

The Tragic African Commons

A century of expropriation, suppression and subversion

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1. Introduction

When Garret Hardin published his much acclaimed article "The Tragedy of the Commons" some thirty-two years ago, he may not have been aware that a tragedy of major proportions had, for half a century, indeed been unfolding in respect of the African Commons. Contrary to Hardin's now discredited thesis, that tragedy had nothing to do with the intrinsic characteristics of the Commons. It was triggered by their expropriation and ruthless exploitation by colonial authorities; fueled by the contemptuous denial of their judicial content and compounded by systematic administrative, judicial and legislative subversion designed to foreclose any possibility of their renaissance!

But the African Commons, as a proprietary system, nonetheless, survived. The Commons survived mainly because the expectation that they would disintegrate and dissolve by reason of internal contradictions, presumed social and cultural anachronism, and inability to resist the impact of "modernizing" western values, did not materialize. Instead, the defining regimen of the Commons, namely custom and customary law, responded with reverse effects, which began to threaten the viability of the terrain of national legal and political economic structures.

This piece examines the nature of the African Commons as a property system; analyses the extent of damage which was inflicted upon it during one hundred years of exploitation, suppression and subversion; explains why, inspite of that damage, the Commons have survived; and confronts the issue of what it will take to restore their legitimacy within, and guarantee their status in, positive law alongside other property systems.

2. The Nature of the African Commons

2.1 Defining the Commons

We use the term "Commons" to identify ontologically organized land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities. The Commons are thus not constituted merely by territoriality, or by the temporal aggregation of members of any given entity, but are, in addition, characterized by important ontological factors among which is their permant availability across generations past, present, and future. For those societies which recognize and depend on them, the Commons are the creative force in social production and reproduction. As a general rule, this is the manner in which agrarian resources in Africa were, and largely continue to be organized.

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Internal mechanisms for the management of and determination of access to resources comprised in any distinct body of Commons was and remains a complex issue. That complexity is the result of a number of structural and normative parameters. At the structural level, the Commons are managed and protected by a social hierarchy organized in the form of an inverted pyramid with the tip representing the family, the middle the clan and lineage, and the base, the community. These are decision-making levels designed to respond to issues regarding allocation, use and management of resources comprised within the Commons on the basis of scale, need, function and process. Decisions made at each level are not necessarily taken collectively. Rather, they are made by reference to common values and principles internalized at any such level. Decision-making at the base of the pyramid, however, further entails responsibility for the protection of the territory of the group as a whole; a function which does not entail appropriation of the radical title to the Commons. The location of radical title always was, and remains, in all members of the group past, present and future, constituted as corporate entities.

At the normative level, access to the resources of the Commons is open to individuals and groups who qualify on the basis of socially defined membership criteria reinforced, internally, by obligations which are assumed on the basis of reciprocity and to each member of the social hierarchy. The quantum of access rights depends in the first instance, on the category of membership each individual or collectivity holds, and secondly on the specific function for vest, once membership is established and, being thus vested, are permanent within and across generations, their quality and quantum will, of necessity, vary from one membership category to another. The fact that access rights vest in terms of specific functions also means that the use of the resources of the Commons is available to individuals as well as collectivities whether exclusively, concurrently or sequentially.

In short, the defining characteristics of the Commons are, that land is:

- held as a transgenerational asset
- managed at different levels of social organization, and
- used in function - specific ways, including cultivation, grazing, hunting transit, recreation, fishing, and bio-diversity conservation.

Historians have established that at the end of the 19th Century, land resources in Africa were held, managed and used primarily as Commons. Because of relatively small populations and the expansive nature of the technologies of resources exploitation then in use, the mix of access rights and management processes described above was clearly suited to this form of resource constellation. Society was thus able, at its different levels of organization, to direct the use of resources to the needs of the present, without compromising the ontological demands of the past, and the heritage of future generations. And the fact that decisionmaking was always by reference to common values and principles, ensured that a reasonable balance was achieved between resource availability, technology of use and the rate of consumptive utilization.

In short, we note as others have done, that the African Commons were the primary economic and social asset individuals and communities drew on, and the fountain form which their spiritual life and political ideology sprung. It is primarily for this reason that the Commons were not susceptible to *inter vivos* transfers outside each level of social organization even though latitudinal exchange of function-specific rights was and remains common. It is also for

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this reason that the transmission of access rights to land and associated resources in *mortis cause*, always were exclusively by way of intestacy, and only to a pre-determined class of heirs in accordance with common rules internalized at each level of social organization. (Okoth Ogendo, H.W.O,1989).

2.2 The Commons as Property

The literature is replete with arguments which claim that the Commons are not and cannot be regarded as property systems. They are, it is argued mere *terra nullus* or open access resources. Those arguments proceed from perspectives which regard property as constituted only through the exercise by individuals or other 'jural' persons, of jurisdiction coupled with exclusive control over corporeal or incorporeal phenomena. On this view, property exists only if it vests exclusive right of use, abuse and disposition, in individuals. The argument is further made that property rights derive and derive only from some ultimate (or radical) title vested in an authority which is itself a juridical persona. It is view which led Hardin and some of the early property economists to think that property rights over land could not vest in communities whose rules of organization and access to resources were essential inclusive and collective in character and operation. In their view, such a system conferred mere privileges, hence no rights and duties in respect of the use of those resources, a situation which must lead inevitably to a tragedy.

We note without much elaboration, that this view has now been discredited both as a theoretical postulate and as description of empirical reality. According to *Bromley and Cernea (1989)*, "the Hardin metaphor is not only social and culturally simplistic, it is historical false." The reasons are quite simple. The error which Hardin and most Western property theorists have always made is to assume that:

- property rights must always derive if not directly but ultimately from a sovereign.
- communities qua communities do not, as a matter of course, have a legal persona,
- a system according access on the basis of inclusively cannot at the same time define boundaries of exclusivity, and
- decision-making rules applied by communities demand collective participation by all members.

As Bromley and Cernea further clarify, many of these assumptions are rooted in inadequate diagnosis and/or incomplete understanding of the nature of customary land tenure and of customary law, the regime which gives it structure and content. For the Commons are not *res nullius*, but rather are *res communist*; they represent not a species of public, but of private property for the group have clear rights and duties in respect of the resources comprised therein, and clear decision-making structures exist for their utilization and management. The Commons are, therefore, not open access systems, and not are they species of state, co-operative or socialist property.

In sum therefore, if by "property" is meant a bundle of rights in a specified res vested in a verifiable body of entities recognized by a legal system, then the Commons were and always have been property. It was the failure or deliberate decision not to recognize the proprietary character of the African Commons that led to their tragic deterioration and destruction in the last one hundred years.

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3.1 Expropriation of the Commons

Denial of the proprietary character of the Commons was fundamental to the operation of colonial occupation and subsequent exploitation of the African Commons (Okoth-Ogendo, H.W.O. 1975). In British Colonial Africa this was achieved through a number of important legal mechanisms. The first was the extension of the Foreign Jurisdiction Act 1890 under which the imperial power purported to acquire powers of control and administration over "foreign" lands. Under this legislation, the British imperial authority was further able to exercise a wide range of powers in all manner of overseas territories including those with which it had concluded treaties.

The second was the application of English law as the basis of administration and determination of civil and criminal matters in all these territories. The implications of this was that the law of the colonial power become the basic law of the colonized in virtually all contexts. (MacAuslan, J.P.W.B 2000).

The third, which relates specifically to land, came in the form of an advisory opinion handed down by the Law Officers of the Crown on December 13, 1899 to the effect that the Foreign Jurisdiction Act 1890 had, in imperial law, bestowed upon the "sovereign" the power of control and disposition over waste and unoccupied land in protectorates where there was no settled form of government and where land had not been appropriated to the local declare such land to be crown land" or make grants of them to individuals in fee or for any term British colonial authorities promptly declared their colonies without settled forms government hence with no sovereign to hold title to land. This was followed in rapid succession by a series of legislations which completely appropriated the African Commons to the imperial power and made them available for allocation to colonial settlers in terms of English proprietary principles.

In French, German and Belgium colonial Africa, jurisdiction over and control of the African Commons were achieved in no less a ruthless manner. These powers issued various decrees or statutes which recognized, as property, only rights that had been documented or appropriated to local "sovereigns". The effect of this was that the vast undocumented African Commons were, at the stroke of a pen, declared *terra nullius*, hence, under civil law principles, automatically vested in the imperial power.

The application of these mechanisms led to a number of tragic consequences for the African commons. The most significant of these was the relocation of radical title to the Commons from indigenous communities to the imperial sovereign the colonial sovereign was thus now at liberty to deal with the Commons without reference to or due recognition of the rights of indigenous communities. In the words of an important judgment handed down by a colonial Chief Justice in Kenya, the effect of appropriation of the Commons as "crown land" was *inter alia* to vest land reserved for the use of a native tribe in the Crown. If that be so then all native rights in such reserved land, whatever they were Disappeared and natives in occupation of such Crown Land became tenants at the will of the crown of land actually occupied ...[including] land on which huts were built with their appurtenances and land cultivated by the occupier ... (Okoth-Ogendo, H.W.O. 1991).

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The second consequence was the replacement of indigenous land administration systems by a new regime based on the exigencies of colonial Africa new structures for land rights **delivery**, protection and adjudication were put into effect, even in areas that were still under indigenous occupation.

The operation of these structures paid little regard to established community principles or mechanisms. Even when pressure mounted in the 1930s for the protection of the African Commons from indiscriminate land expropriation and exploitation, colonial authorities in Kenya, Zimbabwe, and South Africa, among others, would not revert to indigenous control and management. They resorted, instead, to the English trust doctrine as a mechanism for the administration of the Commons.

The corporate character of African communities being thus denied, as much of the African commons as had not been expropriated to foreign settlement were placed systems of management over which the Africans had no control. Indeed colonial authorities wrote into that arrangement the power to expropriate, without consultation, any part of those Commons they might fancy.

The third consequence was the general disequilibrium of indigenous social systems which resulted from indiscriminate expropriation of the Commons. In countries like Kenya, Swaziland, South Africa, Zimbabwe and Namibia where large chunks of the Commons were appropriated, the scale of dislocation was astounding. Indigenous communities were crammed into "reserves" (or "Bantustans") or otherwise pushed onto the least productive and most difficult terrain. With a steady rise in population and stagnation in technologies of production, that disequilibrium led inevitably to land deterioration and widespread poverty. Observes Bromley and Cernia.

Resource degradation in the developing countries while incorrectly attributed intrinsically to "common property systems," actually originates in the dissolution of local-level institutional arrangements whose very purpose was to give rise to resource use patterns that were sustainable. The tragic deterioration of whatever remained of the Commons was clearly a function of the breakdown of community resource management structures.

3.2 Suppression of Customary Land Tenure

In addition to the juridical and physical expropriation of the Commons, attempts were made throughout the colonial period to suppress the development and adaptation of customary land tenure regimes. This was effected primarily through legal and administrative contempt of customary law; the domain which defines the structural and normative parameters of the Commons. That contempt was evident in two main ways.

The first was the manner in which customary law was treated. As *corpus juris*, customary law was expressly subordinated to colonial enactments and received principles of the common law of England, the doctrines of equity and statutes of general application. Hence, in terms of hierarchy, customary law was essentially residual even in contexts where it would normally exclusively apply. According to most reception clauses, the High Court and all subordinate courts [were to be guided] by African customary law [only in civil cases], and so far [only] as it is applicable and is not repugnant to justice and morality.

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That rubric gave the courts the power to strike out whatever rules of customary law they did not like or to declare as custom, what was unknown to African culture! Colonial law reports are full of incidences in which common property concepts were declared "repugnant" to colonial notions of property, or where doctrines unknown to common property systems were declared as part of that system (Mann, K and Roberts, 1991).

The second was evident in the strong view held by colonial anthropologists and administrators that "native law and custom" was merely a stage in the evolution of African societies. It was expected, therefore, that relations defined by customary law, including common property systems, would wither away as western civilization became progressively dominant in African social relations. There was, therefore, no need to acknowledge, leave alone, develop customary law as a viable legal system and customary land tenure as a system of rights and duties. Consequently, not only was customary law neglected and undeveloped, as much of the "commons" as remained under indigenous occupation was administered essentially as a non-proprietary regime even though all relevant statutes relating to "native reserves" provided that these would be held in accordance with customary law. The result was that much of what counted as land in those "reserves" was in effect, the law of land administration (Kith Agenda, H.W.O.2000)

3.3 Subversion of Common Property Regimes.

The modes of suppression of customary law and land tenure thus had their origins in the supremacist ideology in which the entire colonial edifice was built. When that suppression did not appear to work, at least within a reasonable time-frame, colonial authorities resorted to more systematic subversion of these regimes. Common property regimes were declared incapable of providing an efficient framework for the development of land and associated resources in areas under African occupation. The Hardin metaphor was thus translated into legislative policy, which advocated the conversion of common property regimes into individualized private property. Although tenure conversion exercises were dotted throughout British and French African colonies, the most comprehensive of such exercises was inaugurated in Kenya in 1954 and continues to this day (Kith-Agenda, H.W.O 1993). Its basic assumption was, and remains, that by legislating change in the technical description of title, i.e. from common to private property, fundamental revolution in land relations, land use and management would occur.

The mechanisms and processes through which this subversion was to be effected has been described and analyzed in many fora. (Okoth Ogendo, H.W.O 1976). Suffice it to say that colonial policy makers and post colonial authorities who initiated and/ or perpetuated this ideology thought that they were not only enhancing the proprietary value of the land resources available to Africans, but also "modernizing" African society in general.

4. The Resilience of the African commons

4.1 Continuity of Policy and process

Independence led, not to a re-examination of status and content of the commons, but rather to its more intensified expropriation and neglect. In all countries where land occupied by indigenous people was held under a trust, including those, like Tanzania, where radical title was supposed to be vested in the people at large, the policy and process of conversion to private

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property and use through state allocations, compulsory acquisition and other irregular purchases, continued unabated. In Kenya, for example, the processes of conversion of tenure regimes through adjudication, consolidation and registration, were extended even to the pastoral and other semi-arid areas where the private property regime was clearly inappropriate. Such was the determination to rid national property systems of common property principles that I was once moved to declare that: "customary law" qua positive law is dying ; it is in fact dead in a lot substantive law areas. Customary "law" now belongs to social and cultural history, and those principles of it as reflect the way of life of Africans belong to sociology and anthropology (Okoth-Ogendo, 1979) I was persuaded then that at the rate in which legislatures in Africa were churning out statutes modeled on Anglo-America precedents, indigenous law, in all areas, would soon be lying in a juridical morgue waiting to be buried beneath unyielding legislative tombstones!

4.2 Resilience and persistence

I am now convicted that indigenous law, including those principles that define the structure and content of the commons, will not succumb so easily to suppression or subversion. To use yet another metaphor, indigenous law, long regarded as a dangerous weed, simply went underground from whence it continued to grow despite the overlap of statutory law that was destined to replace it. That resilience and persistence is evidence in several ways.

First, empirical evidence now shows that whether regarded as "law" or not, indigenous norms and structures, particularly in respect of land relations, continues to operate as sets of social and cultural facts, which provided an environment for the operation of state law. As "facts" in that sense, they are not without important juridical implications. For where these are at variance with state law, its implementation will, as a matter of course, be frustrated. Evidence abounds to the effect that the conversion of common property into private property regimes has continued to flounder because of the severity of that variance. The disintegration of "group" ranches in Kenya, the collapse of the "Ndunda" system of registration in Malawi, and the way in which communal property associations are being manipulated in south Africa, bear witness to that frustration.

Second, a number of jurisdictions now recognize that indigenous values and institutions still provide the only meaningful framework for the organization of social and economic livelihoods in Africa. Consequently, a number of attempts have been made to recognize certain aspects of indigenous laws as part of the formal legal system. These attempts, however, appear targeted only at procedural rather than substantive issues. For example, customary procedures for the resolution of land disputes have found their way back into systems of several countries in the region. These, however, do not appear to be part of a reasoned policy framework in respect of the manner in, and extent to which indigenous values in all spheres of life should be integrated into national legal systems. Attempts to reform areas of substantive life, for example, succession to land and matrimonial causes, have floundered precisely for lack of a coherent policy. As a result, a great deal of social and cultural tension is being generated as individuals and communities compete for resources without a clear framework of law.

5. Legislating the Commons

5.1 The opportunity and the challenge

The resilience and persistence of indigenous values and resource management institutions present an opportunity and a challenge for legal engineering in Africa. Opportunity now exists for a general rethinking of issues of access, control and management of Africa's primary resource, its land, as part of the general process of land policy reforms now taking place in the region (Okoth-Ogendo, H.W.O. 1998)

The challenge, however, is to provide a framework for the orderly development of customary land law. This, however, is an exercise which will require innovation in at least two directions. The first is the development of customary law as the common law of African jurisdictions. The second is the rationalization of the domain of customary land laws as the primary regime of land resources held under common ownership. These two are further elaborated below:

5.2 The Development of Customary Law

The orderly development of customary land law will depend, in the first instance, on how customary law *qua* law continues to be treated in national legal system. The juridical character of custom will therefore have to be clearly defined. That means, *inter alia*, that the replacement policies thus far pursued in respect of customary law must now give way to evolutionary and essentially adaptive models of change. That will involve legislative action in at least three directions.

The first is to raise the status of customary law in the hierarchy of applicable laws, above such received law as has not been enacted into statutes, and to require the courts to apply it: and not merely to "be guided by it". The second is to accord customary law more general applicability as the personal law of the vast majority of indigenous people. That would eliminate the general tendency to hop in and out of foreign law on the ground that the application of customary law is inappropriate in certain contexts. The third is to move towards progressive codification of customary rules of which apply in specific contexts. The process of codification, however, must be approached with caution. Customary rules are part of community norms which govern behaviour in a wide spectrum of spheres and integration must therefore tread softly among those spheres. In recommending that customary law be progressively codified we have rejected the long-standing argument that reducing its rules to legislative text will fossilize them. Custom, when understood as shared norms and values which have evolved over time and which provide a basis for decision-making on matters of common concern to communities or segments thereof, will always remain an organic system which responds to both internal and external stimuli despite initial capture in textual form. Principles of the common laws of England embodying the customary law of the English people would never have found their way into statutes if this were not the case.

The starting point for that exercise is to recognize that many of differences that are presumed to exist in the customary laws of Africa peoples, are the product largely of lack of analytical rigour in the investigation and interpretation of the social and cultural facts that define community relations. Typologies have been developed which indicate that in general variations in rules applied in specific areas are not dramatic, as early anthropologists had suggested. What this points to is that codification can start with areas of commonality; the differences being to further policy development.

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5.3 The Domain of Customary Land Law

The restoration of customary law to its legitimate status in national legal systems would have important implications for the domain of customary land law. First, it would strengthen and revitalize that domain as a governance framework for land and associated resources held by and for the benefit of communities. A context would thus be available for reforming African agrarian systems otherwise than in terms of replacement or conversion to Western property regimes. Second, and perhaps more important, it would enable policy makers to identify resource constellations that still are subject to or ought to revert to common property management. The vast arid and semi-arid lands that are still used largely as range lands by nomadic communities together with their community watering points, dry and wet season grazing areas, and transit corridors appear to be obvious candidates for such management; as would community forests, bio-diversity colonies, ritual grounds and family residential compounds.

The reconstruction of the African commons, which a revitalized domain of customary land law would thus facilitate, would need in turn, to be accompanied by the redesign of a comprehensive land rights system capable of according security to individual and community livelihoods which depend on the resources to which they have access. That system will need to remain faithful to the primary tenets of a regime of common property, namely that

- The location of radical title to community resources is a function of ontology not sovereignty.
- Access to land resources is obtained through community membership, not the free market and,
- Access rights are transgenerational hence carry an obligation of stewardship for the benefit of present and future members of the community.

Those tenets must be reinforced by a system of land administration, which ensures community participation in the management of those resources at appropriate levels of social organization and which is responsive to community values and processes. Care must be taken to avoid the colonial assumption that African communities have no legal (or corporate) **persona** hence can only hold or administer land resources through jural entities created by Anglo-American law. Vesting community property in trusts whose operational processes are not linked to social hierarchies and structures must therefore be avoided. Rules of land administration, like those creating rights and obligations, must therefore be clearly defined and internalized.

5.4 A number of False Starts

There is evidence that the reconstitution (or reconstruction) of the African Commons (Wily, Liz, 2000) is an important item in the land reform agenda of most countries in the region. For example, the last reform effort initiated at the end of the 20th century, the Commission of Inquiry into the land system of Kenya, which was appointed in November, 1999, expressly calls for an investment into and recommendations on customary land law. In all these countries issues of community control, of particular, resource constellations, the relative position of individuals in respect thereof, the role of the state in land ownership and management, and the police power of the state especially as it relates to environmental auditing, are being debated and refined.

That notwithstanding, countries such as Uganda, Tanzania, South Africa and Zimbabwe that have gone past policy development to legislation, appear to have taken a number of false starts on these issues. First, no real attempts have been made in new legislations to create

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complete land rights systems for Commons. The mere recognition of customary land tenure *per se*, as the **Uganda Land Act 1998** now does, will not satisfy this concern. Nor will the provision that certificates of customary ownership are now possible, provide sufficient indication of what rights and obligation arise from such ownership. The view, therefore, that in Uganda, security of tenure to those who hold land under customary tenure is now assured, is premature and may be misleading (Coldman, S. 2000).

Second, the protection of community rights in the Commons appears to be defined essentially as a political and administrative issue. In Tanzania, for example, the drafters of **The Village Land Act 1999**, assumed that if radical title to "village land" is vested in the president, and administration of such land was entrusted to village councils, security of individual and community rights in village land would be assured. No rules setting out the principles upon which these council will manage village land have been formulated, nor are the community values to which administration must conform, prescribed. In Kenya and South Africa, the establishment of corporations in the form, respectively of "group representatives" and "communal property associations," have not prevented the appropriation of community property assets by those outside the group or community membership. What should have been anticipated is that such corporations, once set up, are bound to operate on the basis of private, rather than, common property principles. The same error has been repeated in Uganda, where the 1998 Act also sees "community property associations" as a basis for managing the Commons.

The explanation for these false starts appears to lie in the failure of draftsmen to fully reflect public demands in the process of legislative design. In Tanzania, for example, it is being widely asserted that legislative design took little or no account of the fundamental principles incorporated in the **1995 National Land Policy** and the recommendations of the Commission of Inquiry into Land Matters, which preceded it. Whatever is the accuracy or otherwise of this assertion, what is true is that the Land and Village Land Acts have not fully incorporated community values and principles in the content and structure of new systems they have created. Attempts to deal with this issue in South Africa have not been entirely successful because draft bills directed at tenure security in the former "Bantustans" dating back to 1998 lack clear policy direction. There is great danger that the intended transfer of communal land from the state may lead simply to another phase of expropriation. Greater innovation in design of legislation will therefore be crucial if popular demands for the reconstitution of the African Commons are to be met.

6. Conclusion

There is no doubt that there is unprecedented opportunity to right the historical wrongs that have been inflicted upon the African commons by restoring or reconstituting as much of them as remain, to their proper place alongside other property systems recognized by law. Full advantage can be taken of that opportunity only if broad popular consensus is canvassed and fed into the design of new legislations aimed at reforming and rationalizing African agrarian systems. This will involve a number of systematic steps and processes among which are:

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- the recognition of the Commons as an important property system
- the restoration and strengthening of customary law as the commons law of African jurisdictions,
- the re-design of a comprehensive land rights system founded on the fundamental tenets of a common property regime, and
- the reconstruction of land rights security systems drawing upon community values and-principles at appropriate levels of organization.

The message we want to convey is that the reconstruction of the African Commons will require innovation, flexibility and contextualisation. There are no precedents out there on which to base legislative design. Fundamental concepts, principles and structures will have to be developed and operationalised to reflect die contextual realities on the ground. That is the only way in which the voices of Africa's rural majorities can find their way into national law and policymaking.

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