

Legally securing community lands

Principles & Paths

Liz Alden Wily

Independent land tenure specialist

lizaldenwily@gmail.com

1. PRINCIPLES

1. Community lands = community *governed* lands
2. The law matters – but is not enough on its own
3. Correctly nesting the challenge is needed to grasp the challenges
4. Facing up to the conundrums – e.g. balancing private & communal interests
5. Lawful dispossession reaches deeply into the community
6. Equal but different

7. Ownership not use rights
8. Not just whose rights but who controls
9. Tenure reform is not the only route
10. Going local is key – half-way houses are not enough
11. Time to challenge PA norms 2 billion ha of best CL is under state protection
12. Looking forward, not back
13. Learning *by doing* makes good law

14. Moving beyond trust arrangements
15. Adopting a holistic approach: 6 elements
16. Stretching the boundaries: oil & water
17. No success without political empowerment
18. Grasping the nettle: *the time is right*
19. No one path: usually complex interventions
20. Constructs & paths inseparable from land use systems
21. There is a lot to build on & lessons to be learned

2. PATTERNS

- 1. SIMPLE DOMAIN:** All land area is community property and community seeks single title for whole area in undivided shares (e.g. hunter-gatherers, indigenous peoples).
- 1. DUAL DOMAIN:** Community area divides into private & collective parcels, the former independently alienable, the latter non-alienable community property (major tenure pattern today).
- 1. DOUBLE RIGHTS:** Community holds root title and issues usufructs to individual families: “2 hats” (also dominant).

4. CLIENTAGE: chief external to community owns & controls lands; strictly *usufructs at local will*.

5. COMPLEX: individual parcels, community owns near lands, *access* rights to larger lands, owned by clans or tribes; common in transhumant, pastoralist, agro-pastoral land relations.

3. PLATFORMS

Community Lands I: sustained community-based land & livelihood dependence

Community Lands II: specific to certain assets

Community Lands III: restitution

Community Lands IV: compensation only can now work

Community Lands V: collective tenure to meet modern settlement & urban needs

4. PATHS

1. **Declaration:** overnight change through legal provision
2. **Domain approach:** CLA boundary-focused
3. **Governance approach:** leads with *jurisdiction*
4. **IP approach:** native title, ethnically-defined
5. **Titling approach:** case by case
6. **Back Door approach:** e.g. (a) conservation (b) conflict management (c) limiting undue affects of commercial developments
7. **Incremental approach:** Access, Authority, Tenure

1] Declaration

- *Declares that customary rights have force & effect as private property interests*
- Changes rights status overnight
- Constitutional protection: legal platform
- Minimal assisting instrument: “discovery” obligations
- IN PRACTICE: works only in strong rule of law sits. & works best when partnered with lawful *community jurisdiction system*

2] Domain

- *Focuses on defining & registering outer boundary of the Community Land Area (CLA) (“shelling”)*
- Only works when also vest authority over internal lands in the community (*Jurisdiction*)
- Does not solve internal private/collective issues
- Not as useful when most contested lands are beyond “the home area” & in more complex patterns
- Can fail if “community” is defined as tribe/involve vast areas & tenure & authority in remote bodies

3] Jurisdiction

- *Endows legal authority over land rights to communities*
- Powerful, essential – BUT
- Requires legal instruments requiring inclusive & accountable decision-making
- Can be self-defeating where chiefs make themselves/are made owners & allocators

4] Native Title

- *Recognizes on basis of originality & ethnicity: delivers native title*
- Often the easiest target when a tiny minority
- In practice often endows only some rights
- Tends to have less utility outside h/g sector
- Does not easily resolve later arrivals & can exacerbate conflict & deadlock, aiding state retention of tenure
- Mixed reception in Africa

5] Titling

- *Communities use statutory systems to secure group rights e.g. multiple names on private titles*
- Best when clear constructs for collective entitlement provided
- Necessarily case by case, so slow, expensive
- Disrobes entitlement of customary attributes including community jurisdiction

6] Back door

Such as focusing on a particular resource (e.g. forests), minimizing ill-effects of large-scale developments (e.g. mining, dams) or shifting debate from “who owns?” to “who is being affected?”

- Can be highly useful (demonstrated in forest sector) (“who is the rightful controller?”)
- Requires solid *discovery process*
- Requires substantial compensation packages
- Encourages new shareholding models

7] Incremental

Focuses on securing access rights, then management rights, then tenure

- Establishes platforms and empowerment *en route*
- Can be too slow & too late; lands exposed
- But can be the only way forward