

BACKGROUND PAPER

GOVERNANCE *and* THE LAW

Hybrid Land Regulation between the Commons and the Market Land Tenure in the Comoros

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Land Tenure in the Comoros

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Abstract: Following a chaotic political decolonization, from 1975 to 2000, the Comoros failed to sustain the extension of private land ownership pursued since the beginning of the twentieth century and to implement land reform prepared with the assistance of the FAO and the UNDP but abandoned after the assassination of the President of the Republic in 1989. This reform was based on a form of heritage management recognizing the plural and complementary nature of modes of securing land tenure. It was resumed at the beginning of the 1990s as a “reformation,” that is, an informal policy, and translated into best practice by Comorian agricultural engineers with a view to stabilizing and then improving the productivity of small family farms, which are overwhelmingly predominant in the three islands. In doing so, they came face to face with the “challenge of the commons” translated into new operational strategies while recognizing the diversity of groups, interests, and resources as well as the strongly hybrid nature of local management regulations that helped make customary norms and proprietary procedures complementary. The result was the coexistence of what can be called a “primo-commons” inherited from ancestral practices and a “neo-commons” influenced by the market and opening up the Comoros to international trade and modernity.

Introduction: In the early twenty-first century, development policy needs to be reproducible and sustainable. It needs to be based on existing mechanisms designed to better meet the demands and constraints of wider reproduction by economies and societies on a global scale without suppressing originality. It is now vital to consider the place and role of the commons, which had been overlooked for a very long time (Le Roy 2015), in particular in a context such as the Comoros, where it is so prevalent in practice. However, this rereading of land tenure policy presents a number of difficulties. Over some 50 years, the parameters, objectives, and challenges inherent in these policies have evolved. Moreover, these changes have not taken place synchronously and seldom in an orderly manner or consistent with legal models conceived for developed countries. Driven by guidelines issued by donors and in particular by the Bretton Woods Institutions, these models have not necessarily been well adapted to developing countries, as the land tenure situation in the Comoros will illustrate.

A brief look at the state of the art is therefore required to better understand the issue. The first impression is that the question of the commons is as old as the hills. Yet it is also sufficiently new so as to represent if not an alternative to current policy, at least a substantial innovation, the impact of which remains to be seen.

From the Primo-Commons to the Neo-Commons: The Commons and the Market

Since the pioneering work of Elinor Ostrom (Ostrom 1990), which was crowned by a Nobel prize in economics in 2009, research over the past twenty years has already validated several of the key conclusions that define the field. Yet it has not eliminated all of the problems of interpretation. These difficulties are a function of the ability of analysts to step back from the received wisdom of political economics and the Western institutions of modernity, which are in the process of being reinterpreted, reshaped, or rebuilt in the Comoros as elsewhere.

The most significant definition of this paradigm shift may be borrowed from David Bollier, who illustrates the changing problematic when he writes that

The commons is not [just] a resource but a resource plus a defined community along with the protocols, values, and norms devised by the community to manage its resources....

Moreover, Bollier adds that

There is no commons without “commoning.”... Naturally, forms of commoning vary from one commons to the next because humanity itself is so varied. There is no standard template for commons, merely “fractal affinities,” or patterns and principles shared across commons. (2014, 179–180)

Under this approach, it is no longer the production or allocation of the “wealth of nations” (Smith 1776/1991) that lies at the core of the privileged logic. Rather, it is a societal issue linked to the quality of social relationships within formations that may consist of corporate groups or communities. These entities may be recognized and organized formally or informally. However, the degree of organizational formality is secondary to the requirement that they have rules. Such rules govern access to resources managed in common (or jointly) and in the commons (with an original status we will discuss below). These rules were produced by these entities, or at least, these entities identify with them or place their trust in them. To fully grasp this change of emphasis, we should note that sharing rather than exchange is the driving concept behind the dynamics of the commons, communities, and communitarianism. We should also note the extent to which management practices value legal or normative pluralism as the only framework capable of accounting for the proliferation and complementarity of collective forms of organization and membership.

In an already innovative and destabilizing context, if we are determined to reproduce the prescriptive frameworks of formal law, the concept of ownership—and in particular of private ownership—will appear diacritical. There is a fairly broad consensus that private property rights do not apply to the commons since they entail the exertion of an exclusive and absolute right in a discretionary manner, possibly resulting in alienation as a result of a rupture in the ontological link between man and the resource. It is widely accepted that to the extent that they favor inclusive rights, original experiences of the commons did not pose—or even precluded—the question of recognition of individual private property or even ownership itself. Here, it is the criterion of inclusivity versus exclusivity that is determinant in the terminology to be used.

However, other, more recent and “modern” experiences are more ambiguous in that they allow for the combination of inclusive and exclusive forms. These allow for limits or

boundaries (which are relatively exclusive) to coexist with the exercise of collective rights, which are sufficiently inclusive for sharing to continue occurring. Thus the ability to alienate is controlled or limited by the introduction of conditionality in the exercise of rights and therefore challenges the “absolute character”¹ of private property rights but not the exclusivity of property. They therefore permit the use of a proprietary terminology, at least so long as one is not too particular about the legal categories.² In such a case, we may speak of “rights to common property.”

According to which criteria therefore should these two contexts, possibly resulting in two legal statuses, be distinguished from one another? Recent anthropological and historical research proposes that a distinction be observed between resources under common management depending on whether or not they exist in a universe (ours) dominated by widespread exchanges and controlled by the market and commodification. However, what is true for us may not necessarily hold elsewhere. Since property is a prerequisite for a market and private property a prerequisite for the capitalist market (Madjarian 1991, Polanyi 1983, Le Roy 2011), if the market is not widespread, private land ownership is inconceivable and reference to it counterproductive. Accordingly, two situations can be distinguished according to whether or not the commons resides outside of the capitalist sphere (or the “primo-commons”) or fits within it while identifying formulas protect the autonomy of “commoning” and ensure its compatibility with a market-oriented world, in which case we may speak of the “neo-commons.”

In sum, it becomes axiomatic that in situations where participants and resources are still not subject to market conditions, it is pointless to refer to the presence of property rights, and we may therefore simply speak of “inclusive” rights to the commons, or rights of use both in common and in the commons. This is an experience that is still practiced by a small fraction of humanity. In contrast, where proprietary ideas have spread and become established, the expression “common property”—to conform to these ideas’ own terminology—may be justified when exclusive rights prevail over subsisting inclusive rights and induce forms of existential solidarity between rights holders.

The experience of the Comoros over the past thirty years offers a chance to conduct a case study designed to clarify the place of the primo- and neo-commons and their confrontation with property as a value pursued since the colonial period and as an institution contrasting with the recognition of the commons, even if this is perennially contradicted in practice. We will therefore revisit the context in which the debate over the status of land and resources has taken place since the mid-1980s in the Federal Islamic Republic of the Comoros, thus making it possible to identify the central role played by the commons in land tenure relations. We will then discuss the current land regime in order to assess the role now played by forms of property and commons as revealed by recent research.

From Land Reform to Reformation in the Comoros (1975–2015)

A former French colony that gained independence in 1975 although stripped of one of its four islands, Mayotte, the Federal Islamic Republic of the Comoros (since renamed the Union of the Comoros) experienced a revolutionary crisis from 1975 to 1978 that led to (among other things) workers occupying former colonial estates where perfume flowers and

¹ See the wording “of the most absolute manner” in article 544 of the 1804 French Civil Code.

² Legally speaking, according to the principles of civil law, the notion of common property is problematic term for term as property is alienable and the notion of the common prohibits it or subjects it to *a priori* controls.

vanilla were cultivated and all land records, including registers of land ownership rights, being destroyed in large bonfires.

Against the backdrop of an unstable economic situation, the Food and Agriculture Organization (FAO) commissioned in 1986 a group of international experts charged with stabilizing land tenure relations in the Comoros. The Government had to agree to restore order to its tenure system if it was to attract investors but without triggering an unnecessary return to violence. This gave rise to a debate over options for land policy. Choices were approved by both the Presidency of the Republic and international donors and translated into legislation between 1987 and 1989. Unfortunately, adoption by the Comoros Parliament of the law paving the way for the decolonization of land in the archipelago was brought to a halt by the assassination of the President of the Republic in November 1989, which dragged the country into a series of difficulties that made it impossible to continue with a constitutionally acceptable process of reform.

It was only from 1996 that bilateral and multilateral cooperation as well as successive Comorian governments changed tack under the influence of a new generation of Comorian experts. Echoing foreign know-how, these experts favored a widespread policy of land “reformation” that derived economic and financial policy from institutional reform while translating the choice of land and resource heritage management into best local practice. It was the combination of two perspectives—the exogenous view of land policy experts and the endogenous perspective of Comorian rural development engineers—that enabled the question of the commons to reveal its full breadth, relevance, and complexity.

The External Perspective of the Group of Land Policy Experts: Potential for Reform Leading to Land and Resource Heritage Management

The options studied by the group of experts commissioned by the FAO specified six scenarios for land policy. These described both opportunities for and limitations to choice, ranging from “all private property” (involving proactive and rapid generalization through compulsory registration of land for the entire population) to a *laissez-faire* approach (amounting to the resolution of only the most sensitive conflicts, with local power relationships and negotiating modes deciding in other cases). In August 1986, an inter-ministerial seminar held in Moroni opted for a middle path favoring heritage management.³ In 1987, three texts were drafted in order to translate the chosen principles and disseminated in a 1991 summary presentation.⁴

Given that priority should be given to the respectful cultivation of the environment, a framework law on the conditions for land use in the Federal Islamic Republic of the Comoros establishes a national land heritage, distinct from that of individuals and of the State. It encompasses all land that is neither registered nor assigned to public services.... Most land management based on a negotiated arrangement is the responsibility of the Highest Land Authority (*Hautes Autorités Foncières* – HAF) in each island, an inter-ministerial committee at the federal level, and Land Use Planning Units (*Unités d’Aménagement Foncier* – UAF) in rural areas on the basis of catchment basins.... National heritage land is placed under the protection of

³ This marked the beginning of research that culminated fifteen years later (Le Roy 2011) and sees heritage as a versatile legal category that can be shared by both private property regimes and the commons.

⁴ See also Le Roy 1997, 1999, 2011.

all Comorians and for use by all, on two conditions:

- That the user ensure its vivification, that is, put it in productive use according to the principle of Islamic law; and
- That the user respect the management principles defined by the island's HAF and implemented locally by the UAF.

This arrangement was supplemented by the following additional principles:

- If it is put to productive use according to the regulations of modern law, land may be registered, with the full cost being borne by the applicant;
- Relationships between customary or civil-law owners and users to be given tenant farming and sharecropping status;⁵ and
- The land-owning rights of the State are those of a liberal state that relinquishes the presumption of public ownership (*domaniality*) and are limited to public and private property strictly demarcated according to actual appropriation. (Le Roy 1991, 210).

The fact that the law establishing a land use regime was not adopted meant that the institutions conceived to this purpose were not created, in particular HAF in each island according to Comorian federalism. However, the need for local resource management, which was to be overseen by the UAFs, was transferred informally to another, more generalist institution, namely the village council. This took place in a post-1989 context that would highlight the intelligence and innovative spirit of the Comorian experts in charge of rural development.

The Perspective of the Comorian Manager: Hedging Techniques as Reformation of the Commons

The following account is taken from a working paper by Saïd⁶ 25 years after these experiments began in 1985.

The themes of our agricultural trials were influenced by the aura of Malthusian theory and the pessimism it engendered. In the Research and Development Unit (*Cellule Recherche Développement – CRD*), we therefore adopted a productivist and environmentalist approach in the hope of stimulating the reproduction of family farms. The pre-extension program designed to disseminate the results of these trials, which we subsequently launched, received a mixed response.... Among the pre-extension techniques were soil fertilization through cattle tethering, a peasant innovation based on manure production, and a modern technique introduced in the Nyumakélé region by the Agricultural Production Research Unit (*Bureau d'Études pour la Production Agricole – BDPA*). This peasant technique consisted of cattle tethering and was subsequently improved, giving rise to what we as agricultural development agents generally knew as hedge-making techniques. These techniques consist in combining annual crops, trees, and cattle to create an environmentally, economically, and socially sustainable

⁵ Legislation formally adopted prior to 1989 and applicable to the Federal Islamic Republic of the Comoros.

⁶ At the time, Dean of the Law Faculty at the University of the Comoros in Moroni.

production system. (Sibelet and de Divonne 1990)

Hedge-making proved capable of contributing to the reproduction of family farms both organically and ecologically in that they enabled the continuous cultivation of plots (by removing the need for the previously indispensable fallow period) while ensuring the reproduction of soil fertility as well as a considerable increase in output and productivity (Sibelet 1995). These techniques were developed in particular on land formerly operated jointly by growers and livestock producers characterized by an acute resource and fertility reproduction problem. This contributed to nuancing both the tragedy of the commons theory and Malthusian theory. (Saïd 2013a, 21)

These innovations were translated into land tenure solutions whose parameters can be broadly summarized as follows. As the future of the large capitalist farms had been in jeopardy since 1975, the challenge was to stabilize the small-scale peasant agriculture that could feed the country and export tropical products. To do so, it was necessary to extend the agricultural transformation along with its stabilizing effects on tenure based on enclosures⁷ made of vegetable matter on hitherto open land managed as part of the village commons but used by every family. In addition, this technical assistance paved the way for a regular—albeit informal—village management forum held after Friday prayers at the mosque. This forum, which included farmers and elders, helped prevent problems and resolve tensions locally before they became conflicts. At these meetings, management rules were made or recalled for the good governance of the village's resources. This is reminiscent of David Bollier's earlier definition, which, echoing Elinor Ostrom, emphasizes that the commons is not sustainable without specific rules designed to manage its resources and which are formulated jointly by the community of beneficiaries.

The options for legislative texts abandoned in 1989 were thus translated into effective practices. These governance rules reflected the prevalence of a negotiated order at all levels of political and administrative life⁸ as well as the suitability of heritage as an alternative to the spread of absolute property. Thus, the knowledge and expertise of the Comorian development agents had two beneficial effects. On the one hand, they made it possible to save on the political costs of reform, and on the other ensured a lifestyle that, although modest and often bordering on poverty, is more dignified than that of many of Comorians' neighbors.⁹

To conclude this opening section, it should be emphasized that

What is remarkable [in this reformation experience] is . . . the capacity to go (or to propose to go) against procedures recognized by the international community of experts in agrarian reform in order to give rise to a particular dynamic and to put forward an interpretation justifying a reformation of practices in the direction of commons-based management. (Saïd 2013a, 42)

⁷ Contrary to the English experience in the sixteenth to eighteenth centuries, enclosures in the Comoros did not benefit the rich as well as powerful figures but enhanced village land management, which is more community-based than communal.

⁸ This is subject to the following comment by Saïd: "When it arises within the scope of spontaneous heritage management, access to land tenure is a long social process that cannot be achieved in one, two, or three years. It is motivated by objectives shared by all stakeholders (owners and their social group, users, farmers, etc.). Accordingly, programs designed to establish new stakeholders involved in projects (agriculture, tourism, or otherwise) should have longer lifespans than is customary in order for them to better guide this process." (2013, 35)

⁹ This includes the population of Madagascar, which in 1991 returned to poverty levels last seen in 1896.

Strongly Hybrid Tenure Regimes at the Local Level

Comorian development research led to the implementation of a management mode that can be described as “informal heritage” and that guides modes of governance for the commons. As Saïd comments,

This heritage management mode takes several forms, including the dismantling of property rights..., variants of sharecropping or leasing practices..., or the implementation of mechanisms designed to provide mediation and foster common land and resource management. (2013a, 32–33)

Moreover,

Through the new operating mode of hedge-making, the various stakeholders (female growers, male livestock producers, the unemployed) managed to develop rules based on grazing rights designed to access common land and associated resources for the benefit of all. (*Ibid.*, 33)

A wide variety of land tenure statuses can be handled in functionally differentiated commons. Subject to clarifications we will introduce below, Saïd (2009) points out that these comprise pastoral highlands, or former colonial reserves allocated to tree-growing, parts of occupied colonial estates specialized in harvesting perfume plants, the *manyahule*,¹⁰ or immovable matrilineal assets¹¹ used for food crops, fishing lagoons, and so on. In fact, agricultural, pastoral, fishing, or forestry activities continue to favor commons-based management methods.

It is beyond the scope of this discussion to do full justice to the diversity and historical depth of the Comorian experience of the commons or to systematize the marked differences that give autonomy to specific legal regimes in different localities. The management rules and rights governing land tenure in the commons are highly hybrid and contextualized by a colonial legacy that was never brought to completion. As Saïd explains,

The different modes of land appropriation introduced by the various manifestations of political power (pre-Islamic, sultanate-related, and colonial) overlapped and remain in existence today despite the post-colonial State’s ambition to monopolize Comorian land law by making both public ownership (*domaniality*) and private property sovereign regimes. (2009, 154)

However, this claim for a State monopoly on land tenure never materialized.

As a result, regulations can have recourse to local wordings expressed in Comorian Swahili of village practices known as “customary law” or arise from French colonial law, in particular for land registration and the issuance of land titles. However, these are dominated by the use of the Arabic script¹² and by concepts and procedures drawn from Islamic law, in this case the Shafi’i school.

¹⁰Saïd (forthcoming) explains that in earlier publications, like other researchers, he spelled the term *manyahuli* or *manyahouli* instead of *manyahule*. A discussion with a friend, Abdillahi Mbaé, led him to realize that it should in fact be spelled *manyahule* instead of *manyahuli*. We adopt this stance. However, we retain the *manyahouli* spelling in citations of Saïd’s writings.

¹¹The *manyahule* regime, or immovable property reserved for women, is inherited through the mother’s lineage. Not only is it a curiosity in an entirely Islamicized society, but it was also recently introduced into Comorian law (see below).

¹²According to Mahamoudou Saïd (private communication), the use of French has been on the increase of late.

To quote Saïd,

Analysis shows that in terms of the transfer of ownership, with the exception of *manyahouli* property, both traditional and modern rights give way to Islamic law, while in the case of donations, Islamic law applies exclusively. Although the application of the two other regimes is sometimes possible in other areas, the coexistence of rights poses no particular problems in practice. With regard to heritage, Comorians usually turn to Islamic law, except in the case of *manyahouli* property.... In practice, like modern justice, Islamic justice applies customary rules in cases of transfers of *manyahouli* property.... With regard to sales, the parties can submit contracts to the legal regime of their choice. In almost all cases, the preference is for Islamic law. . . . *The de facto* acquisition of land is recognized by the three concurrent legal systems, which all rely on the productive use of the land as the criterion for establishing transfer of ownership. In modern law, this transfer is made via acquisitive prescription authorized by legislation in force. . . . In Islamic and customary law, the transfer is made via vivification, the Islamic principle according to which land belongs to whoever puts it to productive use. (2013a, 54)

Saïd then concludes as follows:

There is no real conflict between the different legal regimes governing the transfer of property ownership. In theory, it is entirely possible for them to be made complementary. In fact, this possibility of complementarity between the three legal systems is borne out by practice in the field. While largely privileging Islamic law (except in cases such as the transfer of *manyahouli* property), participants also have recourse to the other regimes. (2013a, 54)

Comorian land tenure regimes thus pertain to extremely varied categories.

The *uswayezi*, *manyahule*, and *nabi* lands are characteristic of primo-commons regimes, that is, situations in which customarily inherited usage rights are discussed among all of the eligible members at the scale of community land as well as groups of varying compositions depending on the interests in question. First, *uswayezi* lands consist of the territories of the former sultanate made available to all residents—that is, the Sultan’s subjects—and now within the sphere of influence of the local district (*chef-lieu*) at the micro-regional level. Reflecting a topocentric representation of space (Le Roy 2011), it is the counterpart of a political relationship that paves the way for grazing and tree growing and then forestry rights in competition with the public ownership pretensions of the Comorian State’s technical services. For their part, *manyahule* lands are immovable property inherited through matrilineal lines and predicated on non-division and inalienability unless for exceptional reasons they require the approval of the rights holders. These lands are generally managed by maternal uncles and reinforce the autonomy of women, in particular in Grande Comore (Gast 1987), in cases where the land comprises dwellings fathers can have built for their daughters. In such cases, the husbands are in uxori-local residence. Although not party to the matrilineage, they often farm the land in question. However, their lack of managerial power occasionally leads to insufficient maintenance of structures or investment in the land. Finally, *nabi* property consists of lands already appropriated, escheated, or temporarily managed by the village authorities before being reallocated. At present, their management remains under the control of the village community. As the beneficiary of a collective decision, the recipient of *nabi* lands is sensitive to the views of the

community in his farming choices and management modes. Even though the individualization of tenure status differs little from *milk* land (see below), the benefits of the concession introduce reciprocal obligations of continuity in the use of the land imposed on the beneficiary himself.

The religious foundations known as *waqf* bear closer resemblance to the commons while introducing management modes that are in accordance with Islamic law. They are inalienable, attached to a mosque or a *madrassa*, and managed on the basis of leases. The rents they generate are used to ensure the maintenance of places of worship and cemeteries. However, these religious holdings, which are generally known in Islamic law as *habous*, can encompass less altruistic practices (Gast 1987), as a result of which their actual management mode can be much closer to that of the commons.

Lands reputed to be publicly owned but that have been occupied for thirty years or more without challenge and whose holder can consequently claim registration under special colonial decrees cannot be considered absolute ownership. Another such category is what is known as *milk* lands in Swahili (or *melk* in Maghrebi Arabic). Under Islamic law, these lands constitute exclusive but not absolute property because they can only be transferred under conditions assessed locally, which reduces the scope for discretionary alienation of the “most absolute nature” under article 54 of the above-mentioned 1804 Civil Code, which remains in force in the Comoros. Furthermore, it should be noted that lands appropriated in this way can potentially be converted into *manyahule*.¹³

Last, in principle and in accordance with official law, lands in the public domain as defined in the colonial legislation (in which these lands are considered indefeasible and inalienable) and lands in the private domain assigned to State services or local authorities (which should be registered and may be alienated) do not pertain to the commons, nor do they come within the scope of community ownership. Naturally, all lands registered in the name of private individuals fall under the regime of private property. However, there are few title deeds (1,412 on February 8, 2012, according to Saïd 2013a),¹⁴ and it is rare for these to be put on the market. Although the title is supposed to guarantee maximum land tenure security, this is not the case in practice¹⁵ as a large share of registered or publicly owned lands is managed communally in an entirely informal manner and in a context characterized by the State’s inability to guarantee the indefeasibility of property rights. Examples of common land management have been identified in Fumbani and Hajoho on Anjouan Island (Saïd, forthcoming), and the common management of land and housing continues to take place in Moroni, the capital of the Comoros (Saïd 2013b). These cases should be seen as characteristic of a neo-commons regime.

In conclusion, while ownership of land is expanding in the Comoros as in the rest of the world, associated as it is with the spread of capitalist relations, we should not overlook the opposite effect the management of the commons can have on the practice of property rights. Dubbed “imperfect commodification” (Le Roy 1995), the process describes situations of partial individualization via a reduction in the size of family communities or cooperatives and the use of leasing and selling arrangements with the issuance of notes establishing to various degrees the rights involved in a property along with, in particular, the assertion of

¹³ Apparently, land cannot leave the *ummah* (Islamic community) even at the local level of the village community, which reduces the scope for commodification.

¹⁴ Needless to say, this figure is very small relative to a total population for the Union of the Comoros of nearly one million.

¹⁵ Private communication with Saïd confirming our own observations in the 1990s.

exclusive rights and eviction of those holding no such rights. However, obligations toward the community remain, disseminated by a religious or ideological symbolism that excludes the absolutism associated with private property. Thus the influence of the commons remains significant. Stakeholders navigate between individualism and communitarianism and between inclusive rights and exclusive rights in an attempt to best manage new local land-related challenges with pragmatic and suitable strategies that should continue to be observed and analyzed.

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