Abstract

This chapter focuses on community rights to land and natural resources, arguably the greatest rule of law challenge of our time. It explores three struggles in particular: communities in Liberia, Uganda, and Mozambique documenting customary land claims; rural land owners in Sierra Leone renegotiating an inequitable agreement with a large agribusiness project; and coastal communities in Kutch, India, seeking the enforcement of environmental law against a massive coal plant and port. From these experiences, the chapter draws insights into how people pursue the rule of law. It addresses, in turn, the way that communities in each of these stories confront power imbalances, the way they interact with the administrative state, and the way they grapple with internal rule of law problems. It concludes with a reflection on the relationship between the rule of law and social movements.

6 Legal Empowerment and the Land Rush: Three Struggles

Vivek Maru

Introduction

If international "rule of law promotion" is only about assisting state elites, then it is a narrow, technical concern. Imagine if "democracy promotion" was only about helping officials hold elections or run parliaments. If, on the other hand, "rule of law promotion" is to have moral force and global significance, it needs to be in support of a broader social movement, something akin to the movement for democracy.

What does that movement look like? This chapter will focus on the issue of community rights to land and natural resources, arguably the greatest rule of law challenge of our time. A combination of two things—increased investment interest in land and natural resources, and insecure tenure for the people who live and depend on those resources—is leading to exploitation, conflict, and decisions that favor short-term profit over long-term stewardship.

I will describe three struggles: communities in Liberia, Uganda, and Mozambique documenting customary land claims and strengthening local land governance; communities in Sierra Leone renegotiating an inequitable

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and fraudulent agreement with a large agribusiness project; and coastal communities in Kutch, India, seeking the enforcement of environmental law against a massive coal plant and port.

I will draw from these experiences insights into how people pursue the rule of law. I will address, in turn, the way that communities in each of these stories confront asymmetries of power, the way they interact with the administrative state, and the way they grapple with internal rule of law challenges. I will conclude with a reflection on the relationship between the rule of law and social movements.

The Rush for Land and the Rule of Law

For billions of people, land is their greatest asset: the source of food and water, and the site of history and culture. More than ever, that land is in demand. The pace of large-scale land sales surged when food prices spiked in 2007–2008. And while food prices have slowed, the land rush has continued. Estimates of the size of the phenomenon vary, with one World Bank study finding that 56.6 million hectares of land were leased or sold in one year—an area equivalent to roughly the entire landmass of Spain and Portugal, and more than thirteen times the average amount of land opened to cultivation annually between 1961 and 2007 (Deininger et al. 2011).

In principle, these transactions have the potential to create jobs and stimulate economic growth. But approximately three billion people in the developing world live without secure legal rights to their lands, forests, and pastures (Rights and Resources 2014). Colonial powers centralized authority over much of the land they conquered, diminishing the ownership rights of rural communities into more fragile use rights, or in some cases no rights at all. Some postcolonial states have sustained those regimes of appropriation to this day. Others have made *de jure* changes to restore customary rights or decentralize land governance—India's 2006 Forest Rights Act, for example, and Mozambique's 1997 Lei de Terras—but those laws have gone largely unimplemented (Cotula 2013, 15–26; Alden-Wiley 2012).

It is this historical legacy that makes the current rush for land and natural resources arguably the greatest rule of law challenge of our time. When the rights of existing owners are insecure, there is great risk of fraud, conflict, and irresponsible land-use decisions. Indeed, recent evidence suggests a race to the bottom: large-scale acquisitions and concessions are disproportionately concentrated in countries where land rights are weakest (Arezki, Klaus, and Harris 2012, 49).

Three Struggles

This section explores three grassroots efforts to protect community rights to natural resources in the context of increased investment interest. I work with a group, Namati, that, along with local partner organizations, is supporting communities in each of these cases.

These stories illustrate three key moments in the arc of interaction between rural communities and large-scale firms: securing customary rights before industrialization arrives, negotiating the terms under which industrialization will take place, and seeking compliance with contractual and legal requirements once industrialization has begun.

Securing Tenure in Liberia, Uganda, and Mozambique

In Liberia, Uganda, and Mozambique, Namati and national partner organizations are pursuing a proactive, preventive approach to the land crisis: we are helping rural communities document their customary land claims and strengthen local governance over those lands. In Mozambique and Uganda, we are working to bring to life provisions in existing laws—the Lei de Terras in Mozambique and the Land Act in Uganda—that have gone largely unimplemented. In Liberia, we are working under the auspices of a memorandum of understanding with the Liberian Land Commission.

Most efforts to strengthen land rights involve the titling of individual household plots. Our work instead focuses on community claims. By starting with the outer boundary of the community, it is possible to protect more land faster and at a lower cost per hectare. Community land claims also include common resources—like forests, grazing lands, rivers, and lakes—that are particularly vulnerable to exploitation, and yet are left out if individual holdings are the only rights protected.

This work grows out of a two-year experiment with our three partners—the Sustainable Development Institute in Liberia, the Land and Equity Movement of Uganda, and Centro Terra Viva in Mozambique—and the International Development Law Organization (Knight et al. 2012).[1] The most significant finding from that study is that in order for community land protection efforts to be effective, they should combine the technical work of mapping and titling with two thornier, more political tasks: the resolution of border disputes and the strengthening of local systems for land governance.

When those efforts were joined, they produced remarkable changes. Communities wrote down their rules for land use, revised those rules to ensure compliance with their national constitutions, and developed plans for managing their natural resources. In the process, communities established new

mechanisms for holding their leaders accountable and protecting the rights of women. They revived old conservation rules that had lapsed—restrictions on felling trees in reserve forests, for example—and created new ones.

In October 2013, I attended a public gathering under a tree in Mata, a small coastal town in Inhambane Province, Mozambique. The people of Mata had recently completed the documentation process laid out in the Lei de Terras, and the provincial land administration had granted them a land delimitation certificate. Community members put up a celebratory arch of coconut fronds and magenta-colored flowers for the occasion.

Antonio Augusto, the elected mayor of Mata, dressed in suit and tie, explained that the journey had not begun easily. When Nelson Alfredo, a staff member of Centro Terra Viva, first visited the area speaking about maps and deeds, many people suspected he was angling to purchase land, as investors had been doing along the coast. But Alfredo, Augusto said, had patience and a good sense of humor, and he persisted.

As people in Mata learned from Alfredo about the Lei de Terras, and as they heard stories from neighboring communities about exploitation by investors, their interest in securing land rights grew. The community began following the steps in the documentation process—first electing an interim committee, then mapping their lands. Mata had been having a longstanding boundary dispute with a neighboring town. Motivated by the prospect of formalizing ownership, leaders from the two towns managed to resolve the conflict after extensive negotiation.

In a series of meetings, some consisting of men and women separately and some open to all, Mata residents documented their existing rules for land use and debated potential revisions. According to Augusto, Mata's traditional rules dictated that ownership over individual plots be vested in the male head of household. A lawyer from Centro Terra Viva, however, pointed out that this was inconsistent with the Mozambican Constitution.

"After much discussion," said Augusto, "we accepted." Mata's by-laws now state explicitly that women can own land and that if a husband dies, family property goes to his widow. When we walked out to the beach that day in October, after the public discussion had concluded, several women repeated this to us: we now have equal claims.

A South African businessman attended the same celebratory gathering in October 2013. He had moved to Mata and set up a small facility to extract and bottle coconut oil. Augusto and other elders emphasized that they wanted to attract more investors of this kind. Now that Mata had formal land rights, clear rules, and an elected management committee, Augusto said, the town would be in a position to negotiate fair terms.

The two-year experiment by Rachel Knight et al. (2012) tested three models for facilitating community land protection: a full legal-services approach, in which communities received direct assistance from lawyers; a pared-down education approach, where information, and little else, was provided; and a middle-path paralegal model, in which a community representative was trained and supported to drive the process forward.

Knight and her colleagues found that of these three, the community paralegal model was most effective. Communities receiving full legal services tended to rely heavily on the outside professionals, while communities with paralegals took greater ownership over the process. Paralegals also proved most capable of mediating contentious border disputes, which can otherwise sideline protection efforts (ibid., 191–95).

Namati is currently working to scale up community land protection activities in all three countries. We train and support paralegals in communities that request it, and we work with land administration departments to make the documentation process easier to complete. We are also conducting a cross-country longitudinal study to determine the long-term impacts of this approach.

Renegotiating with an Investor in Sierra Leone

In recent years, about a million hectares—one-seventh of Sierra Leone's land mass—has been leased out for mining and large-scale agriculture projects (Oakland Institute 2012). As in many other parts of Africa, the vast majority of land in Sierra Leone is held under customary tenure, with no formal documentation and no clear governance arrangements for making land-use decisions.

Since Sierra Leone, unlike Mozambique and Uganda, does not yet have a law that allows communities to formalize their customary land claims, Namati has instead focused further down the stream of interaction between communities and firms, on the point at which the two sides negotiate the terms by which industrialization takes place. In one project that we are involved in, the people of forty-eight villages in the Northern Province are attempting to renegotiate an agreement with the Sierra Leonean subsidiary of the Swiss energy firm Addax and Oryx Group.

In 2009, newspapers reported that Addax would be exploring a €200 million investment project in Sierra Leone—the company proposed growing sugarcane and producing ethanol for export to Europe. In 2010, the firm signed fifty-year lease agreements with three chiefdom councils in the Northern Province—Makari Gbanti, Bombali Sebora, and Malal Mara—acquiring

23,000 hectares of land. The firm agreed to pay US$3.60 per acre per year; half of this would go to landowning families and the other half would be divided between the chiefdom and district councils.

Over the following year, the company signed "acknowledgement agreements" with individual landowning families, under which the firm committed to paying an additional US$1.40 per acre per year. However, landowners from one village, Masethle, refused to sign the acknowledgment agreement. They had learned that although Addax had said that it intended to use one-fourth to one-third of the village's land, the lease actually covered all of it: all farmland, all common areas (such as forests, swamps, and streams), and even the land where people had their homes. We became involved in the case when a native of Masethle living in Freetown contacted Namati's Sierra Leone director, Sonkita Conteh. Ultimately, we were engaged by the landholding families of all forty-eight affected villages.

When we explained the scope of the lease to other landowners who had already signed the acknowledgement agreement, they were shocked. "Ah staful lie," said the chief of Lungi Acre village—roughly translated, "that's a preposterous lie." He and most of the landowners were illiterate. They had placed their thumbprints on the acknowledgment lease without understanding the terms.

There is a tradition in Sierra Leone whereby a "stranger" comes to a village and asks for land, perhaps because he has married someone there or because he has migrated south from Guinea. A chief can grant available land to use and farm; a small rental payment at harvest time serves as an acknowledgment that the land does not belong to the newcomer. But no stranger can lease the entire village, including the common areas and the settlements.

The chief's response was an eerie echo of the way some Native Americans responded upon learning the terms of treaties to which they had supposedly assented: not only "I didn't agree to that" but "that is not possible."[2]

In principle, denizens of the forty-eight affected villages were provided with lawyers, but those lawyers were paid for by Addax, and the villagers said they hardly had any contact with them. Contrary to the written agreement, local political leaders indicated that Addax would use only a portion of their land. Sierra Leonean president Ernest Bai Koroma, meanwhile, repeatedly championed the project in public speeches (see, e.g., Sierra Leone State House 2010). In the end, our clients saw this not as a negotiation but as a fait accompli.

Chiefdom authorities, district councilors, and local parliamentarians repeatedly told villagers "dis go pull you 'pon povaty" (the project would

lift them from poverty) and "den go tek you pikin dem" (they will hire your children). Two years into the project's operations, however, most landowning families are disappointed. The company promised jobs, new borewells, schools, and clinics. But according to our clients, there are very few jobs, the infrastructure remains largely unbuilt, and Addax has not communicated plans for completion (see, e.g., Action Aid 2013).

Landholding families are also very concerned about damage to their environment. They claim that Addax is depleting water supply and contaminating water sources with chemical waste; that the company is permanently destroying swamps and bolilands, which our clients had understood would not be touched under the project; that the companies' trucks and tillers have caused severe dust pollution; and that speeding company vehicles have caused several fatal road accidents.

We asked our clients whether they would like to see the company leave. Unanimously, they said no; rather, they would like to change the terms under which the company operates.

When we presented these findings to Addax in 2013, to our surprise, company representatives agreed to renegotiate the terms of the lease. There had been a change in staff at the company's Sierra Leone office. The new officials acknowledged that at least some of our claims were valid and that in a fifty-year project, the company could not afford to have hostile relations with its hosts.

Addax asks—reasonably, perhaps—that the three paramount chiefs who signed the original agreement take part in any renegotiation. All three chiefs admit that there are serious problems with the lease and that their constituents are dissatisfied. But there are obvious reasons why a public figure might not want to tamper with an arrangement backed by the president of the country, even when the company is willing. Initially, two of the chiefs agreed to renegotiate, while one, who lives in the president's hometown, did not. Conteh began to consider a somewhat creative legal action against this chief, for breach of his fiduciary duty to the residents of his chiefdom. But as of this writing, that third chief has said that if Addax and the others go forward, he will not stand in the way.

Although Conteh is the lawyer representing the landowners, he is not handling this case alone. Organizers from the Sierra Leone Network on the Right to Food and Namati's own community paralegals have been crucial in serving as a bridge between Conteh and residents of the forty-eight villages. The organizers and paralegals have convened community meetings, explained the contents of the lease, and gathered information from farmers about their

experience with the project thus far. They have sought in particular the views of women and less well-off residents, to make sure that we are representing the interests of the villages as a whole.

As the case has progressed, we have received requests from communities in several other parts of the country: regarding a sand-mining operation on the southern coast, two iron ore mines in the north, and a proposed palm-oil plantation in the southeast. All over, deals are being cut for the use of rural land. And all over, the Sierra Leoneans whose land it is want to be able to shape the terms.

Seeking the Enforcement of Environmental Regulation in Kutch, India

Kutch is a district in the western corner of India. Historically, Kutch's poverty, remoteness, and semi-arid landscape have rendered it of little interest to the rest of the country. Even the British Empire left it alone: Kutch was an independent princely state when it joined free India in 1947. In the late 1990s, however, the district began attracting industry. Land in Kutch is relatively cheap, and rich in minerals like limestone, lignite, and china clay. Kutch is also attractive for its harbor, and the Ahmedabad-based Adani Group chose the Kutchi town of Mundra to build what is now the largest private port in the country.

Unfortunately, the new port is located in the heart of what was Kutch's richest mangrove marine ecosystem. The mangrove is a special tree, a cornerstone species for the three traditional livelihoods: fishing, farming, and animal husbandry. The mangroves thrive in the estuaries, where fresh and sea water meet. Their root systems and falling leaves create a fertile breeding ground for fish, making the trees crucial for fisherpeople along the Kutchi coast. The trees also create a natural barrier against salinity ingress, protecting the purity of inland farmers' well water. Finally, mangroves provide a good source of fodder for cattle and camels (see, e.g., Kohli 2011).

In addition to building the port itself, the Adani Group built several industrial projects in its vicinity that provide the port with shipping contracts—including a coal power plant, a salt works, and an edible oil refinery. In the process, Adani and other companies destroyed hundreds of thousands of mangrove trees. Satellite data from the Indian Space Applications Centre show that mangrove cover on Navinal and Bocha, two of the major coastal mudflats, dropped from 590 hectares in April 1988 to 346 hectares in 2000.[3] Cutting down any tree without permission is illegal; and mangrove trees are further protected by India's Coastal Regulation Zone Notification.

Adani also closed off the ecosystem's lifelines by building dams across its creeks. Starved of water, the creeks became filled with silt. This dried out the fish breeding grounds and eventually transformed the mangrove habitat into barren land. Coastal Regulation Zone protection is dependent on the location of the high tide line; the dams physically forced that line further into the sea.

In 2000, I worked with a coalition of local organizations known as the Forum for Planned Industrialization of Kutch. As the careful name suggests, the forum sought not to oppose industrialization but rather to ensure that industrialization benefited the Kutchi people and was in harmony with the traditional livelihoods that sustain most Kutchis. The forum embraced the idea of a port in Kutch but argued that it should be located on the western coastline, between Mandvi and Jakhau, where the land is less ecologically productive and where outside employment was more needed.

I had never confronted so squarely the brute face of power. The Adani Group's destruction of the mangrove ecosystem was blatantly illegal, and yet all attempts at resistance were crushed in a hazy mixture of bribery and state complicity. Several lawsuits were dismissed in their final stages when one of the plaintiffs mysteriously withdrew.

In 1999, members of the Coastal Zone Management Authority, a body meant to enforce the Coastal Regulation Zone Notification, came to visit the port project and stayed in Adani's guest houses. The forum organized a rally of fisherpeople at the port's gates and delivered a petition documenting violations. But after its visit, the authority took no action. The state government, meanwhile, maintained its unambiguous support of the company. On January 23, 2000, at the port's dedication ceremony, Gujarat chief minister Keshubhai Patel stated that whosever opposed the Adani Port was antipatriotic and was opposing him personally.

I spent one morning with Muhammad Jaffar of Shakhadia village. He is a member of the Pagadia community, which still fishes by wading on foot rather than by boat. During the rainy season, when fish are most plentiful, Pagadia fisherpeople connect their nets and divide the catch equally. Jaffar used to be the person who connected the nets; now, he stays home and his sons go to fish. He said that his community had been practicing fishing in this way for as many generations as could be remembered. He told me that his people would not want boats even if they could afford them. Laughing, his wife said that if you give a Pagadia man a boat, he would sail away and never make it back to shore.

Members of Jaffar's village had a lawsuit pending against Adinath Salt Works, one of the earliest industrial projects in the area. The villagers were

arguing that four kilometers of the land, which they had used for generations but which had now become Adinath property, should be left open for them to access the sea. Jaffar told me that his catch had decreased by 50% over the last five years, which he attributed mostly to industrial pollution. The lawsuit might prevent this livelihood from ending right away, he said, but even then he thought the fishing would end shortly. He was beginning to look for other work but felt qualified for nothing but fishing. He was considering buying an auto rickshaw. Did I have any suggestions?

That afternoon, I went to visit the port. There, I faced massive warehouses, roaring cranes, and a steady flow of trucks. I was most startled by the enormous piles of sulfur, sitting in the open, waiting to be transported for use as an ingredient for a chemical processing plant. Sulfur is neon yellow, and the piles were at least fifty feet high and one hundred feet wide. The world that makes use of this sulfur was a very different world from that which Jaffar lived in. At what table, I found myself asking, could Jaffar and the movers and users of this sulfur negotiate equally?

As industrialization continued over the following decade, no such table was made available. In 2006, the government designated 6,400 hectares around Mundra as a special economic zone, creating tax incentives for industry. Adani's coal plant now operates at 4,600 megawatts and is one of the biggest in the world. Adjacent to it, in 2012, Tata Power completed another mega-coal plant, which now operates at 4,000 megawatts.

Since 2012, Namati has worked with fishing and farming communities along the southern Kutch coast. This work is much further downstream than that in Mata, Mozambique, where communities are seeking to strengthen land governance in advance of major industrialization, and Northern Sierra Leone, where communities are aiming to negotiate fairer terms with an industrial project that has just begun.

In Kutch, the landscape has been transformed. Although the terms of industrialization had been set on paper—in mandatory conditions attached to the clearance of each project and in laws like the Coastal Regulation Zone Notification—many of those terms were violated. At this stage, communities in Kutch are seeking compliance with those broken commitments, as well as protection of what remains of the ecosystem on which their livelihoods depend.

Volunteer community paralegals began by researching the contents of the conditions to which Adani and other firms had committed when receiving their environmental clearances from government. The paralegals then used satellite maps, cell phone pictures, newspaper clippings, and government documents to compile extensive evidence on violations of three key conditions in Adani's clearance: that it should not cut mangroves, that it should not dam

creeks, and that it should not block fisherpeople's access to the sea (Namati et al. 2013).

These paralegals have now formed a new group with perhaps a less diplomatic name than its predecessor—Mundra Hit Rakshak Manch, or Forum for the Protection of Rights in Mundra. Namati and the Manch, along with a women's association, Ujaas, and a fisherpeople's association, MASS, are seeking enforcement actions based on the evidence gathered by the paralegals. Together, we are also developing a proposal—based on extensive community consultations—to declare the remaining portion of untouched coastline, around the village of Bhadreswar, a "critically vulnerable coastal area" under the Coastal Regulation Zone Notification. If adopted, the proposal would prohibit heavy industry, make provisions for ecological restoration, and improve facilities for fisherpeople.

Confronting Power Imbalance

The basic difference between a Hobbesian state of nature and a social contract governed by law is that under the latter there are limits on private power. Law is meant to provide, in the words of the Fourteenth Amendment to the US Constitution, "equal protection." But in the three struggles described above, power imbalances render nominal legal protections hollow. The recognition of customary land rights under laws in Uganda and Mozambique is easy to bypass when communities have no maps and no deeds. Contract law has little meaning when villagers in Sierra Leone are pressured to accept an agreement without understanding its contents. Powerful companies in India ignore environmental regulations with impunity.

When people stand up to confront these imbalances of power, civil society organizations of various kinds—local membership-based groups like the fisherpeople's association in Kutch, and national mission-driven organizations like the Sustainable Development Institute in Liberia—can provide a source of countervailing power.

Lawyers working in the public interest are scarce and costly. In India, for example, with a population of over one billion, there are fewer than a dozen practicing lawyers focused on environmental protection.[4] As these three stories illustrate, "community paralegals" trained in law and in approaches such as mediation, organizing, education, and advocacy can form a larger front line.

There is a growing body of evidence suggesting that paralegals, with quality training and supervision, can succeed in surmounting power imbalances and achieving concrete remedies to injustice.[5] Paralegals' flexible set of tools, and their closeness to the communities they serve, makes them well placed

not just to provide a technical service but to "empower"—to strengthen citizens' ability to understand and use the law.

Just as primary health workers are connected to doctors and hospitals, it is important for paralegals to be connected to a small corps of lawyers who can engage in litigation or high-level advocacy if frontline methods fail. Paralegals are more cost-effective than a purely lawyer-based model, but they are not free. Paralegals who work full time require a salary; and those who serve their own villages or membership associations as volunteers require support from "lead paralegals" or other advocates who earn salaries and work full time. There are also costs associated with training, office space, materials, transportation, and the few lawyers who support the front line.

Yet there is a persistent financing gap for legal aid efforts that support the least powerful. Addax in Sierra Leone recognized the need for affected communities to have representation, but it created an obvious conflict of interest by directly hiring a private law firm to fulfill that role. There are far better ways to narrow the financing gap.

Governments can provide resources through autonomous bodies such as ombudsman's offices or public legal aid boards if the bodies genuinely respect civil society independence. Investors like Addax could be asked to contribute funds to those institutions rather than hiring opposing counsel themselves. Namati and other groups have argued for such an arrangement in Sierra Leone, and have managed to incorporate that proposal into new voluntary guidelines for agricultural investment (Bioenergy and Food Security Working Group of Sierra Leone 2013, 10).

Client fees and contributions are also important for defraying costs and ensuring the accountability of legal aid providers to their constituents. In Sierra Leone, we intend to experiment with contingency-fee arrangements, through which communities would cover a portion of the cost of our representation by promising to pay us a small percentage of future rental revenue. We would compensate lawyers and paralegals on a salary basis, unrelated to revenue generation, in order to avoid an incentive to push communities to accept deals that are not in their best interest.

Legal empowerment, like public health and the environment, is arguably a public good. Legal empowerment efforts render governments more accountable to their citizens and make economic development more equitable. But unlike public health, there is a natural disincentive for states to finance such programs within their borders, because legal empowerment efforts constrain state power.

Moreover, the power imbalances that make legal aid necessary are often international, as in the case of multinational firms investing in natural resources

belonging to poor rural communities. It makes sense, then, for there to be international collaboration in the attempt to address those power imbalances. We have therefore argued for a multilateral financing mechanism (Maru 2011; Hall and Maru 2013; Namati and Open Society Foundations 2014).

In our view, a "global fund for legal empowerment" should be reciprocal: countries should agree not only to contribute but also to receive investments, albeit in different proportions. There is no country where laws work perfectly for citizens. Legal empowerment efforts must adapt to social and legal context, but in some form they are useful everywhere. The distribution of funds across countries could be tacked to metrics of governance, such as the Rule of Law Index published by the World Justice Project.

Furthermore, coalitions of civil society organizations, such as the Rights and Resources Initiative and Namati's legal empowerment network, can facilitate collaboration among local groups across borders. Organizations can learn from one another about strategy and methodology; they can also work together to take on specific cases. Swiss and European law regulates Addax's operations abroad, for example, and so communities affected by the Addax project in Sierra Leone may find public interest lawyers in Switzerland helpful.

No number of community paralegals or public interest lawyers will eliminate the power disparities that characterize today's rush for land and natural resources. But if we take the rule of law seriously, our international regime should commit to narrowing those disparities as much as possible.

Engaging the Administrative State

Efforts to improve the rule of law often focus on judicial systems—including courts, prosecutors, and bar associations (Golub 2003, 8–9; World Bank 2012, 3–5). But for many people around the world, law touches life most directly through the administrative state. In each of the three stories described here, administrative institutions are meant to play a crucial role. Ruefully, they often fail.

In Uganda, communities have been unable to acquire certificates of incorporation for their newly formed land associations, despite having completed all of the steps in the legal process, because the government has yet to appoint a provincial official with the authority to issue the certificates. In India, research by Kanchi Kohli and Manju Menon (2009) found rates of noncompliance with environmental clearance conditions set by the Ministry of Environment and Forests to be as high as 60%.[6] In Sierra Leone, when we asked the Environmental Protection Agency to provide us with a copy of the environmental impact assessment for the Addax project—something that

should be a public document—the agency told us it had only a hard copy, which it could not locate.[7]

Disputes over land and natural resources are some of the most significant conflicts of our times, and yet the administrative agencies meant to deal with them are often neglected backwaters of government. There is a massive need to strengthen the effectiveness and fairness of those institutions.

But reforms should not set priorities based on idealized conceptions of what a legal system should look like—that approach is a major reason why prior generations of rule of law efforts have faltered.[8] Instead, reformers could take their cues from the lived experience of constituents, addressing institutional failures that form a "binding constraint" on attempts to obtain justice. The World Bank (2012, 9) suggests a similar approach in its latest strategy on justice reform:

> While taking into account the views of professionals in the system, such as judges, lawyers, and administrators, the diagnosis of problems should be anchored in the priorities of end users—citizens and firms. Rather than beginning with the question of how to modernize the court system, such efforts should begin by asking where failings of the justice system are a constraint to equitable development.[9]

The World Bank speaks of "end users" as a whole, perhaps anticipating aggregating the views of individuals through surveys. A variant of that approach, one that may be more politically realistic, is for reformers to respond to the demands of existing grassroots efforts.

In Liberia, for example, the Sustainable Development Institute, Namati, and other groups successfully advocated for Liberia's first national land policy to establish a process for formalizing customary rights. The policy, which was issued in 2013, embraces the model that we piloted in Rivercess County during the three-country, two-year experiment described above. The policy recommends that rural communities be allowed to demarcate boundaries, establish governance structures and by-laws, and register community land associations (Liberia Land Commission 2013, 15–20).

The Land Commission has agreed that the Sustainable Development Institute, Namati, and other civil society groups should support communities in following that legal process. We will aim, moreover, to incorporate feedback from the communities with whom we work into the design of the administrative body that will review land association applications.

Reformers of administrative institutions should pay particular attention to policies that hold back attempts to overcome imbalances of power. In India, for example, the Ministry of Environment and Forests has prohibited civil

society organizations from participating in environmental public hearings on projects such as the Adani Port (Indian Ministry of Urban Development 2006). This kind of constraint hinders nongovernmental organizations' ability to counterbalance the power of private firms.

In Sierra Leone and many other countries, social and environmental commitments—for example, the number of jobs that will be created or the measures that will be taken to mitigate pollution—are framed as voluntary corporate social responsibility measures. Instead, governments should require that such commitments be included as binding provisions of land lease agreements. The conditions will then be the explicit subject of company-community negotiations, and host communities will have legal recourse in the event of a breach.

These are the kinds of priorities that emerge from a reform agenda grounded in the experience of grassroots efforts.

Strengthening the Law Within

Power can trump law at all levels. Defenders of individual liberties are rightfully cautious about action by communities, because community institutions can be captured by local elites. B. R. Ambedkar voiced this concern in response to Mahatma Gandhi's embrace of decentralization during debates about the Indian Constitution.[10] A recent review of participatory approaches to development emphasizes the same risk (Mansuri and Rao 2013).

The paramount chiefs who signed the original Addax agreement without prior consent from their constituents are a case in point. Unaccountable local elites also caused the early cases against the Adani Port to fall apart. And in Uganda, Mozambique, and Liberia, local elites often stall the process of community land protection when they realize that it may lead to constraints on their power.

Efforts to protect community rights to natural resources are not only about the fight outside. They also involve an internal struggle for fairness and equity. Four observations about that internal struggle stand out from the stories described here. First, decentralizing control over land and natural resources creates new opportunities for people to hold their local leaders accountable.

For example, in 2012, the *gram panchayat* (the most local level of government) election in Bhadreswar turned on the question of a third proposed coal plant on the Kutch coast. Voters rejected the existing *sarpanch* (village head), who had been in favor of the plant and had allegedly accepted money from the project proponent. In his place, they elected a vocal opponent of the project. That kind of election would not have been possible before the 73rd

Amendment to the Constitution and the 1993 Gujarat Panchayat Act, which grant *gram panchayats* the power to make rules and decisions regarding their natural resources.

But, second, decentralization should not be completely unfettered. Local rules must comply with the constitution and laws of the country. For this reason we advocate for administrative bodies to review community by-laws before registering land associations. Reviewing agencies can check to make sure that by-laws are constitutional—that they do not discriminate against women, for example. Agencies can also set minimum standards for downward accountability. Land associations might be required, say, to establish an elected land-use committee subject to term limits (Knight et al. 2012, 185–86).

Third, the presence of an external threat can create an opportunity to improve local governance. In Mozambique, Uganda, and Liberia, Knight et al. found that communities that perceived the immediate possibility of a land grab were the most motivated to establish governance structures and to write and revise rules (ibid., 204). In Sierra Leone, the villages that engaged Namati to represent them in the Addax matter are now working to strengthen local downward accountability, to ensure that future negotiations are conducted with genuine consent. A fight outside, it seems, can open space to grapple with inequities within.

Lastly, there is the question of civil society organizations themselves. These groups claim to support communities in the pursuit of justice, but what ensures that they are accountable to their constituents? In Indonesia and the Philippines, many paralegals are a part of membership organizations—such as farmers' and fisherpeople's associations—and therefore must answer to their members. In Sierra Leone, paralegal organizations have adopted the model of the organization Timap for Justice, which includes community oversight boards in every chiefdom where paralegals operate. The boards are charged with ensuring that the paralegals are serving the constituent community effectively.[11] Such structures are crucial for ensuring civil society legitimacy.

Conclusion

The rule of law is a procedural rather than substantive ideal. It has a neutrality that is both a strength, in that it can attract diverse allies, and a weakness, in that it lacks teleological content and can therefore fail to inspire. Rule of law, many people naturally ask, to what end? But grassroots efforts to secure the rule of law are seldom neutral. They are almost always in pursuit of a thicker, substantive vision of society.

In the case of community rights to nature, the struggles described in this chapter are about more than the rule of law. They are about democracy: the ability of people to govern their resources and to undo a history of centralization of authority. The struggles are also about protecting the traditional livelihoods of farming, animal husbandry, and fishing in the midst of industrialization. Last, they are about stewardship of our most precious resources. Research shows that giving communities the power to govern their natural resources leads to decisions that are more environmentally sound (Ostrum 2009; Persha et al. 2010).

The global movement for women's rights is similarly multidimensional. Many of the movement's goals involve the rule of law—the enforcement of nominal rights, for example, and protection from violence. But women are also seeking other kinds of changes, like new cultural norms for gender and family.

Perhaps the rule of law field will find its brightest future by following the lead of the great social movements of our time. If rule of law efforts take their priorities from those movements, the practical significance and moral urgency of the rule of law may grow more clear. And comparative learning across social movements may yield new insights about what methods work under which circumstances. Out of that diversity might emerge a genuine, crosscutting social movement for the rule of law itself.

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Notes

1. Rachael Knight initiated this effort while working with the International Development Law Organization; she joined Namati as a program director in 2011.

2. See, for example, *The Indians of Washtenaw County*:

> [L]ack of entire comprehension as to land titles is what led to the misunderstanding of . . . treaties. The most of [Native Americans from what is now Michigan], if not all, supposed when they acceded to treaty bargains that they were simply granting the other party the same and only the same opportunities as they gave one another—that is, a place for a temporary home, rights to hunt in the woods, to navigate the streams and lakes, to breathe the air and to "enjoy" whatever other

> benefits might occur from this situation, without molestation upon their part. They could not grasp the idea of land title and probably little pains were taken to explain it to them. (Hinsdale 1927)

See also Black Hawk's (1999, 41) autobiographical account regarding nineteenth-century treaties between the United States and Native Americans.

3. I obtained this data from the Bhuj-based organization Sahjeevan. See also, e.g., Ramanathan (2013).

4. Rigorous data are not available. This estimate is based on conversations with Manju Menon, Kanchi Kohli, and Ritwick Dutta, each of whom has worked on environmental justice in India for over fifteen years.

5. This is one of the key findings of a forthcoming book, edited by Varun Gauri and me, that includes empirical studies of paralegals in Indonesia, the Philippines, Kenya, South Africa, Liberia, and Sierra Leone. See also, e.g., Dale (2009, iv, 33); Jacobs, Saggers, and Namy (2011); Kumar (2013); Sandefur, Siddiqi, and Varvaloucas (2012). A forthcoming review of evidence on legal empowerment found a total of forty-five studies of community paralegals (Goodwin and Maru, forthcoming).

6. Kohli and Menon (2009) analyzed government "monitoring reports," which are often derived from self-reported data submitted by firms without any form of verification. Independent review would likely reveal even higher rates of noncompliance.

7. Sonkita Conteh, phone interview with the author, December 2013.

8. See, e.g., Carothers (2006); Daniels and Trebilcock (2008); Hammergren (2007); Jensen and Heller (2003); Trubek and Galanter (1974).

9. I should disclose that I was one of the authors of this document.

10. In contrast to Gandhi's embrace of village-level democracy, Ambedkar described villages as "a sink of localism, a den of ignorance, narrow-mindedness and communalism" (Jayal 2013, 309).

11. Timap cofounder Simeon Koroma elaborates on the experience of community oversight boards in Koroma (2008).