

Legal dimensions to providing customary rights

Tanzania has introduced a legal approach to forest ownership that builds on the customary system

by Patrick McAuslan

University of London
pmcauslan@bbk.ac.uk



Coping with pluralism: Professor McAuslan makes a point during a conference break-out session *Photo: A. Sarre*

Before I talk about the process of developing Tanzania's 2002 forest law it is necessary to say something about the co-existence of two or more legal systems in one country—legal pluralism. The issue that must be addressed in developing a forest law is how to give customary forest-tenure rights a role in forest management that is equal to statutory rights—regardless of whether the legal system is based on common law, Roman-Dutch law, civil law, customary law, or, in some countries, Shari'a law.

There are ten principles to a modern approach to legal pluralism:

1. there should be equality of tenure and legal systems;
2. there should be recognition of communal rights in land: in too many judicial systems, customary tenure is not treated equally;
3. all sets of legal rules must respond to constitutional principles;
4. there should be provisions to opt for one system or another: the system tends to be hierarchical but there is no reason why a state should opt for a single system or why people should be forced down a single legal route;
5. customary dispute-resolution mechanisms should be used;
6. the judicial system should be empowered to fuse systems;
7. land should be administered at the local level within the framework of the constitution—local decisions about land may differ between localities, and that is nothing to worry about. Customary tenure and law are essentially local: local land management systems have a better chance of being kept up to the mark by local knowledge;
8. in land adjudication, all customary interests should be recorded—one of the worst aspects of colonial systems was the way in which they failed to report customary

rights. Women in particular have lost out to this loss of customary rights;

9. there needs to be clarity: the system of land law must not be confusing. There must be a clear set of rules, decided in a transparent manner and properly regulated. Private-sector institutions such as banks must adapt their practices; and
10. customary institutions should be brought on board (others must adopt their approaches).

Under Tanzania's colonial Forest Act, which was enacted in 1957, customary rights were derived from and understood by local communities. If proved, they were converted to statutory permissions that derived their authority from central government. This was based on the belief that the common-property forest resources under customary law operated on 'unregulated open access use'—because the customary system lacked institutions or mechanisms to enforce rules that would have limited use.

The 1998 national forest policy of Tanzania made a decisive break from this approach. It accepted that, rather than replace existing rights, the government should build on and adapt existing rights and authorities. This idea was applied in the development of Tanzania's 2002 Forest Act. The tenure principles of that Act followed the principles of the Land Act and the Village Land Act, which were based on national land policy. These were the breakthrough laws in the recognition of customary tenure, and they gave village councils considerable powers.

Under the Forest Act, the first step is to find out and record existing forest rights that local communities claim in a forest that is, or is proposed to be, a forest reserve. An investigator is appointed to investigate claims to customary rights; the investigator assists people to make claims and is given wide

powers to get the information needed to make recommendations on forest-tenure rights.

The investigator has five options:

1. a continuation of the existing rights;
2. a continuation of existing rights with modification(s);
3. to not declare a forest reserve because of the effect on existing rights;
4. to end rights because of the importance of the forest reserve. In this case, rights would be replaced by licenses; and
5. to create a village or community forest reserve as the best way of preserving existing rights and the forest.

Any proposal that deprives people of their customary tenure rights involves the payment of compensation.

Lessons learned

The following lessons can be learned from the Tanzanian experience:

- a national policy must be in place before a law can be drafted. Laws cannot be a substitute for policy but must follow and apply policy;
- a national policy of recognizing customary forest tenure as an equal tenure to statutory forest tenure must be adopted. Forests cannot be managed as if customary tenure did not exist;
- a participatory approach should be used to find out what customary forest rights people have. This is needed to develop forest management laws incorporating such customary rules; and
- a participatory approach to developing community forest reserves should be adopted, with reserves being recognized on the basis of practice on the ground.

Comment from the floor: It is an illusion to think that there can be a simple legal transfer. We are in a complicated world. Land conflicts are often not just between one community and another but also within communities and even within families. The existing system is unfair and has to be reformed but we should take into account the complexities of the world. I would warn speakers against a tendency to show that these things are very easy to do.

Professor McAuslan's response: Some 10 000 villages now have power over land and therefore over the management of forest reserves. That is not a simple system; it is a democratic system. The simplistic solution would be to centralize everything, but it would not be simpler.

Comment from the floor: We should not forget that most countries are made up of villages and tribes and that for years we've been working to overcome problems of national cohesion. We must reflect on the best legal and organizational framework and the impact it will have on human development. Reform depends on the country situation; some countries run the risk of tribal problems. The treatment of the land problem is not just a legal problem, it is also a social and economic one.

Professor McAuslan's response: There is no suggestion that Tanzania's model is the solution to problems of forest management throughout Africa. This is one model. There are lessons to be learned from it. Every country must develop its own solution but presumably it's worth looking to see what is happening elsewhere in Africa. It would be presumptuous of me to comment too much on the situation in Central Africa. But it is worth making the point that an awful lot of countries have been trying to abolish customary tenure on the assumption that it would improve development. This doesn't work, so the alternative is to recognize it and to work with it rather than against it.



Debatable: Conference participants debate issues surrounding legal pluralism during a break-out session *Photo: A. Sarre*