

## **Assessing common property institutions in the South African countryside**

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Communal tenure in South Africa's rural areas was entrenched through colonial and apartheid policies which sought to manipulate indigenous systems of land tenure and local administration to fulfil the requirements of successive white governments. The resulting systems of communal land tenure were more often than not, experienced as disempowering, unaccountable and authoritarian systems unable (and unintended) to support needs for tenure security and local development (McIntosh et al, 1996). Despite these problems, communal land tenure continued to have support from rural dwellers. This support seems based on the desire for traditional values (understood differently by different interest groups) and on the livelihood support for very poor households, provided by access to land (ibid.). Poor rural households would be unable to access or retain access to freehold land even with the assistance of land acquisition grants (Vaughan, 1997). In view of this South Africa's land reform programme (as set out in the Department of Land Affairs White Paper of 1997) supports communal land tenure as one of the tenure forms through which groups of people can access and hold land.

In an attempt to address the shortcomings of apartheid communal land tenure regimes, new communal tenure regimes were developed to address the need for legal protection for tenure rights (for both men and women), democratic and accountable procedures of land administration and local institutions to promote and manage local development. Land reform policy proposed a number of purposes for these new communal tenure institutions (also referred to as "legal entities").

- Take transfer of land
- Secure tenure of members of the legal entity
- Achieve sustainable resource management
- Provide institutions for effective and democratic management
- Management of development

· Achievement of equity in land holding and administration  
(Department of Land Affairs, 1997).

The primary practical reason for the establishment of legal entities is to take transfer of the land on behalf of an identified group (the community). The next major concern is to establish tenure security for group members through defining membership and rights in a founding document, the constitution (Cousins, 2000:2). This constitution also sets out other functions and administrative tasks of the legal entity.

The legal entity assessment project emerged out of concern about the viability of these new common property institutions, “legal entities”(for example Common Property Associations), set up to hold and manage new communal land tenure settlements established through land reform. Considering these common property institutions, we were asking;

what functions are they able to perform effectively? and why are they able, or not able, to perform these functions?

LEAP is committed to a participatory approach to addressing these questions, driven by interactive learning between LEAP participants and community participants. To promote this, LEAP is working at three levels;

With affected communities trying to deepen our understanding of common property institutions through participatory research and workshops with communities to report back on this process, gather responses and other input to work done so far, and facilitate sharing of experiences and learning between different communities.

With the KwaZulu Natal Provincial Department of Land Affairs, development practitioners and service providers to develop and debate terms of reference for setting up legal entities and the necessary support for this process.

At a theoretical level to develop a conceptual frame for understanding and assessing common property institutions and for guiding future LEAP work. In the analysis of case studies already done by LEAP we found ourselves at one level unsure of how to measure essential functions like tenure security and sustainable resource management. At another level we were concerned about the assumptions we were making in our tentative attempts to measure these functions. We were also concerned that legal entities have only been very recently established and that we should be able to identify steps towards the achievement of sustainable resource management and tenure security in a democratic and accountable manner. We felt that legal entities could not be expected to achieve all this so

soon, but that they should be on the path towards these achievements.

This paper outlines our conceptual framework. Our central argument in this conceptual framework is that tenure security is a necessary condition, though not sufficient, for resource management, equity and development, and that the establishment of legal entities should focus on tenure security and address resource management once processes of tenure security have begun to take hold. Ways of assessing sustainable resource management highlight not only the processes through which management takes place, but also the way in which the specific nature of the resource in question shapes sustainable resource use, the technology available for regulating use and the scale at which management takes place. These technical requirements for sustainable resource management can only be achieved once equitable and accessible processes for realising rights of access and management have been established.

In this paper I argue that tenure security is constructed through social processes. While it is possible (and sometimes useful) to consider tenure in terms of legal rights and obligations, my argument in this paper is that the institutions and processes through which property rights are accessed and managed are an essential focus to assess the security of rights and their effective management. Institutions are regularised ways of interacting that have particular social, economic and political implications. These regular processes of interaction privilege specific assets (for example money, academic qualifications or perhaps lineage membership) and so enable some people to participate while excluding others. As such they reflect and reproduce dominant (and unequal) distributions of power in society. At the same time, practices of interaction are shaped rather than determined by institutions, and are evidence of human agency in the contestation and negotiation of regularised ways of interacting. While understanding institutions is essential for assessing tenure security, highlighting practices reveals the way in which these institutions are being shaped and contested. Focussing on practices reveals the way in which institutions are structured and the inequalities reflected and reproduced through their structure.

This consideration highlights the central role of institutions. In the last section of the paper I consider the emphasis on institutional development to improve tenure security. I argue that this approach conceals the power relations intrinsic to institutions. I identify three major tensions which institutions for common property management must grapple with - the community - individual tension, the tension between requiring certainty and flexibility in rules and authority, and the tension between local authority and external intervention. I conclude that while institutions play a key role in tenure security, institutional development cannot be considered as a technical solution to fundamental problems of power and inequality. Struggles for tenure security are ongoing and rooted in wider social processes and fundamental inequalities.

Attempts to enhance tenure security must be driven by the recognition that these problems are about power and inequality, not simply technical characteristics of institutional arrangements.

This paper outlines the conceptual framework underpinning these assertions and goes on to identify implications of this conceptual framework for the establishment of common property institutions in South Africa's rural areas.

### **Assessing tenure security**

Land tenure, or ways of holding land, are diverse, shaped through social norms, values and customs and dynamic in response to social, political and economic changes. A framework for assessing levels of tenure security must enable the recognition of diverse tenure forms, highlight the crucial social foundation of tenure and allow for the ranking of various tenure forms in terms of their relative security. It is equally important that land rights are considered in relation to the political, economic and social context in which they are situated. The interplay between national and local processes and events is crucial for understanding the nature of various tenure forms. What is required is a framework for analysing tenure security that can appreciate the dynamic and socially embedded nature of tenure. At the same time this framework must enable field research to clearly assess tenure security and highlight areas for policy intervention to improve levels of tenure security.

Place et al (1994) identify three components to be considered in definitions of tenure security: Breadth of rights held, duration of rights held and assurance of these rights for a specific time period. The first component concerns the nature of the right held. Schlager and Ostrom (1992) identify rights to natural resources in terms of four kinds of property rights. Rights of access and withdrawal (e.g. fish from waters, crops from land), rights to decide the manner in which access and withdrawal should take place (that is management rights), rights to decide who may access the resource (rights of exclusion) and the right to transfer one or all of these rights to another person. Tenure rights to a particular parcel of land might involve only access and withdrawal rights as an 'authorised user' of a field (Schlager and Ostrom, 1992). They might involve access, withdrawal and the management of a resource, for example as those with access and withdrawal rights formally or informally decide on the manner in which they can utilise the resource. Tenure rights might extend to include the right of exclusion - to decide who is eligible to access the resource and they might extend to the right of transfer of one or all of the rights above to another person.

Place et al (1994) show that these rights have been used as the basis for indicators of tenure security in numerous case studies. However depending on the perceived purpose of tenure

security, different rights are emphasised as being more important, implying greater tenure security, while other rights are overlooked. For example in several of the studies surveyed transfer rights were emphasised and management rights neglected (Bruce and Migot - Adholla, 1994). This was most likely an outcome of the recognition that property rights are rights to a stream of benefits resulting from the object rather than the object itself. The right to transfer the property right leads to the holder benefiting from the potential productive value of the resource, even if they are not using the resource productively themselves. This emphasis on economic benefits to be had from land access could perhaps account for distinctions made between complete transfer rights (rights to sell land) and preferential transfer rights and limited transfer rights. Preferential transfer rights are held when gifts or bequests of property are allowed, usually subject to the wishes of family or kin. Limited transfer rights denote rights of temporary transfer, for example lending or lease. In this schema greater value is assumed for land parcels over which complete transfer rights are held. This economic and individual focus might account for the relative neglect of management rights (particularly important for common property resources in which several individuals have rights) in the case studies (ibid.,).

Applying this to communal tenure settlements in South Africa suggests that while different levels of transfer rights entails an important distinction, the emphasis on individual rights conceals the specific nature of the social relations through which all forms of tenure are constructed. While there are individual and exclusive property rights in communal tenure systems, there are also rights to resources that cannot include rights for an individual to exclude others or to transfer the resource. Furthermore, the resources are themselves socially constructed (Bromley 1995) - existing as "resources" only in a particular time and place and for a particular social actor - rights attached to these resources can only be activated by those holding a particular position in the social or kinship order. A hypothetical example of this might be that cow dung becomes a resource only in times of increased fuel demand, for particular culturally, economically and politically constructed individuals. As cow dung is created through nature, it might be seen to belong to no individual - thereby having no possible individual rights of exclusion or transfer associated with it. Thus the right itself is dependent on the nature of the resource and the particular social meanings and relations at play. Furthermore, the right to collect cow dung might be restricted to married women (or those working on behalf of them), in view of their responsibility for household maintenance. Cow dung collection might be limited to community members or the nature of the resource and the social meanings and relations at play might make the right of exclusion impossible, even at the level of the community.

The second component to definitions of tenure security identified by Place et al (1994) is the duration or length of time for which the land right is held. They argue that land must be held long enough to recoup the full income stream generated by investments in land and as a result

that the duration necessary for tenure security is dependant on land use. This also privileges the productive value of land, concealing other values of land, for example the political and social value of land. Bruce and Migot- Adholla (1994:8) argue that where land access represents both old age pension and social insurance, “ ...the right of continued and unchallenged use of agricultural land is perhaps the most critical measure of tenure security”. This notion of long term duration is important, but might not apply equally to all parcels of land and all kinds of rights to land - some parcels are suitable only for seasonal use while other rights are exercised only at a particular time in an individual’s or household’s life cycle. What this suggests is that the full bundle of rights exercised by an individual over multiple parcels of land should be considered in evaluating tenure security and that duration be known and guaranteed (Place et al, 1994:20).

The third component to definitions of tenure security is the assurance that rights and duration are held with certainty (*ibid.*). This highlights the fundamentally social nature of property rights. Property rights describe relationships between people with respect to a certain object, rather than the relationship between a person and an object (Meinzen-dick et al, 1997:1303). It is an inherently social concept that depends on others upholding the right. Ultimately the existence of property rights depends on an effective social instrument to ensure the protection of the right. This widespread recognition of the need for a legitimate authority to enforce respect for rights and punish offenders highlights the need for institutional capacity at both state and local community levels. At the same time rights are normative - socially constructed and underpinned by dominant ideologies. The potential for enforcing outsiders’ notions of equity and particularly gender equity is thus tightly constrained by the persistence of social norms legitimising and reproducing social inequality.

One of the benefits of approaching tenure security in terms of bundles of rights to streams of benefits, is that degrees of control and contestation over essential livelihood resources becomes evident, highlighting inequalities in tenure security. Meinzen-dick et al (1997) point out that identifying levels of rights over land parcels is particularly useful for highlighting the relative distribution of management and use rights - women are frequently found to have use rights rather than management, exclusion or transfer rights over land parcels. Meinzen-dick et al (1997:1305) call for analysis not only of degrees of inequality in land rights, but also of concepts of equity (fairness) accepted with regard to various resources within particular social settings. They point out that concepts of equity might be based on principles of reward distribution in proportion to investment or might be based on a need principle. Proportional equity might suggest that those who invest more labour and other resources should get more land, while need based equity suggests that more resources should go to the disadvantaged to help them reach the level of more advantaged others. Concepts of fairness accepted with regard to particular

resources in particular social settings might indirectly preclude certain sectors of the community from accessing resources and legitimise this exclusion as 'fair' (ibid.,1306). For example in Nepal women are prevented from contributing their labour to the maintenance of irrigation systems and as a result are prevented from utilising the resource unless they can find the cash to compensate for their absent labour contribution (ibid.,). Although there is no 'de jure' exclusion of women from the property rights and the method of allocation could be considered to be 'equitable' in terms of a 'proportional rewards' concept of equity. In this manner, while there might be 'de jure' equal rights to land for women, 'de facto' access to land rights might indicate significant inequality and be legitimised by dominant local concepts of equity. Women are also denied de facto access to resource rights as they frequently lack inputs essential to make benefit from the resource. For example allocation of grazing rights to those who hold cattle excludes most women (who have unequal access to income and cattle) from accessing the stream of benefits produced by that property, although there is no 'de jure' exclusion of women from the resource rights.

### **Evaluating and analysing tenure security in new communal tenure systems**

The purpose of this document is to provide the theoretical foundations necessary to evaluate the potential of legal entities, established through land reform to hold and manage communal land, to provide tenure security and to identify factors which could enhance this potential to provide tenure security. The above discussion calls for the inclusion of three central aspects in defining tenure security; nature of rights held (or breadth of rights), duration of rights held and assurance that these rights and their duration can be and will be enforced and protected. This provides for comparisons of the relative security of particular tenure forms but does not itself indicate the point at which 'tenure security' can be said to be achieved as an absolute value.

This calls into question more fundamental ideological issues - is it necessary that an individual (or household) receive all possible economic benefits which can be derived from a property right in a capitalist economy? Or are other benefits to be had from property rights (for example of community, lineage identity or spirituality) more important than rights to individual economic benefits? These questions are difficult to consider within a body of literature focussed on the management of physical resources for maintaining productive value. They are also very difficult to consider in view of the danger of assuming harmonious or even definable communities and in view of the value placed on individual freedom from constraints, rather than individual freedom to achieve adequate human needs (Sen 1989).

Another problem with this schema is that it confines social and political analysis to the judgement of "assurance", emphasising the legal nature of "rights" to the detriment of their

social foundations. Property rights describe relationships between people with respect to a certain object, rather than relationships between a person and the object (Meinzen-dick et al 1997, 1303).

In the following matrix we have identified the nature of rights which we feel are essential for the existence of tenure security. In this matrix we have attempted to promote the visibility of the individual and the nature of the rights held to allow for recognition of inequality within households and communities. At the same time this matrix allows for the recognition of rights accorded only to households, or to the community as a whole, and re-iterates the social embeddedness of property rights. Rights at each level are subject to the institutions through which access is achieved, highlighting the social norms, concepts of equity, culture, kinship relations and wider social and political relations that regulate and construct the realisation of property rights.



	<b>Land holding community</b>	<b>Land holding household</b>	<b>individual - every individual is a member of the community</b>
<b>Access and use rights</b>	Access to defined land by a self-defined (??) group and use of its natural resources in accordance with agreements made by the social compact. Definitions of community are centrally important here.	Agreed on specified access and use of a specified share of land and resources between households within the land holding community	Rights for all members to have independent access and use of a specified share of land resources, either within or outside a household.
<b>Management rights</b>	Right to decide and enforce manner of access and use - present and future. Decisions about “how”.	Right to decide on the use and access of your household share of land resources, subject to the rules of the collective that your household has helped to shape.	Right of each individual member within and outside the household to shape decision making on the manner of specific access and use of individual, household and community land and resources.
<b>Exclusion rights</b>	Right to define group and maintain and enforce definition and procedures for defining who has access and use in the present and future.	The right to exclude other households from residential and arable land. Noting that the resources and people to whom this can apply are fuzzy - this might not apply to all resources, for example thatching grass, and it might not apply to family . It would also be subject to social norms.	Assuming that individuals will have independent access and use of a specified share of land and resources, that person has the right to exclude others from the land or resources. Noting that this too is fuzzy around which resources this can apply to. Assuming every individual is a member of the community, he or she has a right to be a party to collective decisions about exclusion.
<b>Transfer rights</b>	Right to sell, lease or mortgage land.	Right to transfer household resources, on which you have rights of exclusion, through inheritance, subject to household approval, and sale, lease and lending with community approval.	Right to transfer individual resources over which you have rights of exclusion, through inheritance, lending, leasing or sale, subject to household approval.
	<b>subject to constitution and legal framework</b>	<b>subject to community constitution</b>	<b>subject to household approval</b>

Also evident in the content of this matrix is the difficulty with applying legal definitions of “rights” to rural communal tenure settlements. The most readily apparent difficulty is that of different potential rights attached to particular resources. Both the resources and the rights attached to these resources are socially constructed - what is a resource for a pregnant woman in a particular community, is not a resource for a different person. The rights which one can have over a particular resource are constructed through social relations at a particular time and place.

Reflecting on the contents of this matrix suggest five considerations in assessing tenure security.

1. Tenure security, which is meaningful for subsistence rural livelihoods in the South African countryside, involves a bundle of property rights. This bundle of property rights should be considered together, as some rights are limited and activated only at certain times or during certain life events, while other rights are more substantial in breadth and duration.
2. Approaches to assessing tenure security need to identify rights held by individuals and not just households. The household as a unit of measurement conceals significant gender, status and age based inequality in access to property rights.
3. The social location of the individual and the household is a key consideration, highlighting the institutions in which they are embedded and which construct and constrain the nature of the property rights which can be held by the individual or household or community. Clarifying the relationship between individuals, households and ‘the community’ requires more substantial work than has been possible in this framework.
4. The content of the matrix given specifies rights of exclusion as essential for the tenure security of communities, households and individuals. While exclusion rights of households are recognised as ‘fuzzy’, shifting in relation to the resources in question and definitions of household members, it is assumed that exclusion rights of the community are not subject to the same ‘fuzziness’. A stated condition of this is that the community is clearly defined. This is an essential, though extremely difficult requirement of both tenure security and common property resource management (see Ostrom 1990, 1993, 1987; Pienaar 1999).
5. Another assumption evident in this matrix is that all individuals can participate in shaping the collective rules that construct and constrain their realisation of property rights.
6. The nature of formal and informal institutions through which claims to property rights are asserted, vindicated and realised, indicates what property rights and interests are upheld and what rights and interests are marginalised.

### **Socially embedded rights**

Mc Cay and Jentoft (1998) argue that compelling narratives of the self interested actor and the self governing harmonious community have encouraged a reliance on “thin” approaches to understanding property rights and resource use. These approaches, both the rational man and

communitarian, try to simplify social context to an abstract background and focus narrowly on property rights. They argue that a “thick” approach to analysing property rights, which can recognise the complex human environment interaction, is essential. They call for more ethnographic approaches to research that recognise the embeddedness of property rights within discrete and changing historical moments, social and political relations and environmental conditions (McCay and Jentoft 1998, 24). This view is re-iterated in other approaches to analysing tenure and resource use (Peters 1987, Leach et al 1999). Assessing tenure security should incorporate an analysis of the institutions and social relations through which tenure claims are made and enforced. Leach et al (1999) draw on Entitlement Theory to highlight the institutions and practices through which people realise rights, or through which they are prevented from realising rights.

Amartya Sen’s (1981) theory of Entitlement<sup>1</sup> was developed as a means for explaining and forecasting vulnerability to famine. He argued that famines result not from the absence of food, so much as from the collapse of entitlement relationships through which food was accessed. For example in a market economy, famine among specific sectors of the population might result when the price of food rises above the income of these population groups, or when they lose their means of income (the goods they are selling are no longer in demand). This analysis focuses not only on the assets people have to establish an entitlement relationship (for example the assets of land, labour or cattle), but also the nature of the relationships they must establish to translate these assets into food. An example of an entitlement relationship could be a direct entitlement relationships - where a person with assets of land, labour and other essential inputs are able to enter a relationship with their assets to translate land to food. Having land does not necessarily mean that a person has food - the person must also have the labour and other essential inputs for the production of food from land. Furthermore, the social, political and economic context in which this productive activity is taking place further specifies the nature of the relationship that may take place. One might identify local social relations and customs, for example prohibitions on the type of labour that a person might exercise, other claims on a person’s labour, other claims on agricultural produce or regulations governing the way in which land is used. Broader social and political relationships are also important - agricultural support services which might exist, disaster relief in times of weather abnormalities, assurance of your rights to your produce and outside claims to your produce will all affect the degree to which a person with the asset of land is vulnerable to famine. Other entitlement relationships, for example trade based entitlement or transfer based entitlement relationships would direct our inquiry to other social relations and other institutions.

Leach et al (1999) draw on entitlement theory to understand property rights and resource use,

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<sup>1</sup>In this case the term “entitlement” is used as a verb, highlighting the process through which food is accessed, or rights realised, rather than in the normative sense as a deserved right.

arguing that one's practical realisation of a property right (a right to benefit from a resource) is dependant on a plethora of social relations and institutions which specify what kinds of assets are necessary to access rights and the nature of the relationships which must be established to translate these assets into practically realised rights. For example one must be accepted by neighbours as a member of the community to access rights of use over common grazing lands, one must also have cattle and labour, and the right of use might only be available to a particular gender identity. The social, legal and political relations and institutions would further regulate what kinds of relationships could be established to translate these assets into use of grazing fields. For example, one might have to inherit rights, or pay for use or one might be compelled to apply to some formal or informal body to be allocated rights. Social relations would further specify the exact nature of the relationships - for example the conditions under which inheritance could take place, who might be eligible to inherit the right, whether or not the payment for use is fixed, or whether that amount is based on demand and supply.

Entitlement theory directs attention to the practices and institutions through which rights are realised and in so doing, highlights the rules governing and specifying potential entitlement relationships. While the above examples focus on a consideration of local social relations and institutions, a full analysis of the security of a specified right would need to consider broader social processes and institutions which regulate and define access to assets and the nature of potential entitlement relationships (for example national legislation or bureaucratic processes which result in Identity Documents being an asset for land access). Critiques of Sen's work (see Gore 1993) have emphasised the need to include actual social practice in the analysis of entitlement relationships - pointing to the everyday activities through which social, legal and political institutions are constructed. This has the added benefit of recognising contested claims to resources and highlighting human agency in the construction and reconstruction of social structure.

### **Indicators for assessing tenure security**

In the preceding discussion I have argued that indicators for assessing tenure security must be based on local concepts of rights and resources, that they must reveal the social processes and institutions through which rights are constructed and realised, and that they must be useful for research purposes and have the potential to highlight areas for policy intervention. I argue that entitlement theory provides a useful framework through which to consider rights. Despite the limitations of legalistic definitions of rights, it is also important to recognise that property rights might comprise different bundles of rights, applicable for different social actors - individuals, households or communities. One way in which to translate these criteria into operational research indicators would be to identify local resources and question who can use these resources in what

ways - that is, the nature of rights which a particular social actor could hold over the resource in question. To illuminate the nature of the institutions and processes through which these rights are asserted, justified and realised, one would then question the basis on which the right is justified (with reference to what authority, process or criteria) and what is necessary to claim the right (see Lund 1999). This schema would orient research towards the assets necessary to assert a specific right, the social relations and institutions through which those required assets are constructed (or contested and reconstructed), the manner in which the right can be translated into a realisable benefit and the social relations and institutions which regulate and construct these relations.

Drawing on Entitlement Theory as a framework to analyse and assess tenure security also follows recent attempts to improve tenure security. These attempts have focused on the interaction between local concepts and procedures for identifying rights and institutions and procedures for enforcing these, and formal state registered rights. These emerging models seek to clarify and regulate the relationship between state (civil) and customary power, thereby reducing uncertainty and ambiguity in land rights (Cousins 1999, 7). Cousins suggests that local, procedurally based approaches to land rights and resource management are more flexible and cheaper to administrate than rights based attempts to legally register land rights. However, local procedures are both an outcome of power struggles as well as a significant resource which powerful elites in communal tenure systems are likely to capture. Cousins suggests a combination of state registration and community agreement over procedures for delineating rights, might be called for. This is echoed by Berry and Okoth-Ogendon who argue that security of tenure is attained through processes of negotiation , adjudication and political manoeuvring and

... the critical factor is the ability of people to engage in ‘tenure building’, by which he means ‘the expression and continuous vindication of particular allocations of power in specific reproduction contexts’ (Okoth -Ogendon cited in Cousins 1999: 15).

The manner in which institutions reflect and reproduce social power relations should also bring those marginalised by institutional arrangements into visibility.

### **Indicators for assessing sustainable resource management in communal tenure settlements**

Ostrom (1987, 1990, 1992) argues that promoting cooperative rather than individual action is the central problem in achieving management of common property resources in a way which ensures their continued value for years to come. A common property resource is a resource over which a number of users hold rights of access and withdrawal. This multiplicity of users demands cooperative action if all users are to continue to benefit from the resource. Oakerson (1992) argues that the specific nature of the resource has important implications for how that resource (or the stream of benefits from the resource) can be managed and the potential for cooperative rather than individual action. He identifies three key concepts for understanding the nature of the resource.

“Jointness” refers to the potential of the resource to support multiple joint users, in a situation where one person's use does not subtract from another (Oakerson, 1992:43). In this sense the commons usually display partial jointness, in that many users can derive benefits jointly, for example many users grazing cattle or collecting water at the same time, but also partial subtractability. That is, that a resource unit extracted (e.g. a gallon of water or an animal grazing), is no longer available for use by anyone else. Ostrom (1992:296) points out that a distinction between the resource system (the field or river) and the resource unit (a gallon of water or an animal grazing) enables us to consider the subtractability of the resource units but the jointness of the resource system. This highlights the physical limits of the resource which specifies the constraints on resource use which are necessary for the continued existence of the resource. This provides critical information for devising and evaluating rules to maintain jointly beneficial resource use.

“Exclusion”: Oakerson (1992:44) argues that the nature of the resource and the technology available specifies whether or not the resource can be regulated. Rather than stipulating whether or not users must have rights to exclude others, he questions whether the resource itself is amenable to this sort of regulation - the excludability of the resource itself.

The last concept he draws on in the analysis of the resource is that of ‘divisibility’ - whether or not the common resource is divisible into parcels, and the scope of these parcels. For example, is the resource divisible to individual right holders, or only to a grouping of people, or only to a large geographical area? He argues that the analysis of the commons must specify boundary conditions - if the boundaries chosen for the purposes of analysis are too small, then relevant aspects of the problem of managing the resource will be left out, if it is too large then multiple management problems may be compounded. For analysis of resource management it is essential to specify boundaries which are appropriate for the resource under consideration.

The physical nature of the resource affects the decision making arrangements set up to manage these resources, the behaviour of the resource users and the final outcome of the management of the resource. Oakerson (1992:46) emphasises that his reference to decision making arrangements concerns a very broad set of arrangements and is not confined to any particular organisation. He distinguishes decision making arrangements, depending on the level of decisions they involve. Operational rules serve to regulate individual user behaviour. These are shaped by the nature of the resources they apply to, and are nested in higher level decision making arrangements - rules which establish the conditions under which decisions of collective choice are made - for example rules on the number of people required to change a rule, dispute procedure in the case of objections to rules, capacity of the group to enforce collective decisions and potential veto positions accepted in the

process of rule making (ibid.,47). These collective choice rules are nested in external arrangements which might vary in their impact from broad constitutional perimeters (for example gender equity specifications) to bureaucratic regulation and enforcement of resource use which would direct attention to the practices involved in this regulation (ibid., 48).

Oakerson's work identifies the nature of resources as an essential consideration in assessing resource management arrangements. What is considered a resource requiring cooperative management is dependant on the socially, politically and economically constructed actor, and the context of resource use. Recognizing this highlights the limitations of general frameworks for assessing resource management, which by its very nature requires in depth assessments of each particular case.

Furthermore, as Oakerson (1992) points out, the operational rules of resource use are nested in rules which establish the conditions under which decisions of collective choice are made. These collective choice rules establish procedures through which rights of management are realised and contested. Tenure security concerns the realisation of a bundle of property rights, with management rights stipulated as intrinsic to tenure security in communal tenure regimes. Thus, focusing on the processes for tenure security addresses the collective choice rules in which operational rules for resource use are embedded. For this reason we feel tenure security should be the primary objective at the establishment of legal entities. Resource management should be addressed once collective choice rules have been established. This is also supported by Feeny (1992:280) who has commented that the challenge to develop indicators of common property institution performance is quite formidable. Focussing on process variables (for example the development of processes for managing resources) is easier than having to establish causal connection between for example, active development of processes for managing and more diverse household livelihood strategies.

By focusing on tenure security we have sidestepped a major area of debate and concern - the purposes or objectives against which resource management is assessed - for example sustainable livelihoods or local economic development. In a LEAP workshop on resource management this debate was highlighted and broad categories of purposes were identified

- sustainable livelihoods
- local economic development
- wider development processes

each of which would suggest different players and so different interests and different resources.

In the South African land reform context, the purposes of common property resource management are contradictory and subject to wider social and political struggles. An emphasis on local economic development driven by emerging political elites in rural areas is currently evident

in the policy environment. While this approach does not deny the importance of addressing basic human needs, conditions likely to favour a dual approach to poverty alleviation and economic development are not present. The state is faced with constrained financial resources and a broader policy environment that discourages state intervention and assumes poverty alleviation will be addressed through free market processes (MacDonald, 1998). Furthermore elites in rural areas have the capacity to benefit from processes like land reform, which tend to exclude those less able to interact with bureaucratic processes and articulate their demand for basic human needs (Ibid.).

The policy environment also does not provide the much needed support for cooperative activity. The key to avoiding the 'tragedy of the commons' lies in

... developing conditions that are conducive to the emergence of coordinated, rather than independent actions by individual users of a common property resource (Ostrom, 1992:297).

Cooperative behaviour is essential for common property management. Its emergence depends on the benefits of cooperative behaviour being greater than the benefits of pursuing individual activity. Dominant approaches to local economic development promote and support individual gain while the benefits of cooperative activity are reduced through inadequate institutional support, which increases the cost of enforcing cooperative behaviour. In addition, dominant approaches to economic development devalue subsistence oriented resource uses, favouring commercial resource uses that are realised through individual, not cooperative activity. This tension between values of individual benefit and values of wider social benefit reverberates in the tension between individual and cooperative behaviour.

### **Indicators for assessing institutional capacity**

Land tenure rights are realised, mediated and negotiated through institutionalised social practices. Formal and informal institutions facilitating collective decision making are thus a key aspect to understanding and assessing security of tenure. In this section I aim to develop a framework for highlighting factors, which can enhance or inhibit coordinated as opposed to individual actions. Elinor Ostrom (1987, 1990, 1992, 1993) has written extensively on the subject of institutional development, and has developed a comprehensive framework for the analysis of institutions for collective decision making. Ostrom (1987) defines institutional arrangements as "...the rules in use by a community to determine who has access to common pool resources, what units authorised participants can consume and at what times, and who will monitor and enforce these rules" (Ostrom 1987 cited in Murombedzi, 1990:4). Her framework begins with a consideration of the factors affecting an individual's choice of supporting or rejecting proposed rules for coordinated action, as opposed to the status quo (for example individual action). From this



perspective of individual choice and assessments of costs and benefit, she moves outwards to consider the factors affecting the assessment of costs and benefits incurred by the proposed rule. These proposed changes to rules for managing resources (which previously might have been based on individual rather than collective action) are nested within wider contexts of rules - collective choice rules specifying how decisions are taken within the institution, which are in turn nested within constitutional rule contexts specifying for example, legitimate processes for decision making. Individual choices to support or reject a proposed rule are thus filtered through collective choice rules before rules are ultimately adopted or rejected.

### **Variables influencing co-ordinated action**

Ostrom (1990:194) identifies the variables affecting decisions to support or not to support coordinated action:

- internal norms regarding the value of certain types of behaviour, for example cooperative behaviour (shaped by the society in which the individual is situated),
- the degree to which the individual concerned will discount (i.e. forego) future benefits in favour of immediate benefits (shaped in part by the availability of other opportunities for survival and their long term commitment to a specified common property),
- The expected benefits (or harm) of proposed cooperative action which is dependant on the availability of information concerning the current state of the common pool resource and the implications of the status quo and proposed use arrangement.
- The expected costs of changing the status quo rules and the expected costs in the monitoring and enforcement of proposed coordinated action.

In order to assess the benefits of proposed rule changes one must be able to assess the flow, variability, market value and quality of resource units under current and proposed rules of use, as well as potential levels of conflict under proposed rules (Ostrom, 1990:196). If one had access to perfect information, means of measuring costs and benefits, if one could be assumed to act in a straightforward rather than strategic manner and if discrete and specified institutions governed resource management, this framework might be sufficient to predict the likelihood of coordinated activities. However in reality there are a host of situational variables that affect the information available, affect the weight given to potential costs and benefits and the incentives for strategic rather than straightforward behaviour.

These situational variables highlight assessments of the current condition of the common pool resource, and the type of information generated and made available by the current institutional arrangement (Ostrom, 1990: 198). They also highlight the importance of conflict management for

promoting cooperative decision making.

Ostrom (ibid.,) argues that if the expected costs of changing rules are higher than the anticipated benefits, the proposed changes will be rejected. If however the benefits are more substantial than the costs, then further assessments will be made of the costs of monitoring and enforcing the proposed rules. Situational variables which are likely to affect the assessment of the costs of changing rules are as follows.

- The number of decision makers (the more decision makers the greater the costs).
- Perceived heterogeneity of interests.
- Rules governing rule changes.
- Skills of leaders.
- The proposed rule.
- Past experiences of collective action. If past experiences suggest that not all individuals will accept rule changes or that extensive conflict will result from rule changes, then the costs of the change are likely to outweigh the benefits of the change. Conversely if there are norms favouring coordinated behaviour the costs of rule changes can be substantially reduced.
- Autonomy to change rules – generally, the more autonomy, the less costly the change (Ostrom, 1990:199).

These variables highlight the potential conflict incurred by changes and the institutional context, both local and external in which the decision is being made. Implications of this for supporting institutions during rule changes suggest that incremental changes and regular familiar procedures for rule changes are likely to reduce the costs of change (ibid., 201).

A major criticism of this focus on the costs and benefits of cooperative action in a particular institutional framework is that it assumes institutions as a solution to the complexity and uncertainties of resource access and management. The assumption is that institutions, being regularised social practices in pursuit of a particular goal, provide familiar processes and rules for activity and thereby reduce the costs of cooperative activity. This leads the development practitioner to focus on promoting institutional arrangements to support cooperative rather than individual activity. While institutional arrangements do reflect and construct particular distributions of power and forms of activity in society, institutions engaged in the management of common property rights are diverse and sometimes contradictory in their activity. Furthermore, institutions do not determine human action.

Ostrom (1990) constructs a very rational approach to human action, assuming that institutional arrangements (at diverse but relatively discrete levels) order costs and benefits of particular choices, and that individuals thus favour some choices over others. Even if there could be perfect information available for rational decision making, the ideological position of individuals

influence what kinds of information are highlighted and which decisions are favoured (Grindle and Thomas, 1991). Similarly the past experiences of decision makers will influence which decisions they support, and the context of the decision itself has important implications for the decision made. For example, a decision which must be made in the context of crisis is likely to involve a different grouping of decision makers and institutions, and might entail more radical changes than decisions made in the context of social and political stability (Grindle and Thomas, 1991).

In part, this emphasis on institutional development as a solution for the management of common property rights, reflects a dominant development paradigm which assumes that project interventions can address fundamental social and political inequalities.

This emphasis on institutional arrangements also conceals the impact of informal processes of resource access and management. Informal processes and social relations might supplant the role of formal institutions in resource access and management, and are sure to influence who is involved in formal decision making processes and what decisions are favoured. Similarly, Mehta et al (1999) argue that the increasing complexity of institutional arrangements, through processes of globalisation, means that a plethora of formal and informal institutions at many different levels of operation, have important effects on the local environment and local decision making processes.

Mehta et al (1999) argue that while the focus on institutional arrangements constructs institutions as a means to reduce complexity and promote stability in social relations, this is not possible in the current environment. They argue that 'balance' is not the natural state of any human environment, but that in the interaction of myriad forces disequilibrium and chaos are inevitably more constant states than balance. This disequilibrium is the outcome of uncertainty that characterizes our environment. Uncertainty is indicated when risks cannot be calculated and where outcomes or patterns cannot be predicted. Processes of globalization – the development of political and economic systems (most obviously in production, technology and international agreements) which have enabled rapid dissemination of products, ideas and influence, exacerbate this uncertainty. At the same time uncertainty promotes and rewards opportunistic behaviour - to recognise and exploit opportunities, which is an essential aspect of securing one's livelihood. Mehta et al (1999) argue that dominant institutional theory conceives of institutions as striving to reduce uncertainty - providing regularised and familiar relationships through which rights and resources are accessed. This conception casts opportunistic behaviour as a liability rather than an essential activity in response to uncertainty. Rational approaches to understanding institutional arrangements for cooperative action deny the social politics and contestation which are at the heart of resource access and management. Institutions are of central importance, for the power

distributions they reflect and reproduce and the decisions they shape, rather than for their role in representing objective costs and benefits and regularising behaviour.

Ostrom's work is valuable as one aspect of understanding cooperative action. Indeed, tensions within her work stem from her awareness of the complexities and social politics of cooperative action. These tensions are mirrored in other work and in the experiences of LEAP workshop participants. The first of these is the tension between striving for clear concise rules while needing to ensure flexibility in the application of rules, in recognition of the dynamic, negotiated and often uncertain nature of tenure rights and resource management. There is also a tension between the need for decentralisation of control – locally agreed upon and implemented rules appropriate for the manner in which resources are used (Murombedzi 1990, Ostrom 1987,1990) - and external support to ensure that rules are enforced. A third tension is evident between notions of 'community' and the benefits of co-ordinated action and on the other hand, individual choices, interests and conflicts between these interests.

### **Tension between clarity and flexibility**

The nature of rules themselves affect the cost of monitoring and enforcing (Ostrom, 1990:201). There is a tension here between simple, clear, unambiguous rules so that users are confident in their rights to sanction those perceived to be contravening rules, and rules which are flexibly applied. While Ostrom argues that rules should be clear, unambiguous and able to be applied by resource users (Ostrom, 1990:204), She also agrees that

The way in which rules are enforced is forgiving of occasional lapses or errors and allows appropriators to avoid the high costs that can result from rigid application of uniform rules in a changing environment (ibid.,186).

This is not a tension which is easily resolved. Ostrom argues that commitment to follow rules is possible so long as:

- Most similarly placed individuals adopt the same commitments.
- The long term expected benefits of collective action are more favourable than the benefits of individual action.
- The commitments will not lead to the exploitation of some by others who do not follow rules.

This belief in the commitments of others is a result of past experience and shared norms, but it is also strengthened by a more contingent commitments - "I will if you will". While this contingent commitment reduces the likelihood of free riders, it is dependent on constant mutual monitoring. Furthermore, it could be expected that infringement of rules by one person would lead to

infringement by others. In order to reduce the possibility of this happening, Ostrom suggests that rules should be flexibly applied with graduated sanctions (ibid.,187) which reduce the severity of minor or occasional offences while retaining the sense of surveillance achieved through sanctions.

### **Tension between local management and external authority**

Considering the legitimacy of the rules in use also highlights another major tension - that between the need for locally devised rules , and local monitoring of rules, and the need for external authority to back this up. Pienaar (1999) has argued that land management responsibility in South Africa's land reform process, should be held by those institutions which have the mechanisms to enforce collectively made decisions.

The extent to which mechanisms may be used to ensure the achievement of targets should in turn play a key role in both determining the objectives of the entity and the place where land should vest (Pienaar, 1999:3).

Similarly Ostrom (1990, 1992) argues that where external authorities refuse to support and enforce locally held rules, rules will not be successfully enforced. Conversely Murombedzi has highlighted the negative impact of external regulation;

... resource degradation in developing countries ... originates in the dissolution of local institutional arrangements ... (that) arose from a combination of powerful rulers at some remove from the village, colonial administration, and the rise of the nation state. National governments have not replaced the former resource management regimes (Bromley and Cernea, 1988 quoted in Murombedzi, 1990:5)

Ostrom has also supported this focus on local institutions by arguing that given the uncertainty associated with rule changes, local users will be more likely to adopt rules held by others in similar situations, than they would be to accept rules imposed from outside authorities. She continues to point out the reliance of external actors on locally held knowledge and the potential this holds for some local individuals to present information which furthers their own interests at the expense of others (Ostrom, 1990:213).

Pienaar's (1999) conclusion that a range of public and private institutions should be involved in the management of common property resources is perhaps one way out of this dilemma although it assumes an unfounded commonality of interests among different institutional actors and levels. Ostrom (1990) suggests that these broader institutional linkages should be underpinned by the principle of moving from the bottom, with incremental institutional changes to gradual linkages with higher level institutions once linkages between locally based institutions have been established.

One of the major reasons for the tension between local and external input in institutions for common property management, is the necessity of external support to enforce locally held rules. Ostrom's experimental work with group governance has suggested that rule following for cooperative action is most effective when participants decide on their own punishments for rule infringement, and have opportunities to discuss rule infringement and the application of sanctions (Ostrom, 1993: 148). Rule following was less successful in situations where subjects were forced to apply sanctions and denied communication, or when it was decided through communication not to apply sanctions for rule infringement (ibid.,). She highlights the policy implications of this as being that appropriators must have sufficient information to decide on optimal use of resource systems, and they must have an arena where they can discuss joint strategies and implement monitoring and sanctioning. At the same time, a supportive external institutional environment will enhance this process.

Individuals who are not able to supply new rules in an indifferent setting may succeed in adopting new rules under a political regime that allows substantial local autonomy, invests in enforcement agencies, and provides generalised institutional choice and conflict resolution arenas (Ostrom, 1990:212).

Leach et al (1997) and Cousins (1999) support this suggestion of an external framework for support of local processes. They identify the potential value of external support in procedures for negotiating conflicting rights and resource uses, and externally supported arenas for conflict mediation. Nevertheless, Leach et al caution that this alone does not level the playing fields.

All negotiation processes will reflect prevailing power relations ... and if powerful groups do not achieve their desired outcome through open negotiation, they are likely to do so through other means (Leach et al, 1997:92)

In view of this they argue that external authorities should specifically support the struggles of less powerful groups in an effort to enhance their capacity to make decisions over resources and protect the value they derive from various resources.

### **Tension between “community” and individual**

Murombedzi's (1990) focus on the value of locally developed institutional arrangements based on local norms, highlights a third tension. That is, the tension between recognising the value of local norms and community identity promoting cooperative behaviour, while acknowledging significant social stratification and conflicting interests among resource users. This difference of interests constitutes a powerful disincentive to cooperative activity. Pienaar's (1999) analysis of five South African land reform case studies identifies observable difficulties experienced by legal entities as:

... partial or total breakdown of communication between leadership and members, frequent turnover in leadership and increased factionalism ... prevarication by leadership exists as a general trend since making decisions appear to cause greater tensions than not making them. Other problems concern either no allocation, or inequitable allocation of assets based on self help; mismanagement; the squandering of opportunity; a disregard for internal rules; and infrastructure and land are left to deteriorate (Pienaar, 1999:7).

He goes on to indicate difficulties experienced in the relationships with external actors and institutions and identifies conflicts between personal and collective interests:

In certain cases sufficient distance/distinction between the personal beneficiary status of the committee member as members of the (legal) entity and the exercising of their duties as committee members does not exist (ibid.,).

Similarly, Murombedzi (1990) describes opportunistic behaviour in response to government regulation of land holdings and describes the problems created for resource management when integration into local and national economies leads to local economic differentiation. Murombedzi describes this as leading to tension between wanting to draw on the most inclusive definition of resource users in order to prevent the manipulation of poorer groupings by commercialising users, and the need for tightly defined membership in order to reduce the potential for a commons to become open access land. Ostrom too has highlighted the importance of clearly defined users and resource systems for effective institutional development (1990:185).

Pienaar argues that this tension is a result of conflating “community” and “interest groups”. Drawing on the work of Li (1996) he argues that “community” is used as a discursive tool to stake claims over land and to resist state control over the identification of beneficiaries. This notion of “community” also serves to conceal significant differences in the capacity of community members to interact with state officials and so further their interests at the expense of others (MacDonald, 1998). Pienaar argues that we should be focussing on interest groups within this differentiated community (1999:3). He argues that this might reduce tensions as a result of conflicting interests, promote the recognition of historically marginalised population sectors, contribute to local development through the dynamism of small groups and overcome the need to match membership of the land owning group with membership of ‘the community’.

## **Equity**

Despite this need to recognise the limitations of conceptions of ‘the community’, this tension is again evident in considerations of equity in common property resource management. Common property rights differ from private property rights in that where private property rights refers to

the individuals right to exclude others from a resource, common property refers to the right of the individual not to be excluded from sharing in the groups resources (Murombedzi, 1990). The issue of equity, fairness in sharing group resources is a key aspect in assessing common property tenure systems. Equity is important, not only for its relevance in tenure security, but also for the relevance of equity in coordinated strategies for resource management - coordinated strategies depend on mutual trust and reciprocity between users (Ostrom, 1992). Mutual trust is strengthened through, among other factors, community identity and community ethic.

The perpetual tension in common property resource management between ‘the individual’ and ‘the community’ is evident in Ostrom’s (1992) emphasis on the importance of group processes and yet individual calculations of value. It is also evident in observations that in times of transition, individuals try to capture common property resources for their own private purposes (Cousins, 1999; Murombedzi, 1990), and in processes of economic differentiation in rural communities. Murombedzi (1990:8) argues that particular strains on collective decision making around resource use come into play when users begin to develop different production rationales (e.g. for subsistence or profit) and similarly different resource management styles. At the same time processes of differentiation and political struggle and contestation of resource use is an undeniable aspect of common property resource management (See Mehta et al, 1999). As long as the physical attributes allow resources to be individually appropriated, a community ethic and sense of collective (and redistributive??) equity are essential to sustain the benefits of cooperative strategies. Alongside this recognition of the importance of community ethic and equity for common property rights, is the converse - that individual regulation and specification is essential for ensuring sustainable resource use and security of access to resources. For example, a tension between using the most inclusive definition of “the community” to include all resource users, and using the most clearly defined and restrictive definition of “the community” to ease administration difficulties and prevent the degeneration of common property resources into open access resources (Murombedzi, 1990:8). This tension is also seen in bureaucratic responses to common property management regimes, which Murombedzi (1990:6) argues have overlooked the central importance of user groups and group processes in favour of the administrative ease of user individuals. Murombedzi (ibid.,) quotes Lawry 1989 to illustrate his point:

... the state’s principal objective in centralizing control (is) to assert its political authority over local interests, not to impose new resource management regimes. State’s have concentrated their regulatory efforts on individual users, not on local user groups.

## **Conclusion**

What this discussion reveals is the complexity and dynamism of social processes through which



the bundle of property rights making up tenure security in communal tenure regimes, are constructed and realised. Tenure security depends on equitable, accessible, familiar, clear, socially acceptable and transparent institutional processes for asserting, justifying and realising claims. While this highlights the role of institutions in tenure security, institutions shape rather than determine human action. Institutions will never be able to solve problems of inequality and power or remove uncertainties. The contestation and negotiation of rights among actors with differential power and resources in a context of increasing uncertainty is inevitable. While institutions can attempt to reduce the complexity of this dynamism they will never prevent its occurrence.

What this suggests for the establishment of common property institutions in South Africa's rural areas is that policy and implementation should focus attention on the processes of asserting, justifying and realising claims to property rights, rather than just the property rights themselves. Institutional support should be directed with this in mind. Additional functions for common property institutions to fulfill (especially development oriented functions) should be considered when the detailed planning of new settlements takes place, after the land holding entities have been established and processes for tenure security supported. This focus on processes of asserting, justifying and realising rights also highlights the need for clear and accessible constitutions specifying membership definitions and processes to be followed in claiming resources and defending rights. There has been little formal support from state policy elites for translating founding constitutions into local languages and little commitment to ensuring that founding constitutions are accessible to the people who supposedly formed them. These are major problems which demand changes. Making legal constitutions accessible will not be a simple task - disjuncture between legal English and local languages are considerable. Recordal systems to provide administrative support in processes of asserting, justifying and realising property rights is another area which requires substantial work. Alongside this an external authority with legitimate power to ensure the realisation of rights is also essential. Currently, while the Department of Land Affairs is required by legislation to monitor and support communal property institutions, they lack the administrative means to do so. The foregoing discussion has emphasised the role of external institutions in supporting the enforcement of rights as key in achieving tenure security.

Also evident in this paper and other work undertaken by LEAP, is the importance of already existing practices for asserting, justifying and realising property rights. Working with these processes and supporting incremental changes is likely to enhance the potential for change by reducing the costs of change, and draws on local forms of control rather than imposing inappropriate systems from above. While notions of 'community' do have value recognising different interest groups is also necessary. This is particularly important in the definition of community members. In the past practitioners have worked from grant beneficiary lists which are

based on households and not members of households. Careful work is necessary around who is a member of the community in their own right, and who is dependent on the continued membership of the household. This will also demand considerable attention to gender inequalities and work around addressing this basis of stratification.

One of the major problems with the establishment of common property institutions identified by the LEAP was the construction of legal entity establishment as a milestone in the achievement of land reform objectives. At this point engagement between state officials and beneficiary communities tend to taper off quite suddenly. The assumption here is that once land has been transferred into the name of the legal entity the role of the state can be reduced. LEAP's work suggests that tenure security is an ongoing process of negotiation and contestation and that this should be seen as a process which requires ongoing support through an effective and accessible administration system. Seeing the establishment of common property institutions as an ongoing process also supports an initial focus on tenure security, as the most basic and fundamental objective of legal entities, and addressing development and resource management objectives after the establishment of the institutions. Acknowledging the differential capacity of interest groups to assert their needs means that practitioners can recognise the limits of land reform and so focus on what can be most meaningfully done to lay the basis for future change. Recognising and supporting slow processes of achieving more equitable gender relations and more accessible and democratic processes of accessing property rights is of key importance.

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