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Original Article

The Resource Tenure and Property Rights Conundrum in Zambia's Natural Resource Management

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ABSTRACT

Nothing affects natural resource management more than resource tenure and property rights. This paper argues that natural resource management revolves around clarification, elaboration and enforcement of resource tenure rights, and that failure to clarify, elaborate and enforce the different bundles of these rights is central to many of the challenges faced in natural resource management, especially, in community based natural resource management. From a legal and regulatory perspective, we construe natural resource management as nothing but an interplay of legal and non-legal rights that incentivize and/or disincentivize peoples' full enjoyment of the different bundles of rights within the framework resource tenure and property rights. As such, we observe that failure to clarify, elaborate and enforce these rights along the different interested parties delineated as users, proprietors, owners, of, and claimants to, a pool of natural resources, marks the largest lacuna in natural resource management law and policy. Therefore, many of the challenges faced in natural resource management in Zambia are emblematic of a conundrum of resource tenure and property rights.

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INTRODUCTION

Nothing affects how people interact with natural resources more than resource tenure rights.[1] With this in mind, natural resource management and conservation efforts in the age of the Anthropocene are affected by human needs and interests. Human needs, interests and claims are themselves deeply grounded in the bundle of resource tenure and property rights as espoused in 1992 by Schlager and Ostrom.[2] What complicates natural resource management even further is the social and political uncertainties brought to the fore in the midst of ecological changes;[3] who is allowed to use how much water or access grazing land will differ during a drought compared to a period of bountiful rainfall.[4] At the core of these uncertainties lies the challenge of elaborating, clarifying and enforcing the different configurations of resource tenure rights especially insofar as a common pool resources are concerned.

Galik and Jagger have asserted that Schlager and Ostrom provided arguably the most ubiquitous framework for natural resource tenure and property rights analysis.[5] They have revisited the Schlager-Ostrom framework to examine how it can address and incorporate complex emerging issues,[6] especially given the fact that the Schlager-Ostrom analysis was based solely on fisheries. Implicitly, Galik and Jagger have validated the foundational role that the Schlager-Ostrom framework plays in the analysis of resource tenure rights regimes. This article does the same: it builds on the Schlager-Ostrom framework to shed light into one of the largest grey areas of natural resource management in Zambia, if not in the developing world, namely resource tenure and property rights of local communities in common pool resources.

1. Ruth S Meinzen-Dick and Rajendra Pradhan, 'Implications of Legal Pluralism for Natural Resource Management' (2001) 32(4) IDS Bulletin 10.
2. Schlager Edella and Elinor Ostrom, 'Property Rights Regimes and Natural Resources: A Conceptual Analysis' (1992) 68(3) Land Economics 249-250.
3. Ruth and Pradhan (n 1) 12.
4. ibid 12.
5. Christopher S Galik and Pamela Jagger, 'Bundles, Duties and Rights: A Revised Framework for Analysis of Natural Resource Property Rights Regimes' (2014) Nicholas Institute for Environmental Policy Solutions, Duke University Working Paper EE 14-18, 3.
6. ibid 3.

The overall objective of this article is to analyze the natural resource tenure rights regime in Zambia specifically where common pool resources involving local communities are concerned. Using the Schlager-Ostrom framework, the article analyzes the nexus of community and legal rights in accessing, withdrawing, managing, protecting and alienating natural resources, a conundrum which complicates natural resource management in the different resource sectors of Zambia, such as forestry, water, fisheries, mining, land and wildlife.

This article unbundles and analyzes the bundles of resource tenure rights separately as they affect, and as they are affected by, natural resource management and conservation actions. In so doing, the article seeks to explicate the role of resource tenure rights in defining different categories of resource rights-holders, users, claimants, proprietors and owners, as well as the nexus of rules and rights that incentivize and/or disincentivize these different users to act towards a resource in a certain way. Ultimately, the article advances a thesis that natural resource management law, namely forestry, wildlife, water, fisheries, land and mining laws and regulations, should ideally be nothing but an elaboration, clarification and enforcement of these bundles of tenure rights.

The need for such a discourse derives from the authors' empirical observations, being environmental legal specialists and having worked in the natural resource management sector for more than fifteen years, that:

i. Much of the stock of natural resources in dire need of conservation or under conservation are in rural settings on minority peoples' lands in local communities, in traditional territories and under customary authorities. This augments Ubink's observation that millions of people live and work on land they do not own in accordance with enforceable state law.[7] But do they only need to legally own the land or resource? We attempt to answer this question, asserting that no one de-

7. Janine M Ubink, 'Legalizing Land Rights in Africa, Asia and Latin America; An Introduction' in Janine M Ubink and others (eds), Legalizing Land Rights; Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America (Leiden University Press 2009) 7.

serves a clear elaboration and clarification of these bundles of tenure rights than the abovementioned class of people. In addition, public participation in natural resource management is a constitutional requirement, the participants must know their rightful delineations in the configuration of resource tenure and property rights;

ii. Much of the challenges wrought in the conservation of natural resources are borne from policy failures to elaborate, clarify and enforce these bundles of rights from both customary and statutory perspectives;

iii. Much of natural resource legislative and regulatory frameworks fail to elaborate these bundles of rights notwithstanding that legislation is rather coalesced around a bulk of procedural matters, and

iv. Even the procedural bulk of the letter of the law is not drafted to cascade down to the substantive spirit of natural resource management law, which this article considers to be the elaboration, clarification and enforcement of the bundle of resource tenure rights.

On the basis of these premises, the article opens by unbundling the terms "tenure" and "tenure security". It proceeds to unbundle and analyze resource tenure rights and the different categories of rights-holders, resource users, interested and affected parties which these rights effectively delineate in natural resource management practice. We also demonstrate the importance of these bundles of rights both positively – how they can enhance conservation efforts – and negatively – how they can inhibit conservation efforts – in natural resource management. The article elaborates how overlapping, entangled and mutually nested these rights can often be in practice, a factor which makes them ambiguous and difficult to address, respect and enforce in natural resource management.

In its conclusion, the article re-emphasizes how crucial resource tenure and property rights are in natural resource conservation. For natural resource management, resource tenure rights underpin both the conception and practice of managing natural resources either through private and/or communal enterprises. Particularly, because much of the stock of natural resources being conserved and protected in Zambia is found in rural areas and on communal lands, the elaboration, clarification and enforcement of resource tenure rights is a crucial missing key in Community based Natural Resource Management (CBNRM).

TENURE AND SECURITY OF TENURE

Tenure is mostly defined as terms and conditions on which land or a resource is held, used and transacted.[8] The OECD uses the Schlager-Ostrom framework to define tenure as the right to hold property or a bundle of rights over property.[9] It goes further to define tenure in terms of property and what a person or group can do with that property, i.e. property rights.[10] Rasmus Heltberg conceptualizes these rights in terms of multidimensional claims over future incomes accruable from asserts or property.[11] Hidden in these constructions of tenure is a set of rights individuals and communities have with regards to land or a resource, the social relations and the complexity of rules that govern land/resource use and ownership.[12] This complexity of rules unfolds in reality as legal and extra-legal (anything non-statutory) – also known as customary tenure. But whether legal or extra-legal tenure, there is a common denominator that both systems present to the fore, i.e. the set of rules exercisable by the individuals or community groups holding and using the land or resource.

The distinction between legal and extra-legal tenure does not only signify the controlling powers behind the tenure system, but crucially determines the extent to which the individuals or community groups can exercise the bundle of rights under that tenure. One of the major reas-

8. ibid 11.
9. OECD, Natural Resource Tenure: Key Points for Reformers in Eastern Europe, Caucasus and Central Asia (Organization for Economic Co-operation and Development, 2011) 11.
10. ibid 11.
11. Rasmus Heltberg, 'Property Rights and Natural Resource Management in Developing Countries' (2002) 16(2) Journal of Economic Survey 189.
12. OECD (n 9) 11.

ons people convert land acquired from customary authorities to statutory tenure [an increasingly common trend in Zambia] is in order to determine the extent to which they can exercise the bundle of rights enshrined under statutory tenure. Others have premised this conversion in terms of the need to acquire security of tenure. Policy-makers have also often thought of consolidating property rights through statutory law in the quest for securing tenure.[13] But what is security of tenure?

Security of tenure refers to (i) the certainty of land or resource rights,[14] (ii) the assurance in exerting or exercising these rights,[15] and (iii) the uninhibited cost of exerting or exercising the rights.[16] Others have construed tenure security as a right to effective protection against forced eviction,[17] and the UN Habitat defines it conversely – insecure tenure being the risk of forced eviction.[18] In a study of land tenure and rural development, the Food and Agriculture Organization (FAO) defines tenure security as the certainty that a person's rights to land will be recognized by others and protected in cases of specific challenges.[19]

All these definitions cascade down to one concept – a continuum of "rights", whether they are legal rights [herein used to mean rights provided for in statutory law], rights held in communal trust [customary rights] or rights guaranteed by social mores, and whether for an individual or a community group. The enjoyment of these rights becomes a central feature which nebulously resides in the extent to which individuals or groups can exercise the different rights which they are legally or socially permitted to exercise. More importantly, the enjoyment of the exercise of these rights should itself be secured by the certainty and assurance that the individual or community group will not incur any unreasonable costs in the course of exercising these rights.

Therefore, without the full enjoyment associated with the exercise of these rights, the concepts of tenure and its security are rendered meaningless. This has empirically been proven in REDD+; that security of tenure on its own and by itself may be an insufficient guarantee for improved forest management.[20]

Demsetz makes explicit what is implicit in the exercise of tenure rights; property rights are social instruments which derive their significance from the fact that they help humans form expectations which can reasonably be held in dealing with others over property.[21] These expectations find expression in laws, custom and mores of society, and must receive the consent of fellow men to allow the property rights-holder to act in certain ways towards his/her property.[22] From Harold's ontological view of property rights, security of tenure is measured by the extent to which society of fellow humans consent to the expectations of the property rights-holder to exercise his/her rights over property. Without such societal consent, a property rights-holder cannot enjoy the exercise of the said rights irrespective of whether those rights are given legally, customarily or by social mores.

Some of the natural resource management challenges in Zambia attest to the assertion that security of resource tenure is not necessarily guaranteed by its mere legal or customary configuration: it is rather guaranteed by the extent to which society consents to the expectations of the rights-holder in respect of the resource in question. If this were not true, encroachments into legally protected public or private resource areas would not be such an endemic problem in the country. But why does society have problems with such consent in the first place? Because property rights, as Harold rightly posits, convey the right to benefit or harm oneself or others.[23] Where society feels harmed by the ex-

13. Ruth and Pradhan (n 1) 10.
14. Janine Ubink (n 7) 13.
15. ibid 13
16. ibid 13.
17. Alain Durand-Lasserve and Harris Selod, 'The Formalization of Land Tenure in Developing Countries' (World Bank's 2007 Urban Research Symposium, Washington, 14-16 May 2007) 6.
18. UN Habitat, Global Campaign for Secure Tenure. A Tool for Advocating the Provision of Adequate Shelter for the Urban Poor: Concept Paper (2nd Edn, UN Habitat, Nairobi, 2004) 31.
19. FAO, Land Tenure and Rural Development. FAO Land Tenure Studies Volume 3 (FAO, Rome 2002) 18.
20. Anne M Larson and others, 'Tenure Matters in REDD+: Lessons from the Field' in Arild Angelsen and others (eds), Analyzing REDD+ Challenges and Options (CIFOR 2012) 156.
21. Harold Demsetz, 'Towards a Theory of Property Rights' (1967) 57(2) The American Economic Review 347.
22. ibid 347.
23. ibid 347.

ercise of others' tenure rights, society fails to consent to the expectations of the tenure rights-holder regarding the resource.

This article focuses on the different resource tenure rights. It uses Migot-Adholla and Bruce's definition of tenure security because it presents some pertinent elements of the bundle of rights regime this paper is mainly concerned with:

The perceived right by the possessor of a land parcel to manage and use the parcel, dispose of its produce, engage in transactions, including temporary or permanent transfers, without hindrance or interference from any person or corporate entity, on a continuous basis.[24]

OPERATIONAL LEVEL RIGHTS

Operational level rights refer to a set of rights that allow a certain category of resource owners, users, claimants or proprietors to devise rules of operation in respect of the extent to which a resource can be accessed, managed, protected, harvested and/or alienated.[25] Given that human and economic development depends on the ability of a society to control and utilize environmental resources,[26] an intricate nexus is created between two mutually reinforcing concepts; "utilization" [rights] and "control" [rules]. While the manner and extent of 'utilization' of resources determines human and economic development outcomes, 'control' of the resource determines both access to, and utilization of, the resource. In practice, therefore, resource management is a boiling pot of rights and rules combined to form different resource tenure regimes.

Part of the confusion in the understanding of resource tenure lies in the synonymous use of rights and rules. While rights are authorized actions, rules prescribe the authorization of the actions.[27] Therefore, rights are products of rules and the two cannot be treated as equivalent of each other.[28] Flowing from this, the term 'property rights' cannot be construed as a single conceptual entity, but rather an operational domain of authorized actions [rights] and the prescriptions that authorize those actions [rules]. That rights are only as strong as the institutions or social collectivities that gives them force,[29] makes common pool resource tenure rights even more intriguing, as will be seen, because the resource often exists in a social collectivities of different people having different stakes, interests and claims to the same resource yet lacking the power to make rules.

The Schlager-Ostrom framework describes access [the right to enter a defined physical parameter of a resource area] and withdrawal [the right to obtain or harvest a product] as the most relevant operational-level property rights.[30] This underwrites the operational tenure rights in natural resource management – for these authorized actions [rights] will determine the extent to which both access to, and utilization of, the resource are realized in practice. Besides, there will always be a set of rules – legal, customary or social-relational, which prescribe the authorization of the rights and control both access to, and withdrawal of, a resource. Essentially, rules specify the conditions under which those authorized actions [rights] can be exercised.

Much of our operational challenges in natural resource management and conservation of communal resources issue out of three fronts; firstly, failure to elaborate and clarify the authorized actions [rights] and secondly, failure to enforce the [rules] which prescribe the rights in practice. The third factor is a consequence of the first two - access to, and utilization of, the resource in question is impaired because those authorized to access the resource do not normally know the right to act with, the limits of their rights and the rules to control utilization of the resource. They may know the rules but they may not exercise their rights in compliance with

24. Shem E Migot-Adholla and John W Bruce, 'Introduction – Are Indigenous African Tenure Systems Insecure?' in John W Bruce and Shem E Migot-Adholla (eds), In Search of Land Tenure Security in Africa (Kendall/Hunt Publishing Company 1994) 3.
25. Schlager and Ostrom (n 2) 250-251.
26. Helge Kjekshus and Phil O'Keefe cited in Samuel N Chungu (ed), Guardians in their Time: Experiences of Zambia under Colonial Rule, 1890-1964 (MacMillan 1992) 9.
27. Schlager and Ostrom (n 2) 250.
28. ibid 250.
29. Ruth and Pradhan (n 1).
30. Schlager and Ostrom (n 2) 250.

the rules which authorize the right. The resultant effect is over-exploitation or under-exploitation of the resource.

Access and withdrawal rights

From a property rights, access is often defined in terms of the right to benefit from "things".[31] This is a narrow view of the meaning of "access" and is part of the causes of problems in natural resource management especially in traditional and customary settings. This article adopts a holistic view of the meaning of "access" espoused by Ribot and Peluso, namely the ability to derive benefits from "things".[32] In the latter, access is more akin to the bundle of powers and social relations associated with access to a resource than the restrictive bundle of property rights and ownership in the former.[33] In the latter, property is constructed as a bundle of interests to tangible or intangible "things" held by many interest-holders having different relational rights to one another.[34] Under such a view, property is functional serving social needs and values.[35]

But in the former, property is a bundle of rights over tangible objects owned and controlled by private individuals with little room for government regulation.[36] As such, this view of property rights serves individualistic economic ends.[37] Contrary, the latter is multidimensional in breadth and width, focusing on the object of both person-person and person-thing relationships, while the former is unidimensional focusing only on the person-object relationship.[38] In short, access as ability espouses access to property shared by others while access as a right represents property rights exercisable against, or at the exclusion of, all others.[39]

31. Jesse C Ribot and Nancy Lee Peluso, 'A Theory of Access' (2003) 63(2) Rural Sociology 153.
32. ibid 153.
33. ibid 153.
34. Craig Anthony Arnold, 'The Reconstruction of Property: Property as a Web of Interests' (2002) 26 Harvard Environmental Law Review 281.
35. ibid 290.
36. ibid 289.
37. ibid 291.
38. ibid 292.
39. ibid 303.

The property rights definition of access as a "right" is a subset of the holistic concept of access as 'ability' associated with power and social relations in respect of a resource. The holistic concept of access draws from the pluralistic view of law as a coexistence and interaction of legal orders within a social setting or within a domain of life.[40] It should be clear, by the end of this article, that in drawing upon different resource tenure rights, individuals can make use of more than one legal order to rationalize and legitimize their claims, decisions and behaviours.[41] Minding this, therefore, legal drafters should take heed to provide for regulation of the social relational powers that can enhance or constrain access to a resource where access means the ability to benefit from things differently from the manner in which provisions are traditionally drafted to regulate individualistic property ownership deriving from the meaning of access as a right to benefit from things.

This inadvertently draws a practical line distinguishing socio-legal expertise in natural resource management akin to the social relational powers of access from the positivistic legal pragmatism which is doctrinally grounded in the positivistic view of access from property rights. Legal pragmatists in the latter have been accused of failing to discover social contract bridges to regulate human-land or human-nature relationships.[42] This failure is particularly attributed to the dominance of the conventional narrow view of property rights in legalistic terms, and the construction of access in terms of rights rather than ability.

The imperative of articulating the aggregation of natural resource rights beyond a narrow focus on the bundle of property rights in natural resource management is made crucial by Craig Anthony's observation that the modern concept of property rights diminishes the importance of the relationship between humans and natural environment.[43] It is accused of being incompatible with Aldo Leopold's land ethic underpinned by the interconnectedness of people and their physical environment.[44] As a consequence, it

40. Ruth and Pradhan (n 1) 11.
41. ibid 11.
42. Hernando de Soto, 2000 cited in Janine M Ubink (n 7) 9-10.
43. Craig Anthony Arnold (n 34) 281.
44. ibid 281.

disregards the nature of the "thing" owned and fails to consider a variety of factors that shape both human relationships with respect to object owned and the content and scope of property arrangements.[45]

While the customary and traditional ethic of natural resource management in Zambia has always been relational to things in nature (although this ethic is increasingly diminishing in many places), the metaphor of property as a bundle of rights advances a physicalist paradigm contending that property [including natural resources] is an "object" rather than a "thing".[46] This dichotomy presents a huge implication on the conceptualization of ownership, access and withdrawal (or use).

Both the "ability" and "right" to access a resource cascades down to one object – withdrawal, use or utilization of the resource; which simply means the enjoyment deriving from the benefits which either "ability" or "right" to benefit from something brings to the fore. As such, use or utilization is merely an enforceable claim acknowledged and supported by society through law, custom or convention.[47] Whether resource access and use is achieved through ability to benefit from a resource by virtue of social relational powers or through legally espoused property rights to benefit from a resource, circumstances are inevitably created where some people benefit from a resource at the expense of others. It is a documented fact that, although social relations provide some form of security over a resource, the relations are themselves unequal.[48] At the same time, law creates privileged access to a resource for individuals or institutions in authoritative positions to benefit from the resource in question.[49] On the other hand, law can control non-state authorities like community leaders, chiefs, religious clerics, or village heads to prevent them from allocating resource access selectively along identity lines.[50]

All these factors combined do cause tension and increase inequities in natural resource management and resource use among different classes of people and actors. They worsen the complexity, ambiguities and nuances associated with the term access. At this juncture, the dichotomy of access as "ability" vs access as a "right" comes into play at a point of clarifying, according to Anthony, the boundaries, the core and the ideal of withdrawal and use of a resource.[51] This is crucial for reconciling different interests to the same resource pool and especially in determining which interests are more socially acceptable and/or legally legitimate than others. Without this clarity, conflict arises which, according to Van Rooij, jeopardizes the very certainty upon which the breadth, duration and assurance of tenure security are defined.[52] The villagers' riot in Mwandi township of Sesheke District expressing their anger and displeasure over the Simalaha Community Conservation [reported on Saturday/Sunday of March 27/28, 2021] epitomized the jeopardy on the security of tenure for the Community Conservation located on more than 180, 000 hectares of customary land spanning two chiefdoms.[53]

Heuristically, societies have the 'ability' to benefit from natural resources within their localities but they may not have a well-defined 'right' to benefit from the resource in question. This conundrum is exemplified by the Simalaha community through the community riot which exemplified the frustration caused by the conundrum of "ability to benefit" vs "right to benefit". The conundrum is also exemplified by people living in a Game Management Area (GMA) as a buffer zone to a National Park, having the "ability" to benefit from wildlife resources in the GMA, in a National Park or in an open area. But what "rights" do these people possess to benefit from the wildlife resources is a different matter altogether! Without addressing this question, the battle against poaching and illegal wildlife hunting may continue on a losing end.

45. ibid 296.
46. ibid 282.
47. Ribot and Peluso (n 31) 155.
48. Janine M Ubink (n 7) 9.
49. Ribot and Peluso (n 31) 170.
50. ibid 171.
51. Craig Anthony Arnold (n 34) 294.
52. Benjamin van Rooij, 'Land Loss and Conflict in China: Illustrated by Cases from Yunnan Province' in Janine M Ubink (n 7) 436.
53. Simalaha Community Conservancy <www.peaceparks.org.simalaha/>.

People living in forest open areas, within the vicinities of a protected National or Local Forest have the "ability" to benefit from forest resources in the protected or open forests, but what sorts of "rights" do they have to benefit from those resources?[54] Without addressing this question, the battle against deforestation and forest degradation may never be won. Specifically, failure to address this question strangles the legitimacy and legal validity of REDD+ right at its birth.

A similar question can be extrapolated to water and fishery resources with respect to the growing human population living around these dwindling resources. Why does natural resource management legislation in Zambia seem to be blunt in the face of increasing biodiversity loss and environmental degradation? In answering this question, it should be understood that some activities may be illegal under statutory law yet they receive socially strong support in customary or conventional realms of collective legitimacy.[55] Flowing from this, the strength of social legitimacy may justify access to a resource with or without an ostensible right promulgated by law. On the other hand, rights defined by law [legal rights], custom or convention are all legitimate mechanisms that shape who controls and maintains access to the resource.[56]

From the analysis of Rasmus Heltberg, what may be seen as deviance from governmental regulatory order is mainly a consequence of collective action at local level failing to legitimize governmental rules especially that governmental regulatory action [inherited from colonial orders] often undermines local/traditional structures.[57] Therefore, contrary to the conventional definition of illegality in the sense of abrogating prescribed legal rules, illegal access to a resource from the broader theory of access - as the ability to benefit from things, can be construed in terms of enjoyment of benefits from things which are not sanctioned legally by the state and/or socially by society.[58]

Therefore, the locus of Ribot and Peluso's theory of access is that legal means are not the only legitimate way of gaining access, control and benefits from a common pool resource.[59] In addition, Ruth and Pradhan have argued that statutory laws are but one resource used in the strategies of individuals and groups to acquire, establish, protect and continue their rights to a resource.[60] But these observations stand in stark contrast to the regulatory hegemony of command-and-control increasingly employed by the state in natural resource management.

From regulatory ethos, much of our challenges in the conservation and management of natural resources issue out of the fundamental yet unchecked conflict between "ability to benefit" vs "right to benefit" from a resource. While the absolute ownership of water resources vests in the state,[61] the riparian private farmer on whose land the river flows is both an authorized user and a resource claimant to the resource since the river flows through their private farm land. On the other hand, the riparian local community downstream has an equally important stake in the water resource having both "ability" and "right" to the resource as claimants, authorized users and proprietors of the resource as it flows through their communal lands.

The water resource conflict in Mkushi District of Central Province issues out of this nexus – a nexus which is meant to be ameliorated through easements; those with the "ability" to benefit from water resources also have the right to an easement,[62] which, from legal rights theory, gives them another right to cross onto another person's property [land] just in order to access the resource on that land.[63] Understandably, the easement right in water resource management is informed by the nature of water as a mobile, fugitive and fluid resource with a great deal of uncertainties regarding its quantity and quality in relation to its location at a particular time.[64]

54. Makweti Sishekanu, Forestry in Zambia: An Empirical Socio-Legal Regulatory Perspective (LAP-Lambert Academic Publishing 2020) 11.
55. Ribot and Peluso (n 31) 155.
56. ibid 163.
57. Rasmus Heltberg (n 11) 197.
58. Ribot and Peluso (n 31) 164.
59. ibid 164.
60. Ruth and Pradhan (n 1) 12.
61. Water Resources Management Act No.21, 2011, s 3.
62. Ibid, s 125.
63. Henry E Smith, 'Property is not just a Bundle of Rights' (2011) 8(3) Econ Journal Watch 279.
64. Ruth and Pradhan (n 1) 13.

Essentially, the characteristic nature of a resource in question shapes the nature and form of property rights that would constitute its tenure – who [category of rights-holder] should have how much water [allocation of rights] in what place [location] for what use [withdrawal rights]?[65] This brings to light the nested nature of these rights and the extent to which the holders can benefit from them - the right to withdraw is meaningless without the right of access, yet withdrawal rights do not necessarily confer alienation rights at the schema of collective-choice.[66] This further creates a dichotomy between "authorized users" [operational rights holders] who may not have authority to change the operational rules on the one hand, and resource claimants [operational rights holders who also have collective-choice powers to manage a resource] on the other hand.

The dichotomy of "authorized users" vs "resource claimants" creates an interesting phenomenon in Zambia's natural resource management. A forest concessionaire in an open community forest is an authorized user who does not have authority to change operational rules. In both the Schlager-Ostrom framework,[67] and Zambia's forestry legal framework, authorized users cannot devise their own access and withdrawal rules – they are expected to simply comply with the rules set for them. At the same time, members of the local community and their traditional authorities are resource claimants to the same forest and have a right to manage the resource. The ensuing outcome is resource conflict, as the case is between private concessionaires and local communities in Sioma and Kaoma Districts of Western Province, in which resource claimants have a collective-choice power to devise withdrawal rules,[68] yet they have no power to devise access rules in entirety. In short, authorized users have operational rights but have no collective-choice power and the rights accruing from it.

This sort of conflict is equally evinced in Lufwanyama District on the Copperbelt Province where a private mining company is an authorized user of mineral resources underground in a communal setting in which local communities and their traditional authorities are claimants [claiming a right to the minerals] but have no power to determine access rules. Standing between the authorized user and resource claimants in resource conflict is the rule-maker, the state - who must elaborate, clarify and enforce, through a system of rules, the operational and collective-choice rights of both parties.

COLLECTIVE-CHOICE RIGHTS

Collective choice rights refer to the collective authority, actions and socially-determined power a group of people may exercise over a resource in a defined resource area. Collective-choice rights in the Schlager-Ostrom framework subsist in three forms; (i) management – the right to regulate internal use patterns and transform the resource by making improvements, (ii) exclusion – the right to determine who can or cannot have access rights, and how that right may be transferred, and (iii) alienation – the right to sell or lease either or both of the above collective-choice rights.[69]

The logic of collective action resides in the conditions in which actors are likely to be organized to jointly change the institutional equilibrium around a resource.[70] This logic includes acts to promote and/or retard cooperation within a group of people to achieve certain goals.[71] Depending on what collective-choice rights people possess in collective action, the major obstacle to collective action is 'free-riding' especially where there is disutility from effort and where individual effort is difficult to monitor and enforce.[72] Where resource tenure rights are obscured, there is inequality among users in production and income which may further in-

65. ibid 15.
66. Schlager and Ostrom (n 2) 252.
67. ibid 257.
68. ibid 252.
69. ibid 251.
70. Rasmus Heltberg (n 11) 191.
71. ibid 191.
72. Mancur Olson, The Logic of Collective Action - Public Goods and the Theory of Groups (Harvard University Press, 1965), cited in Rasmus Heltberg (n 11) 191.

duce distrust leading to resource conflict due to cooperation failures.[73]

This is one of the major challenges in community forest management as it proves difficult to provide appropriate incentives and disincentives for individual self-interests towards the public good in a common pool resource like a community forest. Therefore, without elaboration of collective-choice rights and clarification of the different rights-holders delineated thereof, collective action may produce the paradox of the Prisoners Dilemma,[74] which is a common recipe for the Tragedy of the Commons in common pool resources. According to Garret Hardin (1968), the foundation of the Tragedy of the Commons is unclear ownership over common resources – a scenario which condemns such resources to overexploitation. It is not difficult to discern - from Hardin's original thinking - that the main issue at play in the Tragedy of the Commons is property and resource tenure rights. Rasmus summarized this problem in the simplest terms; 'When everybody owns a resource, nobody has incentives to conserve it for the future'[75]

If, therefore, everybody be an owner, nobody has the right to exclude anybody else from the resource – which also means, there is no control over operational level rights of access and withdrawal. As such, overexploitation becomes a consequence of uncontrolled operational level actions which reside in access and withdrawal rights. This must underpin the locus of this article; that configuration of resource tenure rights is the mother of natural resource management and the spirit of natural resource management law.

Operational level rights do not necessarily translate into collective-choice rights. This is part of the aetiology of resource conflict among different users, claimants and proprietors. As Schlager and Ostrom rightly outlined it, people authorized to access and withdraw (use or harvest) a resource may not necessarily have further rights to manage, exclude others from the resource, or even a right to alienate the resource in full or in part.[76] This depicts the character, nature and form of resource tenure regimes and the system of rules prescribing the specific resource rights in Zambia.

The Community Forest Management Regulations of 2018 present a classical case where the state, as the overall rule-maker, decides to upgrade the local communities from mere resource claimants to "resource proprietors". Proprietors possess the collective-choice right to participate in the management of the resource as well as the right to exclude others but do not have the right to alienate the resource.[77] However, proprietary rights do not turn the local communities into 'resource owners' as most local communities often regard themselves. Without a detailed analysis and elaboration of resource tenure rights regime the Community Forest Management Regulations have brought to the fore, local communities have a blind faith of ownership of a resource over which they are merely claimants and proprietors, and not owners.

Management rights

All rights [authorized actions] come with complementary duties which also means that rules do prescribe both rights and duties.[78] Naturally, management is both a right and a duty - a collective-choice action which gives its holders a right to appropriately devise operational-level actions – access and withdrawal.[79] Through the exercise of this right, rights-holders devise harvesting techniques, access restrictions and changes in resource structure. Management rights give resource claimants stronger incentive than authorized users to devise governance systems and institutional structures for the resource under their management. Notwithstanding, this incentive is weaker than the incentive proprietors and owners would possess in a similar arrangement.[80]

That management is a collective-choice action, participatory resource management plans are

73. Rasmus Heltberg (n 11) 197.
74. ibid 191.
75. ibid 192.
76. Schlager and Ostrom (n 2) 251.
77. ibid 253.
78. ibid 250.
79. ibid 251.
80. ibid 257.

only legitimate if the participants come to the table with a clear awareness of their access and withdrawal rights at operational level. One of our major hurdles in participatory natural resource management is academic resource management plans – plans which are rarely implemented in practice either because, there are no rules of enforcement or the participants have no sense of security insofar as their access and withdrawal rights within the management plan is concerned. Community forest management typifies this challenge.

While Galik and Jagger consider improvements to a resource as alteration, an additional and unique sixth right to the Schlager-Ostrom schema of rights,[81] this article considers alteration as part of the ingenuities that come with management of a natural resource. Alteration in Galik and Jagger's framework includes such acts as conversion of forested land to agriculture and inundation of a river for Hydro Electric Power generation. That alteration is an extreme form of management which can change the very nature of a resource as Galik and Jagger rightly note, the right to alter a resource can itself be detrimental to the long-term survival of the resource.[82] This means, rights allocation within the spectra of resource tenure rights does not necessarily protect the resource. Rather, protection of the resource lies with the manner in, and extent to, which the right is exercised in practice.

Hence, the allocation of rights, duties and responsibilities to manage a natural resource should ideally be premised on an ecological argument that not all land and related ecological features are the same and should therefore, not come with uniform rights and duties.[83] This is an important ground because ecological connections do not recognize resource tenure or legal boundaries dividing land into parcels among humans, and the interdependence of all parts of an ecosystem means that alteration or harm to any part through excessive use, development or commodification hurts the whole ecological community.[84]

81. Galik and Jagger (n 5) 4.
82. ibid 5.
83. Craig Anthony Arnold (n 34) 319.
84. ibid 319.

Therefore, the rights to manage a resource are inevitably affected by access and withdrawal (or use) rights, the boundary of property ownership and the concept of entitlement to the resource. In this vein, the concept of 'property management' and the legitimation of its attendant rights must here be differentiated from the conventional understanding of property management in a commercial sense. The nature-oriented concept of property management espoused herein demands consideration of the scale of resource in question and its carrying capacity; its role in the larger socioecological community and the amount of developments tenable from such resource base. As such, Anthony rightly posits that property law should enforce a human-nature relationship, a relationship of stewardship and a precautionary approach to access, use and alienation based on the awareness of future generations.[85]

Exclusion rights

Exclusion is a collective-choice right by which its holders devise appropriate operational-level actions authoritative enough to restrict others from accessing a resource.[86] This includes the right to exclude others from transferring or alienating a resource.[87] Realistically, however, exclusion is a means to an end[88] – which end lies in the extent to which the excluding party intends to enjoy the benefits of the resource without any hindrances from others. Common law Torts like Trespass are common means of exclusion while land titling is seen to provide the strongest right to exclude others from a resource. In practice, increasing exclusivity may increase tenure security for the excluding party,[89] and inversely decrease the tenure security for the excluded party. Therefore, more than any other right, exclusion makes explicit what is inherently implicit in the bundle of rights metaphor, i.e. property rights convey the right to benefit or harm oneself or others.[90] Ultimately, exclusion is a means to protect an individual or

85. ibid 320.
86. Schlager and Ostrom (n 2) 251.
87. ibid 251.
88. Henry E Smith (n 63) 281.
89. Janine Ubink (n 7) 14.
90. Harold Demsetz (n 21) 347.

group's privileges that come with operational rights like access to, and withdrawal from, a resource.

Ironically, the conundrum of resource tenure rights is seen in the fact that the right to exclude others from a resource does not necessarily make the excluder an owner. Possessing the right to exclude others, many authorized users, resource claimants and proprietors have often regarded themselves as "owners" and have acted as such when they are technically, from a resource tenure rights perspective, not owners. Essentially, exclusion right is not absolute in itself – it is a governance action-based right implemented by overriding or making exceptions to who can be excluded and who can be included to access a resource.[91] With easements in Zambia's water resource sector, for instance, exclusion becomes more difficult to exercise in practice than in other sectors because it is a right whose exercise may not entirely reside with the rights-holder but with the ultimate authorizer being the rule-maker.

The right to exclude others from a resource only makes an individual and/or a group 'proprietors' of the resource,[92] but not owners as people have often regarded themselves. By virtue of exclusion rights, proprietors are de facto authorized resources users, they can also be resource claimants but they are not resource owners. Conservation projects undertaken in our communities have exposed the fact that much of the customary boundary conflicts among chiefs in our communities emerges out of the attempts to exercise exclusionary rights against competing claims of access to, and withdrawal from, a resource.

Alienation rights

Alienation rights refer to the right to sell or lease either all or one of the collective-choice rights. The right permits its holders to transfer part or the whole of the resource to others and exercise, in the process, the right to relinquish either management and exclusion rights or one of them to others.[93] Alienation from a bundle of rights perspective refers to the free transferability of property.[94] But this transferability is not only in terms of sell or lease, alienation includes the transfer of a resource from a less productive to a more productive use.[95] To effectuate this in practice, Anthony identifies a number of factors the interest-holder must be wary of in order to enjoy the right of alienation, i.e., the interest-holder must think about legal entitlements against other interest-holders and the state, social-relational or power-relational aspects of the resource, resource availability and scarcity, market value of the resource in question, consumption with or without restraints, control and regulation.[96]

As such, while the interest-holder may have access to a resource by ability or by right, their capacity to alienate may be hindered by legal entitlements against other interest-holders and the state, social-relational or power-relational concepts may be prohibitive, resource availability or scarcity which may in turn affect the market value of the resource in question, there may be restraints on consumption of the resource and hence regulatory controls may be inhibitive. The empirical observation of gaps between regulatory text and social context[97] compounds the prohibitory environment in which a resource can be alienated as part of the full enjoyment of the benefits that come with ability or right to access.

Further, the collective-choice rights to manage and exclude others from a resource does not necessarily give an individual or group the right to own of the resource. In short, being an authorized user, a claimant and/or a proprietor does not make one a resource owner. If, in addition to the collective-choice rights of management and exclusion, an individual or group have an exercisable right to alienate a resource, they are deemed "resource owners".[98] Essentially, the vested interests which an authorized resource user, a resource claimant and/or a proprietor

91. Henry E Smith (n 63) 285.
92. Schlager and Ostrom (n 2) 253.
93. ibid 251.
94. Craig Anthony Arnold (n 34) 297.
95. Posner, 1975 cited in Schlager and Ostrom (n 2) 256.
96. ibid 299.
97. Makweti Sishekanu, 'Evolution of Forest Law and Regulation in Zambia from 1973 to 2015: Analysis of the Gap between Text and Context' (2020) 16(1) Law, Environment and Development [LEAD] Journal 39.
98. Schlager and Ostrom (n 2) 254.

have in a resource does not make them owners until they have an exercisable right to alienate the resource in question - they can sell or lease the resource, in full or in part, freely without any form of hindrance either by law or social relational powers. Therefore, merely having ability or right to access and the right to withdrawal, use or utilization, the right to manage and even exclude others, by themselves, may not necessarily lead to the full enjoyment of the benefits of a resource given the foregoing myriad of prohibitive factors associated with the right to alienate – a right only reserved for owners.

THE CRITICAL NEXUS OF COMMUNITY AND LEGAL RIGHTS

The traditional bundle of rights theory is critiqued for its inherent wrong assumption that the different sticks [rights] of the bundle do not interact.[99] This part of the narrative seeks to demonstrate how the different sticks of the bundle metaphor interact with each other particularly in influencing natural resource management decisions – just like exclusion rights for the excluding party is a de facto denial of access rights for the excluded party. When the forest landscape restoration project in Mafinga District seeks to demarcate, with clearly marked beacons, the legal boundaries of the Mafinga Hills Forest Reserve in a typically rural community setting, the project proponents must realize that the one 'stick' in the bundle metaphor used to demarcate the forest is an exclusion tool for members of the local community around that forest. In which case, using exclusivity as tenure security for others means increasing tenure insecurity for the excluded others.[100] Therefore, each stick [right] in the bundle serves the whole system of property and its attendant tenure rights sub-system whether individually or collectively.[101]

This narrative will highlight part of the common challenge with natural resource exploitation faced in customary rural communities, apparently, where the largest stock of natural resources in dire need of conservation or under conservation, is found in Zambia. The challenge is compounded by the practical reality that those who control access to, and withdrawal of, a resource in the operational schema of rights may not necessarily control management, exclusion and alienation in the collective-choice schema of rights. In short, local communities have often regarded themselves as 'owners' based on both their ability and right to access, withdraw, manage and exclude. They have further acted as such in attempts to assert their ownership. In practice, however, the purported communal owners of a resource have been hit by the reality of the fact that they have no exercisable right to alienate the resource in question – which legally nullifies their ownership claims.

This represents what Ruth and Pradhan have posited as one of the most important challenges in common pool resource management, i.e. knowledge uncertainty - where the local communities do not know nor understand what legal framework applies to their meaning of resource ownership and what provisions, whether socially, politically or legally defined, they have to rely on regarding their property rights.[102] Part of this uncertainty is reinforced by the substantive gap between legal text and social context,[103] which also renders statutory law partially applicable to, enforceable in, and fragmented for, local community needs and interests.[104] This leaves resource users, claimants, proprietors and owners acting in ignorance in respect of their property rights.[105] This is the biggest source of frustration in our communities which was also demonstrated by the riot over Simalaha Community Conservancy in Mwandi District.

The ability and right of a chief/chieftainess in Zambia to alienate land makes him/her a de facto "owner" from a resource tenure perspective but the de jure exclusive exploration rights

99. Henry E Smith (n 63) 286.
100. Janine M Ubink (n 7) 14
101. Henry E Smith (n 63) 287.
102. Ruth and Pradhan (n 1) 12.
103. Makweti Sishekanu (n 97) 54.
104. Ruth and Pradhan (n 1) 13
105. ibid 13.

legally granted to a private prospecting mining company even over customary land brings into question the extent to which the chief/chieftainess can enjoy this ownership right. On the other hand, the exclusive prospecting rights for minerals does not confer any land ownership rights to the prospector yet the prospecting license grants the company exclusive "access" to the land.[106] The question itself highlights the locus classicus of resource tenure rights, namely the extent to which an individual or group can enjoy the exercise of the bundle of tenure rights guarantees tenure security more than just a mere claim to a specific type of right. In the same manner, water resource claimants and proprietors may have an easement right yet the easement to access water on another person's land does not grant ownership or proprietary rights over the water.

The critical nexus between communal resource tenure rights and natural resource management in especially common pool resources is summarized by an analogy provided by Ruth and Pradhan:

> *Who is allowed to use how much water or access grazing land will differ during a drought compared to a period of bountiful rainfall.*[107]

To manage the foregoing situation in the given analogy, it is inevitable that consideration of who [authorized user, claimant, proprietor or owner] possess what rights will come into play. Under such circumstances, legal pluralism expands the repertoire of options available for different people, especially those most vulnerable to the situation, to fall on by appealing to a variety of norms regarding benefit-sharing and meeting basic human needs instead of relying on legal rules that give some a right to exclude others.[108] In which case, resources under common property rights regimes can often provide social security, insurance and vital economic functions which private property rights regimes cannot.[109] In essence, different bundles of resource rights, whether de facto or de jure, affect the incentives presented to individuals or groups, they affect the type of actions people can take and the outcomes of such actions in given situations.[110]

It is economically logical that resource 'owners' holding the complete bundle of resource tenure rights and the other categories of rights holders will act differently in accordance with different arrays of incentives before them. The array of incentives is demonstrated by Kundhlande and Luckert as the expansion of the market system, production and distribution of outputs, and incentives to efficiently manage the resource [emphasis added].[111] The incentive to undertake long-term investments is predicated, according to the Schlager-Ostrom framework, mainly on alienation and exclusion rights, for this combination guarantees ownership and proprietary rights over a resource. The ability to transfer a resource from less productive to more productive uses under alienation rights,[112] provides additional economic advantage to 'owners' than authorized users, claimants and proprietors.

The extent to which an owner and/or proprietor can enjoy the exercise of these rights determines the security of resource tenure which also depends on the survival of the resource. The observation raises a caution for the role of resource tenure rights in enhancing the rate of resource exploitation, which rate is consciously linked to the exercise of the right. This gives credence to self-organized collective-choice property rights regimes in the management of common pool resources, which, although mainly de facto in nature, can determine operational-level rules [access and withdrawal] closely matched to the physical and socioeconomic conditions of a particular resource site.[113]

Finally, the authors could not find any better expression of how resource tenure rights affect natural resource management and socioeconomic development than what is expressed in the OECD's construction of tenure and tenure rights;

106. Mines and Minerals Development Act No.11, 2015, s 23(2).
107. Ruth and Pradhan (n 1) 12.
108. ibid 12.
109. Rasmus Heltberg (n 11) 198.
110. Schlager and Ostrom (n 2) 256.
111. Kundhlande and Luckert, 1998, cited in Christopher S Galik and Pamela Jagger (n 5) 3.
112. Posner (n 95) 256.
113. Schlager and Ostrom (n 2) 255.

'It is property and what a person or a group can do with it'[114]

CONCLUSION

The focus of this article has been the natural resource tenure rights regime in Zambia, specifically where common pool resources involving local communities are concerned. Using the Schlager-Ostrom framework, the paper has unbundled and analyzed the nexus of community and legal rights in accessing, withdrawing, managing, protecting and alienating natural resources, a conundrum which complicates natural resource management in the different resource sectors of Zambia.

Much of the natural resource management analyses in Zambia have concentrated at conceptual level from cultural, anthropological, social and scientific perspectives and the political economy within which resources are confined. However, whether implicitly or explicitly, all aspects of natural resource management are foregrounded in, and cascade down to, the need to clarify, elaborate, define and determine the bundle of resource tenure rights for the different interest and rights-holders.

By providing glimpses into how the intricate nexus of community and legal resource tenure rights unfold in natural resource management, the article concludes that natural resource management is not only juxtaposed with a bundle of tenure rights interests but an elaboration and enforcement of these rights is the foundation of natural resource management itself. As such, failures to clarify the different configurations of resource tenure rights, failure to elaborate the different levels of interest and rights-holders as they are delineated by their respective rights, and a failure to enforce these bundles of resource tenure rights from customary, policy and statutory perspectives has far-reaching impacts on resource conflict and the challenges faced in natural resource management. All these factors do negatively affect conservation efforts.

Ultimately, the article has argued that conservation, and natural resource management law in the Anthropocene fails in its substantive spirit if does not elaborate, clarify and enforce these bundles of resource tenure rights. Effectively, natural resource management is foregrounded in nothing but the extent to which these bundles of rights and duties are exercised and enjoyed in practice. A concept like Community Based Natural Resource Management (CBNRM) is strangled at birth if not based on an elaboration, clarification and enforcement of community resource tenure rights.

114. OECD (n 9) 11.

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