investors. This is because many governments sustain conditions by which they make themselves the legal or effective owners of rural lands which are unsettled or uncultivated. They do this on grounds that such lands are unowned and unutilized. This contradicts the reality that these lands are the longstanding collective assets of individual communities, in accordance with community-derived norms (customary law) and that these resources represent a used and pivotal support to individual communities, whether settled, pastoral, or hunter-gatherers.

The *principal remedy* advocated is to focus directly on removing the conditions by which governments may lawfully alienate the common properties of their rural citizens. Achieving this requires forceful revitalization of reforms which began to make good progress from the 1990s in Africa, Latin America, and Asia. This progress is now flagging in the face of opportunism afforded through a sharp leap in globalization of the land market. While such globalism is not reversible, unjust and ultimately unsound investment strategies which exclude the majority of the rural poor and deny their shareholding in transformation *are* reversible.

Key indicators of success within the decade would be visible in (a) a dramatic reduction in the area of lands deemed as unowned public lands or state property, in favour of customary owners; and (b) an equally significant rise in arrangements whereby these communities, not governments, are the *lessors* of land to large-scale enterprises which are demonstrably viable and beneficial.

Context

What are the commons?

There is a recent tendency to refer to oceans, libraries, public services, and even intangibles such as knowledge and outer space as "commons", though most of these are better described as *open access resources* or *public assets*.

The singular features of *landed commons*, as discussed here, are that they are tangible, discrete in area with locally known boundaries, and by custom owned and used by communities. Mostly they comprise natural assets such as uncultivated rangelands, grasslands, forests, and marshlands. These are resources which rural communities quite widely around the agrarian world find sensible to own jointly in undivided shares (as "common property") and to use and regulate on a communal basis.

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While these commons are steadily receding under pressure of expanding cultivation, they are valuable in their own right, complementing settled farming with subsistence or income from fishing, grazing animals, collection of wood and non-wood resources, and often as sites for shifting cultivation. The poor in particular are beneficiaries, including those in feudal or other inequitable arrangements in which

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they have no farms of their own, or own farms that are too small to live from, a common situation for millions of people in Asia especially. Commons also have a high socio-cultural value.

How big are the commons?

Commons are an immense global resource.

The most satisfactory route to their identification is by land types, on grounds that forests/woodlands, shrublands, grasslands, savannas, wetlands, and sparsely vegetated lands are most likely to be owned and used communally. These resources cover 8.54 billion hectares, or 65% of the total global land area. The largest sphere of commons falls within sub-Saharan Africa (1.785 billion hectares). Nonetheless, this provides only 3 hectares per rural person in Africa, compared with 78 hectares and 19.4 hectares per rural person in Oceania and South America respectively.

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Who owns the commons?

Governments are the main legal owner of commons. This is despite these same lands being considered locally as the private collective property of communities, under customary norms.

This contradiction arises because customary land ownership is not well supported in many countries. For example, most of the 1.7 billion hectares of terrestrial Protected Areas are lands which have been formally removed from local tenure and made state property, and without compensation. Some countries (e.g. Cameroon) additionally declare ***all*** forested lands to be national property, further undermining community rights. Others, particularly in Latin America, recognize that communities are the lawful owners of customary areas but maintain the right to reclassify these at will, such as by issuing concessions on them and without necessarily securing local consent. Violence erupted in Peru in 2009 over this contradiction.

Still other countries adopt laws which recognize that rural families or whole communities may become the legal owners of customary estates, but through impossibly cumbersome and expensive procedures including formal survey (e.g. Mali, Niger). Many others limit even this opportunity to lands held for housing or farming,

There are a handful of cases where customary land tenure is now recognized as a legal means of owning property, *inclusive of unfarmed common properties*, and guarantee security of tenure over all these areas even without registration. Ghana, Uganda, Tanzania, and most recently Southern Sudan are examples in Africa. Benin, Burkina Faso, and Mozambique have also adopted more just land policies but with more caveats and limiting procedures.

There are other countries which have reformed their land laws to at least endow security of tenure to customarily held house and farm parcels, but *not the commons* (forests, woodlands, grasslands, etc.), which governments retain as their property. Although distinctive in each case, this is the situation in a host of countries from Nepal, Cambodia, and Afghanistan to Rwanda, Madagascar, Ethiopia, and Namibia.

Still, for most rural populations around the developing world, their customary ownership is not accepted ***at all*** in national legislation. They remain, as was the case in colonial states***,*** *mere permissive occupants and users* of lands which governments claim as their own property, or as public lands under government control. In this way, rural communities are in effect "squatters on their own land". In practice, their occupation and use may be undisturbed, especially for remoter communities. However, the current global land rush is putting paid to that peace.

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The core problem

Clearly the root constraint is a matter of law. To recap, commons are a particularly easy target for large-scale land acquisition because:

- Customary rights to land in general are not held to amount to property rights in many national laws.
- Such customary lands are quite frequently designated as national, state, or public lands.
- As mere tenants on these public or government lands, families or communities may be lawfully dispossessed at any time.
- Laws which acknowledge that even lawful occupancy and use apply only to settlements and farms directly add to the special exposure of commons to involuntary loss.
- Additionally, commons usually include resources which, by virtue of not being farmed, state laws consider to be generically unowned, unutilized, and even "wastelands". This enables governments to treat these areas as "vacant", "idle", and available. As "unowned lands", these lands may then be legally alienated or leased by governments to those of their choice.
- Nor need compensation be paid for these "unused" lands. Their real estate value is therefore entirely lost to owning communities along with the use and product values.
- Commons are also doubly vulnerable because governments prefer to direct investors away from settlements and farms to limit potential eviction, conflict, cost, and time. Many governments make it a matter of formal policy to lease only presumed "unutilized" (i.e. unfarmed) lands (e.g. in Madagascar, Ethiopia).
- Governments also aim to *add to* rather than transform the current area under production, increasing focus on lands which are by custom communally owned.

- Only commons provide the scale of estates sought by large-scale investors; existing farmed areas are usually too fragmented.
- Large-scale investors seeking to buy or lease land do not want the constraints of having to negotiate with or work with local populations other than as direct employees, which is necessary where investment is channeled through smallholdings. Accordingly they favour unfarmed commons over settled or farmed areas.

Are commons in practice being interfered with?

Yes. New land large-scale land acquisitions under implementation demonstrate that all categories of untitled rural lands are being affected, but especially unfarmed communal properties. For example, in Madagascar 19 of 29 land acquisitions since 2008 reviewed by GTZ co-opted grasslands owned and used on a community basis, mainly for livestock keeping. An unspecified number of villages have lost their entire community land areas, inclusive of farms and commons, in eastern DRC because the government has leased these lands to a grain-producing company. The evicted communities are now forced to beg a place to live in the neighbouring Kundelungu National Park, from which they will in due course also be evicted. The issue by the Government of Kenya of 40,000 hectares of land in the Tana River Delta to the Government of Qatar is expected to decimate the dry-season grazing lands of 20,000 Orma and Wardei pastoralists. Its lease of 6,900 hectares of the Yala Swamps to a subsidiary of a US company for rice production has removed this wetland from local control. Field studies conducted under the ILC research project, details of which may be found in other reports in this series, reinforce the evident loss of common properties in such diverse settings as Indonesia, Malaysia, Peru, Rwanda, and Ethiopia.

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Impacts

The impacts thus far are multiple. These are mainly negative and include eviction, loss of livelihood from non-farm resources, and loss of the major natural capital of poor rural communities. Evidence of new employment or other opportunities and benefits which offset these negatives is yet to be demonstrated. Increase in the loss of community-owned resources is likely to occur. Oil palm developments already interfere with the forested lands of communities and this will increase with carbon trading schemes. Rises in the number of ranching schemes will increase the loss of community rangelands. The resources themselves may be transformed in irreversible ways.

The relationship between governments and their people is strained as the gap between state and popular interests in matters of land rights widens. Signs of grievance, instability, and conflict abound, in virtually every country where rural lands are being leased at scale. Arguably great risks are being taken in this respect. For example, despite the fact that large-scale leasing in the 1970s helped trigger the 24-year civil war in Sudan, Khartoum has recently leased an additional further several million hectares of community plains and woodlands.

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More positively, the wave of leasing in Africa and other agrarian economies can be expected to trigger heightened awareness and demand around majority rural land rights, giving impetus to much-needed legal and policy reforms, and new ways of handling investment. Such shifts have already begun to be seen in Tanzania and Mozambique, including giving more encouragement to investors to work through existing farming systems and populations.

Recommendations

Nothing short of reforming *unjust law* can redress the injustice of depriving already poor rural communities of their natural resources. Aside from immediate livelihood and socio-cultural deprivations, these lands represent the very kind of capital assets which the poor need to help themselves clamber out of poverty.

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The current surge in large-scale land investments has the potential to provide a platform for this. Where schemes are vetted as having a good chance of positive outcome economically, investors could be directed to negotiate directly with rural communities, and reach fair and accountable contracts, by which they pay rent and other agreed benefits to these land-owners. The terms by which communities are assisted to lease out their customary lands for private investment purposes needs rigorous monitoring, as salutary experiences with early schemes of this type, such as in Sarawak, demonstrate.

For such developments to evolve in fair and workable ways, land laws must be amended to recognize that unfarmed common lands *belong to rural communities in the first instance*. Changes must endow these lands with all the attributes of statutorily recognized private property. Without this, wrongful, although "legal", dispossession of rural communities will continue apace. It is no coincidence that in countries where some of the most active leasing is occurring, such as in Northern Sudan, DRC, Ethiopia, and Madagascar, laws do not accord unfarmed lands status as owned property.

Accordingly, the key recommendation is to focus on land tenure reforms which recognize customary rights as private property interests. Such reformism made good progress from the 1990s, with some significant successes, but now it is flagging in the face of globalised demand for rural lands and the opportunism in host countries which this inspires.

Advised routes to kickstart and promote the further evolution of reforms include:

- Putting both international trading and human rights law more effectively to work in support of the majority rural poor who own and depend upon land through community-based regimes;
- Promoting the restructuring of international aid priorities and conditionality towards heavy investment in land tenure and administration reform. As necessary, this may be justified on security grounds, with wrongful land takings at scale being recognized as bound to generate instability;
- Speeding up concrete entitlement at the local level, with a focus on the most vulnerable estates, the commons. Delimitation of overall community land areas inclusive of farms and commons is a practical first-line step to focus upon. This can remove large areas from immediate vulnerability. Procedures for this can be adapted from the existing experiences of such delimitation in Tanzania, Mozambique, central Sudan, Benin, and Liberia;
- Integral to the above, focusing investment in developing community-based land administration systems, to empower ordinary poor rural communities to be better aware of and in control of land disposition matters.

Indicators of success

Key indicators of success which should be aimed for within a decade include:

- A sharp reduction in the area of designated state/public land in favour of legal community tenure, especially in those Asian and African countries where involuntary land loss is most pronounced;
- A sharp rise in arrangements whereby rural communities, not governments, are the legal lessors of lands to investors, able to be benefit from the rent and additional legally agreed benefits under those leases, and without losing root ownership of their important natural capital, the land and its resources;
- Significant evidence that issue of concessions for timber and contracts relating to carbon trading are also beginning to be reconstructed to reflect the above principles of respecting the land rights of rural populations.

Further reading

Alden Wily, L., 2010. '*Whose Land Are You Giving Away, Mr. President?*' http://siteresources.worldbank.org/INTARD/Resources/335807-1229025334908/alden-wily.docx

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This policy brief is derived from a wider initiative on Commercial Pressures on Land (CPL). If you would like further information on the initiative and on the collaborating partners, please contact the Secretariat of the International Land Coalition or visit **www.landcoalition.org/cpl.**

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