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POLICY BRIEF # 12

# THE PROPOSED LOCAL GOVERNMENT ACT: COMMUNITY FORESTRY AND DECENTRALIZATION

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

### POLICY ISSUE

Political and administrative authority has, from the Liberian Republic's inception, been concentrated in the capital. As the preamble to the *National Policy on Decentralization and Local Governance* ("Decentralization Policy") points out, "since 1847 and throughout the history of Liberia, governance and public administration have remained highly centralized in Monrovia and controlled mainly by institutions and structures of the central state, which have not allowed adequate legal opportunities for the establishment of a system of participatory governance." The Government of Liberia's (GoL) Decentralization Policy, which has now been converted into the *Draft Local Government Act of 2013 (LGA)*, aims to address this problem by devolving authority over a range of issues and services to the fifteen counties and other subordinate administrative units.

### Final Evaluation of the Land Rights and Community Forestry Program USAID, p.49

*"The Community Assemblies of the pilot communities do not contain Town, Paramount, or Clan Chiefs; they are composed of locally elected elders and leaders elected specifically for the CA in a general assembly. This adaptation to the challenge of creating CF institutions in the context of weak and distrusted local governance institutions may be the only solution for now. As Liberia's governmental reform decentralizes government authority, it will be important that the roles and responsibilities of institutions are absorbed into the functions of local governing bodies."*

County Administrations will have new powers to raise their own revenue, plan and implement development projects, and manage natural resources, all of which will affect community forestry (CF). The potential for disruption to the CF program is high, as it was established relatively recently – the *Community Rights Law with Respect to Forest Lands (CRL)* was passed in 2009, while the implementing regulations ("CRL Regulations"), which are currently being reworked, were promulgated in 2011 – and is still being programmatically developed. At the same time, the decentralization process could greatly benefit CF because local government is, by definition, closer, which means it is potentially more accessible, responsive, and accountable. This policy brief will look at how CF will likely be impacted by the passage of the LGA, and specifically how the Departments of Land, Environment and Natural Resource Management, proposed therein, will need to be considered by the Forestry Development Authority (FDA).

## BACKGROUND AND CONSIDERATIONS

### **Keeping Up with Legislative Reform**

The CF program, which is being collaboratively developed by the FDA and USAID|PROSPER, is less than five years old and has already suffered a series of setbacks, including the temporary suspension of operations because of the need for regulatory harmonization, and the devastating effect of Ebola. Most stakeholders agree that the passage of the CRL has been an important step for Liberia, as it establishes a process through which communities can have their customary rights over forest resources formally recognized. But as with any system of governance, whether or not the reform effort is successful depends upon effective implementation, which is arguably easier when there is a singular focus – that is, when a government or agency is able to address a particular subject or area, while the rest of the system remains stable. The CF program faces significant challenges in this regard.

This is because the GoL is embarking on an extremely ambitious program of legislative reform that will fundamentally reshape land rights, land administration, and local government. First, the proposed *Land Rights Act* (LRA) will create Community Land Development and Management Associations (CLDMA), the functions and authority of which will overlap with the CF governance bodies. This may lead to competition or even conflict within communities, unless the various land administration and CF governance bodies are harmonized.<sup>1</sup> All of this is further complicated by the requirement that CLDMAs be “integrated in the official administration of the community in keeping with the Decentralization Policy of the Government” (Article 36(11) of the LRA). The proposed LRA has therefore introduced a significant amount of uncertainty about how community forests will be governed.

This uncertainty is compounded by the introduction of the LGA, which, if passed and implemented, will reshape the way Forest Communities interact with local and central government. The FDA, which is primarily responsible for the CF program, must therefore consider the Land Rights Act and how it will affect CF, the Local Government Act and how it will affect CF, and how the Land Rights Act will be integrated into the Local Government Act and how this will affect CF. In this manner, the pace of legislative reform is arguably outpacing CF, as new structures and systems are being developed – and will likely be passed and implemented – before the program can be stabilized and made to work. Although this is a relevant criticism it is, to a large extent, a moot point: the GoL is already proceeding with the creation of county “service centers,” which will issue driving licenses and other permits locally, so that county residents do not have to travel to Monrovia. This “deconcentration” is a precursor to full decentralization, and makes clear the need for the FDA to start seriously considering how to respond to the changes proposed in the LGA, beyond the current establishment of regional offices.

## DECENTRALIZATION & THE LOCAL GOVERNMENT ACT

### **Assumptions and Existing Arrangements**

The proponents of decentralization cite various benefits, the foremost being increased accountability. This is because in a decentralized system political and administrative decisions are usually made at the level closest to local constituents – the principle of “subsidiarity.” Because administrative and political representatives can be removed in an elective democracy they are far more likely to seek to protect and advance their constituents’ interests, which fosters downward accountability. In addition to increased accountability, decentralization is also supposed to increase efficiency and effectiveness. This is because local representatives know their communities’ socio-economic context, and so are aware of the obstacles and challenges that may face a particular reform or development program – in other words, they know the best way to achieve particular objectives in their locality.

Accountability in the Liberian local government system, in its current form, does not run “downwards” to the people, at least not at the senior level of County Administrations. This is because County Superintendents, the highest representatives of the local government structure, are appointed by the President rather than elected by residents of the county. Instead of considering how county residents will respond to policies and programs, Superintendents are more likely to consider how the President who appointed them will react – accountability, in this case, runs “upwards.” The extent to which this has

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<sup>1</sup> This issue was addressed in the earlier policy brief, *Customary Land Governance: Options For Community Forests*.

negatively affected development in the hinterland is unclear; however, it seems reasonable to assume that there is plenty of room for improvement.

Decentralization, which is underpinned by the principles of increased accountability, participation and effectiveness, is a laudable concept, but it faces numerous challenges. Citing a conversation he had with the British Prime Minister, Gordon Brown, a Liberian official explained, “You should not decentralize from a weak center.” A central government with weak capacity will find it difficult to impart the technical skills and transfer the necessary resources to local governments in a manner that will allow for the realization of decentralization’s presumed benefits, and may in fact worsen governance. This poses a serious challenge for the GoL. However, there are also real opportunities to improve governance structures, as the CF program – itself a form of decentralization – has already shown. The imperative is to make sure that the LGA is implemented in such a way as to strengthen and support the CF program and the forestry sector more widely, rather than undermine it.

### **The Local Government Act and Community Forestry**

The two documents on which this policy brief is based – the Decentralization Policy and LGA – provide a broad picture of the decentralization process, though many gaps will need to be filled in following the LGA’s ultimate passage and implementation. Listed below are some of the main issues that the CF program, and therefore the FDA, will need to consider:

- The LGA grants local governments new authority to collect revenues from Forest Communities, through fees from chainsaw permits and the provision of delegated services, such as land registration and oversight of demarcation;
- Under the LGA local governments will be given authority to plan, implement and oversee County Development Agendas. Because Forest Communities are also supposed to plan and implement development projects within their forest lands, and these can be substantial, they will need to coordinate with local governments;
- In some cases a community forest will fall within more than one political-administrative jurisdiction, either at the county or district level. Where this occurs there is a danger that local governments will fail to effectively coordinate, leading to a heavier regulatory burden on the community in question.

These issues will all need to be considered, but the most immediate concern with regard to the impact of the LGA on community forestry is the establishment of new Administrative Departments, and specifically the Department of Land, Environment and Natural Resource Management (DLENRM). What powers and responsibilities will these new departments have; how will they oversee community forestry activities; and to what extent will they be responsible for oversight of commercial activities, which has traditionally been the regulatory focus of the FDA?

## **DEPARTMENTS OF LAND, ENVIRONMENT AND NATURAL RESOURCE MANAGEMENT**

### **Statutory Requirements and Agency Discretion**

Section 5.3(a)i of the LGA mandates that “each county *shall* establish” a Department of Land, Environment and Natural Resource Management (DLENRM), which will: regulate land registration; attend to land issues, such as illegal sale of land; provide oversight of land surveying activities; enforce community land rights laws; ensure environmental conservation and protection; natural resource management; enforce community mineral rights in concession agreements; and, most importantly for the purposes of this policy brief, “enforce community forestry rights.” For the purpose of determining the powers that will be decentralized to local authorities, the question that needs to be answered is, what does “enforce community forestry rights” mean and how will the FDA be required to respond?

Reading the LGA, the meaning of “enforce community forestry rights” is not entirely clear: does it mean that the new departments will require communities to claim their legal rights to forest resources, or is it referring to the need to ensure that communities comply with the CRL? Normally, only the legislature is able to establish and define legal rules, but in cases such as this – where the meaning of a clause is ambiguous – the agency or department responsible for enforcement usually has the authority to clarify what the rule

means.<sup>2</sup> Given the ambiguity of the wording, the FDA arguably has the authority to exercise its discretionary power and determine the meaning of the language in the context of decentralization.

Support for this approach can also be found within the LGA under Section 5.3(b) of the LGA, which establishes that the “central government shall, through its relevant ministries and agencies, undertake institutional development measures leading to the establishment of County Administrative Departments as provided for in this Act.” Section 3.3(b) expands upon this, explaining that “[f]or each sector in which functions are devolved from central government ministries and agencies, the relevant sector Minister in collaboration with the Ministers responsible for Local Government and Finance shall develop a clear definition of the specific functions and activities which have been devolved, and the general standards, procedures and requirements for their performance.”

From the wording of the LGA, it is clear that the FDA has a significant degree of discretion to determine how authority over the community forestry program will be decentralized, just as long as the approach is reasonable. Jesse Ribot, writing for the World Resources Institute on the issue of the decentralization of natural resources management, puts forward a principle that provides possible guidance on what “reasonable” means in this context: “decisions that can be made by citizens without regulation, should be established in the domain of citizen rights. Decisions that can be made by representative local government without jeopardizing social and ecological well-being should be retained at that level.” Based upon this, there are likely two main policy options.

## **POLICY OPTIONS**

### ***Option 1 – Complete Devolution of CF to Local Government***

The first option is for the FDA to devolve all responsibilities over community forestry to the new DLENRMs, including oversight of commercial activities on CF land, whether undertaken by Forest Communities or other parties. This would be in conformity with the LGA’s wording, since commercial activities are explicitly permitted under community forestry.

Although the FDA has created regional offices, bringing the agency closer to communities dwelling in and around forestlands, it is still oftentimes difficult for community members to reach an FDA office – transportation fees can be high for community members, and road conditions challenging. Establishing county-based DLENRMs would mean that community members could more easily access CF support services: communities interested in forming a Forest Community would only have to travel to the county capital to submit their application, rather than to a regional office or Monrovia.

The issue of proximity similarly affects the entire Nine Steps to develop an Authorized Forest Community, as the regulatory body – currently the FDA – is required to assist the community throughout, and ensure that all legal requirements are met. This process is challenging, as there are logistical and financial obstacles: notice needs to be provided; meetings need to be organized and coordinated; the socio-economic survey needs to be conducted; elections need to be held for the various positions within the governance bodies; and a Community Forest Management Plan (CFMP) needs to be developed, all in order to ensure that communities provide free, prior and informed consent. A significant amount of travelling is required to facilitate these activities, as well as many man-hours. Reducing travel time, per diem payments to Monrovia-based officials, and transportation costs would both increase the speed at which Forest Communities could be formed, and make it cheaper to manage them in the long term. This is an important consideration, given that in some cases it has taken years for a Forest Community to be formed.

It is relatively simple to understand the application process and Nine Steps, meaning that DLENRMs will be able to perform these functions with relative ease. More challenging will be developing the capacity of DLENRMs to oversee communities’ writing of the requisite CFMPs, especially if those plans are to include commercial timber harvesting. Devolving oversight of commercial operations within community forests would undoubtedly be the most difficult part of the decentralization process, as any such exploitation must comply with complex technical standards. DLENRM staff would have to be as equally proficient as the staff of the FDA, which will therefore require extensive and sustained capacity building at the county level.

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<sup>2</sup> This is a principle of American jurisprudence, based upon the ruling in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Although the law of the United States is not controlling, it is authoritative, especially with regard to administrative action – it is the model that many modern administrative States attempt to emulate.

An additional layer of complexity would be the collection of revenues from commercial operations undertaken on CF lands, and the appropriate allocation of payment to the Ministry of Finance. Because DLENRMs would be responsible for the monitoring and enforcement of CFMPs and compliance with the Code of Forest Harvesting Practices and Forest Management Guidelines, they would also have to collect all relevant taxes and fees on behalf of the central government, which would entail even more training.

### **Option 2 – Separating Community and Commercial**

The second option is to separate commercial operations from other aspects of community forestry, such as practices relating to sustainable livelihoods (the harvesting of firewood, hunting, etc.). The FDA would retain regulatory authority over the commercial exploitation of timber at all levels, while local government – through the DLENRMs – would be responsible for other aspects of the CF program.

Under this option the DLENRMs would review and approve applications submitted by communities, which sought Forest Community status, and would support communities throughout the Nine Steps. The benefits of decentralizing this part of community forestry are clear, as pointed out in Option 1 – lower costs and speedier service delivery. DLENRMs could also provide support to communities throughout the drafting of CFMPs, and review and approve any CFMP that did not include plans for commercial timber harvesting, or for the medium- or large- scale harvesting of Non-Timber Forest Products (NTFPs) for commercial purposes.

Where Forest Communities declared their interest in harvesting timber for commercial purposes, or in medium- or large-scale harvesting of NTFPs for commercial purposes, the FDA would be required to continue to support and oversee the drafting of the CFMP. This is because the CFMP establishes the basis for all future commercial operations, which means it must meet all requirements established by the National Forestry Reform Law (NFRL), the Ten Core Regulations, the Code of Forest Harvesting Practices, Forest Management Guidelines and, very soon, the Voluntary Partnership Agreement (VPA). The FDA would also continue to be responsible for enforcement of regulations during all commercial operations.

Newly created DLENRMs would likely struggle to understand, apply, and enforce the rules and regulations governing commercial timber exploitation – including during the drafting of the CFMP – as the regulatory structure governing commercial timber harvesting is complex. The FDA is already struggling to enforce existing regulations and standards due to financial and logistical constraints, so decentralizing authority over the commercial harvesting of timber in community forests at this stage would be extremely disruptive, and would likely lead to ineffective oversight.

Having the FDA ensure that the commercial harvesting of timber complies with the CFMP and all other legal requirements also makes sense for purposes of revenue collection. Based upon the approved annual operations plan, the FDA knows what to expect in terms of fees and taxes, and is therefore able to verify that all such payments have been made. If DLENRMs were responsible for part of this, the FDA would be required to review and verify all submitted documentation to ensure that all relevant payments to the central government had been made, which would introduce bureaucratic redundancies. Having the FDA oversee the payment of all fees and royalties would also dispense with the need for additional capacity building, which is costly and time-consuming.

### **RECOMMENDATION**

Based upon the above considerations, the most reasonable approach to decentralization would be that proposed in Option 2. Communities would receive the majority of benefits related to the regulatory body being locally located, while the drawbacks of having the FDA oversee commercial aspects of community forestry are minimal. In theory it may be better to have the local authorities oversee operations, as officials could more easily inspect sites and conduct patrols, but this assumes they have the necessary skills and resources. A full transfer of authority would entail a massive capacity building effort, which would be time consuming and expensive. There is also a significant danger that such a capacity building exercise would be inadequate – the FDA already faces serious challenges with regard to technical capacity – leading to ineffective oversight and, consequently, environmental degradation and deforestation. In sum, Option 2 is the more sensible of the two paths that could potentially be taken, as it makes the community forestry program more accessible and responsive, while maintaining a rigorous oversight mechanism in order to protect communities and their forest resources.

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

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