Good, average & bad: law in action

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Summary

The GAB is a tool for scrutinising and improving the practical outcomes of legislation for marginalised communities. Where legislation results in variable practical impact (good, average and bad) the GAB identifies at what level improvements to legislation can be made (i.e. during formulation, implementation or enforcement). It can be used to identify what is working, what is missing and what legal changes are required to improve the situation. This paper describes the tool and its use in identifying ways to improve required community-concessionaire forestry negotiations in Mozambique.

What is 'the GAB' and why is it useful?

In many countries there are gaps between the community rights and benefits *intended* in legislation and the field truths of those rights and benefits. The marginalised communities have few means of drawing attention to gaps between well intentioned policy and their day to day realities. To change this state of affairs, legal shortcomings must be identified and improved procedures must be put in place.

The GAB identifies policy gaps between legal intent and practical impact. It is a tool for evaluating and improving the impact of existing legislation by analysing the experience of 'Good', 'Average' and 'Bad' examples of implementation. Practical results are reviewed in light of the legal provisions for community rights and benefits. The tool compares situations, differing on the basis of their output, and determines to what extent differences in implementation results are the outcome of legal gaps and/or deficiencies in formulation, ineffective implementation mechanisms, or lack of enforcement. At the same time, examples of successful implementation of community rights and benefits can be viewed as a model for establishing transferable 'good practices' and a strategy for overcoming highlighted shortcomings. The GAB can therefore be used to promote learning based on successful and less successful cases. Experiences at the local level can be extrapolated to inform strategies at the macro level.
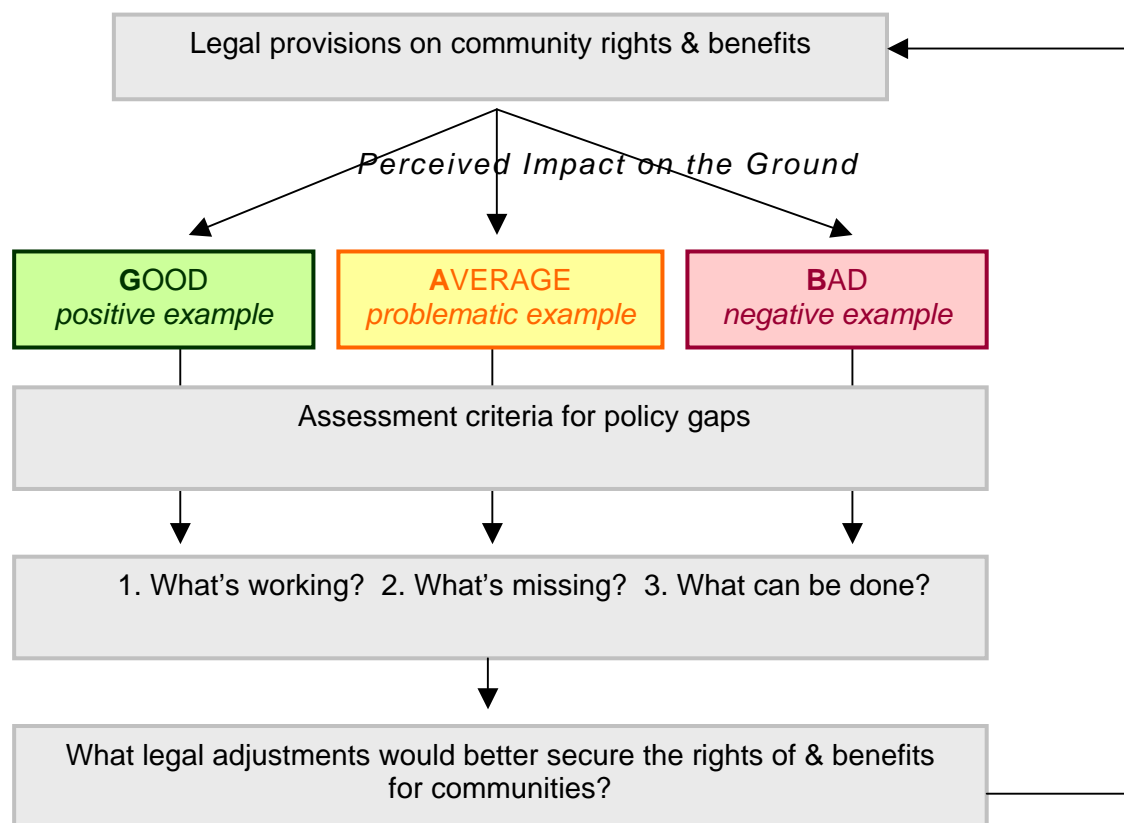
> **The GAB:**
> ✓ Offers a framework for the participatory assessment of the actual impact of legislation on rural populations in the field
> ✓ Provides a means of identifying both problems and existing 'good practices'
> ✓ Identifies gaps in legislation by analysing compliance in relation to the formulation process, implementation mechanisms and enforcement capacity
> ✓ Promotes learning

Part one – tool guidance

The GAB framework is based on the assumptions that:

1. Within the same legal, macro-economic and political environment, policy interventions should have the same level and nature of outputs for local benefits and levels of participation.

2. Wide differences in performance reflect the gaps in legislation formulation, implementation and enforcement.

Figure 1. Stages of the 'GAB' - comparative analysis of the capacity of legislation to secure intended rights and benefits

Legal provisions on community rights & benefits

Perceived Impact on the Ground

GOOD *positive example*	**A**VERAGE *problematic example*	**B**AD *negative example*

Assessment criteria for policy gaps

1. What's working? 2. What's missing? 3. What can be done?

What legal adjustments would better secure the rights of & benefits for communities?

When would you use the GAB?

The GAB is a useful tool for highlighting and narrowing the gap between legal intent and practical delivery, which can be used when:

1. Proposed legislation is piloted and evaluation of its efficiency is required during the pilot phase.

2. Already adopted legislation results in a widely varied levels of performance in terms of securing intended rights and benefits, and there is interest in finding out why.

3. There is a range of acknowledged problems as well as home-grown solutions that need to be systematically analysed in order to fill in legal gaps responsible to the variable nature of outputs.

Who should use the GAB?

The tool can be used by stakeholders themselves or by independent bodies as a participatory way of assessing the impact of legislation. However, in all cases the individual or team applying the tool must have a thorough understanding of the legislation and relevant mechanisms for implementation, as well as a good overview of the existing experience in applying it.

In addition, it is necessary for one or more facilitators to have a wide range of participatory methodological skills to facilitate a constructive dialogue at all levels and with all types of stakeholders, plus the ability for complex comparative analysis.

How to use the GAB?

The GAB framework consists of a number of sequential steps that build towards an accurate diagnosis of the reasons for varied outcomes of the same legislation applied in different cases. The successful application of the tool is highly dependent on the careful selection and application of the methods and techniques used to carry out the impact assessment and comparative analysis.

Step 1 - Identification of legal provisions on community rights and benefits

First unpack the legal provisions into discrete points of analysis. A particular piece of legislation might intend to lay down guidance for a number of different elements of the rights and benefits of communities. For example, Table 1 shows the various elements of community benefit intended by the Forestry and Wildlife Law 12/2002 in Mozambique. This more detailed analysis of intended rights and benefits can later become the basis for the assessment of what is working and what is missing in three case studies (one good example, one average example and one bad example of the implementation of that legislation).

Having an accurate understanding of what the legislation says, what key authority figures understand it to mean, and how this understanding fits with other overlapping bodies of legislation is an essential first step in using the GAB. There is no substitute for getting hold of the legislation and reading it through in detail – where possible clarifying any ambiguous phrases with someone integral to the process of drafting that legislation.

Extensive background research with respect to legal context and practical experiences of applying the law is the backbone of this tool. A detailed study of legislation in Mozambique, available as a companion document[1], gives an indication of the depth required.

Table 1. Example of summary table of the legal provisions on community rights and benefits drawn from Law 12/2002, Mozambique

Legal provisions on community rights & benefits *Regulations on the Forestry and Wildlife Law 12/2002*	
Article 7	Allows for community declaration of historical and culturally significant forest sites
Article 15	Guarantees community access rights for subsistence use of resources
Article 26.2 e)	Requires favourable outcome of community consultation prior to concession approval
Articles 35 & 36	Details mandatory procedures within the community consultation process
Articles 62-64	Guarantees community hunting rights and tax exemption on subsistence or ceremonial hunting practices
Articles 95 – 99	Ensures community participation in the co-management structures (COGEPs)
Article 102	Allocates 20% of taxes collected from the exploitation of the forestry resources to the local communities
Article 112	Gives up to 50% of the value of the fines issued upon transgression of the legislation to community members participating in enforcement activities or denunciation.

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[1] Johnstone et al. 2004. *Specific example of using the GAB in Mozambique*. Download pdf from http://www.iied.org/forestry/tools/

Step 2 - Identification of provided implementation mechanisms

Having identified the rights and benefits intended by a particular piece of legislation, investigate how those benefits were to be delivered. In some cases the exact delivery pathway may be spelled out in the legislation. In other cases the delivery pathway may be left vague with mention to some other existing or intended piece of legislation – the nature and status of any additional mechanisms needs to be investigated.

In yet other cases there may be no written clarity concerning the intended delivery of benefits within the legislation. It is for this reason that anyone using the GAB needs either to be familiar with the normal operating practices of the government, private sector and civil society operators in the forest sector, or to have access to key informants who are. If no written instruction for the delivery of rights and benefits are given, it may be that normal operating procedures in the sector guarantee their delivery without need for legislation. On the other hand, there may be glaring gaps between the intended rights and benefits and the capacity to deliver them. Assessing which of these is the case requires familiarity with the operational procedures within the sector.

It is useful to tabulate more detailed information about how the rights and benefits intended within the legislation are to be delivered to the communities. Table 2 is an example of the preliminary analysis of such delivery pathways for one of the intended benefits outlined in Table 1.

Table 2. Example of more detailed analysis of delivery pathways of intended community rights and benefits, Mozambique

Law on Forestry and Wildlife **Sept 1999**	**Regulation on the Law on Forestry and Wildlife**	**Diplomas & Technical Annexes**
CHAPTER VI Management of Forest and Fauna Resources **ARTICLE 31** Participatory Management 1. Local resources management councils constituted by the representatives of the local communities, the private sector, associations and local State authorities with the aim of protecting, conserving and the promotion of sustainable use of forest and fauna resources are hereby created. 2. The attributions and competencies of the local councils set forth in the previous paragraph are defined by a decree of the Council of Ministers. 3. The management shall ensure the participation of the local communities in the exploration of forest and fauna resources and in the benefits resulting from such use.	**SECTION III** Participatory Management ***ARTICLE 95*** Local Councils 1. With a view to guaranteeing compliance with article 31 of law 10/99 of 7th July local councils for the management of forestry and wildlife resources will be established, comprising an equal number of members from the following sectors: a) Local community representatives; b) Singular or collective persons with activities linked to forestry and wildlife resources; c) Associations, organisations or NGOs linked to forestry and wildlife resources or to local community development; d) The state 2. The Local Management Councils for forestry and wildlife known by the abbreviation COGEP are governed by the legislation applicable to associations and association related activities **ARTICLE 96** Personality (legal) 1. COGEPs are collective persons in the eyes of the law with private right, with their own legal personality independent of their members 2. In the exercise of their activities COGEPs are independent and obey the law, and may not require any violation of the law by their associates or by third parties **ARTICLE 97** Attributes of COGEP 1. In the carrying out of its activities, objectives and general procedures COGEP, in respect of its geographic or administrative area must be involved in the following: a) The procedure for requests to exploit forestry and wildlife resources b) The development of activities leading to the sustainable use of forestry and wildlife resources, and the way in which these can contribute to raising the level of lifestyle for members of local communities c) The mechanisms for resolution of conflicts which involve different parties in the sector d) Collaboration with state bodies responsible for the inspection and control of forestry and wildlife resources e) The improvement of policy and legislation related to the sector f) The promulgation of activities designed to control fires g) The directing of the management plans for resources situated in their geographical area	Further forthcoming legislation Technical annex on the delegation of powers on forestry and wildlife management will define precisely what power communities have over their forest – legislation currently in second draft Joint ministerial diploma on the mechanisms for channelling and use of the twenty percent earmarked to benefit the local communities from the exploration of forestry and fauna resources (Ministry of Tourism & Ministry of Planning and Finance) Still in draft form

Step 3 - Identification of assessment criteria that 'unpack' the legal context for delivering the intended rights and benefits into a 'checklist' for evaluation

Prior to embarking on a detailed analysis of case studies, develop a set of assessment criteria. For example, if the legislation in question requires community consultation by concessionaires prior to the approval of a concession, then the nature of the community consultation process becomes one of the assessment criteria. From there, it could be determined if there are differences in the way community consultation is carried out and to what extent this potentially impedes the delivery of community rights and benefits. How was community consultation approached in the 'Good' case scenario, as opposed to the 'Bad' case scenario and how did this influence its outcome? Why does the same legal requirement result in different situations – are there legal gaps that allow for undesired interpretations or non-compliance?

A detailed specific example of the use of criteria in such case studies is given[2] where an assessment was made of the quality of the processes intended by the legislation for concessionaire-community partnerships. Five criteria in that particular case included:

- Resource use – how the patterns of resource use intended in the legislation were carried out in practice;
- Company policy – how the patterns of company behaviour intended by the legislation were implemented or not in the field;
- Community organisation – how the model of community organisation specified in the legislation translated into field reality;
- Labour relations – how the labour standards and conditions laid out in the legislation are observed in practice;
- Government role – how the government responsibilities in governing company-community relationships were achieved in practice.
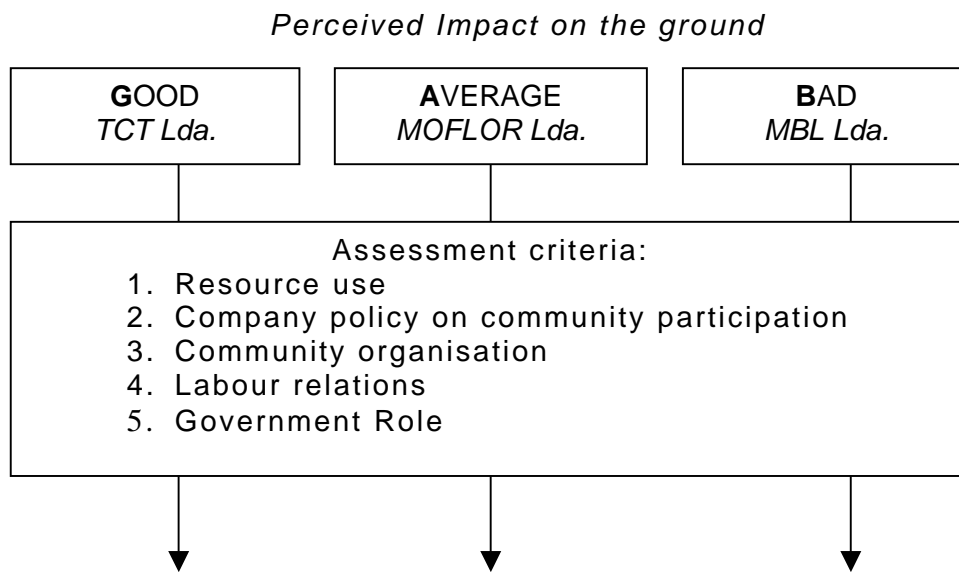
Step 4 - Selection of three case studies based on the perceived nature of their performance in relation to rights and benefits

Identify three case studies that represent one good, one problematic and one bad example of implementation of the legislation (or element of the legislation) in question. The selection of each case is determined by concurring views derived from various independent sources regarding the nature and level of performance – and requires once again a sound knowledge of the sector.

The careful identification of case studies for analysis of the legal impact is a fundamental part for obtaining valuable results by applying the tool. In situations where practice (implementation) has produced a wide range of clear-cut outcomes – from success to conflict, the identification of case studies can easily be based on the use of a number of independent sources, agreeing on what each case offers in terms of security of rights and benefits.

In other circumstances, where there might be contentious views as to the nature of outputs and a thinner line between success and failure, an appropriate flexible methodology must be applied, which allows for in-depth understanding of the outcomes leading to diverging opinions and the reasons behind it. In the Mozambique example, this kind of flexible method was needed. Thus, five criteria were developed to assess the implementation of policies relating to concessionaire-community partnerships (Figure 2).

Figure 2. Specific case study examples chosen in Mozambique to assess legislation governing concessionaire-community partnerships

Perceived Impact on the ground

GOOD *TCT Lda.*	**A**VERAGE *MOFLOR Lda.*	**B**AD *MBL Lda.*

Assessment criteria:
1. Resource use
2. Company policy on community participation
3. Community organisation
4. Labour relations
5. Government Role

Step 5 - Identification of the cause and effect of difficulties related to securing community rights and benefits and to what extent these are due to a 'legal deficit'

Once both assessment criteria and case studies have been identified, set an appropriate timetable for fieldwork to allow for active participation of all stakeholders in the assessment process, as well as the in-depth evaluation of legal impact through the prism of the assessment criteria. It proved useful in the development of this tool in Mozambique to separate out case study field surveys into three viewpoints: government services, private sector and community groups. For each group, the survey team went through each of the criteria and sought the opinion of the group. In the final analysis this allowed the opinions of the government services to be checked against or triangulated with the opinions of local communities and companies and vice versa.

Depending on the nature of rights and benefits, a mixture of qualitative and quantitative techniques can be used to give more in-depth understanding of responses to the five assessment criteria. In some cases, where implementation mechanisms are lacking or the legal environment has recently changed, legal awareness and the perceptions of stakeholders on their involvement and importance to the process can be useful indicators as to how effective the legal provisions are, or will be, in securing community rights and benefits.

Alternatively, an example of a combined qualitative and quantitative method, which could be employed for each of the assessment criteria, is the use of 'semantic differentials' (bipolar scales ranging from successful to unsuccessful). These are able to clearly identify the level of satisfaction or discontent of the stakeholder in regard to a particular element of policy.

Semantic differential -3   -2   -1   0   +1   +2   +3
                        Unsuccessful   Successful

The views of government services, the private sector and civil society members can then be ranked against one another – or alternatively, a range of policy options can be compared by a single interest group. The results can also serve as the basis for further qualitative discussions on reasons behind the expressed opinion.

Step 6 - Identification of differences in approach and strategy between the three case studies

Use a structured approach to understand the differences in approach that caused the differences in outcome among the case studies. During the case study field surveys it is important to understand not only what elements of the legislation were successfully or less successfully applied, but also what the main causal differences were between cases of good policy implementation and cases of bad implementation. A structured approach to this can be quite useful – looking within each of the selected assessment criteria at differences between good, average and bad cases in:

Formulation
- Information access to the legislation before and after launch
- Participation in and ownership of the legislation and consequent reaction to it (willingness to comply)
- Legal design reflecting and building on existing reality of capacity, roles and responsibilities

Implementation
- Operational context creating divergent incentives for compliance
- Capacity to comply with intended norms
- Institutional mechanisms and procedures established to fulfil the obligations laid out in the legislation
- Power balances and nature of relations between the various stakeholder groups involved

Enforcement
- Cost-benefit advantages between compliance and non-compliance
- Capacity and resources for adequate enforcement
- Clear identification of mechanisms and roles of enforcement agencies

Step 7 - Examine the potential for cross-learning

Examine to what extent specific successful implementation and enforcement practices (i.e. those from the good case study) are transferable to the operational reality of the less successful cases (the average or bad case studies). In some instances good practice can be easily transferable, while in other cases the extent success or failure may be purely context specific and thus not a generally applicable solution. It is not possible to define guidelines for what is and is not transferable – this will depend very much on the experience and judgement of the survey team.

Step 8 - Draw general conclusions aimed at meeting the identified gaps in existing legislation

As a final stage, draw general conclusions aimed at mending the identified gaps in existing legislation. A simple way of doing this is to present findings in tabular form under the three headings: "What is working?" "What is missing?" and "What legal adjustments would better secure the rights of the community?" It is these messages that act as the rationale for making changes to the processes by which legislation is developed or the content of existing legislation, the patterns of implementation and

the enforcement structures and protocols. An example of the type of table resulting from an analysis using the GAB is given below:

Table 3. Table of summary conclusions for a GAB analysis in Mozambique concerning concessionaire-community partnerships

What's working? ✓ Legal enforcement regarding natural resource use ✓ Government and private sector awareness of legal rights & duties ✓ Community – NGO collaboration ✓ Employment opportunities through establishment of forestry concessions
What's missing? - Government strategy on creating and empowering community organisations within the forestry concessions - Guidelines on procedures within the consultation process - Guidelines on content of management plans regarding community development - Clear definition of private sector role in community development and relations - Clear definition of roles and responsibilities for monitoring between district administration and forestry services - Effective mechanisms for conflict resolution - Capacity at all levels – government to deal with social issues, private sector to engage with community & community to establish necessary structures for effective participation - Involvement of District level government in the evaluation of management plans - Community ability to independently create the necessary local level organisations
What legal adjustments would better secure the rights & benefits of the forest dependent poor? + Capacity building at all levels to fulfil the needs identified above + Definition of roles – between government departments and establishment of monitoring and evaluation framework + Strengthening of social development aspects of monitoring and evaluation + NGO role of information dissemination and capacity-building formally structured + Guidelines on how to establish relationships between government, private sector and the community + Well-defined process of consultation and limited scope of promises + Empowerment of communities within forestry concession areas through land delimitation + Establishment of mechanisms for conflict resolution

Strengths and weaknesses of the GAB tool

As a tool that tackles the issue of securing legally provided benefits, the GAB offers a way of gaining a systematic overview of the real impact of legislation on marginalised groups, while at the same time providing practical examples and potential solutions that can be discussed and developed further. It is a way of simplifying the complex task of assessing legal impact by examining analytically a cross-section of experience on the ground from the perspective of all stakeholders. This tool is easily transferable to most legal contexts, not just the example of forestry concessions given here, and can be adapted to help identify legal gaps of different nature.

However, this type of analysis can be demanding in terms of the methodologies applied at each step of the framework. For example, the selection of each analysed case is initially determined through the perception of various independent sources regarding the nature and level of performance, thus potentially leaving the door open to criticism on the basis of contending opinions. In addition, the results of the comparative analysis could become overly reliant on qualitative evaluation of legal impact, while lacking in quantitative data. In this sense, the preparation phase of legislation scrutiny and significant knowledge of different case examples of implementation are a necessary prerequisite to successfully applying the GAB.