



Briefing Note

Traditional land law

The background

In most of Africa's sub-Saharan nations as well as in Latin America and Asia, two very different and opposing systems of land law exist: traditional land law on the one hand, locally anchored and oriented to communal use, and state land law on the other, based on private ownership and in many places introduced under colonialism. Many aspects of these systems clash and contradict each other, at times causing violent conflict. In rural areas in particular, small farmers often cultivate land on the basis of traditional rights of tenure or use which, however, have never been documented in writing. In the eyes of modern law, this land is officially owned by the state.

Traditional land rights may apply to certain parcels of land, collectively used areas such as grazing land, or to use of natural resources found on ancestral land. This includes, for example, hunting and gathering rights in forests. Traditional land law systems have differing distinguishing characteristics. They are usually geared to prevailing livelihood strategies and forms of land use, and continue to develop in line with these strategies and uses. Traditional land law and land management systems consider land in general to be the communal property of a defined group, which can encompass for example the descendants of the first inhabitants. Non-members of the group have only limited rights. Someone within the user group who is recognised and respected by all is responsible for fiduciary administration and resolution of land conflicts.

The applicable rules are generally known and recognised within the user group. Entitlements and claims of individual persons are often only temporary, and cannot be sold or divested to any party outside the group.

In some countries, traditional land law has survived over the centuries and still holds sway today. However, traditional systems have also often been - and still are - marked by land conflicts and unjust distribution of land.

In traditional land law, women in particular usually do not possess any permanent, secure rights of use of their own. In many cases these systems have nevertheless long enabled unbureaucratic access to land. Population growth, a turning away from subsistence farming, and increasing production for the market are progressively eroding the functional capability of traditional land law. In addition, it is often no longer transparent who is using what land for what purpose. Continuing migration to the towns and settlement of non-indigenous land users, such as previously nomadic livestock herders, also contribute to the lack of secure access to land.

Large-scale acquisitions and leases of land exacerbate the situation even further. Recent years have witnessed governments in various developing countries increasingly ignoring traditional rights of use and promising the land to national or international investors. In many instances this has been done without compensating the previous users; instead, they were displaced or forcibly resettled.

The parallel existence of traditional and modern systems of land law harbours considerable potential for conflict, most commonly caused by overlapping claims of tenure rights, unclear competencies and authorities, and the fact that ancestral systems are usually passed down by oral tradition, while modern legal systems are codified in writing.

Up to date, there are but few examples of nations where traditional and modern land law systems have been successfully merged. One of these is Namibia. The communal areas in the north of the country are separated from so-called commercial areas in which the major industries are located. Most of these are privately owned by white Namibians. The framework for development of the communal areas has been regulated by law since 2002 under the Communal Land Reform Act. The centrepiece of this legislation is the establishment of local, participatively organised bodies called Communal Land Boards. These boards play a significant role in efforts to integrate traditional laws into the modern land law system with more strongly secured tenure rights. Similar structures exist in Uganda and Ghana as well.

Another variant can be found in local user agreements such as those used in Mauritania. In the country's Guidimaka and Hodh El Garbi Regions, these agreements cover land outside the fields used by specific individuals. Among other aspects, they regulate grazing, harvesting of dry grass, gathering of dead wood, cutting of branches for fencing, and felling of trees. Such use is controlled by fees that are then made available to the communities. These arrangements can also exclude parcels of land from any use or render certain specific uses, such as harvesting of gum arabic, subject to special regulations. Communities monitor for compliance with the agreements, deploying wardens for this purpose, who are also responsible for collecting user fees and imposing fines. There has been demonstrably less degradation of vegetation thanks to these protective measures.

In rural regions in particular, traditional land law retains its prevailing authority as it commands greater respect at the local level, and can more readily be implemented and enforced. Nevertheless, efforts to

redesign national land policy and legislation are steadily curtailing the powers of traditional authorities.

By contrast with arable farming, the rights of use traditionally enjoyed by livestock herders have so far hardly achieved any recognition at all.

Our position

In light of these considerations, GIZ's position is as follows:

1. Traditional and modern systems both have legitimate authority

Both modern as well as traditional systems of land law hold justifiable power of authority. Which of these systems is more suitable depends for example on whether the land is used for intensive irrigated agriculture that requires substantial investment, or for livestock herding and rain-fed agriculture.

2. Recognise and integrate traditional law

In many rural areas, traditional land laws form an inherent part of economic and social life. Such laws should therefore be formalised and the systems of land administration established in these regions by traditional authorities officially recognised, provided they follow democratic principles and respect human rights. It is extremely important that any reform of land regulations include participation by all persons directly or indirectly affected.

3. Intensive agriculture needs land titles

However, individual land titles are often absolutely essential to pursuing highly productive agricultural systems such as irrigated farming and plantation management, intensive livestock husbandry or contract agriculture. Modern management practices, capital-intensive investments and good farm-to-market access are crucial to the success of such undertakings. Not only do individual land titles secure tenure rights, they can also help

generate higher investments and serve as collateral for obtaining loans.

4. Clearly defined powers of authority help prevent conflicts

When merging parallel systems, the powers of authority of the national and decentralised administrations as well as the legal jurisdiction must be clearly defined and adapted where needed. Implementing directives issued to the individual institutions should be clearly communicated. This will largely prevent multiple, contradictory decisions by different institutions when allotting or awarding land or resolving conflict.

Our recommended action

International cooperation should focus its efforts on strengthening administration, mainstreaming and anchoring traditional land law in international guidelines and national legislation, and promoting participatory land-use planning.

GIZ's key recommendations for action are as follows:

1. Merge parallel systems and disseminate innovative approaches

Land law reform should merge the most important elements of traditional and modern systems and adjust legislation accordingly. It is essential that everyone affected participates in this process, from the national government right down to traditional local authorities. So far, few approaches to merging traditional and modern land law have proved successful. This is why international cooperation efforts should seek to systematically adapt and apply innovative examples such as the (Communal) Land Boards in Namibia and Botswana. This information can help launch land law reforms in other countries.

2. Strengthen local administrative authorities

International cooperation should target efforts by land administrative authorities to promote capacity building and enhance staff qualifications.

International cooperation can also participate in quality management and process monitoring. Such efforts are particularly important because benefits can be won from shifting process management and registration to the regional or local level. The reality, however, tells a different story. Many land administrative bodies are allocated too little funding and too few personnel, and therefore lack the capacities needed to fulfil their duties.

3. Support international initiatives

Efforts to achieve recognition of traditional land laws and to merge traditional and modern systems of land law are also playing an increasingly important role in international and regional processes of responsible land management. Such guidelines are being set down in writing, for example in the Framework and Guidelines for Land Policy in Africa (African Union). The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), an international reference frame for good land governance, were adopted by the Committee on World Food Security in May 2012.

Core elements include examples of best practices and criteria for successful merging of traditional and modern land law. The initial steps towards implementing these guidelines have already been taken. The international community is working to provide assistance to various target groups, such as governments and investors, including recommendations for implementation. Programmes and projects designed by international donors are also aimed at achieving thorough, consistent implementation of these guidelines at national level. This represents a first step towards merging the two systems of law.

International cooperation should strive to strengthen civil society, for civil society plays a key role in the call for and monitoring of efforts by governments and investors to implement voluntary guidelines.



4. Promote land-use planning

Participatory spatial and land-use planning is an important instrument for beneficially linking traditional and modern land law systems. International cooperation should therefore step up its efforts to promote such planning.

Land-use planning also secures existing land rights, helps prevent potential conflicts, and contributes to avoiding overlapping planning by different ministries.

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