

## Brief §1

# Community Property Around the World

Liz Alden Wily<sup>1</sup>

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### **Main messages –**

- 1 **Community property is a major and expanding regime.** Despite urbanization, rural communities are expanding in number and their land security is even more pressing. Recognition of existing collective ownership of lands previously deemed to be un-owned public property is also expanding its reach.
- 2 **Community/ customary tenure is ceasing to be rejected as archaic, instead held to be relevant to 21<sup>st</sup> century conditions.** As a **community-based system** it supports devolutionary democracy, and brings millions of hectares of fragile and randomly encroached lands under ownership that can be held accountable. The human rights of land dependents are also served, a 21<sup>st</sup> century imperative.
- 3 **The law reflects this change.** Nearly three quarters of national land laws around the world now acknowledge community lands/ customary lands as ‘property’ deserving recognition and protection as lawfully owned.
- 4 **Legal handling of community property is changing the way property in land is defined:** it is now broadly accepted that this is not *necessarily* a saleable commodity, not *necessarily* owned by individuals or legal entities, and in some countries advantageously but not *necessarily* surveyed and registered to be acknowledged as already owned lands.
- 5 **This transition predictably faces backlashes, especially as governments fear losing *de facto* ownership over millions of hectares of once presumed ‘ownerless’ lands.** Promotion of individualization as essential to accumulation of private wealth to reinvest in economic growth has resurged, aided by investor ambitions. Collectively based economic growth strategies are lagging behind, in Africa in particular. **Success is never final:** even where supporting national laws exist, communities need to guard against backtracking.

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<sup>1</sup> Land Tenure & Natural Resources Governance Specialist: [lizaldenwily@gmail.com](mailto:lizaldenwily@gmail.com)

## 1. Five Background Questions

### 1. Why refer to community lands as 'property'?

*Because –*

- a. As far as several billion citizens are concerned, their lands *are* their 'property'.
- b. Although *customary* landholders may not have referred to their lands as 'property' (or been encouraged or permitted during colonial eras to do so), many do so today. They consider their lands to be as much 'theirs' as private persons or companies consider their lands to be their properties.
- c. Recognition of community land as property is a conscious objective for millions of communities around the world.
- d. Using the term 'community property' helps bring this home to policy and lawmakers.
- e. Conventional views are fading that property in land could only exist if it was granted and registered by the State. Many modern land laws accept that property exists in different systems.
- f. Precedent: many countries now acknowledge that even unregistered community lands *are* property, and make formalization of each of these properties a priority, through survey and registration a priority.

### 2. Why care about what state law says?

*Because –*

- a. Everyone lives within one or other state today.
- b. State laws are supreme with each country. They prescribe what is property, and how it is protected. Even customary law and customary tenure depend upon the status granted them by state laws (national laws).
- c. In the past, remote communities could ignore this, as national or state laws did not change much on the ground. Today, community lands everywhere are vulnerable. Legal acknowledgement that they may not lawfully be casually encroached or taken has become important.

### 3. Why care about what is going on outside the country?

*Because –*

- a. The world is globalizing fast, along with threats to community land security. Learning about trends and risks is helpful at home.
- b. Each country, and each community, is different. But similarities in norms, conditions, and challenges are even more common. It is useful to see how communities elsewhere are tackling these.
- c. Laws routinely borrow from each other, across boundaries. It is good to know what the trends are, what can be borrowed and what should be avoided.
- d. It is encouraging to see progress elsewhere. Communities can use the evidence to prompt their own governments to adopt changes.

### 4. Are land titles really important for communities?

Yes, in the end, community land title is important - even where the law does not require titling to protect the community as owner.

*Because –*

- a. Titling double-locks the property in a way administrators understand and respect.
- b. The chance for full compensation at compulsory acquisition is increased when a community can show its title ('native title', collective title', community title' or other form which title takes).
- c. Nascent disputes with government over the extent of public lands can be directly confronted during adjudication, survey and registration. Governments generally want to hold on as much land as possible as public or State property. The goal posts keep changing, new classes of public property being established all the time. Communities need to secure their lands as fast as possible and formalization is a tangible process to do this, and to remove overlapping claims at the same time.
- d. Formalization prompts communities to define their membership, the exact extent of their lands, to resolve lingering conflicts within the community and with

neighbours, and to define which areas within the community property should be earmarked for collective and private use.

**5. Does community land ownership and community land title mean that no individual/ family can own land of its own?**

No. Arrangements are up to the community. Here are some typical options –

- a. The community decides to bring only off-farm shared lands under community ownership (and title). This leaves homesteads outside the community property, and eligible for individual entitlement.
- b. The community treats the entire land as its common property, and if it applies for formal title, it secures a single community title for the whole area). But the community makes provision for individuals/ families to secure inheritable usufructs over their respective houses and farms within the community property. Each individual/ family is therefore both (i) a co-owner of the land itself with all other members, and (ii) a right-holder over one parcel in the community property.
- c. The community brings all the land under collective ownership as above but also leaves open the option for the community to subdivide, or partition off some or all of the lands for private ownership at a future date.

**2. Community Property Around the World<sup>1</sup>**

1. *Community property is a major resource.* It is estimated to comprise more than half the total land area excluding inland waters; that is, more than six billion hectares (twice the area of Africa).
2. *People who possess and use lands as community members are a major group.* They are believed to number three billion people today (40 percent of the world's population in 2018 (7.6 billion people).
3. *Community landholding is not new.* It goes back even before Roman times. Community landholding became the dominant form of defining rights to land when people began to settle and needed to protect their domains. Archeologists show that hunter-gatherers possessed distinct territories at least 50,000 years ago.
4. *Community landholding changes with the times.* Because it operates in direct contact with changing land uses and other practical needs, it adjusts accordingly and is always relevant. A community based tenure system cannot survive if the majority does not support its norms (rules). Disagreements can trigger new practices and rules.
5. *There is nothing old-fashioned about community owned lands.* These operate in all regions of the world today. This includes Europe. *For example,* communities own a large number of forests in Norway, Sweden and Romania. Communities own many pastures in Austria, Switzerland and Germany. New laws in Spain and Portugal encourage community ownership after local governments admit they are unable to protect forests from fires and that citizens with real interests in those resources will do better.
6. *Some land types are not always productively subdivided into private parcels.* Forests, rangelands, marshes, mountains, and waters, are common examples. Many countries acknowledge that it is sensible for these to be owned collectively.
7. *Many countries also realize that their citizens can be more efficient collective landowners;* that the state does not have to coopt and turn all lands that are not private properties into public/ national/ government property.
8. *Most lands within community properties are unfarmed.* This is not surprising. Rather little of the world's lands are permanently cleared and cultivated or used for permanent pastures – less than 12 percent.
9. *Community properties are often mosaics of different land types, each with a different set of uses, and a different access arrangement.* The property may include a settlement area,

farming area, forest/ woodlands, riverine area, rangelands, and a public service area, each with its own rules.

10. *Most community lands around the world have a long history as collectively-owned by communities*, often under the aegis of customary tenure systems. There are also cases where Governments assist communities to create new collective tenure without this history. This has been important to remove feudal and landless situations. A prominent example is China where one million rural collectives own half of China's land area.
11. *National law recognition of community lands as community property has flourished since 1990* (see later). Significant cases go back 1,000 years (e.g. Sweden, Switzerland) and to the 19<sup>th</sup> century (e.g. USA, Fiji and Ghana). Major developments occurred in especially Latin America Australia, New Zealand, and Canada in the 1970s and 1980s.
12. *Most legally acknowledged community lands are rural*. This is changing. There is growing interest in collective title to regularize urban slum occupancy. Slum dwellers will number 2.5 billion people by 2050. Community title can assist a whole neighbourhood to secure its occupancy, giving and incentive for improved housing and a framework for assistance to do this and to obtain service provision.
13. *Community title has also been adopted to protect significant environmental areas of interest to local residents or remoter stakeholders*. This may affect ownership of a mountain, riverine area, degraded marshland, public area, national park, or other areas. Collective title is designed to enhance management. This can be an expensive model suited to wealthy economies, such as Community Land Trusts (CLT), of which there are several hundred in USA, covering mainly parks and reserves, but spreading to urban areas. Several cities and towns in Europe are exploring the construct. An interesting example for communities is the Cano Martin Pena CLT in San Juan in Puerto Rico; 5,000 families now own 3,000 ha around a polluted channel in an inner-city slum. They are turning the channel into a clean beauty spot, building permanent homes, which cannot be sold for clearance for high-end gentrification. The CLT combines environmental and land tenure security for the extreme poor.
14. *Each form of property has its own demands and features*. Community property is often distinct from private property in these ways –
  - a. It is frequently not saleable, by decision of the owners or by legal dictate.
  - b. It often has two levels of ownership: the community owns the land but families may own exclusive rights to certain parts of the land, described as secondary rights (secondary to the primary right of the community as owner).
  - c. It requires more complex governance machinery than an individual owner or company needs due to multiple owners, and whose views must be considered. Community decision-making assemblies are common; e.g. operating in as far apart places as Romania, Vanuatu and Tanzania.
  - d. Community property often comprises different zones such as for settlement, public services and pastures.

### **3 The Legal Status of Community Property in 2018**

1. The back has been broken on legal refusal to recognize community lands as properties. Historically, these have been legally treated as rights of occupancy and use on lands belonging the state, not property rights. In a study recently conducted by the author, *73 of 100 countries recognize community lands as lawfully possessed property in 2018* (see citation at beginning of Brief).
2. *The trend is mainly new*. Fifty three percent of relevant laws (53%) were enacted since 2000. It shows signs of continuing; e.g. at least ten countries have draft new land laws under consideration in June 2018.
3. Yet statistics also show that laws are taking twice as long to be enacted today as in the 1990s. Rising awareness by governments and legislators of the loss they face to prerogative to dispose of untitled lands with widening recognition of community property is a likely main trigger to roadblocks. However, it is unlikely that legal change enabling community property will disappear. With each passing decade, communities are more

aware, vocal, organized and connected among themselves and more actively supported by international bodies.

4. *Constitutional law has played a major role in establishing that communities own their lands* and that national laws must lay out procedures for recognition. The wave of recognition of this right is closely associated with governance reform including ending of one-party states, the break-up of the Soviet Union and resurgence of human rights law. Many countries enacted new national constitutions to embed new systems, noticeably in Latin America in the 1980s, and in Asia and Africa in the 1990s.
5. *Indigenous Peoples (IP) are not the only beneficiaries.* IP were the main target in the 1970s and 1980s, especially in Latin America. Today, among the 73 national laws providing positively for community property surveyed, 47 (64.4%) make no distinction among rural communities, or provide texts directed respectively to indigenous, peasant, former slave, or other communities.
6. Legal support for community property is not uniform. Of 100 countries -
  - a. 55 % - Provide strong support
  - b. 18 % - Provide support but with 1-2 a key weaknesses
  - c. 10 % - Provide support but with a number of weaknesses
  - d. 17 % - Provide no legal support.
7. Commonest *weaknesses* in b. & c. above include -
  - a. The law does not make it free, or easy for communities to register their properties
  - b. Off-farm communal lands (e.g. forests, rangelands) are excluded from the community property, remaining in Government hands
  - c. The law is not implementable because they have not been followed up with regulations or application decrees, so legal commitment is on paper only.
8. *Legal support can still be grudging.* Communities in a number of countries have needed court rulings to secure recognition as owners (e.g. Canada, Australia, South Africa, Belize, Nicaragua, Tanzania, Kenya).
9. *More laws are providing equivalent protection to private, community and corporate property.* This is directly stated or strongly implied in 50 of 64 laws sampled (78%).
10. The picture is less satisfactory when it comes to *equitable compensation for community and private property when government compulsorily acquires lands for public purpose.* Many parts of community properties continue to be undervalued as 'undeveloped' because they are not cultivated or built upon. Loss of social, historical, and cultural values is also rarely compensated when communities lose their lands for claimed more important public purposes. The threat of involuntary dispossession has also risen exponentially as many laws now consider commercial developments to be eligible as public purpose.
11. *Title to community property is mainly vested in the community directly or in a state-established collective or cooperative created on behalf of the community.* Title is retained by the state in trust for owners in 20% of cases. Governments claim this is too necessary to limit distress sales. Their reluctance to lose control over valuable resources is a stronger driver in practice.
12. *Some countries do not permit forests and/or pastures to be owned by communities* (e.g. forests in Peru and Armenia, high grazing lands in Afghanistan, Mongolia and Kyrgyzstan).
13. *Only one third of countries permit communities to freely sell any part of their lands, subject to majority consent to the disposal* (32%). National law forbids sale of customary or community property in 43% of countries surveyed, and permits sale for homesteads but not common lands in 25% of countries.
14. *Most laws acknowledge community lands as property only on a case-by-case basis of identification, survey and registration* (55%). A surprising 45% of national do not require this but recognize ownership on the basis of customary possession or other factors.
15. *100% of sampled laws provide procedures for communities to register their lands* (formalization: adjudication, survey, mapping, and registration of the community parcel, with issue of evidential title). All national laws strongly encourage this.

16. *Procedures for formalization are becoming less complex.* Africa leads the way in one aspect – recognizing the community as a juristic person for purposes of property, and therefore not required to establish a company, cooperative, association or other legal entity to hold title on its behalf. This is partly a response in Africa to rejection of norms whereby either a national or local government is made trustee, a trust that has been repeatedly breached.
17. *Regional differences are not marked* in legal provision for communities as property owners, with the exception of Middle Eastern countries, which mainly fail to endorse collective tenure. All surveyed states in Oceania recognize community property (and have done so for some decades). Eighty-four percent (84%) and 78% of sampled countries in Latin America acknowledge community lands as legal property. The rate is lowest in Asia (62%) and Europe (65%).
18. The outstanding impediment to community land security today lies less in opening legal paths for this than in being able to take up these opportunities with timely adjudication support, to overcome the marked degree of overlapping claims in many countries by governments and private persons, and even once secured, to sustain the integrity of the community property in face of external commercial demands, and pressures for private accumulation by well-off members of the community itself.

## Endnotes

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<sup>1</sup> Documentation of facts and figures are available in *Collective Land Ownership in the 21<sup>st</sup> Century: Overview of Global Trends*, by Liz Alden Wily, published in *Land* 2018, 7(2), 68; <https://doi.org/10.3390/land7020068>