

REPORT

CUSTOMARY LAND RECOGNITION

**ZAMBIAN APPROACH TO
DOCUMENTATION AND
ADMINISTRATION**

by Andrew Chilombo and Matt Sommerville



INTRODUCTION

From January 15 to February 6, 2018, the USAID's Tenure and Global Climate Change Program and Land Portal Foundation co-facilitated a **dialogue** on experiences of documenting household and community-level customary rights in Zambia. The dialogue brought together the perspectives of government, traditional leaders, practitioners, civil society, and academics to consider how customary land documentation can contribute to national development goals and increased service delivery in rural and peri-urban areas. It considered challenges associated with large-scale documentation and administration processes and the relevance of customary documentation processes to Zambia's National Land Titling Program and potential future Customary Land Administration Bill.

Customary Land Rights are key to ensuring basic rights of access of resources that underpin basic livelihoods of the most vulnerable are protected. With perhaps over 50% of the world's land surface de facto managed by indigenous peoples and local communities, there is a need to recognize and subsequently document these rights to land and associated natural resources. Many of these systems have been governed through unwritten, though locally legitimate, customary norms that rely on traditional leaders. With the recognition of customary rights there is also a need to ensure that state and customary institutions are able to communicate, share information, and work toward complementary objectives.

Customary land is often portrayed as rural, forested, and lightly inhabited with limited state engagement, while state land is seen as high value urban and peri-urban planned areas. Yet customary institutions are evolving and are not divorced from market forces, urbanization, or migration pressures. Youth migrate into cities only to return to the safety net of customary land when times are difficult. Households may migrate to lightly populated areas with improved soil fertility or more consistent rains. National and international investors seek land for agriculture, as well as commercial, residential, and industrial developments. In some cases, customary systems are disintegrating, where, for example, large areas of land are being converted to leasehold title and local populations are being displaced. These pressures are particularly strong at the interfaces where customary and statutory land management meet on the peri-urban fringe. In other cases, customary systems are evolving and leaders are protecting the rights of local populations through customary land documentation processes or by promoting fair negotiation between communities and investors. In this context, tools are needed to share information freely and promote improved management of land and natural resources. This is particularly important given that in many contexts, while land may sit with the customary institutions, resources, such as timber, wildlife, and minerals, are unambiguously under the control of the state.

Zambia presents an excellent case study for understanding the opportunities and challenges associated with promoting customary rights recognition. Zambia's 288 customary chiefs have legally recognized authority over ~70-94% of the country's 752,000 km², while government leaseholds on state land are restricted to ~6% of the country at independence, surrounding urban centres and lines of rail, with a further 10-20% of the country that may have been converted to leasehold since 1995. The authority of customary leaders over land is recognized but these leaders have limited tools for land management. Spatial records for both state and customary land allocations are limited, and only a handful of chiefs issue documentation of their land allocations or of customary decisions made in traditional courts. Zambia's chiefs are relatively non-political, and while some chiefs have been accused of allocating land to investors through non-transparent means, others are seen as advocates for protecting the rights of rural stakeholders. In recent years, the government has launched efforts to document state land through a National Land Titling Program, while at the same time discussing options for promoting the documentation of customary land allocations through a National Land Policy and a subsequent Customary Land Administration Bill. While still under development, these initiatives provide an opportunity to harmonize and build bridges between Zambia's customary and state land administration systems, which to date are entirely separate from one another. There are a number of pilots related to land documentation being carried out on both state and customary land in Zambia by the government, the private sector, civil society and donors to test processes and technologies for systematic land documentation across customary and state land. These experiences are creating an evidence base from which to develop a national system.

An equally important, though less discussed, element of customary land management in Zambia is the devolution of rights to natural resources found on customary land, particularly wildlife and forests. At present, though communities may have customary rights to land, they do not have rights to commercialize wildlife or timber, limiting their opportunities for diversified rural livelihoods built on natural resources. Yet there are emerging mechanisms such as community forestry, community game ranching, and community titles that may strengthen local institutions and their legal authority to manage resources.

The discussion contributed to Zambia's customary rights recognition processes by increasing internal understanding of the conducive policy and social framework for rights documentation, and by increasing global awareness of Zambia's opportunities for leadership in this area.



OBJECTIVES

The specific objectives of this dialogue were to:

- » Demonstrate the role of documentation to increase transparency between state and customary authorities to improve land use decision-making;
- » Highlight how documenting customary rights can be achieved cost effectively through engagement at the interface of the policy, participatory processes, and technology;
- » Increase awareness of the benefits of documenting customary rights for responsible investment, peri-urban development and rural planning, and resource management; and,
- » Raise awareness within the Zambian community of practitioners and government of their opportunity to be global leaders in customary rights documentation, and to raise awareness globally of Zambia's unique tenure arrangements.

DIALOGUE QUESTIONS

The dialogue questions were divided into four broad categories: customary, community, and communal land in Zambia; documenting customary rights at scale; customary land administration: How to avoid creating a snapshot in time; and opportunities for scaling. As detailed below, under each category were sub-category questions that guided the discussion:

1. CUSTOMARY, COMMUNITY, AND COMMUNAL LAND IN ZAMBIA: WHAT ARE WE TALKING ABOUT?

- » What is the role of customary/traditional authorities in a modern state?
- » What tools are needed to manage rural and peri-urban land?
- » Customary land and state forest, wildlife, and minerals: What is the value of documenting land rights when resource rights rest with the state?

2. DOCUMENTING CUSTOMARY RIGHTS AT SCALE:

- » Legal Framework: Is it legal?
- » What institutions are prepared to document: government, CSOs, private sector?
- » What are the most important pieces from a process perspective?
- » How to from a technology perspective?
- » How can we reduce costs?
- » Potential unintended consequences: Impacts on women, youth, and vulnerable populations?

3. CUSTOMARY LAND ADMINISTRATION: HOW TO AVOID CREATING A SNAPSHOT IN TIME?

- » How to increase transparency and sharing of data between customary and state authorities using online platforms?
- » What low-cost tools can be used to register changes?
- » How can services be bundled for chiefs and communities?
- » How to build a use case:
- » What is the interest ranging from land use planning and service delivery to taxes and restrictions?
- » What is the interest of private sector in customary land documentation?
- » How does documentation change the actions of smallholder farmers, evidence from impact evaluation?

4. OPPORTUNITIES FOR SCALING:

- » Who can pay for mass documentation?
- » How to support customary authorities while respecting their differing needs?

Following the proposed categories of questions above, the dialogue was organised by weekly submissions and contributions on the challenges of customary land in Zambia; how documenting customary rights can be done and improved; impacts of customary land documentation; and the sustainability and potential for scaling up of customary land administration.



BRIEF DESCRIPTION OF THE DISCUSSION POINTS

1. CHALLENGES OF CUSTOMARY LAND IN ZAMBIA

There are challenges in the existing land governance system in Zambia. Cited challenges included: power concentration in individuals rather than strong institutions; illegality/corruption when 'trading' customary land; limited research that limits evidence-based decision-making processes; illiteracy coupled with lack of sensitisation campaigns that should empower communities who are the primary stakeholders; and absence of a comprehensive land policy that reflects the local as well as national socio-economic and environmental interest. Other challenges included the (wrong) perception that Zambia has abundant customary land. Currently, research suggests that land under traditional administration is way below 94% that appears on paper. This perception has implications on development priorities that the government sets for customary tenure recognition. The bifurcated land tenure system and the manner in which it is administered in the country has created a 'State vs Traditional,' and 'us vs them' situation. In some (if not, in most) cases, this has led to an antagonistic rather than synergistic relationship between the state land administrators and traditional authorities.

- » A case for focusing on chiefs in customary land documentation. Zambia's chiefs are crucial partners in all that happens on customary land. They administer traditional land in line with their customs and traditions, beyond that, they are arbiters who resolve a range of issues affecting their subjects as relates to land. But with the incoming need of documenting land, they now stand at the centre stage of being the key player in the documentation process.
- » Rural chiefs are the greatest driver of change in their communities. Information or instruction coming from a government employee or organizational partner simply does not carry anything near the sway of that same information coming from a chief.
- » The health of the customary commons is dependent on its shared social equilibrium, its protection of the 'living ancestors' and the sacred groves, its judicial system, its custodianship of the land and protection of the land rights of its villager usufructuaries – all of it unwritten. The rule of law is therefore achieved more easily in a customary commons where there are no written rules whatsoever, and where the chief is not corrupted, overly dictatorial or weak. And unlike written constitutions, it is flexible. And dealing with land, the responsibility of headmen, in this manner poses less of a risk to landgrabs and the plundering of ecosystem services.

2. DOCUMENTING CUSTOMARY RIGHTS AND HOW IT CAN BE IMPROVED

Documenting customary land rights remains an unquestionable imperative. More than that, it is also legal within the existing legal framework, and a preserve of traditional authorities. Documentation and customary tenure are not conflictual. Actually, the less than one-third cases of chieftdom documentation in the country demonstrate that it (documentation) is a possible process, and needs to be scaled up. Documentation requires that land be audited. National Spatial Data Infrastructure with a geoportal that will allow different stakeholder access and share fundamental spatial data that is being done at the Surveyor General is in the right direction. The process is important in the sustainability discourse as it can incentivise land use initiatives that take care of the needs of the people and environment. The land governance system in Zambia remains plagued with weak institutional frameworks and infrastructure. Power dynamics between traditional leaders and the state are hugely in favour of the state. Prospects of enforcing customary law without government interference cannot be ascertained. In addition, there is 'failure to resist temptation' and bowing to 'pressure from outside' of chieftdom that compromise the chiefs' ability to govern customary land equitably. Customary land and associated rights are embedded in values and norms which are orally bequeathed, and consequently, lost with the dying of the old generation. There is an apparent antagonising disconnect between customary law and state law in ways that reflect difficulties in the co-habitation of the two to achieve national development objectives. Other points raised included::

- » The Comprehensive National Land Policy that was awaiting validation at the time of the dialogue, and was later rejected by traditional leaders when it was presented, has been silent on important issues such as the shrinking of land that is under traditional leadership due to large scale land acquisitions (LSLAs) and land acquisitions owing to land speculation. It lacks provisions on the reversion of land tenure in the event that converted land has not been developed. LSLAs for Economic Multi-Facility Zone and other purposes lead to involuntary displacements across the country.
- » Decentralisation holds promise in improving land governance at local levels, however, the financial implications are too enormous to ensure in place a devolved, transparent, inclusive and accountable institutional framework.
- » The thought that there is too much land in Zambia persists, and this is partly attributed to lack of evidence to pin down the ratio of customary land to state land;
- » Media fetishisation of land governance ills does not raise the profile of good land governance efforts, working right and success stories such as land documentation in Chief Sandwe and elsewhere.
- » Clarifying what should be documented and by who, for who, for what and how; establishing trusts in rural areas; devising mechanisms for power-sharing; certifying customary land; giving customary land the same legal standing as state land, duly compensating victims of land alienation; halting new farms blocks on land alienated from customary control; transfer of renewable natural resource rights to customary land commoners; and payment of mineral royalties into a Permanent Fund.

- » The government's role on customary land is based on the Lands Act of 1995 together with the procedures as laid out in the Land Circular of 1985. Specifically, for any grant of land to be effected on customary land the local authority (the district council and the chief) must recommend to the Commissioner of Lands such grant. The Commissioner of Lands will make sure that the recommendation is accompanied by the Chief's written consent and minutes of the Full Council. In respect of planning customary land as well as maintaining Forest land in customary areas the government relies on Urban and Regional Planning (URP) Act of 2015 and the Forest Act of 2015 respectively. The URP Act provides for the preparation of Integrated Development Plans in all planning areas which include areas under the jurisdiction of traditional authorities. Section 25 of the Act provides for local authorities to enter into planning agreements with chiefs in customary areas. The Forest Act provides for sustainable utilization of forest resources in both customary and state land.
- » Mechanisms for accountability, whether on state or customary land need to be in place; building capacity of land service providers (state and customary) and encouraging citizens to hold these providers accountable. This can be achieved through both access to information, such as Zambia's new National Spatial Data Infrastructure supports, and access to justice, where statutory systems are often less accessible to the rural poor than the customary structures.

3. IMPLICATIONS OF DOCUMENTING CUSTOMARY LAND

Customary systems offer more accessible access to justice and the use of social norms to enforce a set of rules that are (more) commonly understood locally, while state law (and processes) may be unknown, rather foreign, inaccessible, and enforced haphazardly to local communities. Given the existing bifurcated system of land governance in Zambia, attention needs to be drawn to ensuring the respective jurisdictions of the two systems are respected and transparent in sharing information. The chief might well be a custodian of land in customary areas but what is emerging is that the temptation to give out that land is getting greater. Documentation can help curb the level of such occurrences. With open information, it would be more difficult to undertake double allocation of land and claim consent. Other points raised included:

- » Historically, though customary law has not been recorded, it can still be codified, and best practices identified and shared among traditional leaders. According to custom, when an individual leaves one chiefdom and moves to another in Zambia, a traditional leader will often write a reference letter for the individual and the individual will apply for land with a new chief. In many cases, the new chief will write a letter and stamp it to say that they are allocating the individual land in a particular village or area. Similarly, a chief may write down customary rules for new members of the community to follow. Just because a chief chooses to record their customary decision does not turn it into "statutory law."

- » Customary law (and indeed decisions made under customary law, such as the allocation of land rights) can be written down, and indeed there has been hesitance to do this among some because a common feature of customary law is that it evolves over time through customary practices. Writing down customary law can be seen to limit this evolution, or indeed the flexibility of the customary leaders. However, one of the benefits of documenting customary decisions on paper is that it may be used as evidence, particularly where two customary leaders or the state and customary leaders clash. Documenting customary land is about writing down actual rules and decisions of customary leaders as evidence of individual rights rather than an attempt to convert customary land into statutory land. Having guidelines for customary land and natural resource management will not change the customary status but upgrade it to customary written law
- » Undocumented culture and customs that are only orally preserved are lost.
- » Customary documentation is only recognized at grass root level. While chiefs are ambitious to protect their rights and resources, the majority are illiterate. Customary land attracts no rates or taxes, therefore, the traditional leaders heavily depend on a salary that comes from the government. This weakens their ability to say 'no' to the government when the latter want to get traditional land.
- » It remains a concern how traditional leaders will ever be able to enforce their customary laws without government interference or without being compromised, even 'bribed.'

4. SUSTAINABILITY AND POTENTIAL FOR SCALING UP CUSTOMARY LAND ADMINISTRATION

Large scale land documentation facilitates rapid assessments of the structure and size of land ownership. Overlaid with remotely sensed imagery, experts are able to determine types of land use, crop yields, planning for disaster prevention and mitigation.

The sustainability and potential for scaling up customary land administration in Zambia will and can benefit from the methodological advances in computing, positioning and mapping techniques that have considerably lowered the cost of large scale property documentation/ registration. The just completed TGCC project and other pilot projects within Zambia are a good example. Besides methodological advances, there are other challenges to the process. These are of a political, technical, institutional/legal nature which would impact the potential for scaling up the documentation process. Other points raised included:

- » Urban areas with demographic pressures and high economic potential as well as less problematic areas in terms of local/national politics could be prioritised for documentation. Documentation needs to be sensitive to the culture and needs of the community, and desired by the people both primarily and secondarily concerned. This necessitates building local capacities. External experts need to work with local communities in knowledge generation.

- » Maintaining land records system, including updating data land holdings change needs to be planned for.
- » There is value in highlighting success stories in land documentation such as the customary land certificates which were piloted in Eastern province. This has potential in inspiring broader adoption of the exercise.
- » Strengthening local governance institutions, including legislation amendment where necessary need to accompany the process of documentation and scaling up, ensuring the 'peaceful co-existence' of two land governance regimes in ways that minimise regional isolationism or even tribalism. The protection of communities from the plunderers requires stronger institutions in land administration above the chief only. A devolved, transparent, inclusive and accountable institutional framework in which land and resource ownership vest in chiefs and headmen who hold it on behalf of the people is a legal imperative.

CONCLUSIONS

The points above are a summary of the discussion about customary land recognition in Zambia, focusing on the approach to documentation and administration. As has been mentioned, discussants came from diverse professional backgrounds; bringing together perspectives of government, traditional leaders, practitioners, civil society, and academics. The dialogue therefore, was an enriching experience for all who participated and those who followed the dialogue. From the quality of the submissions and the diversity of participants, the dialogue raised the profile of land governance in Zambia and beyond as a topical but also as a thorny issue for the socio-economic and democratic emancipation of the most vulnerable people. In addition, looking at successful stories in Eastern Zambia and in Rwanda, there is hope that some of the challenges and wrongs of land governance can be surmounted and righted for the socio-economic prosperity of the most vulnerable and powerless people who are often disenfranchised from land legal protection.

The dialogue brought different participants together. This created an opportunity for building professional networks for land related causes. In this way, the dialogue was a contribution to strengthening and linking existing but often-isolated expertise on land issues within and beyond Zambia. The momentum has been created. The hope is that our interest in land issues and in the vulnerable communities will maintain and increase this momentum. We sincerely thank you for your participation and generous contributions to this important topic.





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