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POLICY BRIEF #5

CUSTOMARY LAND GOVERNANCE: OPTIONS FOR COMMUNITY FORESTS

PEOPLE, RULES, AND ORGANIZATIONS SUPPORTING THE PROTECTION OF
ECOSYSTEM RESOURCES

POLICY ISSUE

The Government of Liberia (GoL) recently adopted a new land rights policy and is currently developing land administration and land rights legislation. The guiding policy document, endorsed by the President, grants unprecedented land rights to communities. The draft land rights law provides for community-based organizations (CBO) to oversee and administer community customarily owned lands. In developing the community land governance institutions, it would be useful to look at the Community Rights Law (CRL) and its governance institutions as a model for local governance. However, in doing so, it becomes evident that a CRL governance organization may overlap with the responsibilities of a land governance entity. Further, the land governance entity would likely fall under the Ministry of Internal Affairs (MIA) or a newly created Land Management Agency which could lead to issues of jurisdictional authority and murky areas of the law that could be exploited by unscrupulous interests. At this formative time, it is worthwhile to consider the different ways in which customary land management and governance can be streamlined at the local level to avoid duplication of efforts, conflict between different governance institutions, and to provide clarity regarding government agencies' roles and responsibilities under a land management system that recognizes enlarged community rights.

THE COMMUNITY RIGHTS LAW AND LAND RIGHTS POLICY ISSUES

Securing Customary Rights to Forests under the CRL

The CRL recognizes customary ownership of forests and allows these lands to be legally classified as community forests, §2.3. The CRL also clarifies that, unlike mineral resources, which are regulated by the state for the benefit of the nation, forest resources¹ on community forest lands are owned by the community, §2.2a-b. While customarily owned forestlands may be classified as community forests, such a classification requires the completion of a process that culminates in a Community Forestry Management Agreement between the FDA and the community². This process is outlined in the CRL regulation and requires the community to, *inter alia*, submit an application to the FDA; undertake socio-economic and resource surveys; demarcate the forest area with the FDA; and adjudicate any conflicts.

¹ The CRL defines Community Forest Resources as “Anything practical, commercial, social, religious, recreational, educational, scientific, subsistence or other potential uses to humans that exists in a community forest, including but not limited to flora, fauna and micro-organisms.

² The CFMA is valid for a period of 15 years after which time it may be renewed. The CRL and its regulation are silent on whether or not failure to renew the CFMA will result in a reclassification of the forestlands. This represents one weakness in the current law and regulation.

In addition, and important for this analysis, the community must first undertake a process to form a representative governance institution prior to classification of customary land as community forest through a CFMA. This process is outlined in Chapter 3 of the CRL regulation and requires the community to elect a Community Assembly (CA) and an Executive Committee (EC). The regulation also stipulates that two members of the County Legislative Caucus must be selected by the Caucus to sit on the CA but that neither member can stand on the EC. The Community Assembly must also adopt a Constitution and by-laws to govern the activities of the CA prior to obtaining a CFMA. Finally, the CA must also appoint a 5-member Community Forest Management Body that is responsible for the day-to-day governance and management of the community forest.

Expanding Customary Rights Beyond Forestlands

The Land Rights Policy approved by the Land Commission and presented to the President recognizes community customary rights over land and proposes to place these rights on par with private land rights (§ 6.2.2). The proposed definition of customary land in the policy is expansive: “land owned by a community and used or managed in accordance with customary practices and norms, and may include, but is not limited to: wetlands, communal forestlands, and fallow lands” (§6.2.1). Importantly, the policy proposes that “[c]ustomary [l]and rights, including the rights of ownership, use or management, are equally protected as Private Land rights, whether or not the community has self-identified, established a legal entity, or been issued a deed.” *Ibid* and include (but are not limited to) forest resources, carbon, water (Art. 33).

The Land Rights Policy also proposes that all customary land ownership will be memorialized in deeds issued to legal entities representing the community (§6.3.1). Further, it is proposed that management authority will rest in community representatives that must be selected in a way to ensure equitable representation of all community members (§6.4.1). Similarly, it is proposed that the community’s representatives’ decision-making be conducted in a way that ensures equitable representation and accountability to all community members (§6.4.1).

The policy recognizes that this is an ambitious agenda and proposes that the government assist communities to self-define, obtain deeds, establish the community as a legal entity, demarcate boundaries and put in place required governance and management procedures (§6.6.1).

In order to operationalize this policy, a Land Rights Act (LRA) has been drafted and presented to the legislature. The draft has adopted the policy’s definition for customary land, and has strengthened further these rights by declaring that registration of rights is not a necessary precondition for enforcement of

BOX 1: AGENCIES WITH LAND MANAGEMENT MANDATES

- Ministry of Lands, Mines and Energy (MLME) is responsible for, *inter alia*, approval, oversight and regulation of mineral exploration and mining activities
- MLME Department of Lands, Surveys and Cartography (DLSC) is responsible for surveys and mapping.
- MLME Center for National Documents and Records/Archives (CNDRA) manages Liberia’s deeds registry.
- The Land Commission (LC) is charged with leading land policy and legal reforms but is a temporary body whose mandate will expire in 2015.
- Ministry of Agriculture (MoA) is responsible for governance, management and promotion of agriculture. The Minister represents the government in agriculture concession agreements and signs off on Community Forest Agreements.
- Forestry Development Authority (FDA) is responsible for management of the country’s forest estate, including commercial concessions, protected areas, and development and regulation of community forests.
- The Environmental Protection Agency is responsible for environmental regulatory compliance
- National Bureau of Concessions is responsible for managing concession processes to ensure compliance.
- Inter-Ministerial Committee on Concessions negotiates concessions on behalf of the GoL.
- The President must approve concession agreements and signs public land sales deeds
- County Land Commissioners and Public Surveyors (both Presidential appointees) manage the program of public land sales (although there is a public land sale moratorium in place).
- Town, Clan and Paramount Chiefs under the authority of the Ministry of Internal Affairs are charged with administering ‘tribal’ areas and play a role in land-related decisions and dispute resolution.
- Traditional authorities such as Town Elders, Town Chairmen, Town Chairladies, Family Heads and Quarter Chiefs play a key role in land governance at community level.

customary land rights³. That said, the proposed LRA does present guidance for identifying customary lands and organizing a representative body that can undertake the registration process. Specifically, the draft LRA outlines a Confirmatory Survey process by which all land will be surveyed to determine the “size and boundaries” of each community’s customary land and requires the community to create a Community Land Development and Management Association (CLDMA) governed by by-laws and managed by an elected representative governing body (see Art. 35, 36). Importantly, the LRA also requires that the CLDMA be “integrated in the official administration of the community in keeping with the Decentralization Policy of the Government (Art. 36). The local government civil service structure will need to be finalized and resources allocated accordingly in order to implement this proposed requirement⁴. Further, it is not clear under what line agency the CLDMA would report: the Ministry of Land Mines and Energy, the Ministry of Internal Affairs, or the proposed Land Administration agency?

BOX 2: DIFFERENCES AND OVERLAP BETWEEN CLDMA and CA/CFMB -

Governance under CRL	Governance under LRA (proposed)
CFMB members can be compensated	CLDMA Governance Body members work <i>pro bono</i>
Elected officials are required members of the CA	Elected officials are not allowed on the CLDMA
No requirement	CLDMA governance structure must be integrated into local governance structures

POLICY OPTIONS

OPTION 1: Two governance bodies; one community forest. Under this scenario, FDA would continue to accept applications for community forests while at the same time a CLDMA would be formed and communities could register their claims over customary lands inclusive of forest. However, under this scenario, forests registered as customary by a CLDMA would become *de facto* community forests without regard to the CRL and would be removed from the government-owned forest estate. Under this scenario, the actual need for a CFMA (and associated creation of a CA, CFMB and management plan) would be limited to those communities that would like to commercially exploit their forests for timber species - an activity that requires approval from the FDA⁵. The challenge in this scenario would arise where a community opts to have both a CLDMA, and a CA/CFMB under the CRL. Management authority and jurisdictional responsibilities between the CFMB and the CLDMA would clearly overlap under such a scenario and could lead to possible conflict both within and between communities, particularly where one community includes several community forests, or where a community forest is made up of several community’s customary lands⁶. In addition, it is not clear to which entity money derived from the exploitation of forest resources, (timber or NTFP) would flow. Finally, under this scenario, the CRL and the FDA’s role in the management of community forests is significantly diminished.

OPTION 2: One Land Governance Body; one forestland committee. The CLDMA has a larger mandate for customary land management than CA/CFMB whose mandate is limited to community forestlands. In order to avoid the issue of overlapping jurisdictions and mandates, the CA/CFMB could be organized as a CLDMA subcommittee responsible for forestland management (much as other committees may be responsible for the allocation of agricultural lands, residential lands, etc...). Rather than require a CA distinct from the CLDMA, the CLDMA could assume the responsibilities of the CA, and appoint a CFMB for day-to-day forestland management purposes. The FDA, or a community forest unit within the proposed Land Management Agency, could provide the technical support for community forestry related

³ The draft LRA also defines the bundle of rights associated with customary ownership to include use, management, exclusionary rights, and some rights of alienation (Art.33).

⁴ The draft Local Government Act (LGA) proposes a County government structure that includes a Department of Land, Environment and Natural Resource Management headed by a Director appointed by the Superintendent. District Commissioners will head Administrative Districts with the assistance of an advisory board. Paramount Chiefs and an Advisory Board will lead Chiefdom Administration while the Clan Chief heads Clan Administration with assistance from an Advisory Board.

⁵ It is unclear if a community could enter into a Conservation Agreement with a third party without a CFMA although it is assumed that fee simple land ownership would preclude the need for a CFMA for conservation purposes.

⁶ CF communities define themselves and their boundaries around the management of common forest resources. This often results in a community based along clan lines or around clusters of villages. In contrast, communities may define themselves differently under the Land Rights Law when organizing around customary boundaries that include farmland, forests, and other customary lands,

organizational, planning and management activities. Under this scenario, the Community Forestry Unit of the FDA or the proposed Land Management Agency could support the capacity building of the CFMB committee and provide technical support for management planning and implementation. Any commercial activities could be regulated through the Commercial Division of the FDA. This has the advantage of aligning all land governance institutions under a single government line agency at both the Central and local level. While requiring a rethinking of the way in which the CRL is implemented, this scenario maintains the spirit of the CRL and ensures that the governance structures envisioned for Liberia's community forests are maintained and supported. Another advantage to this approach is that it would require a community to think through how it defines itself and its boundaries not merely for forest management, but for land management writ large.

The final advantage of this scenario is that it would also work where CF are created wholly within a CLDMA jurisdiction, or where a CF straddles multiple communities. Under the latter scenario, CF subcommittees in each community could form a CA to manage the community forest.

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People, Rules, and Organizations Supporting the Protection of Ecosystem Resources

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