What assumptions are made when communal land registration is promoted?

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Land and Equity Movement in Uganda (LEMU)

Making land work for us all

Introduction

In its Community Land Protection Project (CLPP), LEMU sought to bring communities from a status quo of post-displacement disengagement through a process of reliable registration, constitution drafting, and vibrant community land and natural resource management. The CLPP was first implemented by LEMU, IDLO and NAMATI in Oyam district only in Lango sub region from 2009 to 2011.[1] The project informed the communities of different ways to protect their land, including the planting of boundary trees, registering as a Communal Land Association, and then supporting community members to follow the necessary procedures to successfully apply for their chosen documentation option—a Certificate of Customary Ownership or Freehold Title. In the first phase, 34 communities invited LEMU to support them in registering their community lands. This phase progressed up to a certain extent, with seven (7) communities drafting constitutions with an eye to obtain legal status as Communal Land Associations. The lessons learnt from these 34 communities in Oyam have informed LEMU's implementation of Phase 2 of the project. These lessons are described below.

In the 2nd phase, LEMU expanded its community land protection work to all 8 districts in Lango sub-region. Individual representatives from 74 communal land sites (also known as "communities") volunteered their communities to receive the support of LEMU's Community Land Protection Project. Out of the 74 communities, 51 were assessed. Out of these, only three (3) sites were found to have no ongoing land disputes, while the other 48 featured conflict on either their wetland or their grazing land. LEMU also found that 49 of the 51 sites are either wetlands or adjacent to wetlands[2].

Systemic realities—especially conflicts over the size of the community land and its misappropriation for personal use—therefore challenged LEMU's initial assumptions for CLPP work and demanded a more savvy and contextualized approach. The underlying assumptions that the CLPP project made were:

1) That community land exists and is managed well under customary tenure;
2) That any conflicts that exist can be easily solved using conventional methods;
3) That the project could be completed in a relatively short duration; and
4) That current Ugandan law offers a reliable way for community land to be protected.

This paper shares with stakeholders lessons learnt in the implementation of the CLPP so as to influence implementation of the forthcoming World Bank project termed "Competitiveness and Enterprise Development Project (CEDP) – Land Component" that dedicates, amongst others, USD $54M to the Government of Uganda's Ministry of Lands, Housing, and Urban Development (MLHUD) for *"undertaking systematic registration of* ***individual*** *and* ***communally*** *owned*

[1]For more information, see Protecting Community Lands and Resources: Evidence from Uganda, a book produced on Phase 1 of the Project by IDLO/NAMATI/LEMU/CTV/SDI found online at: www.land-in-uganda.org

[2]Under Article 237(b) of the 1995 Constitution, wetlands are vested in the state, and not technically "owned" by communities

land" and for *"implementing a program of actions for strengthening institutions and mechanisms for land dispute resolution."* It is important to spell out assumptions that underlie LEMU's Community Land Protection Program, as they will have a serious impact on any attempt to register these lands, should the assumption turn out not to be true. This article highlights some of the key assumptions that LEMU made but proved not to be true.

What is land that is communally owned?

Before examining the Community Land Protection Program's assumptions that LEMU made, it is important to ask whether the understanding of "communally owned land" is the same for all stakeholders. It has been a common position for policy and law to regard all land under customary tenure as "communally owned," something akin to "an open access regime" where everybody—and thus nobody—"owns" the land. In fact, LEMU's experience shows that the owners of a communal land holding can number as many as 4,000 people.

In reality, however, customary tenure comprises three types of land: ***family*** lands, ***individual*** lands and ***community*** lands.[3] Of the three types, family land is the most predominant and encompasses the interests of men, women and children. As such, should the design and implementation of the Government's CEDP not first focus on registering customary family lands rather than privatized lands and community lands?

Because customary tenure is an oral system, many development actors are unfamiliar with the basic paradigms of customary legal frameworks and land-owning systems. This affects their ability to facilitate communities to undertake steps to authentically protect their communal lands and resources and register existing customary land rights "as is". **Without first defining what "community lands" are or establishing whether they are still in plenty, any large-scale attempt to register these lands may cause more harm than good.**

LEMU's experience reveals that, depending on who you speak with, "community land" in the Lango region may be considered to be:

a) All of the customary lands in a given community;
b) A standalone grazing land, a grazing land adjacent to a wetland, or a wetland used and shared by a community;
c) Land that is already allocated to members but some left in the family pool and is, as yet, undivided;
d) Clan land that is all as yet undivided amongst members;
e) Land that communities donated in the past to government as agricultural demonstration farms.[4]

LEMU's Community Land Protection Program found that in Lango, out of the original 51 communal land sites that LEMU assessed, community land appears to take three main forms:

[3]These classifications are now enshrined in S.41 (vi) of the 2013 Uganda National Land Policy, which states that *"Government shall… Define family and individual land rights, from communal rights under customary land tenure and distinguish the rights and obligations of customary institutions vis-à-vis those of the community and individuals."*

[4]Some communities want these lands considered to be community land as well, especially where demonstration projects either failed or are no longer functioning.

a) standalone grazing land (4%);
b) grazing land adjacent to wetlands (57%); and
c) purely wetlands (39%).

Overall, sizes of community land holdings in Lango subregion appear to be reducing. Some district lands administrators even question whether communal land even exists anymore in Lango sub region. A likely reason for this may be that the definition and boundaries of community land have changed over time, often without the full knowledge of all community land owners. For example, after the massive cattle raids of the mid 1980s, a select group of more powerful community members may have decided to divide up communal grazing lands among themselves, to the extent that today, there is no longer any communal land left to protect.

***Assumption 1:* Communal land exists in plenty. Those responsible for its ownership and management are working effectively, and community members care enough about their communal land to protect it.**

LEMU's Community Land Protection Project was originally based on the assumption that communally owned land exists and its rights and management are functioning well under customary tenure without many problems. Our learning has led us to conclude that displacement and loss of cattle in the 1980's and again during the recent Lord's Resistance Army (LRA) insurgency have led to "social disengagement" and the loss of a strong sense of ownership over communal lands. As a result of this insecurity, life during and after displacement elevated survival needs (such as immediate threats to individual and family landholdings) above the longer-term stewardship of communally shared assets (such as lands for grazing, hunting, and gathering). This is because in the customary system, where land was historically plentiful, land usage led to a felt sense of ownership. But with community lands left without managers (due to loss of elders and customary management structures) and idle (due to insecurity and the loss of cattle), community land became gray zones and attraction for encroachers. This vacuum of oversight has enabled powerful people to encroach onto it as their personal property.

For the Community Land Protection Project to begin without first **reviving the customary sense of stewardship and collective responsibility** which motivates communities to take the necessary steps to safeguard their lands—including finding solutions to ongoing encroachment—was to miss an important step. Put simply, if community members do not share a strong sense of rightful ownership of their community resources, the protection provided by CLPP cannot work. Effective tenure security provided by CLA registration is founded upon a community's intrinsic sense of responsibility over communal customary lands. This must be revitalized if communities are to realize sustainable community land protection.

Lesson: Communal land rights and resource management under customary tenure must therefore first be strengthened if communities are to realize sustainable protection of communal lands and to take full advantage of provisions in Uganda's *Land Act.*

***Assumption 2:* Conflicts over community lands can easily be resolved through normal channels.**

Of the original 74 community lands whose owners applied for LEMU's assistance, 71 had land conflicts. These conflicts could be grouped into 3 types, namely:

a) encroachment by needy community members (such as internally displaced persons and the elderly);
b) genuine disputes on who has land rights; and
c) deliberate bad faith attempts to grab land by powerful or elite encroachers.

Information on conflicts is not easily given by communities and their leaders; this makes it difficult to identify the type of conflict at hand. Yet understanding of the conflict type is necessary to design an appropriate intervention strategy. For example, conflicts under type "a" and "b" are typically *civil* and appropriate for clan mediation, while others under "c" (bad faith attempts to grab land) have *criminal* elements under S.92 of the Land Act and under National Environment Management Authority (NEMA) laws and require state law enforcement. Nevertheless, strategies for resolving serious land conflicts must be sensitive, since persons acting in bad faith are often community members with rights to the very communal land in dispute. The presence of deliberate bad faith may also bring the entire CLPP process to a standstill, and may divide, frustrate, and discourage the community and put staff lives at risk.

***Assumption 3:* LEMU could complete this work in a short period of time.**

The Community Land Protection Program originally believed that it would take a community between one to two years to complete the full, integrated community land protection process, which includes many steps (each of which may take up to 12 months of intra-community discussion or inter-community negotiation):

Yet what the project aims to achieve is in fact changing the "way of life" of customary land owners from an oral system to a written system. Under customary tenure, laws are oral, meetings are rarely recorded, and enforcements are negotiated. While addressing any existing conflicts, and working to involve what might be hundreds or thousands of community land owners, the Community Land Protection Project facilitates community land owners to register as a Communal Land Association (CLA), write down the rules that govern their communal resources, and then apply to get and manage a Certificate of Customary Ownership or Freehold Title. Each of these steps builds on the previous one. In effect, this process introduces a new way of working – moving communities from an oral system to a written system – which is highly risky for community members who are illiterate and do not speak English (often the majority). To address the risks that might arise, it is necessary to build time into the process.

The experience of LEMU—and that of other civil society organizations working to register Communal Land **Associations**[5]—reveals that structural challenges also delay the CLPP process.

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[5]CEPIL, BIRUDO in Gulu and Buliisa District. In Mozambique we have registered 17/20.

LEMU began its CLPP work in 2009; but as of 2014, no District Registrar, an essential actor in the land surveying and documentation process, has been appointed or stationed in all of Lango sub region.

***Assumption 4:* The Land Act provides a reliable framework for Community Land Protection.**

The law for registration of Communal Land Associations (CLAs) in Uganda's Land Act provides for communities to first be registered as a legal entity by incorporating them as a CLA before they apply for a certificate or a title. To do this, the Act provides that the communities be registered as a legal person in the names of **individuals** rather than in the name of the association itself. This is problematic because registering the association in the names of individuals makes the individuals—not the community—the legal proprietors and owners of the land. These registered "owners" of the land could easily sell the community land, should they wish, without the consent of all the owners (all community members), even when the law does not allow it, as has happened in Liberia and other contexts. Were the District Registrar of Titles to exist, the Act gives the Registrar vast powers to change a community's CLA constitution without thorough consent of all community land owners. This also puts the communities at the mercy of the state administration.

Recommendations

To ensure that community land protection is not premised on untested assumptions, LEMU recommends the following:

1) Understand what tenures exist in a given community. If customary tenure exists, work with each community to discuss and define what their "community land" is (as opposed to "family" and "individual" lands) before beginning community land documentation work in any given community.

2) Make sure that you are working with all of the owners of the communal lands in a given community (it will usually be all or most community members, as well as any seasonal users). LEMU's experience is that these land owners may include the population of 2 to 11 owners and users villages.[6]

3) Strengthen peoples' awareness and sense of their land rights under customary tenure first, before any form of certification work. The understanding—and social claiming—of one's land rights are foundational to tenure security. Without these, community land registration is rootless and disconnected from people's lived reality. People must know the measure of their land rights before they can leverage that knowledge to protect their assets under the Land Act. With decades of displacement and the erosion of cross-generational cultural values, it is now even more important to link communities' past ways of life with future protection.

[6]"Owners" villages are those that are geographically closest to the communal land and own the land year-round. "users" villages, on the other hand, are typically farther away from the site and send members to access and use the communal land during certain times of the year (for example, to graze cattle in the dry season). They would have their own land and water which dries up seasonally.

4) Strengthen local governance within the community before doing any of the boundary harmonization or land conflict resolution work. This is land governance and local democracy-building work, above all else. The aim is that once community leaders are elected and rules are in place, then issues like encroachment become the responsibility of all community members. Meanwhile, strong, revised and written rules (by-laws) for community land management help guide leaders' actions and can help mediate pre–project land conflicts and any subsequent land conflicts.

5) Be prepared for the long haul. This is not a quick-fix project. Community land protection happens at the community's pace, according to the community's priorities, and unfortunately within a context where legally prescribed positions (i.e., District Registrars) have not always been filled. After four years of community land protection work, only seven of LEMU's communities have reached the stage of drafting a constitution. Two are ready to register their CLA – and even these are waiting to find out whether the registering the association in the names of individuals means they should instead opt to be incorporated as another alternative legal entity. Even then, these communities are not always living out the management of their community land under their newly adopted Constitution. Changing a community's way of life from oral to written takes time and requires sustained technical support.

6) The Land Act should change to allow community land associations to be registered in the names of the association and not in the names of individuals as the current law turns "owners of land" to "beneficiaries of land".

7) The law should categorically state that existing customary laws and management applied to community land, will continue to apply, even after the land is registered. It should also state that once communities have debated, written, and adopted their rules for managing the community land, magistrates and state law enforcement will work together with managers of the community lands to recognize community's efforts, enforce their constitutions, as provided for in S.42 of the 2013 National Land Policy.

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